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Bilateral Investment Treaties: An unfair proposition for Developing countries[1]

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After the explosive expansion of Bilateral Investment Treaties (BITS) in the 90s, recent times have seen a reduction in the number of new annual BITs (UNCTAD 2012). With rising number, prominence and success of BIT claims, there is an increasing realization that traditional BITs put undue risk on the host nations without obligating the investors to follow the measures necessary for ensuring the development requirements of the host state (Friedman and Verhoosel 2003). Known investor state dispute settlement cases have increased dramatically in the last 15 years to reach 608 cases in 2014 from a level of around 50 cases in 2000 (UNCTAD 2015). The gravity of the situation is conveyed by the huge amount of claims made by the investor litigants that put host states in serious fiscal strain.

It is therefore not surprising that in recent years BITs have been a source of political controversy. At least 45 countries and four regional integration organizations are currently revising or have recently revised their model agreement to include including provisions on pre-establishment commitments and sustainable development-oriented clauses (UNCTAD 2015). South Africa has terminated its BITs with the Netherlands, Switzerland and Germany in 2014. Further, it has given notice of termination of its treaties with Belgium & Luxembourg and Spain. Indonesia has followed suit recently and terminated its BITs with the Netherlands.

Against this backdrop, an analysis of the issues relating to diffused reciprocity imbibed in BITs indicates that it leads to the unequal distribution of rights and obligations between developed and developing countries. The hypotheses that emerges within this analytical framework that a) BITS increases the risk of litigation and b) BITs negatively impacts on the net benefits of countries, are tested empirically using litigation data from the International Centre for Settlement of Investment Disputes (ICSID).

[1] The full research paper is available as ERSA Working paper no.590

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Tables below summarise the distribution of ICSID cases in a North-South paradigm.

Profiles of Defendants & Litigants

	Defendant		Litigant	
	Developed	Developing	Developed	Developing
No. of cases	60 (13.8%)	376(86.2%)	382(87.6%)	54(12.4%)
No. of countries	20(18.4%)	89(81.6%)	29(58%)	21(42%)
Cases per country	3.0	4.2	13.2	2.6

Source: Author calculation from analysis of ICSID cases

Over 86% of ICSID cases have developing countries as defendants. The number of countries involved in these cases are also overwhelmingly developing countries. This shows that it is not just a few developing countries that account for bulk of the cases. The cases per country stands at 4.2 for developing countries whereas it is lower at 3 for developed countries.

In order to quantify the net benefits accruing from BITs to host nations, it is necessary to take in to account the FDI it attracts together with the risk of litigation it entails. Therefore an analysis of the difference in the shares of global FDI stock and shares in the total cases at ICSID of host nations are undertaken next.

Net Benefits of BITs: developed vs developing host countries

countries	% countries with -ve Net Benefits	% countries with +ve Net Benefits	Total no. of countries
Developed	7.4	92.6	27
Developing	56.7	43.2	111
Total	47.1	52.9	138
Pearson chi2(1) =	21.2272	Pr = 0.000	

Source: Author calculation

It is evident from table above that statistically significant difference exists in the net benefits of developed and developing countries. Almost 93 % of developed countries accrue positive net benefits while only 42% of developing countries are able to do so. A regional analysis reveals that differences in net benefits from BITs among developing countries is not statistically significant. It is however evident that negative net benefits outweigh positive net benefits in all regions except Asia where both are in balance. Latin America seems to fare the worst with 75% of countries having negative net benefits.

Net Benefits of BITs : Regional differences among developing countries

Region	% countries with -ve Net Benefits	% countries with +ve Net Benefits	Total no. of countries
Europe	66.7	33.3	21
Africa	58.3	41.7	36
Asia	50.0	50.0	32
Latin America	75.0	25.0	16
Total	60.0	40.0	105
Pearson chi2(4) =	3.2639	Pr = 0.353	

Source: : Author calculation

The findings based on multivariate regression analysis that control for the idiosyncratic characteristics of defendant countries validate the conclusions from the tables above that the investors initiate higher number of cases against countries with BITs. Moreover, the net benefits accruing to countries are seen to be substantially lower for countries with BITs. Our findings support the growing view that a re-look at the traditional BITs model is warranted with a focus to evolve a new generation foreign investment policy framework that together with promoting foreign investment will also enable regulation of investment in keeping with host country public policy.