I. METHODOLOGY

This subject of this analysis is the set of all publicly available arbitration awards.

Use this Code Book in connection with the Cost Shifting Chart (the Chart).\(^1\) Primary reliance should be on the Chart. If, however, there are any doubts, ambiguities or confusions about how to code the raw data, the following protocol should be followed: (1) the Coder should refer to the publicly available copy of the award at [http://ita.law.uvic.ca/chronological_list.htm](http://ita.law.uvic.ca/chronological_list.htm) (or available in hard copy in Professor Franck’s library), and (2) write manuscript notes on their copy of the Chart identifying the relevant, omitted information and its location within the award. Any such information will be incorporated into the final version of the Chart.

Coders will separately code six cases and then analyze the results to establish the presence of inter-coder reliability. Should there be a high percentage of inter-coder reliability (95% or greater), the cases will be divided and coders should separately code the assigned cases. Should there be a lower degree of reliability, the coding methodology and this Code Book will be revised.

II. VARIABLES

A. Basic Identifying Information: These variables provide basic identifying information.

1. **Case Identifier:** Cases will be randomly selected and coded from a random numbers table. When a random case number is selected, it is matched with the corresponding “Case Identifying Number,” which is listed in bold in the Chart at the start of every case.

2. **Case Name:** The case name, as produced in the Chart, should be inserted in this cell.

3. **Time – Date of Case:** This variable will record the effect of time. Coders should record the date of each award in the following manner: **YearMonthDay**. For example, an award rendered on 9 September 2006 would be coded: 20060906. (Should there be any missing dates, follow the same format and indicate the missing data with question marks, e.g. 2006????.)

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\(^1\) The Chart contains publicly available cases listed in chronological order.
4. **Investor Nationality**: This variable identifies the nationality of the named investor(s).

   a. In “Claimed Nationality of Investor #1”, coders should record the alleged qualifying investor’s alleged nationality as identified in the award as defined in the List of Sovereign States.\(^3\) If, for example, the investor alleges he/she/it is a national of the United States of America, coders should code “United States”.

   i. For corporate entities, record the country that the alleged investor alleges its nationality for the purposes of making a claim under the relevant investment treaty. For example, if a foreign investment vehicle is organized under the law of a host state (e.g. Bolivia) but alleges it is owned and/or controlled by a company from The Netherlands, coders should code “Netherlands”.

   ii. For individuals, if there is dual (or multiple) nationality, coders should record the nationality under which the investor is claiming benefits under the relevant investment treaty. For example, if an alleged national is a dual national of the United States and Egypt but is claiming under the United States/Egypt BIT, coders should code, “United States”.

   b. If there is a second investor, the second investor’s alleged nationality should be recorded in the same manner in “Claimed Nationality of Investor #2”. If there is no second investor, code this cell with a period [.] to record the lack of a second investor.

   c. The nationality of any third, fourth or fifth investor should be coded in this same manner in the in “Claimed Nationality of Investor #3”, “Claimed Nationality of Investor #4”, “Claimed Nationality of Investor #5” cells, respectively.

5. **Respondent Nationality**: This variable identifies which country is the government respondent in the award. Coders should record the government listed in the title of the award and respondent identified in the

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\(^2\) This variable only considers those investors expressly named in the title of the arbitral award. This means, for example, if the award refers generally to the existence of other investors – but they are not specifically enumerated or identified, they are not coded. For example, in *Goetz et al. v. Burundi*, the award refers to five other Belgian investors but does not provide their names. In this instance, only the nationality of Goetz should be recorded.

\(^3\) This “List of Sovereign States” is available at [http://en.wikipedia.org/wiki/List_of_sovereign_states](http://en.wikipedia.org/wiki/List_of_sovereign_states). The List includes countries on the basis that Article 1 of the Montevideo Convention from 1933. According to the Convention, a sovereign state should possess the following qualifications: (a) a permanent population, (b) a defined territory, (c) government, and (d) capacity to enter into relations with the other states. The list includes all states that satisfy these criteria and claim independence.
award as defined in the List of Sovereign States.\footnote{As with investors, coders should use the “List of Sovereign States” available at \url{http://en.wikipedia.org/wiki/List_of_sovereign_states}. There is one exception to this is Zaire, which is currently the Democratic Republic of the Congo; for coding purposes, even though Zaire no longer exists, as it was the state at the time of the arbitration, Zaire is coded as Zaire.} If, for example, the Respondent is the United States of America, Coders should code “United States”. Similarly, if the Respondent is the “Argentine Republic”, coders should code “Argentina”.

6. \textit{Applicable Treaty}: This variable identifies the treaty under which the parties are arbitrating.

a. In “Applicable Treaty #1”, coders should record the investment agreement under which the investor has brought his/her claim. If, for example, the claim is brought under a multilateral treaty, the Energy Charter Treaty or North American Free Trade Agreement, record ECT or NAFTA respectively. If a claim is brought under a bilateral investment treaty (BIT), coders should reflect: (1) the two signatory countries to the agreement,\footnote{As with the nationality of the investor and respondent state, coders should use the “List of Sovereign States” to identify the state counter-parties to the relevant treaty. The one exception to this is treaties involving the Belgo-Luxembourg Economic Union. Treaties involving this union should be coded as the Promotion and involving the “Belgo Luxembourg Economic Union BIT”.} and (2) the treaty is a BIT. For example, if the claim is brought under the “1991 Bilateral Investment Treaty between France and the Argentine Republic” or “Agreement between the Argentine Republic and the Republic of France for the Promotion and Reciprocal Protection of Investments”, coders should code this as “Argentina-France BIT”.

b. If there is a second treaty, the second treaty should be recorded in the same manner in “Applicable Treaty #2”. If there is no second treaty, code this cell with a period [.] to reflect its absence.

7. \textit{Industry Involved}: This variable identifies what business and/or investment sector is involved in the arbitration. Coders should record not based upon the corporate structure of the investment; rather they should record the sector in which the original investment was based that ultimately leads to the dispute that is the subject of the arbitration. Based upon the text, coders should choose one category.\footnote{Given the initial and exploratory nature of this variable, only one category should be selected. Future research, however, may wish to expand the nature of the categories of relevant industries and/or code for the presence of any and all types of investment within a single for project. For example in \textit{American Manufacturing v. Zaire}, paragraph 54 refers to “the development of the agricultural engineering, the cultivation of agricultural plants/crops, fruits and vegetables in the fields, development of stock raising/animal products, and the necessary activities pertaining to the processing of milk, meat”, which under this coding may fall under multiple categories. As the case mentions the manufacture of the batteries and makes references to the “finished goods”, presumably this is the most important aspect of the case. As such, this case is only coded primarily for Capital Goods.}
1. **Energy** = Infrastructure investments related to: (a) electricity generation, transmission, and distribution; (b) natural gas exploration, transmission or distribution; (c) oil exploration, transmission or distribution; and (d) dam construction and/or hydro-electric projects.

2. **Telecommunications** = Infrastructure investments related to: (a) fixed or mobile local telephony; (b) domestic long-distance telephony, and international long-distance telephony; (c) radio broadcasting; (d) television, cable and/or broadband broadcasting; and (e) the provision of internet services.

3. **Transport** = Infrastructure investments related to: (a) airport runways and terminals; (b) railways services including fixed assets, freight, intercity passenger; (c) local passenger toll roads, bridges, highways; (d) ports; (e) tunnels terminals and channel dredging.

4. **Water** = Infrastructure investments related to: (a) potable water generation and distribution; and (b) sewerage collection and treatment.\(^7\)

5. **Food-Beverage** = Investments related to the manufacture and/or provision of end-use consumer commodities related to foods, feeds and beverages; this includes commodities including (a) corn, (b) rice, (c) wheat, (d) food oils, (e) wine, beer and related products, (f) non-agricultural foods, (g) sorghum, barley and oats, (h) nuts, (i) fruits and frozen juices, (j) bakery products, (k) fish and shellfish, (l) animal feeds, (m) vegetables, (n) meat, poultry, etc., (o) soybeans, and (p) sugar.

6. **Industrial Supplies** = Investments related to the manufacture and/or provision of end-use consumer commodities related to industrial supplies and materials; this includes commodities related to: (a) cotton, (b) iron and steel mill products, (c) cloth, (d) chemicals and fertilizers, (e) tapes, audio and visual, (f) synthetic rubber-primary, (g) glass-plate, sheet, etc., (h) aluminum, (i) hides and skins, (j) logs and lumber, (k) finished textile supplies, (l) agricultural industry unmanufactured, (m) manufactured wood supplies, (n) leather and furs, (o) industrial rubber products, (p) shingles, molding, wallboard, (q) pulpwood and woodpulp, (r) stone, sand and cement and (s) paint.

