

Investment Treaty Arbitration and Developing Countries: A Re-Appraisal

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INTRODUCTION

There is contention among governments, the private sector, civil society organizations, and across academia regarding the extent to which bi-lateral investment treaties (BITs) and free trade agreements (FTAs) with BIT-like investment chapters unfairly subject developing countries to investment arbitration. A key argument is that these treaties elevate the rights of foreign firms over host governments, and allow those firms to directly file claims against those governments. Many claims have been targeted toward policies for the public welfare, so the story goes, and thus hinder the ability of developing countries especially to develop the proper institutions to raise their standards of living. Moreover, the costs of awards that need to be paid to claimants and the cost to carry out a case are seen as enormous by developing country standards. Taken as a whole then, these concerns make developing nations very cautious about any measure that could be perceived as in violation of a treaty.

A growing number of actors argue that such fears can be laid to rest. Defenders claim that the system does not unfairly subject developing countries to arbitral panels. When these arguments are made, they often rely on the relatively recent empirical work by legal scholar Susan Franck (Franck 2009; Franck 2007). Franck's work suggests that developing countries are not subject to more claims under the system, and that investors do not win the majority of cases. When foreign investors do win, the awards paid are not necessarily large amounts.

More specifically, Franck¹ empirically analyzes investment treaty arbitration awards publicly available before June 1, 2006 to better understand trends in investment treaty arbitrations including main players (investors and respondent governments), arbitration outcomes (win-loss rates and amounts awarded v. amounts claimed), costs of arbitration and nationality and gender of arbitrators. The data are collected from three sources: public websites (namely Investment Treaty Arbitration, Investment Treaty Claims and

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¹ Franck, S. D. (2007). "Empirically Evaluating Claims About Investment Treaty Arbitration." *North Carolina Law Review* 86.

ICSID), a fee-based online database (Westlaw Appleton-ISR) and print media sources. The countries are categorized two ways, using OECD's binary categorization (OECD v. non-OECD) and World Bank's categorization (high income countries, upper middle income countries, lower middle income countries and low income countries). Franck also analyses the costliness of supporting and defending a claim, and looks at the role of nationality in dispute outcomes².

Franck's study found that the bulk of the cases (around 90%) did indeed originate from high income countries of which 32 cases were from the U.S. Among the respondent governments, 70% were non-OECD (or developing) countries. However, only few came from low-income countries and high proportion of arbitration (45%) were subjected against upper middle income developing countries. In terms of arbitration outcomes, the ultimate winners did not appear to be significantly different for investors and respondent countries. Investors on average won less than half of the cases and even when they won, they did not win big. U.S. seemed to follow the similar trend and lose more. The study found a statistically significant difference between amounts claimed and awarded. Thus Franck concluded that although there are rooms for improvement, investment arbitration was functioning in an unbiased manner.

In 2009, using 2007 arbitration award data, Franck³ conducted econometric analysis to study the relationship among development status of the respondent government, development status of the presiding arbitrator and arbitration outcome (both in terms of win-loss and amounts awarded). Franck found no significant relationship between development status of the respondent country, development status of the presiding arbitrator and outcome of the arbitration.

THE LIMITS OF FRANCK'S ANALYSIS

This working paper critically analyzes parts of Franck's work and concludes that such work may be limited in explaining the development impacts of investor-state dispute resolution. In the order they will appear in this working paper, our main concerns are:

- There is a lack of adequate sample composition and size to conduct rigorous empirical work from which an analyst could draw such bold lessons.
- Discounting the fact that developing countries are subject to a disproportionate number of claims is not to be overlooked, especially when looking at claims by the United States.

² To these authors, this aspect of Franck's analysis appears to be fairly arbitrary. The nationality of an arbitrator and the extent to which such arbitrators "side" with their respective nationality has never been part of the debate on investor-state arbitration and development and thus we do not focus on this analysis.

³ Franck, S. D. (2009). "Development and Outcomes of Investment Treaty Arbitration." *Harvard International Law Journal* 50: 435–489.

- Relative to government budgets and in per capita terms developing countries pay significantly more in damages than developed nations do.

We therefore recommend caution when relying on Franck's work to argue that investor-state arbitration is neutral toward developing countries.

