Affiliation Bias in Arbitration – Experiment 2
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[START OF SURVEY]

[ARBITRATORS ARE RANDOMLY ASSIGNED TO TREATMENT USING EMBEDDED DATA VIA THE JAVASCRIPT BELOW]

```
Qualtrics.SurveyEngine.addOnload(function()
{
	/*Place Your Javascript Below This Line*/


	/* Randomize Investor-State Dispute Treatments*/
	var is_appointers = [" by the Claimant.", " by the Claimant.", " by the Respondent.", "
by the Respondent.", " by the Parties.", "."];
	var is_resp_awards = ["US$25,001,050.00", "US$12,500,525.00","US$6,250,262.50"];

	appointer_choice = is_appointers[Math.floor((Math.random()*6))];
	Qualtrics.SurveyEngine.setEmbeddedData("Appointer",appointer_choice);
	Qualtrics.SurveyEngine.setEmbeddedData("RespAward",is_resp_awards[Math.floor((Math.random
()*3))]);
	Qualtrics.SurveyEngine.setEmbeddedData("Order1",Math.floor((Math.random()*2)));
	Qualtrics.SurveyEngine.setEmbeddedData("Order2",Math.floor((Math.random()*2)));


	this.clickNextButton()
});
```

Q0 This is a research study of international arbitration being conducted by researchers at Harvard University and the University of Arizona.

The purpose of this research is to better understand how arbitrators make decisions. If you decide to participate, you will complete one survey. You will be asked to evaluate one hypothetical vignette describing an arbitration proceeding. Afterwards, you will be asked a brief set of background questions and a short survey. The complete task will take approximately 7 to 10 minutes to complete. In order to analyze responses to the questionnaire, your answers will be recorded.

This study has no anticipated risks. There are no direct benefits to this survey, but you may find it interesting to consider your responses to the presented vignettes.

Findings from this study will be reported at academic seminars, at research association meetings, and in scholarly articles and journals. If you wish, you may request a copy of the research findings after they are published by sending an e-mail to astrezhnev@fas.harvard.edu or spuig@email.arizona.edu. Additionally, by completing the survey, you will be able to receive working papers and early copies of the research findings.

Your participation in this study is completely voluntary, and you may refuse to participate or withdraw from the study without penalty or loss of benefits to which you are otherwise entitled. You may choose to skip any questions that you do not wish to answer without penalty. Additionally, no identifying information -- such as IP addresses and e-mail addresses -- will be linked to your responses. Your responses will be entirely anonymous. If you submit the completed survey, there will be no way to withdraw your responses from the study because the survey contains no identifying information.

If you have questions or concerns regarding this survey or this research project in general, please contact: Anton Strezhnev by e-mail at (astrezhnev@fas.harvard.edu) or Sergio Puig by e-mail at (spuig@email.arizona.edu).

If you have any questions about your rights as a research participant or any questions, concerns, suggestions, or complaints that are not being addressed by the researcher, please contact contact the University of Arizona Human Subjects Protection Program (HSPP) at 1618 E. Helen Street Tucson, AZ 85721. Phone (520) 626-6721. Email: VPR-IRB@email.arizona.edu.

The nature and purpose of this study have been explained to my satisfaction and I (participant) agree to become a participant in the study described above. I understand that I am free to discontinue participation at any time if I so choose. Answering yes continues the survey; answering no ends the survey.

- ❍ Yes (1)
- ❍ No (2)

Q29 Please print and save a copy of this form for your records.

V1 Imagine an investor-state dispute being conducted under the 2006 Arbitration Rules of the International Centre for Settlement of Investment Disputes (ICSID).

The Claimant investor alleged that the Respondent state violated the provisions of a bilateral investment treaty to which the Respondent is a party. Among other arguments, the Claimant argued that the Respondent violated the treaty's fair and equitable treatment provisions and mistreated the Claimant's investment. You were appointed to the tribunal${e://Field/Appointer} After careful consideration of the facts of the case, the tribunal (you and your fellow arbitrators) unanimously decided that the Respondent unfairly treated the Claimant's investment in violation of the treaty and that the Claimant is entitled to compensation.

You are now asked to decide on the amount of damages owed to the Claimant by the Respondent. The parties have agreed that the tribunal's task is simply to pick one of the two positions of the parties' experts and decide how the expenses should be apportioned in this dispute. In its relevant part, the bilateral investment treaty provides as follows:

1. A Tribunal may award monetary damages and any applicable interest, only.
2. A Tribunal may also award costs in accordance with the applicable arbitration rules.
3. A Tribunal may not order a Party to pay punitive damages.

The Claimant has argued that they should be compensated for lost future profits that would have been realized had the measure not taken place plus interest. The Claimant justifies this claim on the grounds that the enterprise operated profitably for a period of almost three years prior to the violation. The Claimant cites Metalclad v. Mexico ICSID Case No. ARB(AF)/97/1 which considered a minimum presence of at least two or three years necessary for an award of future profits. The Claimant's expert has calculated damages for US$50,002,100.00 based on the discounted cash flow value of the expected returns from the Claimant firm's ten-year investment plan.