7. **Capital Goods** = investments related to capital goods and raw materials to manufacture other products including: (a) computers, (b) metalworking machines, (c) laboratory testing instruments, engine parts and accessories, including batteries, (d) excavating machinery, (e) civilian aircraft, and (f) industrial machines.

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\(^7\) Categories 1-4 are based upon definitions available from the World Bank’s Private Participation in Infrastructure Database. See [http://ppi.worldbank.org/resources/ppi_methodology.aspx](http://ppi.worldbank.org/resources/ppi_methodology.aspx).
8. **Consumer Goods** = investments related to the provision of end-use consumer goods including: (a) gems and jewelry, (b) toys, games and sporting goods, (c) stereo equipment, (d) sports apparel and gear, (e) household appliances, (f) musical instruments, (g) glassware, chinaware, (h) cookware, cutlery and tools, (i) furniture, household goods and rugs, (j) manufactured tobacco products, (k) books, (l) toiletries and cosmetics, (m) TVs, VCRs, etc, and (n) records, tapes and disks.\(^8\)

9. **OtherBusiness** = investment related to business related expenses including: (a) the provision of legal advisory and representation, (b) accounting, auditing, bookkeeping and tax consulting, (c) advisory, guidance and operational assistance services provided to businesses for business policy and strategy, (d) advertising, market research and public opinion, (e) research and development of new products, and (f) publishing and printing services.

10. **Postal** = investment related to postal and courier services including the pick-up, transport and delivery of letters, newspapers, periodicals, brochures, other printed matter, parcels and packages, including post office counter and mailbox rental services.

11. **Insurance** = investments related to the provision of insurance including (1) life insurance and pension funds, (2) freight insurance, (3) other direct insurance, (4) reinsurance and (5) auxiliary services to insurance.

12. **Financial** = investments related to provision of financial services related to financial intermediation and auxiliary services, including: (a) banking services; (b) the issuance of loans or debentures; (c) the trading of securities, and (d) credit card enterprises.

13. **Computer-Information** = investment in computers, information and information technology services, including: (a) the providing of IT support related to hardware and software-related services, (b) data processing, (c) data security, (d) personal identification systems, (e) maintenance and repair of computers and peripheral equipment, (f) disaster recovery services, (g) analysis, design and programming of systems that are ready to use or the creation of customized software, (h) computer facilities management, and (i) data storage and dissemination of data and on-line.

14. **Waste Management** = investment related to the provision of waste and garbage management services, including: (a) disposal of waste, (b)...

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reclamation of waste products, (c) treatment of waste and (d) cleaning up pollution and decontamination, such as PCBs.\(^9\)

15. **Chemical-Mining** = investments related to chemical and mining production, such as MTBE and MMT, including: (a) chemical production; (b) mining of natural resources including precious metals and mineral extraction; and (c) other on-site processing services. NB: This does not include investments related to oil and gas.

16. **Entertainment** = investment related to tourism and travel-related services and recreational, cultural and sporting services entertainment services, including but not limited to: (a) recreational activities; (b) gambling; (c) tourism and travel related investments.

17. **Government** = investments related to the provision of services that exhibit core governmental functions, including: (a) customs duties, (b) embassies and consulates, and (c) military units and agencies.\(^{10}\)

18. **Real Estate** = investments related to real estate transactions, including: (a) the development of property, (b) the leasing of commercial or private property, and (c) the construction of commercial property.

19. **Other** = investments not otherwise capable of primary classification.

**B. Institution:** An investor can elect any arbitration mechanism expressly provided in the international investment agreement under which it is bringing suit. This variable describes which arbitral institution, if any, is administering the arbitration and under what arbitration rules.

1. **Institutional v. Ad Hoc:** This level records whether the arbitration is being administered by an institution and under its rules (i.e. an institutional arbitration) or by itself without the aid of a supervisory institution and its applicable rules and regulations (i.e. an *ad hoc* arbitration).

ICSID = ICSID (International Centre for the Settlement of Investment Disputes)

SCC = SCC (Stockholm Chamber of Commerce)

OTHER = Another arbitration institution (such as the International Chamber of Commerce)\(^{11}\)

\(^9\) Categories 9-17 are based upon the 12 major categories (or a subcategory) of services listed in the Global Agreement on Trade and Tariffs: (1) business services, (2) communication services, (3) construction and related engineering services, (4) distribution services, (5) educational services, (6) environmental services, (7), financial services, (8), health-related and social services, (9) tourism and travel-related services, (10), recreational, cultural, and sporting services, (11) transport services, and (12) other services not included elsewhere. See [http://unstats.un.org/unsd/tradeserv/Papers/m86_english.pdf](http://unstats.un.org/unsd/tradeserv/Papers/m86_english.pdf).

\(^{10}\) This is a combination of two different categories of services listed under the GATT: (1) tourism and travel-related services and (2) recreational, cultural, and sporting services.
AH = Ad Hoc (no institutional administration)\textsuperscript{12}

2. **Applicable Arbitration Rules**: This level indicates under what rules, institutional or otherwise, the parties and arbitrators are conducting the arbitration.

ICSID = ICSID Convention and ICSID Arbitration Rules
ICSID/AF = ICSID Additional Facility Rules
SCC = SCC Rules
UNCITRAL = UNCITRAL Rules
OTHER = Ad hoc rules articulated in treaty, national law or agreed by the parties\textsuperscript{13}

C. **Tribunal**: This variable describes the constitution of the tribunal to consider the impact of the decision-makers. The sub-levels of this variable consider aspects of tribunal composition,\textsuperscript{14} particularly the number and gender of arbitrators.\textsuperscript{15}

1. **Number**: This variable describes the quantity of arbitrators on a tribunal.
   - If the award is by a Sole Arbitrator (i.e. the case is decided by a single arbitrator), code with 1.
   - If there is a three member tribunal, code with 3.

2. **Gender**: This level indicates whether the tribunal’s membership contains at least one woman. If the tribunal is composed entirely of men, code with M. If the tribunal has one or more female members, code with F.

\textsuperscript{11}Should a different rules be involved, please list these in the yellow field for Coder’s Notes at the end of the Excel spreadsheet.

\textsuperscript{12}In some investment treaty cases, institutions (such as ICSID and the LCIA) have provided administrative support to ad hoc proceedings (for example, providing a hearing room, financial administration, the provision of a secretary or acting as an appointing authority). The provision of this support does not transform an ad hoc arbitration into an “institutional” one. This is because the arbitration is: (1) not being conducted according to the institution’s arbitration rules, and (2) there is no reference to the institutions administrative body to resolve questions of procedure. For example, *Occidental v. Ecuador* was an ad hoc arbitration conducted pursuant to the UNCITRAL Rules; while the LCIA managed financial matters and assisted with the organization of hearing rooms, it was not an LCIA institutional arbitration because the claim was not administered under the LCIA Rules.

\textsuperscript{13}Should a different institution be involved, please list this in the yellow field for Coder’s Notes at the end of the Excel spreadsheet.

\textsuperscript{14}A variety of other levels could also be coded, including arbitrators’ nationality and whether it is a developing or developed nation, country of residence, country of legal training, number of arbitrations served on, et cetera. For the initial purposes of this limited study, these variables are not included because of: (1) the wide variety of nationalities of the arbitrators and mixed nature (i.e. a Swedish born arbitrator, trained in the US and living in France), (2) the difficulty and extra time and expense of identifying the country or countries of legal training, and (3) the lack of a reliable index for distinguishing between developed and developing countries. Similarly, while the Chart identifies which arbitrators serve as the chairs of tribunal, qualitative of quantitative research that evaluates the impact of chairs versus party-appointed arbitrators may be a fruitful future project.