To complete this working paper we examine the UNCTAD Database of Treaty-Based Investor-State Dispute Settlement Cases⁴ and the cases included are those that were publicly available as of February 28, 2010. The information was verified using other websites including Investment Treaty Arbitration website⁵, International Center for Settlement of Investment Disputes (ICSID) website⁶ and Westlaw-Appleton-all database. The information on specifics of the arbitrations was collected such as status of the case (pending v. settled v. concluded), amounts claimed⁷ and amounts awarded⁸. The countries were then classified using World Bank's category of High Income Countries, Upper Middle Income Countries, Lower Middle Income Countries and Low Income Countries.

We look at each of these concerns below, and will frequently refer to *Table 1*.

I. *LACK OF ADEQUATE SAMPLE COMPOSITION AND SIZE*

A truly testable dataset that could form the basis of rigorous empirical work does not exist. Focusing solely on arbitration awards to ascertain the effect of investment arbitration leaves out (1) cases where a treaty is used to "chill" or threaten a nation from deploying a particular measure, (2) the many possible cases that are unknown and unreported, and (3) the many likely settlements – under threat of arbitration – the payment amounts and details of which we will never know. Therefore, analysts and policy-makers should take the empirical analysis in these studies with more than a grain of salt because there is an extremely limited set of data to work with. The available data only consists of known cases taken to arbitration and does not include the countless times that investors use the threat of arbitration to change policy in developing countries. Second, when even taking the available data at face value, the sample size is extremely limited in its ability to yield rigorous results.

It is commonly held that threats of claims against government occur much more frequently than actual cases. A truly representative empirical analysis of the impact of

⁴ UNCTAD Database of Treaty-Based Investor-State Dispute Settlement Cases. (2010). Retrieved 2/28/2010, from http://www.unctad.org/iaa-dbcases/cases.aspx?col_aa=show.

⁵ Investment Treaty Arbitration. Retrieved 2/28/2010, from <http://ita.law.uvic.ca/chronological-list.htm>.

⁶ International Center for Settlement of Investment Disputes (ICSID). Retrieved 3/12/2010, from <http://icsid.worldbank.org/ICSID/FrontServlet>.

⁷ Care was taken to collect and standardize the amount of claims and awards. However there are discrepancies: some claims are maximum amount, while others are minimum and some include costs while most do not. In more than half the cases, the claim awards are unknown.

⁸ The award amount has not been classified into merits, damages and costs. It has been quantified at an aggregate level (excluding costs) as much as possible.