The Respondent has argued that the enterprise had not operated for a sufficient period of time to establish itself as a "going concern" and that the ability of the enterprise to generate future earnings was uncertain and compromised. The Respondent cites Tecmed v. Mexico ICSID Case No. ARB(AF)/00/2, arguing that the tribunal in that dispute ruled that the Claimant's operating history of two and a half years was insufficient to establish enough objective data on profitability to apply a discounted cash flow analysis. Therefore, any estimate of future profits would be highly speculative. The Respondent instead proposes that damages should be based on the liquidation value of the firm and their expert has calculated damages for ${e://Field/RespAward}.

In ICSID disputes, the average award for claimants who are awarded damages is about US$45.6 million. The median award is US$10.9 million (See: Franck, S. D., & Wylie, L. E.

(2015). Predicting outcomes in investment treaty arbitration. Duke Law Journal, 65(3), 494-527.).

Throughout the proceedings, both disputing parties were cooperative and the counsels for both parties behaved efficiently, professionally and ethically. The parties have not agreed on how and by whom the expenses shall be paid.

Display This Question:
If Order1 Is Equal to 0

Q1O1 Based on the above information, how much shall the Respondent pay to the Claimant in damages as a result of the violation of the investment treaty?

- The Claimant's amount: US$50,002,100.00 (1)
- The Respondent's amount: ${e://Field/RespAward} (2)

Display This Question:
If Order1 Is Equal to 1

Q2O2 Based on the above information, how much shall the Respondent pay to the Claimant in damages as a result of the violation of the investment treaty?

- The Respondent's amount: ${e://Field/RespAward} (1)
- The Claimant's amount: US$50,002,100.00 (3)

Display This Question:
If Order2 Is Equal to 0

Q2O1 How do you think the parties' expenses, including the cost of legal representation, should be apportioned in this dispute?

- Claimant reimburses all of the Respondent's expenses. (1)
- Claimant reimburses some of the Respondent's expenses. (2)
- Each party bears its own expenses. (3)
- Respondent reimburses some of the Claimant's expenses. (4)
- Respondent reimburses all of the Claimant's expenses. (5)

Display This Question:
If Order2 Is Equal to 1

Q2O2 How do you think the parties' expenses, including the cost of legal representation should be apportioned in this dispute?

- Respondent reimburses all of the Claimant's expenses. (1)
- Respondent reimburses some of the Claimant's expenses. (2)
- Each party bears its own expenses. (3)
- Claimant reimburses some of the Respondent's expenses. (4)
- Claimant reimburses all of the Respondent's expenses. (5)

Q3 Please briefly discuss your reasoning for your answers to the above questions.

V3 This survey is almost finished. We would like to ask you a few questions about your background. Please remember that you can choose not to answer any question.

Q8 What is your gender?
- ❍ Male (1)
- ❍ Female (2)

Q10 What is your primary country of nationality?
Country (1) [OPEN RESPONSE]

Q11 What best describes your primary, current place of employment?
- ❍ Private Practice/Law firm (1)
- ❍ Professor/University (2)
- ❍ Government/Public sector (3)
- ❍ Other (4) _____

Q12 What is your highest level of education?
Degree (1)

Q13 In total, on how many arbitrations have you served?
- ❍ 0 (1)
- ❍ 1-5 (2)
- ❍ 6-9 (4)
- ❍ 10 or more (5)

Q14 Have you ever been appointed to an investor-state dispute?
- ❍ Yes (1)
- ❍ No (2)

Q32 In political matters, people talk of the "left" and the "right. How would you place your views on this scale?
- ❍ Left 1 (2)
- ❍ 2 (12)
- ❍ 3 (3)
- ❍ 4 (4)
- ❍ 5 (5)
- ❍ 6 (6)
- ❍ 7 (7)
- ❍ 8 (8)
- ❍ 9 (9)
- ❍ Right 10 (10)

Q15 In your opinion, how fair is the international investment arbitration system currently?
- ❍ Very fair (1)
- ❍ Somewhat fair (2)
- ❍ Not at all fair (3)

Q17 In your opinion, do states or investors tend to benefit more from investor-state arbitration, or do both benefit about equally?
- ❍ States benefit more (1)
- ❍ Investors benefit more (2)
- ❍ Both benefit about equally (3)

Q18 In your opinion, how well does the current international investment arbitration system take into account the interests of developing countries?
- ❍ Very well (1)
- ❍ Somewhat well (2)
- ❍ Not well at all (3)

Q19 In your opinion, how difficult is it for firms to successfully litigate a claim against a state in an investor-state arbitration?
- ❍ Very difficult (1)
- ❍ Somewhat difficult (2)
- ❍ Not difficult at all (3)

Q20 In your opinion, do you think that investor-state arbitration tribunals' interpretation of what constitutes "fair and equitable treatment" of foreign investments tends to be too expansive, too narrow or just right?
- ❍ Too expansive (1)
- ❍ Too narrow (2)
- ❍ Just right (3)