\textsuperscript{15}When creating the Chart, Professor Franck created a list of all the arbitrators in investment treaty cases that indicates their nationality, gender and the cases they have been involved with. Nationality and gender were determined by: (1) information expressly stated in the awards, and (2) publicly available information discovered from searches on Google.
3. *Names of Arbitrators:* This level indicates the names of the arbitrators.

a. For “Know which Party Appointed which Arbitrator?”, if the award indicates which party appointed which arbitrator, code this with A to indicate the information is available. If the award does not indicate which party was responsible for a particular arbitrator’s appointment, code this as NA\(^{16}\) and list the arbitrators in the next two cells in alphabetical order (by their last name). In the case of a Sole Arbitrator, code this field as “.” since neither party is solely responsible for the appointment.

b. For “Arbitrator #1”, list the first initial and last name of the arbitrator appointed by the investor. For example, if an investor appointed Prof. Karl-Heinz Böckstiegel as its arbitrator, this will be coded as “K. Böckstiegel”. Similarly, if it is unclear who appointed J. Christopher Thomas, Q.C., the cell “Know which Party Appointed which Arbitrator?” is coded with NA, “Arbitrator #1” could be coded as “J. Thomas” – provided of course his last name is alphabetically before the other arbitrator. If the name of the arbitrator is not publicly available, code this box with NA.

c. For “Arbitrator #2”, list the first initial and last name of the arbitrator appointed by the respondent. If the prior box is coded with NA, put down the name of the remaining arbitrator that is not the Chair. If the name of the arbitrator is not publicly available, code this box with NA.

d. For “Chair – Sole Arbitrator”, list the first initial and last name of the Chair or Sole Arbitrator. If there is a sole arbitrator, the prior two cells should be marked as “.” To indicate that there are no party-appointed arbitrators. If the name of the arbitrator is not publicly available, code this box with NA.

D. *Awards: Phase and Success:* This variable considers both (1) what phase the case is at when an award is rendered and (2) the success of each phase.

1. **Finality:** This level evaluates whether the award is “final” and ultimately disposes of the entirety of the claim.\(^{17}\) If the award is not final (i.e. the award is a partial award and/or leaves some aspect of the case to be decided in the future), enter NF. If the award is final, enter F.

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\(^{16}\) This might be, for example, because the award simply does not recite the information and/or an appointing authority was responsible for nominating and appointing the arbitrators.

\(^{17}\) A “final” award is one which: (1) dismisses the claim on jurisdictional grounds, (2) dismisses the case on the merits, or (3) quantifies the degree of damages after jurisdiction has been established and there is a claim on the merits. An award is not “final” because it is labeled as such by the tribunal or it disposes finally of one aspect of the claim. Rather what makes an award final is the substantive impact of the determination (i.e. does the claim continue or come to an end).
2. **Stage of the Process:** This level indicates what stage the arbitration process is at when the tribunal renders an award. An award is defined as a written opinion by an arbitration tribunal that evaluates one or more of the following phases: (1) jurisdiction, (2) merits, (3) quantum, and (4) cost. Each case should therefore be coded according to its own particular phase. Record any and all categories that apply.

(NB: The Chart records the title of the award in quotes. Professor Franck’s subjective comments are in parenthesis. Where there are no subjective comments or in the case of doubt, coders should refer back to the original case.)

- **J = Jurisdiction**
  - 0 = Tribunal does not evaluate
  - 1 = Tribunal evaluates

- **M = Merits**
  - 0 = Tribunal does not evaluate
  - 1 = Tribunal evaluates

- **Q = Quantum**
  - 0 = Tribunal does not evaluate
  - 1 = Tribunal evaluates

- **C = Costs**
  - 0 = Tribunal does not evaluate
  - 1 = Tribunal evaluates

a. **Success at Jurisdiction, Merits and Quantum Phase:** This sub-level will record, for each stage of the process, which parties were

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18 For the purposes of this research, “awards” include only those decisions from tribunal that dispose finally of one or more phase in the arbitration – namely jurisdiction, merits, quantum and cost. This necessarily excludes certain aspects of the proceedings which also have the potential to be impacted by cost-shifting, namely: (1) procedural orders, (2) requests for rectification and correction, (3) requests for interpretation, (4) applications for annulment, and (5) vacatur and enforcement proceedings. Future research in this area may prove insightful but is beyond the scope of the current project.

19 Jurisdiction is defined as the authority of the tribunal to hear the claims arising under or related to the applicable investment treaty. This might include, for example: (1) whether there is a qualifying investment, under the relevant investment treaty (2) whether there is a qualifying investor under the relevant investment treaty, (3) whether the investment is within the jurisdiction, or (4) whether ICSID Convention’s Article 25 jurisdiction is established (where applicable).

20 Merits decisions involve whether a sovereign state has breached the substantive rights provided under the applicable investment treaty. This might include, for example: (1) national treatment, (2) discrimination, (3) expropriation, (4) fair and equitable treatment, (5) full protection and security, (6) the international minimum standard of treatment.

21 Quantum decisions evaluate the value of an investor’s loss. When an investor has made a successful claim on the merits, this phase will determine how much the claim is worth.

22 For the purposes of Jurisdiction, Merits, Quantum and Cost, the term “evaluate” means to make a substantive determination on a specific issue. This means, for example, in a case where there is a settlement agreement and the tribunal does not evaluate issues of jurisdiction or quantum, these must be coded as 0.
successful in their legal claims. For the Jurisdiction (J), Merits (M) and Quantum (Q)\textsuperscript{23} phase discussed in the award,\textsuperscript{24} record the following:

\begin{itemize}
  \item \textbf{C} = Claimant was successful on all determinative\textsuperscript{25} issues\textsuperscript{26}
  \item \textbf{R} = Respondent was successful on a determinative argument\textsuperscript{27}
  \item \textbf{M} = There are mixed results\textsuperscript{28}
\end{itemize}

\textit{Use a period [.] in the event that the tribunal does not analyze J, M or Q and there is no “success” to measure at a particular phase.}

\textbf{b. Treatment of Costs:} This sub-level will record, when costs are evaluated in an award (C), whether the tribunal discusses or references costs or whether the tribunal makes a substantive determination to award costs (or not).

\begin{itemize}
  \item \textbf{R/D} = Tribunal references or discusses the possibility of a cost determination but does not make a decision on the issue
  \item \textbf{SD} = The Tribunal makes a substantive determination on costs.
\end{itemize}

\textit{Use a period [.] in the event that the tribunal does not evaluate costs and there is no treatment to measure.}

\textsuperscript{23} The success of the Cost phase need not be considered at this level as the variables (1) Parties’ Legal Costs (PLC) and (2) Tribunal’s Costs and Expenses (TCE) analyze it.

\textsuperscript{24} If the phase is not addressed in an award, coders need not address the success.

\textsuperscript{25} For the purposes of this Code Book, the term “determinative” means affecting the claimant’s capacity to move to the next phase of the adjudication of the claim (i.e. from jurisdiction to merits or from merits to damages).

\textsuperscript{26} For example, in a jurisdictional decision, a Claimant is successful on all determinative issues where they have established all the requisite preconditions to jurisdiction (e.g. ratione materiae, ratione personae and ratione temporis). A Claimant is \textit{not} successful on all determinative issues where they win one sub-issue (i.e. ratione materiae) but lose on another determinative sub-issue (i.e. ratione personae).

\textsuperscript{27} Since Respondent’s only need to disprove one element of a jurisdictional claim or one element of a cause of action to prevent advancement to the next phase of the adjudication, Respondent success is defined as making one or more successful arguments on a determinative issue. For example, if a claimant prevails on one jurisdictional issue (i.e. ratione materiae) but a respondent wins on a determinative issue (i.e. ratione personae), jurisdiction will be denied and the Respondent is successful. Similarly, if a cause of action requires a Claimant to demonstrate arbitrary and discriminatory conduct, but only one sub-issue is established, the Respondent is successful.

\textsuperscript{28} Mixed results are defined as Claimant or Respondent winning one or more determinative issue. For example, there are mixed result at a jurisdictional phase, for example, if: (1) a Claimant is successful on establishing jurisdiction for a contract claim at ICSID but not for a BIT claim, or (2) a Claimant successfully establishes jurisdiction for a BIT claim under an MFN provision but fails to establish jurisdiction on a different basis in the BIT. Similarly, at the merits phase, a Claimant that is successfully establishes all of the elements of a breach of fair and equitable treatment but cannot establish all the elements of expropriation has mixed results. At the damages phase, mixed results might mean that the Claimant successfully establishes its claim for lost profits but a Respondent convinces a tribunal not to use a discounted cash flow analysis.
c. **Separate Opinion:** This sub-level records whether the existence of a separate opinion in the award – irrespective of whether the tribunal member is concurring, dissenting or both. Please record the following:

- **NA** = There is no separate opinion available
- **SO** = There is a separate opinion available

### E. **Damages:**

This level indicates the actual damages the parties’ requested and received. As none of the cases have a Respondent/State successfully bringing a cross-claim against an investor, this looks only at Claimants’ rate of success in actions they bring further to an investment treaty.