TABLE 1: SUMMARY OF U.S. "WINS AND LOSSES" AND RELATIVE IMPACT OF U.S. WINS TO HOST COUNTRIES' ECONOMY

Country with BIT/FTA	Total # of arbitrations				US wins		US losses		Average Award		Award Amt/ Govt Exp		Award Amt/ per capita	
	US as investor	US as respondent	As investor	As respondent	As investor	As respondent	As investor	As respondent	US as investor	US as respondent	US as investor	US as respondent	US as investor	US as respondent
Argentina	17	0	0	5	0	0	1	1	\$107,138,243	0.386%	\$2.73	0.000%	\$0.00	0.000%
Armenia	1	0	0	0	0	0	0	0	\$0	0.000%	\$0.00	0.000%	\$0.00	0.000%
Bangladesh	1	0	0	0	0	0	0	0	\$0	0.000%	\$0.00	0.000%	\$0.00	0.000%
Canada*	13	12	6	1	6	0	2	2	\$3,858,911	0.003%	\$0.12	0.003%	\$0.12	0.003%
Congo, Dem. Rep.	4	0	0	1	0	0	2	2	\$9,000,000	1.894%	\$0.19	1.894%	\$0.19	1.894%
Czech Republic*	1	0	0	0	0	0	1	1	\$0	0.000%	\$0.00	0.000%	\$0.00	0.000%
Dominican Republic	1	0	0	0	0	0	0	0	\$0	0.000%	\$0.00	0.000%	\$0.00	0.000%
Ecuador	10	0	0	2	0	0	1	1	\$38,556,108	1.006%	\$2.98	1.006%	\$2.98	1.006%
Egypt	2	0	0	0	0	0	1	1	\$0	0.000%	\$0.00	0.000%	\$0.00	0.000%
El Salvador	1	0	0	0	0	0	0	0	\$0	0.000%	\$0.00	0.000%	\$0.00	0.000%
Estonia*	2	0	0	0	0	0	1	1	\$0	0.000%	\$0.00	0.000%	\$0.00	0.000%
Georgia	2	0	0	0	0	0	0	0	\$0	0.000%	\$0.00	0.000%	\$0.00	0.000%
Guatemala	1	0	0	0	0	0	0	0	\$0	0.000%	\$0.00	0.000%	\$0.00	0.000%
Jordan	2	0	0	0	0	0	0	0	\$0	0.000%	\$0.00	0.000%	\$0.00	0.000%
Kazakhstan	4	0	0	2	0	0	1	1	\$9,425,855	0.372%	\$0.63	0.372%	\$0.63	0.372%
Kyrgyzstan	1	0	0	0	0	0	0	0	\$0	0.000%	\$0.00	0.000%	\$0.00	0.000%
Mexico	14	0	0	3	0	0	6	6	\$17,040,968	0.020%	\$0.17	0.020%	\$0.17	0.020%
Moldova	1	0	0	0	0	0	1	1	\$0	0.000%	\$0.00	0.000%	\$0.00	0.000%
Panama	1	0	0	0	0	0	0	0	\$0	0.000%	\$0.00	0.000%	\$0.00	0.000%
Poland	2	0	0	0	0	0	0	0	\$0	0.000%	\$0.00	0.000%	\$0.00	0.000%
Romania	3	0	0	0	0	0	2	2	\$0	0.000%	\$0.00	0.000%	\$0.00	0.000%
Sri Lanka	1	0	0	0	0	0	1	1	\$0	0.000%	\$0.00	0.000%	\$0.00	0.000%
Trinidad And Tobago*	1	0	0	0	0	0	1	1	\$0	0.000%	\$0.00	0.000%	\$0.00	0.000%
Turkey	2	0	0	1	0	0	0	0	\$9,061,479	0.011%	\$0.12	0.011%	\$0.12	0.011%
Ukraine	5	0	0	0	0	0	1	1	\$0	0.000%	\$0.00	0.000%	\$0.00	0.000%
	93	12	6	15	6	22	22	22		0.53%	\$0.99	0.53%	\$0.99	0.53%

Note: *indicates high income countries.

Sources: http://tcc.export.gov/Trade_Agreements/Bilateral_Investment_Treaties/index.asp;
http://tcc.export.gov/Trade_Agreements/Free_Trade_Agreements/index.asp; http://www.unctad.org/jia-databases/cases.aspx?col_aa=show;
http://ita.law.uvic.ca/chronological_list.htm; <http://icsid.worldbank.org/ICSID/FrontServlet>; Westlaw-Appleton-All database; World Development Indicators (The World Bank Group).

investment arbitration on developing countries would include such data. Of course such data does not exist. An illustrative list of some cases is exhibited in Box 1.

As Luke Eric Peterson, publisher of the *Investment Law Reporter* said in an interview for this working paper:

“There is no obvious way to measure how often investment treaties are used in *informal* contexts by foreign investors in the context of negotiation or lobbying. However, in my experience as a journalist tracking this area, I would not be the least bit surprised if there were dozens upon dozens of such *informal* treaty-uses for every claim that actually gets arbitrated. Virtually every lawyer I know professes to use these treaties in negotiations on behalf of their clients with governments. As a reporter it’s frustrating to know that the primary use of these treaties is in such non-arbitration contexts, but to lack fuller details of such uses – including the legal, policy and financial impacts.”

Even taking Franck’s work at face value, the sample size does not lend itself to fully rigorous work, and Franck admits that much (Franck 2009). The sample size for Franck’s study consists of 102 awards from 82 cases out of which 52 are final awards that resolved case’s treaty claims. Due to problem of missing data, sample size was lessened to 47 when testing the relationship between development status of the country and arbitration outcome. Moreover, the sample size was 49 when testing the effect on awarded amount. Franck herself admits that small sample size could lead to statistical results which may be spurious. Franck conducted effect size analysis in addition to hypothesis testing. She found that the effect size were “small” to “moderate” in the analysis of World Bank status of the respondent country, presiding arbitrator and the result of the arbitration.