1. **Damages Claimed:** For those cases where a party has claimed damages, this sub-level records what the claimant – as reflected in the award – actually requested.

   a. **Availability of Quantification:** If no damages have been quantified and/or the amount is not available, then code **NA**. If damages have been partially quantified and specified, code **PQ**. If damages have been fully quantified, where the precise amount of total damages claimed is known, code **FQ**.

   b. **Original Currency:** Values should be recorded in the currency stated in the award. Record the *original currency and original amount* by listing the currency in one column and the amount in another. If parties have made multiple quantifications of their claim for damages, the higher value should be used. Interest calculations should be omitted from the quantification.

   Use a period [.] in the “Original Currency of Claimed Damages” and “Amount Claimed (in original currency)” cells in the event that data is not available.

   c. **Common Currency:** Values should be recorded in their original U.S. Dollar amounts. If the original currency was not in U.S. Dollars, the currency should be converted from its currency into U.S. Dollars as at the date of the award. Where possible, the currency conversion should be based upon figures from the FX Converter available at [http://www.oanda.com/convert/classic](http://www.oanda.com/convert/classic) using the interbank rate. (The Chart reflects these figures.)

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29 A claim has been partially quantified if one head of damages has been reduced to a precise value but another aspect of the case has not. For example, a Claimant articulates the expropriated value of their property is US$1 million but does not articulate the damage caused for a failure to provide full protection and security to the investment. Also, if a value has been defined as “no less than” a figure or a range, the value is also partially quantified.
2. **Damages Received**: This level states what amount of damages the tribunal awarded as regards the claim under an investment treaty.

   a. **Availability of Damages Quantification**: If information on damages is not available, not applicable or reserved to a future phase, then code NA. If damages have been awarded, code DA.  

   b. **Original Currency**: Values should be recorded in the currency stated in the award. Interest calculations should be omitted from the quantification. Values should be recorded in the currency stated in the award. Record the *original currency and original amount* by listing the currency in one column and the amount in another.  

   Use a period [.] in the “Original Currency of Damages Received” and “Amount Received (in original currency)” cells in the event that data is not available.

   c. **Common Currency**: Values should be recorded in their original U.S. Dollar amounts. If the original currency was not in U.S. Dollars, the currency should be converted from its currency into U.S. Dollars as at the date of the award. Where possible, the currency conversion should be based upon figures from the FX Converter available at [http://www.oanda.com/convert/classic](http://www.oanda.com/convert/classic) using the interbank rate. (The Chart reflects these figures.)

   Use a period [.] in the “Common Currency - USD - of Received Damages” cells in the event that data is not available.

F. **Allocation of Parties’ Legal Costs**: There are differences how ICSID, ICSID-Additional Facility, SCC and the ad hoc UNCITRAL rules address costs. There are

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30 In the event that a tribunal dismisses a claim and awards the investor no damages, this should still be coded as DA because it is known than no damages were awarded (i.e. damages are quantified at zero). The cases of **CCL v. Kazakhstan**, **CSOB v. Slovak Republic** and **Tradex Hellas S.A. v. Albania**, have jurisdictional awards based upon investment treaties; but because they were all unsuccessful in bringing their BIT claims (but were successful on other grounds), the amounts coded should be 0.00 as this reflects their lack of financial compensation in connection with the BIT claims.

31 In the event that a tribunal dismisses a claim and awards the investor no damages, investors are awarded nothing by placing a 0 in the “Amount Received (in original currency)” cell.

32 In proceedings governed by the ICSID Convention (i.e. where the country the investor comes from and the respondent government itself are signatories to the ICSID Convention), parties can agree to an allocation of costs; but should they fail to do so, Article 61(2) requires the tribunal to “assess the expenses incurred by the parties in connection with the proceedings” and “decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.” Convention on the Settlement of Investment Disputes Between States and Nationals of Other States of March 18, 1965, 4 I.L.M. 524 (1966) available at [http://www.worldbank.org/icsid/basicdoc/partA.htm](http://www.worldbank.org/icsid/basicdoc/partA.htm) [hereinafter the ICSID Convention].
nevertheless some commonalities. All of these rules make distinctions between (1) the parties’ costs for prosecuting or defending a claim, and (2) the tribunal’s costs and expenses for adjudicating a claim.

This variable will consider how tribunals allocate the parties’ legal costs associated with prosecuting or defending a claim. While precise definition of “costs” in the applicable arbitration rules may vary, for the purposes this variable, the “Parties’ Legal Costs” (PLC) refers to the costs incurred by either a Claimant in bringing a claim or a Respondent in defending a claim. PLC might include, for example, (1) attorney fees, (2) expert and consultant fees, (3) travel expenses, and (4) administrative expenses.


33 Article 58 of the ICSID Additional Facility Rules (AFR) – where the ICSID Convention cannot apply – provides the tribunal with authority similar to that of ICSID cases but does not define the “costs” of arbitration or indicate how tribunals should exercise their discretion. ICSID, Additional Facility Arbitration Rules, art. 58, at http://www.worldbank.org/icsid/facility/facility.htm [hereinafter ICSID Additional Facility Rules] (providing that unless the parties agree otherwise “Tribunal shall decide how and by whom the fees and expenses of the members of the Tribunal, the expenses and charges of the Secretariat and the expenses incurred by the parties in connection with the proceeding shall be borne. The Tribunal may, to that end, call on the Secretariat and the parties to provide it with the information it needs in order to formulate the division of the cost of the proceeding between the parties”).

34 The Stockholm Chamber of Commerce Arbitration Rules define costs. Article 39(1) describes arbitration costs – ie. the tribunal and institutional fees for the arbitration – as: “(i) the arbitrator’s fee; (ii) the Administrative Fee of the SCC Institute; (iii) compensation due to the arbitrator and the SCC Institute to cover their expenses during the proceedings; and (iv) the fees and expenses of any expert appointed by the Arbitral Tribunal pursuant to Article 27.” Stockholm Chamber of Commerce, Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (1999), at http://www.chamber.se/arbitration/english/rules/scc_rules.html [hereinafter SCC Rules]. Article 40(2) then indicates that the tribunal “decides on the apportionment of the arbitration costs as between the parties with regard to the outcome of the case and other circumstances.” The SCC separately discusses the parties’ costs; and Article 41 states “Unless the parties have agreed otherwise, the Arbitral Tribunal may, at the request of a party, in an Award or other order by which the arbitral proceedings are terminated order the losing party to compensate the other party for legal representation and other expenses for presenting its case.”

35 The UNCITRAL Arbitration Rules also expressly define costs. United Nations Commission on International Trade Law (“UNCITRAL”) Arbitration Rules, Apr. 28, 1976, 15 I.L.M. 701 (1976), available at http://www.uncitral.org/en-index.htm [hereinafter UNCITRAL Rules]. Article 38 defines costs as: “(a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39; (b) The travel and other expenses incurred by the arbitrators; (c) The costs of expert advice and of other assistance required by the arbitral tribunal; (d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal; (e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable; (f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague.” Article 40 then directs how the tribunal should allocate those costs. Article 40(1) provides that “Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.” Article 40(2) then provides that “With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.”
1. **Determination: Presence of PLC Analysis:** This level indicates whether the tribunal has addressed the possibility (or not) of shifting the PLCs.

- If the tribunal has not discussed PLC, code with **ND**.
- If the tribunal has referred to the PLC but deferred a decision or reserved it for the future, code with **R**.
- If the tribunal has discussed the PLC and has made a decision about whether or not to shift costs, code with **D**.

**ContribParty: the PLC Determination:** For those cases where the tribunal has decided whether or not to shift costs, this level records what decision the tribunal actually made. For these purposes, a **Contributing Party** is defined as a party that must make a contribution to the legal costs of the other party.\(^36\)

- If the tribunal decided that each party should bear its own legal costs (i.e. there is no shifting of PLC and there is no Contributing Party), code with **NA**.
- If the tribunal decided that the Claimant is the Contributing Party, code with **CC** (Claimant Contribution).
- If the tribunal decided that the Respondent is the Contributing Party, code with **RC** (Respondent Contribution).

For those cases coded with **ND** (No Decision) or **R** (reserved), code this cell with a period [.] to indicate data is not available.

2. **Degree of PLC Contribution:** These sub-levels look at the degree the tribunal shifted the PLC. If the Claimant is responsible for paying a portion of the Respondent’s legal costs, this sub-level will record the percentage of those costs for which the Claimant is responsible and/or the actual amount they must pay to the Respondent. Likewise, if the Respondent is responsible for paying a portion of the Claimant’s legal costs, this will record the percentage and/or amounts. If there is no shifting, do not code these levels.

   **a. Percentage:**

   - If Claimant or Respondent must pay part of the other party’s legal costs, but the tribunal does not indicate (or it is impossible to calculate) the percentage of responsibility, code with **NA**. If the data is available, code with **A**.

   \(^36\) In other words, if Claimant must contribute to the Respondent’s legal costs, the Claimant will be the Contributing Party; likewise, if the Respondent must contribute to the Claimant’s cost, the Respondent will be the Contributing Party.
• If Claimant or Respondent must pay part of the other parties’ legal costs, indicate the percentage that the Contributing Party must pay by stating the percentage. (For example, if the Claimant must pay 100% of Respondent’s costs, this would be coded as 100; and if a Respondent were required to pay 80 percent of Claimant’s costs, this would be coded as 80.)

For those cases coded with ND (No Decision) or R (Reserved), code the “Data of % of PLC Shift Available?” and “Per Cent of PLC Shift” cells with a period [.] to indicate data is not available.

b. Actual Amount:
• AVAILABILITY: If Claimant or Respondent must pay part of the Respondent’s legal costs, but the tribunal does not state the amount that must be paid, code with NA. If the data is available, code with A.

• ORIGINAL CURRENCY AND AMOUNT: If Claimant or Respondent must pay part of the other parties’ legal costs, indicate the amount that must be paid (using the currency described in the award). (For example, if the Claimant must pay five thousand U.S. Dollars, this would be recorded as: (1) US$ in the “Original Currency of PLC” column, and (2) 5000 in the “Amount of PLC Contribution (in original currency)” column.)

• COMMON CURRENCY: Values should be recorded in their original U.S. Dollar amounts. If the original currency was not in U.S. Dollars, the currency should be converted from its currency into U.S. Dollars as at the date of the award. Where possible, the currency conversion should be based upon figures from the FX Converter available at http://www.oanda.com/convert/classic using the interbank rate. (The Chart reflects these figures.)

For those cases coded with ND (No Decision) or R (Reserved), code the “Data of Amount of PLC Shift Available?”, “Original Currency of PLC”, “Amount of PLC Contribution (in original currency)” and “Common Currency - USD - of PLC Contribution” cells with a period [.] to indicate data is not available.

3. Reasoning for PLC Determination: This level indicates the tribunal’s stated basis for its PLC determination. This variable will consider the factors that influenced the tribunal’s conclusion.

a. Presence of Legal Authority: This level records whether the tribunal expressly referred to textual legal authority as support for its PLC determination. If the tribunal did not cite any legal authority (defined below) to support its decision, code with NA – no authority. If the tribunal did cite to legal authority, code with AP – authority present.
If the tribunal did cite legal authority (AP), this sub level looks at what the tribunal referenced. Coders should code any and all that apply.

**ICSID-C** = ICSID Convention
- 0 = Tribunal does not reference
- 1 = Tribunal references

**ICSID-AR** = ICSID Arbitration Rules
- 0 = Tribunal does not reference
- 1 = Tribunal references

**ICSID/AF** = ICSID Additional Facility Rules
- 0 = Tribunal does not reference
- 1 = Tribunal references

**SCC** = SCC Arbitration Rules
- 0 = Tribunal does not reference
- 1 = Tribunal references

**UNCITRAL** = UNCITRAL Arbitration Rules
- 0 = Tribunal does not reference
- 1 = Tribunal references

**BIT** = Procedural Dispute Settlement terms from underlying bilateral or multilateral investment treaty.
- 0 = Tribunal does not reference
- 1 = Tribunal references

**BITAwards** = Awards from previous investment treaty arbitration tribunals
- 0 = Tribunal does not reference
- 1 = Tribunal references

**IntlTribunals** = Decisions from other international tribunals (i.e. Iran-US Claims Tribunal, International Court of Justice, Mixed Claims Commissions, etc) that do not involve investment treaties
- 0 = Tribunal does not reference
- 1 = Tribunal references

**NC** = Judgments from national courts
- 0 = Tribunal does not reference
- 1 = Tribunal references

**Other** = Other
- 0 = Tribunal does not reference
- 1 = Tribunal references
If the tribunal did not cite to legal authority (NA), code each of these cells with a 0.

b. **Rationale**: This level is identifying the factors influencing the tribunal’s PLC determinations.\(^{37}\) If the tribunal did not provide any rationale to support its decision, code with NR – no rationale. If the tribunal did cite to legal authority, code with RP – rationale present.

If the tribunal did provide a rationale (RP), this sub level looks at what the express basis of the tribunal’s decision on costs. It evaluates the express text of the award to determine what factors impact cost determinations. Coders should code any and all that apply.

\[
\text{LoserPays} = \text{Loser pays rationale}^{38} \\
0 = \text{Tribunal does not reference} \\
1 = \text{Tribunal references}
\]

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\(^{37}\) Simply mentioning a factor does not mean that it is a factor “influencing” the tribunal’s PLC determination. Rather, the factor must affect the tribunal’s ultimate determination about how it addresses the cost. For example, if a tribunal mentions that it is impressed with counsel’s professionalism at some point in the decision – but does not indicate in its analysis that the professionalism affects its decision on costs – it is not part of the tribunal’s rationale. Similarly, if a tribunal indicates that the novelty of an issue may be important but that, in this particular case, it does not affect their decision on costs, the novelty does not “influence” the tribunal’s PLC determination.

\(^{38}\) The tribunal expresses a desire to have the loser pay for making losing arguments.
**RewardWin** = Rewarding winning party (making winner whole)\(^{39}\)

- 0 = Tribunal does not reference
- 1 = Tribunal references

**Welamson** = The parties’ relative success (won some arguments – lost others)\(^{40}\)

- 0 = Tribunal does not reference
- 1 = Tribunal references

**DeterIB** = Deter inappropriate behavior\(^{41}\)

- 0 = Tribunal does not reference
- 1 = Tribunal references

**EncourageAB** = Encourage appropriate behavior\(^{42}\)

- 0 = Tribunal does not reference
- 1 = Tribunal references

**Settlement** = Party settlement efforts\(^{43}\)

- 0 = Tribunal does not reference
- 1 = Tribunal references

**Novelty** = Novelty or challenge of establishing claim\(^{44}\)

- 0 = Tribunal does not reference
- 1 = Tribunal references

**PublicInt** = Public importance of claim\(^{45}\)

- 0 = Tribunal does not reference
- 1 = Tribunal references

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\(^{39}\) The tribunal discusses a need to reward the winning party for making winning arguments and/or compensate the winner and making them whole for either: (1) needing to expend legal fees to fully compensate their losses or, (2) put the party in the position they would have been but for the need to bring the claim.

\(^{40}\) The tribunal acknowledges that the parties each won and lost some arguments and is making the PLC determination on the basis of the parties’ relative success. This is based upon the work of Lars Welamson which “holds that costs should be allocated *inter partes* on a sliding scale proportionate to the assessment by the [tribunal] of the claims made by the parties . . . .” J. Gillis Wetter & Charl Priem, *Costs and Their Allocation in International Commercial Arbitrations*, 2 AM. REV. INT’L ARB. 249, 274 (1991).

\(^{41}\) The tribunal expresses a desire to prevent or sanction inappropriate behavior including: (1) bad faith conduct in adjudicating the proceedings, (2) poor pleadings or proof, (3) delays in making arguments, (4) inefficient administration of the arbitration, (5) repetitive or unfounded conduct, (6) unwillingness to produce documents, (7) reliance on annulled cases, or (8) lack of cooperation with the tribunal.

\(^{42}\) The tribunal expresses a desire to praise or reward appropriate behavior by parties or their attorneys. This may include: (1) professionalism of parties and/or their attorneys, (2) constructive nature of parties’ pleadings or proof, (3) efficiency in making arguments, (4) efficiency in the administration of the arbitration, and (5) the absence of inappropriate behavior.

\(^{43}\) The tribunal expresses a desire to be influenced by or consider (1) references that parties have made settlement efforts whether through mediation, negotiation or some other facilitative process or (2) the parties’ recorded settlement agreement.

\(^{44}\) The tribunal indicates that the type of claim or argument made is novel and/or is challenging to establish.

\(^{45}\) The tribunal indicates that the public, issues of policy, or matters of public importance are implicated by the claim and/or the issues raised in the arbitration.
**StareDecisis** = Consideration of the need to adhere to previous cases

- 0 = Tribunal does not reference
- 1 = Tribunal references

**PartyEquality** = Inequality of the parties

- 0 = Tribunal does not reference
- 1 = Tribunal references

**Substantive** = Tribunal expresses concern with party conduct related to underlying substantive dispute

- 0 = Tribunal does not reference
- 1 = Tribunal references

**Equity** = Equitable, fair, just or reasonable

- 0 = Tribunal does not reference
- 1 = Tribunal references

**Discretion** = Exercise of discretion

- 0 = Tribunal does not reference
- 1 = Tribunal references

**InfDec** = Tribunal indicates a desire to make a full and informed decision on costs or asks for information about costs

- 0 = Tribunal does not reference
- 1 = Tribunal references

**Other** = some other basis for determination

- 0 = Tribunal does not reference
- 1 = Tribunal references

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46 Beyond simple reference to precedent, this sub-level should be coded where the tribunal expresses an interest in adhering to established precedent and principles of *stare decisis* (i.e. treating like cases alike), or analyzes the application of or distinctions from previous investment treaty awards.