Thus, she admitted that the result might be underpowered and a larger sample size may be needed to eliminate the power problem. Similarly, she found that the main effect of the OECD status of presiding arbitrator was implying that a sample size of 49 may not be big enough to definitely determine whether OECD status of the presiding arbitrator matters. Similar effect size was found in the analysis of the main effect and interaction of the status of the respondent state on awarded amount. Thus Franck recommended use of larger data pool base to confirm the findings of her study.

When the sample size is small, degrees of freedom get penalized. With lower degrees of freedom, standard errors may be inflated resulting in lower t-statistic. This will make it harder to reject the null hypothesis and lead to results that are not significant statistically. Similarly, *Gus Van Harten*, questions the internal validity of the relationship between development status and outcome resulting from lack of data (Harten).

II. DEVELOPING COUNTRIES ARE SUBJECT TO MORE CLAIMS

It is clear from the data that developing countries are subject to more claims than are developed countries. What is more, the argument that the least developing countries are not subject to many claims does not highlight the fact that least developed countries are subject to significantly more claims than their share of global foreign investment or

BOX 1

BAN ON THE GASOLINE ADDITIVE MMT IN CANADA:

This case concerns a ban on the gasoline additive MMT in Canada. The Government of Canada was involved in arbitration with Ethyl Corp. It is speculated that among various factors, risk of losing NAFTA Chapter 11 arbitration may have been one of the reasons for the Government to settle with Ethyl Corp. The company was compensated and the Government lifted the ban.

PUBLIC AUTO INSURANCE IN CANADA:

This case involves plans by provincial government of Canada to introduce public auto insurance options. Such plan led to threats by insurance industry to sue the Government under NAFTA Chapter 11. The Government retracted and it is believed that threat of arbitration may have been key to Government's decision.

CHANGES TO CIGARETTE PACKAGING AND LABELLING IN CANADA:

In this case, the federal government of Canada proposed changes to packaging and labeling of cigarettes. The tobacco companies responded by threatening to start arbitration under NAFTA Chapter 11, first in 1994 and then in 2004. The Government did not move ahead with the plans and arbitration threats may have been a possible factor for such outcome.

OPEN-PIT MINING IN INDONESIA'S PROTECTED FORESTS:

This case concerns a law banning open-pit mining in Indonesia's protected forests. Several mining companies holding contracts in areas of protected forest threatened to take the government to arbitration (claims in the range of 20-30 billion USD) if the ban was applied to their prospective mining operations. Eventually a number of foreign investors were exempted from such a ban. Given the timing of government's action and responses to media, it is highly likely that the government wanted to eliminate arbitration threat.

OFFSHORE OIL EXPLORATION IN COSTA RICA:

The case concerns a U.S. oil company, Texas-based Harken Energy, that held several land and offshore concessions in the country. The oil company's land concessions were annulled and it encountered problems in the approval of its Environmental Impact Assessment (EIA) for the offshore concessions. This issue led to a conflict with the government and a filing to initiate investment arbitration under the terms of a state contract. The threat of arbitration was viewed as a company's attempt to bluff to strengthen its negotiating power. The company eventually withdrew its arbitration request and started negotiations with the government. At one point, the government was willing to pay up to USD 11 million to eliminate arbitration threat. In 2005, the government finally cancelled the concession contract with no terms of negotiations made public.

OPEN-PIT MINING IN COSTA RICA:

This case involves a Canadian company, Vannessa Ventures, that held a mineral exploration license in the country. In 2002, the Costa Rican government placed a moratorium on oil and gas exploration and open-pit mining. The Canadian mining company's concession was not directly affected by the moratorium, but the company faced difficulty in the approval of its EIA. The company threatened to take the government to arbitration under the terms of the Canada-Costa Rica BIT, but was eventually in 2005 permitted to proceed with mine development. There is continued pressure on the government to annul the concessions but the government considers such a move to be highly costly in the face of repercussions.

Source: (Tienhaara)

of their share of global BITs. Finally, the US is a special case that warrants individual attention – the US has treaties almost exclusively with non-OECD countries and is the most active in taking developing nations to arbitration.