47 The tribunal references the inequalities between the parties, whether based upon power, size or finances.

48 This might include, for example, a tribunal suggesting that parties are winning/losing based upon procedural issues (i.e. burdens of proof or evidentiary rules) or tribunals are concerned about the inappropriate nature of a party’s substantive conduct that may have given rise to a claim or a problem related to the claim.

49 The tribunal expressly suggests its decision is based upon principles of fairness, justice, equity, appropriateness or reasonableness. As regards PLC, this “reasonableness” may also relate to the amount of the fee charged for the PLC.

50 The decision is based upon the tribunal’s exercise of discretion. “Discretion” is present when there is more than a mere reference to a rule that references the possibility of a tribunal exercising discretion; rather the award must demonstrate that the tribunal was exercising that discretion.

51 This is most likely to occur in the context when a tribunal reserves a decision on cost to a later phase or juncture in the case. For example, the tribunal may indicate that a cost decision should be linked to another stage to make a fair determination about costs generally.

52 If there is some other basis for determination, Coders should indicate this in the yellow Coder Comments at the end of the Excel Spreadsheet.
If the tribunal did not provide any rationale (NR), code each of these cells with a 0.

G. Allocation of Tribunal’s Legal Costs:

As previously indicated, there is a distinction between PLC and the Tribunal’s costs and expenses. This level will consider how tribunals allocate their own costs and expenses for adjudicating the claim. As with PLC, the precise definition of the tribunal’s “costs” may vary according to the applicable arbitration rules. For the purpose of this level, however, the “Tribunals Costs and Expenses” (TCE) refers to the costs incurred by the tribunal and the arbitral institution (if any) in adjudicating the claims and arguments made by the parties. TCE might include, for example, (1) tribunal’s fees, (2) the tribunal’s travel expenses, (3) the costs of experts consulted by the tribunal, (4) the costs of hearing rooms and transcripts, and (5) the administrative expenses of the institution.

1. Presence of TCE Analysis: This level indicates whether the tribunal has addressed the possibility (or not) of shifting the TCE. If the tribunal has not discussed TCE, code with ND. If the tribunal has referred to the TCE but deferred a decision or reserved it for the future, code with R. If the tribunal has discussed the TCE and has made a decision about whether or not to shift costs, code with a D.

2. Actual TCE Determination: For those cases where the tribunal has made a decision about whether or not to shift costs, this sub-level records what decision the tribunal actually made.
   - If the tribunal decided that each party should bear one-half of the TCE (i.e. there is no shifting of TCE), code with NA.
   - If the tribunal decided that the Claimant should pay more than one-half of the TCE, code with CC (Claimant Contribution)
   - If the tribunal decided that the Respondent should pay more than one-half of the TCE, code with RC (Respondent Contribution)

For those cases coded with ND (No Decision) or R (reserved), code this cell a period [.] to indicate data is not available.

3. Degree of TCE Determination: This sub-level looks at the degree the tribunal shifted the TCE. Irrespective of the Actual TCE Determination, this sub-level records the percentages and amounts of the TCE for which the Claimant and Respondent are each responsible.
   a. Percentage
      - For “Data Available for % of TCE?”, if the tribunal does not indicate (or it is impossible to calculate) the percentage of Claimant’s or
Respondent’s responsibility for the TCE, code with NA. If the information is available, code A.

- If the information is available, code the following two tasks. First, record the percentage of the TCE for which the Claimant is responsible. (For example, if the Claimant must pay 60% of the TCE, this would be coded as 60.) Second, record the percentage of the TCE for which the Respondent is responsible. (For example, if the Respondent must pay 40% of the TCE, this would be coded as 40) The totals of these two percentages should always equal 100%.

For those cases coded with ND (No Decision) or R (Reserved), code the “Data Availability,” “Claimant %” and “Respondent %” cells with a period [.] to indicate data is not available.

b. Actual Amount:

- AVAILABILITY: If tribunal does not indicate (or it is impossible to calculate) the total amount for which the respective parties are responsible, but the tribunal does not state the amount that must be paid, code with NA. If complete information is available code A.

- ORIGINAL CURRENCY AND AMOUNT: If the information is available, code the following pieces of information using the currency described in the award. First, in “Original Currency for C's TCE Amount” and “Amount of TCE C pays (in original currency)” record the amount of the TCE for which the Claimant is responsible. (For example, if the Claimant must pay five thousand U.S. Dollars, this would be coded by recording: (1) US$ in the currency column and (2) 5000 in the C Pays column.) Second, in “Original Currency for R's TCE Amount” and “Amount of TCE R pays (in original currency)”, record the amount of the TCE for which the Respondent is responsible. (For example, if the Respondent must pay ten thousand Swedish Kroner, this could be coded by recording: (1) SEK in the currency column, and (2) 10,000 in the R Pays column).

- COMMON CURRENCY: If the information is available, values should be recorded in their original U.S. Dollar amounts in two places – the “Common Currency - USD - of C's TCE Amount” and “Common Currency - USD - of R's TCE Amount” cells. If the original currency was not in U.S. Dollars, the currency should be converted from its currency into U.S. Dollars as at the date of the award. Where possible, the currency conversion should be based upon figures from the FX Converter available at http://www.oanda.com/convert/classic using the interbank rate. (The Chart reflects these figures.)
For those cases coded with ND (No Decision) or R (Reserved), code the “Data Availability,” “Currency,” “C Pays” and “R Pays” cells with a period [.] to indicate data is not available.

4. **Reasoning for TCE Determination:** This level indicates the tribunal’s stated basis for its TCE determination. This variable will consider the factors that influenced the tribunal’s conclusion.

   a. **Presence of Legal Authority:** This level records whether the tribunal expressly referred to textual legal authority as support for its TCE determination. If the tribunal did not cite any legal authority (defined below) to support its decision, code with NA – no authority. If the tribunal did cite to legal authority, code with AP – authority present.

   If the tribunal did cite legal authority (AP), this sub level looks at what the tribunal referenced. Coders should code any and all that apply.

   - ICSID-C = ICSID Convention
     - 0 = Tribunal does not reference
     - 1 = Tribunal references

   - ICSID-AR = ICSID Arbitration Rules
     - 0 = Tribunal does not reference
     - 1 = Tribunal references

   - ICSID/AF = ICSID Additional Facility Rules
     - 0 = Tribunal does not reference
     - 1 = Tribunal references

   - SCC = SCC Arbitration Rules
     - 0 = Tribunal does not reference
     - 1 = Tribunal references

   - UNCITRAL = UNCITRAL Arbitration Rules
     - 0 = Tribunal does not reference
     - 1 = Tribunal references

   - BIT = Terms of the underlying bilateral or multilateral investment treaty.
     - 0 = Tribunal does not reference
     - 1 = Tribunal references

   - BITAwards = Awards from previous investment treaty arbitration tribunals
     - 0 = Tribunal does not reference
     - 1 = Tribunal references
IntlTribunals = Decisions from other international tribunals (i.e. Iran-US Claims Tribunal, International Court of Justice, Mixed Claims Commissions, etc) that do not involve investment treaties
0 = Tribunal does not reference
1 = Tribunal references

NC = Judgments from national courts
0 = Tribunal does not reference
1 = Tribunal references

Other = Other
0 = Tribunal does not reference
1 = Tribunal references

If the tribunal did not cite to legal authority (NA), code each of these cells with a 0.

b. Rationale: This level is identifying the factors influencing the tribunal’s TCE determinations. If the tribunal did not provide any rationale to support its decision, code with NR – no rationale. If the tribunal did cite to legal authority, code with RP – rationale present.

If the tribunal did provide a rationale (RP), this sub level looks at what the express basis of the tribunal’s decision on costs. It evaluates the express text of the award to determine what factors impact cost determinations. Coders should code any and all that apply.

LoserPays = Loser pays rationale
0 = Tribunal does not reference
1 = Tribunal references

RewardWin = Rewarding winning party (making winner whole)
0 = Tribunal does not reference
1 = Tribunal references

53 Simply mentioning a factor does not mean that it is a factor “influencing” the tribunal’s TCE determination. Rather, the factor must affect the tribunal’s ultimate determination about how it addresses the cost. For example, if a tribunal mentions that it is impressed with counsel’s professionalism at some point in the decision – but does not indicate in its analysis that the professionalism affects its decision on costs – it is not part of the tribunal’s rationale. Similarly, if a tribunal indicates that the novelty of an issue may be important but that, in this particular case, it does not affect their decision on costs, the novelty does not “influence” the tribunal’s TCE determination.

54 The tribunal expresses a desire to have the loser pay for making losing arguments.

55 The tribunal discusses a need to reward the winning party for making winning arguments and/or compensate the winner and making them whole for either: (1) needing to expend legal fees to fully compensate their losses or, (2) put the party in the position they would have been but for the need to bring the claim.
Welamson = The parties’ relative success (won some arguments – lost others)\(^{56}\)
0 = Tribunal does not reference
1 = Tribunal references

DeterIB = Deter inappropriate behavior\(^{57}\)
0 = Tribunal does not reference
1 = Tribunal references

EncourageAB = Encourage appropriate behavior\(^{58}\)
0 = Tribunal does not reference
1 = Tribunal references

Settlement = Party settlement efforts\(^{59}\)
0 = Tribunal does not reference
1 = Tribunal references

Novelty = Novelty or challenge of establishing claim\(^{60}\)
0 = Tribunal does not reference
1 = Tribunal references

PublicInt = Public importance of claim\(^{61}\)
0 = Tribunal does not reference
1 = Tribunal references

StareDecisis = Adherence to precedent\(^{62}\)
0 = Tribunal does not reference
1 = Tribunal references

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\(^{56}\) The tribunal acknowledges that the parties each won and lost some arguments and is making the PLC determination on the basis of the parties’ relative success. This is based upon the work of Lars Welamson which “holds that costs should be allocated \textit{inter partes} on a sliding scale proportionate to the assessment by the [tribunal] of the claims made by the parties ….” J. Gillis Wetter & Charl Priem, \textit{Costs and Their Allocation in International Commercial Arbitrations}, 2 AM. REV. INT’L ARB. 249, 274 (1991).

\(^{57}\) The tribunal expresses a desire to prevent or sanction inappropriate behavior including: (1) bad faith conduct in administering the proceedings, (2) poor pleadings or proof, (3) delays in making arguments, (4) inefficient administration of the arbitration, (5) repetitive or unfounded conduct, (6) unwillingness to produce documents, (7) reliance on annulled cases, or (8) lack of cooperation with the tribunal.

\(^{58}\) The tribunal expresses a desire to reward appropriate behavior by parties. This may include: (1) professionalism of parties and their attorneys, (2) constructive nature of parties’ pleadings or proof, (3) efficiency in making arguments, (4) efficiency in the administration of the arbitration, and (5) the absence of inappropriate behavior.

\(^{59}\) The tribunal expresses a desire to be influenced by or consider (1) references that parties have made settlement efforts whether through mediation, negotiation or some other facilitative process or (2) the parties’ recorded settlement agreement.

\(^{60}\) The tribunal indicates that the type of claim or argument made is novel and/or is challenging to establish.

\(^{61}\) The tribunal indicates that the public, issues of policy, or matters of public importance are implicated by the claim and/or the issues raised in the arbitration.

\(^{62}\) Beyond simple reference to precedent, this sub-level should be coded where the tribunal expresses an interest in adhering to established precedent and principles of \textit{stare decisis} (i.e. treating like cases alike), or analyzes the application of or distinctions from previous investment treaty awards.
**PartyEquality** = Inequality of the parties

- **0** = Tribunal does not reference
- **1** = Tribunal references

**Substantive** = Tribunal expresses concern with party conduct related to underlying substantive dispute

- **0** = Tribunal does not reference
- **1** = Tribunal references

**Equity** = Equitable, fair, just or reasonable

- **0** = Tribunal does not reference
- **1** = Tribunal references

**Discretion** = exercise of discretion

- **0** = Tribunal does not reference
- **1** = Tribunal references

**InfDec** = Tribunal indicates a desire to make a full and informed decision on costs or asks for information about costs

- **0** = Tribunal does not reference
- **1** = Tribunal references

**Other** = some other basis for exercising discretion

- **0** = Tribunal does not reference
- **1** = Tribunal references

*If the tribunal did not provide a rationale (NR), code each of these cells with a 0.*

**H. Coder’s Qualitative Comments, Notes and Questions.** Use this cell (highlighted in light yellow) to make any appropriate annotations or questions about the case. This might be used, for example, to: (1) record any coding concerns or ambiguities, (2) highlight issues of particular interest, or (3) make notes for future use related to, for example, “Other” categories.

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63 The tribunal references the inequalities between the parties, whether based upon power, size or finances.

64 This might include, for example, a tribunal suggesting that parties are winning/losing based upon procedural issues (i.e. burdens of proof or evidentiary rules) or tribunals are concerned about the inappropriate nature of a party’s substantive conduct that may have given rise to a claim or a problem related to the claim.

65 The tribunal expressly suggests its decision is based upon principles of fairness, justice, equity, appropriateness or reasonableness.

66 The decision is based upon the tribunal’s exercise of discretion. “Discretion” is present when there is more than a mere reference to a rule that references the possibility of a tribunal exercising discretion; rather the award must demonstrate that the tribunal was exercising that discretion.

67 This is most likely to occur in the context when a tribunal reserves a decision on cost to a later phase or juncture in the case. For example, the tribunal may indicate that a cost decision should be linked to another stage to make a fair determination about costs generally.
III. CODING PROCESS

A. The Code Book

Professor Franck produced a first draft of this Code Book. The Code Book was revised after consultations with her research assistant, Melanie Neely, and Mindy Anderson-Knott, Vicki Plano Clark and Walter Stroup, quantitative and qualitative researchers with the University of Nebraska-Lincoln’s Department of Surveys, Statistics and Psychometrics.

Professor Franck and Ms. Neely picked one case, *EnCana v. Ecuador*, to analyze and see how well the Code Book and Chart worked together. Minor revisions to this Code Book were made after that initial coding.

B. Pilot for Inter-Coder Reliability

The objective of the coding pilot was to ensure a high degree (greater than 95%) of inter-coder reliability. At the recommendation of Vicki Plano Clark, based upon the sourcebook *Qualitative Data Analysis* (2nd ed. 1994) by Matthew B. Miles and A. Michael Huberman, we decided that we would use a measure of reliability = number of agreements/total number of agreements + disagreements. Recognizing that this might be viewed as a liberal measure, we made the decision to require a high percentage of reliability.

Six awards (representing approximately 5% of the sample size) from the set of 102 awards were coded in each round. There were two coders in each round, and the researcher (Professor Franck) was involved in coding each round. After separately coding each round of six cases, the coders would meet and orally check the coding decisions reflected in the Excel Spreadsheet. Areas of coder disagreement were indicated by placing a red field in the cell on Professor Franck’s spreadsheet entitled “Code Book - Cost Data - Intercoder Reliability Data.” When there were disagreements between the coding, at least one of the following occurred:

- The Code Book was revised to include more precise directions and fill gaps that became apparent;
- Typos were recognized and coders were cautioned to be as precise as possible when typing in their codes;
- The Chart was revised to include additional data;
- Coders were reminded to: (a) refer to the text of the award itself in case of any ambiguity or confusion, (b) refer to the text of cited authorities (i.e. the SCC Rules), and (c) rely upon the express text of the written awards; and
- When appropriate, there methodological discussions about the content of the Code Book and coding procedures between Professor Franck and Professor Plano Clark.

Areas of agreement and the rationale of coding decisions, particularly for TCE and PLC determinations were discussed; and coders shared the comments from their coding sheets.
Ultimately, there were four rounds of coding prior to reaching inter-coder reliability greater than 95%.

Round 1: Professor Franck and Ms. Neely then used a random numbers table provided by Professor Plano Clark to select six of the 102 cases to code for inter-coder reliability. The following awards were selected randomly: (1) Case 95: Bayindir Insaat v. Pakistan, (2) Case 86: CMS v. Argentina, (3) Case 71: MTD Equity v. Chile, (4) Case 63: CCL v. Kazakhstan, (5) Case 37: Link Trading v. Moldova, and (6) Case 28: Pope & Talbott v. Canada. Out of a possible 510 coding choices, there were 481 agreements between the two coders. This means that there was 94.13% inter-coder reliability. As this was under 95%, the coding decisions were discussed and the Code Book was revised.