It is important to be clear that the available data suggest that there have been 82 claims in the period studied and 57 of them have been against a developing country. Put another way, 70 percent of all claims are made toward non-OECD developing countries. By ignoring the in-group heterogeneity among OECD countries, Franck underestimates number of cases brought against developing countries (Harten). What Franck finds more comforting is that 46 percent of all claims are toward “upper middle income” developing countries as classified by the World Bank, 29 percent toward “lower middle income,” and 5 percent toward low income nations.

It should be noted that such claims are in much larger proportion to the respective developing country share of foreign investment flows. “Upper middle income” developing nations only receive 10 percent of global FDI, but are subject to 46 percent of the claims. “Lower middle income” developing countries only receive 9 percent of global FDI inflows, but are subject to 29 percent of all claims. The “low income” developing nations receive less than one percent of FDI flows but are subject to five percent of the total claims.

The limited available data indicate that the United States is a special case. Of all cases, U.S. investors were claimants in nearly half of them (32 cases). The U.S. has signed bilateral investment treaties and free trade agreement with 53 countries.⁹ The majority (45 out of 53) of the US treaties are with non-OECD countries and 80% of the U.S. investment treaties are with the developing countries as classified by the World Bank. Therefore the structure of U.S. treaty composition pro-determines that developing countries will be subjected to investor-state arbitration more than the U.S. given that most developing nations (at least those that have treaties with the U.S.) are net capital importers with very little investment in the U.S. Thus, any case under a U.S. treaty that is not with the eleven high income countries will be against a developing country.

Since 1993, the investors from the US have been involved in 105¹⁰ arbitrations related to investments. Looking at the arbitrations in which the U.S. has been involved, it was represented as the investor country in 93¹¹ cases. All the cases in which the U.S. was the respondent were brought by Canadian investors. No investor from a developing country so far has subjected the U.S. to a BIT arbitration. Among the twenty-five

⁹ Office of the United States Trade Representative. “Free Trade Agreements.” Retrieved 1/27/2010, from <http://www.ustr.gov/trade-agreements/free-trade-agreements>, Trade Compliance Center – Free Trade Agreement. Retrieved 1/27/2010, from http://tcc.export.gov/Trade_Agreements/Free_Trade_Agreements/index.asp, Trade Compliance Center – U.S. Bilateral Investment Treaty. Retrieved 1/27/2010, from http://tcc.export.gov/Trade_Agreements/Bilateral_Investment_Treaties/index.asp.

¹⁰ Excluding two investment-related arbitrations the U.S. investors has with the Venezuela Republic, there is no BIT/FTA between the U.S. and Venezuela.

¹¹ Two of the arbitrations had both the U.S. and Netherlands as the investor countries.

arbitrations brought by U.S. investors, half were against developing countries and 36% against “high income” countries as classified by the world bank (Canada, Czech Republic, Estonia and Trinidad and Tobago). Thus the claim that developed countries subject developing countries to more arbitration seems valid in the U.S case. However, this should not lead one to conclude that U.S. unfairly targets developing countries. The fact that the U.S. has more investment treaties with the developing countries is precisely the reason why U.S. has more arbitration with developing countries. To be able to correctly infer how the U.S. would have behaved with developed countries vis-a-vis developing countries, U.S. needs to have comparable number of investment treaties with both the developing and developed countries.

In terms of wins and losses, U.S. has never lost a case as the respondent country. U.S. investors have won 15 cases, lost 22 cases and settled 14 cases. In terms of performance with respect to developing countries, U.S. investors have won 14 cases and lost 17. Franck’s work says that this win-loss record is good news for developing countries – because they win more than they lose. However, such a judgment misses the broader picture. As noted, the threat of investment arbitrations alone has a chilling effect on developing countries’ regulatory prerogatives, and this win-loss statistic does not account for every time a developing country acquiesces on a demand for fear of a lawsuit or settles an unpublicized claim (Tienhaara 2010). Moreover, to suggest that a better-than-50/50 win ratio means developing countries are faring well under BITS ignores the profound economic risk facing developing countries based on this statistic; a 50% chance of catastrophic economic loss would factor into most risk-assessments as a bad bet, and would caution against signing onto BITS.