Round 2: Professor Franck and Ms. Neely then used a random numbers table, Table A-1, from George W. Snedecor and William G. Cochran’s Statistical Methods (7th ed. 1980) provided by Professor Walter Stroup to obtain six random cases to check for inter-coder reliability. The following awards were randomly selected: (1) Case 64: Enron v. Argentina, (2) Case 81: Plama v. Bulgaria, (3) Case 1: AAPL v. Sri Lanka, (4) Case 70: MTD v. Chile, (5) Case 56: Generation Ukraine v. Ukraine, and (6) Case 58: Azurix v. Argentina. Out of a possible 558 coding choices, there were 485 agreements between the two coders. This means that there was 86.92% inter-coder reliability. As this was under 95%, the coding discussions were discussed, textual data was added to the Chart and Code Book was modified.

Round 3: Professor Franck and Ms. Neely then used a random numbers table, Table A-1, from George W. Snedecor and William G. Cochran’s Statistical Methods (7th ed. 1980) to obtain six random cases to check for inter-coder reliability. The randomly selected cases were: (1) Case 92: Iurii Bogdanov v. Moldova, (2) Case 44: UPS v. Canada, (3) Case 87: CMS v. Argentina, (4) Case 1: AAPL v. Sri Lanka, (5) Case 30: CME v. Czech Republic, and (6) Case 82: Petrobart v. Kyrgyz Republic. Out of a possible 564 coding choices, there were 35 disagreements, which meant there was a 93.79% of inter-coder reliability. Coding discussions were discussed, and after a conversation with Vicki Plano Smith of the SPP, the Code Book was revised.68

Round 4: Professor Franck and Ms. Neely then used a random numbers table, Table A-1, from George W. Snedecor and William G. Cochran’s Statistical Methods (7th ed. 1980) to obtain six random cases to check for inter-coder reliability. The randomly selected cases were: (1) Case 56: Generation Ukraine v. Ukraine, (2) Case 68: LG&E Energy v. Argentina, (3) Case 83: Impregilo v. Pakistan, (4) Case 48: ADF Group v. United States,

68 One problem that had been noted during the last two rounds of coding was that, both for existence of authority and existence of rationale, if an improper code was entered in the first instance, instead of simply having coded one or two cells improperly, it would mean that 11 or 16 cells were coded improperly. For example, if one coder thought that there was “authority present” (AP) and categorized it as “other” authority and entered in 0 for the remainder of the authority cells, but the other coder thought that no authority was present and coded in “.” for the authority cells, this meant that – even though both coders would agree that the other cells were inapplicable (i.e. that there was no reference to ICSID, the SCC, UNCITRAL rules, BIT cases, etc), this agreement would not be reflected in the coding because – as a result of the initial coding determination – one researcher would code it with a 0 and the other would code with a “.” In an effort to reflect this agreement, the decision was made to code with 0/1 in the authority/rationale categories irrespective of the initial code.
(5) Case 2 Tradex Hellas: and (6) Case 87: CMS v. Argentina. Out of the 564 coding decisions, there were 8 disagreements and 556 agreements, which meant that there was 98.58% inter-coder reliability. Coding decisions were discussed, and the decision was made to go forward with coding using: (1) the FINAL VERSION of the Code Book, (2) the Excel Spreadsheet, and (3) the “Coding Version” of the Chart from 28 June 2006.

C. Coding the Data

After discussing the 98% degree of inter-coder reliability, Professor Franck consulted with Professor Vicki Plano Smith. Franck suggested using a random numbers table to randomly order the 102 cases, which were listed in reverse chronological order in the Chart, so that they could be evenly and randomly distributed for coding. Plano Smith agreed this was sensible. The 102 cases were randomized using a random numbers table, Table A-1, from George W. Snedecor and William G. Cochran’s Statistical Methods (7th ed. 1980). On the basis of a coin toss, it was decided that Melanie Neely would take the first set of 51 randomized cases and Professor Franck would take the second set.

As regards checking inter-coder reliability during the research process, Plano Smith suggested checking a small number of cases (a smaller sample than the coding pilot, such as three) at the end to ensure that the process of coding had not disrupted the coding process. Professor Franck agreed. Using the random numbers table, Table A-1, from George W. Snedecor and William G. Cochran’s Statistical Methods (7th ed. 1980), Professor Franck randomly selected four cases from the randomized set of cases: (1) Randomized Case 008 – Case Number 4: FedEx v. Venezuela, (2) Randomized Case 098 – Case Number 31: Genin v. Estonia, (3) Randomized Case 084 – Case Number 38: Victor Pey Casado v. Chile, and (4) Randomized Case 023 – Case Number 6: Ethyl v. Canada.

On June 29, 2006, Professor Franck then sent out an email attaching the Code Book, Excel Spreadsheet and Chart with instructions to use these documents to: (1) code the set of 51 randomized cases in their random order and (2) code the remaining randomized inter-coder reliability cases in their randomized order. Coders were instructed to code their cases independently; and when their coding was complete to notify the other coder of this via email.

D. Re-checking Inter-Coder Reliability

The coding was performed by Melanie Neely, a research assistant, and Professor Franck. The coding of the 51 randomized cases and inter-coder reliability cases was completed in September 2006.

In terms of the later four cases, out of the 372 coding decisions, there were 10 disagreements and 362 agreements, which meant that there was 97.3% inter-coder reliability.

Because the 10 variances occurred within a single case, Professor Franck decided – out of an abundance of caution and a desire for the most reliable data possible – each person would code the full data set. In other words, each coder would code the other coder’s
original set of data and answers would be compared for the entire sample. This coding was complete by October 2006.

In November 9, 15, 16 and 27, 2006, Franck and Neely met to go over the data set. Out of a series of 9,486 data points (102 awards with 93 fields per award), there were 234 disagreements and 9,252 agreements, which meant that there was inter-coder reliability in the order of 97.5%.69

In each instance where there was a disagreement in the November 2006 meetings, the coders mutually agreed what the appropriate coding would be. In order to promote the replicability of the results, revisions were made to the Code Book to reflect the agreed standards for coding cases. Where there were errors and/or useful supplements, changes were also made to the Chart. The final version of the Code Book, which incorporates the revisions resulting from the November 2006 meetings, is called the “Code Book Final Version”.70 The final version of the Chart is called the “Chart Final Version” and incorporates all of the corrections as well as suggested revisions and supplementations from the June 29, 2006 version.71

Melanie Neely emailed Professor Franck the agreed version of the first 51 cases on November 30, 2006. Professor Franck then submitted the agreed version of the second 51 cases on December 6, 2006. The two sets were then combined into a single document entitled “Cost Data – Final Set – December 7 2006.xls”.

E. Cleaning Up Data and Adding New Data

On December 7, 2006, Lindsay Burford trained Professor Franck on how to use SPSS software. Converting the Excel spreadsheet with into SPSS data demonstrated various problems related to the date and currency conversions. Coding clarifications were made to address this, namely: (1) re-sorting the way the date was reflected, and (3) adding categories to reflect a common currency – U.S. Dollars – for all awards.

In addition, Professor Franck decided it would be useful to gather basic demographic data related to: (1) the nationality of the investor, (2) the respondent country, and (3) the

69 The disagreements were: (1) related to cane name and dates – 3 disagreements out of 204, (2) institutional information – 2 disagreements out of 204, (3) basic information about awards and success at each phase – 12 disagreements out of 1,224, (4) information related to damages – 23 disagreements out of 612, (5) basic statistics about the PLC – 1 disagreement out of 714, (6) reference to authority for PLC determinations – 21 disagreements out of 1,122, (7) reference to reasoning for PLC determinations – 70 disagreements out of 1,632, (8) basic statistics about the TCE – 15 disagreements out of 1,020, (9) reference to authority for TCE determinations – 19 disagreements out of 1,122, and (10) reference to reasoning for TCE determinations – 68 disagreements out of 1,632.

70 Although the initial coding was done with the June 29, 2006 version of the Code Book, all final coding decisions were based upon the Code Book Final Version. The areas of revision related to: (1) coding for success at a particular phase, (2) defining “partially” quantified damages, (3) clarifying what types of decisions come from international tribunals and were part of IntlTribunals, (4) determining that a rationale must actively affect a tribunal’s determination (rather than simply being mentioned at some point), (5) clarifying the settlement rationale, and (6) clarifying the informed decision “InfDec” rationale.

71 Professor Franck kept a redlined version of this document to indicate at what point in time the changes were incorporated.
industry in which the dispute arose. Changes to this Codebook and Chart were made to reflect those changes.