In conclusion on this point, developing countries are not only subject to the most claims but they are subject to many more claims than their proportion of global investment. The U.S. is even more significant. Indeed, we estimate that U.S. investors are increasingly subjecting developing countries to arbitration. To estimate that, we can use the number of arbitrations the country has initiated as a proxy. *Franck’s* Table 1 lists the number of cases by investor nationality, and shows that the U.S. has the highest number of investors bringing cases (Franck 2007). The number of cases brought by U.S. investors is more than five times the number of cases brought by nationals of other countries, and runners-up are in distant second place (Italian and Canadian investors). This statistic suggests that a developing country faces a much higher probability of facing investment claims from U.S. investors than nationals of other high income countries.

III. CLAIMS AND AWARDS TOWARD DEVELOPING COUNTRIES ARE FINANCIALLY MORE SIGNIFICANT

The opportunity costs of losing a claim are much higher for developing rather than developed nations. To illustrate this point we take the example of the U.S. Of the total U.S. wins, the average award amount has been around \$47 million (\$50 million

excluding Canada¹²). The average award Canada is liable to pay to the U.S. for losing arbitration is \$3.9 million which is the lowest amount (See Table 1). Other countries face much higher penalty ranging from \$9 million (Kazakhstan, Turkey and Congo Democratic Republic) to \$107 million (Argentina). For the cases where U.S. has won, the average amount claimed is much higher and is around \$234 million¹³ (\$251 million excluding Canada). Thus compared to Canada (which can be used as a proxy for developed country), the developing countries seem to be subjected to higher amount both in terms of claims and awards. The disparity becomes clearer when we compare the average amount claimed by U.S. investors against high income countries v. developing world. For all the arbitrations U.S. investors have brought against high income countries, the average claim amount has been around \$150 million. That amount is much less than the average amount that U.S. investors have claimed against the developing countries (\$451 million).

To get a more complete picture of how losses affect developing countries, we analyze the amount the developing countries are liable for relative to their economy. Table 1 shows that average award against developing countries relative to their annual government expenditure is 0.53% or 99 cents per capita. The average award amount Canada is liable for is 0.003% of its annual government spending and translates to 12 cents per capita. Thus compared to a developed country, the award amounts have a higher impact on the economy of developing countries.

Looking at the wins of U.S. investors on a case by case basis, there are five awards (four against Argentina and one against Ecuador) that range from \$2.7–\$5.5 per capita. The per capita range for claims are much higher \$5.6–\$18.4. These awards relative to government expenditure range from 0.31%–1.92% (0.69%–7.51% in terms of claims per government expenditure).

With arbitration on the rise, it is a valid concern that a respondent country might be liable for numerous awards. This was the case in 2007, when the U.S. won two¹⁴ cases against Argentina. The total award amount summed to \$235 million which translates to 0.7% of annual government expenditure or \$6 per capita in Argentina.

For example in 2004, a U.S. investor won an arbitration against Ecuador¹⁵ claiming an amount of damages that translated to \$5.5 and \$16 per capita respectively. The claimed damages per capita was equivalent to Ecuadorian aid per capita. Thus, had the U.S. investor been successful in getting the claimed amount, Ecuador payments would have been analogous to transferring aid per capita to the U.S. The award and claim amount relative to government expenditure were 1.92% and 7.5%. The importance of

¹² Canada is the only high income country against which the U.S. has won.

¹³ The claim values for three cases were unknown and hence are excluded.

¹⁴ *Enron Corporation and Ponderosa Assets LP v. Argentina* (ICSID Case No. ARB/01/3) and *Sempra Energy International v. Argentine Republic* (ICSID Case No. ARB/02/16).

¹⁵ The mentioned case is *Occidental Exploration and Production Company v. Ecuador* (LCIA Case No. UN3467).

these numbers become clear in the light that Ecuador spends annually around 7% of their government expenditure on health.

In conclusion, the U.S. is an outlier in the investment treaty arbitration world. It signs treaties predominantly with the developing countries, and its nationals are much more active in subjecting developing countries to international arbitration. While U.S. investors have lost more cases than they have won, the U.S. government has never lost a case as a respondent.

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