

# **Empirical Assessments of Investment Arbitration**

Professor Susan D. Franck  
July 2013

## **I. COURSE DESCRIPTION**

The globalization of the world's economy increasingly gives rise to disputes that cross national borders, affect a variety of institutions, implicate a variety of policies, and can otherwise generate intense debate. Particularly in the last two decades, in the context of international investment and treaty-related disputes, there has been increasing resort to arbitration as a form of conflict management to address investment-related disputes. This course is intended to explore various aspects of the growing area of international investment law, but with a particular eye that uses empirical insights as a framework for understanding the systemic functionality to rationally assess its potential costs and benefits.

Students will be exposed to the basic fundamental empirical framework related to the empirical study of legal phenomenon, typically through the use of quantitative legal approaches. The course will, however, introduce a broad range of empirical opportunities—qualitative and quantitative—as well as foundational concepts related to hypothesis testing and the research loop. This foundation will permit students to be both prudent consumers and producers of empirical insights related to investment law. The course is the first of its kind to use strategic empirical insights to international lawyers and blend those ideas into doctrinal and normative analysis of international investment law.

At the end of the course, students should be able to identify the core types of social scientific methods, understand the value of hypothesis testing, respect the limits of an empirical approach, and have basic skills to review empirical claims with a critical eye to evaluate the underlying utility of both the empirical claims and the quality of related inferences. The objective will be for students to be able to apply those skills in the context of international investment law.

## **II. COURSE MATERIALS**

There are a variety of required and also recommended materials for this course. None of the materials required in this course should cost students any money to obtain.

### **Required Materials – Book Chapters:**

- ROBERT M. LAWLESS, JENNIFER K. ROBBENOLT & THOMAS S. ULEN, *EMPIRICAL METHODS IN LAW* (2010) [**hereinafter Lawless Casebook**]. Chapters 2 and 9 only. The authors and publishers have agreed to make these two chapters available to students free of charge.

- EARL BABBIE, [The Basics of Social Research](#) (4<sup>th</sup> ed. 2008) [**hereinafter Babbie Casebook**] Chapter 1.

Required Materials – Articles:

- Susan D. Franck, [Empiricism and International Law: Insights for Investment Treaty Dispute Resolution](#), 48 VIRGINIA JOURNAL OF INTERNATIONAL LAW 767, (2008) [**hereinafter Empiricism**].
- Susan D. Franck, [Empirically Evaluating Claims about Investment Treaty Arbitration](#), 86 NORTH CAROLINA LAW REVIEW 1 (2007) [**hereinafter Evaluating Claims**].
- Susan D. Franck, [Development and Outcomes of Investment Treaty Arbitration](#), 50 HARVARD INTERNATIONAL LAW JOURNAL 435 (2009) [**hereinafter Development**].

Recommended Materials:

You may also wish to consult additional sources such as:

- Jose Augusto Fontoura Costa, [Comparing WTO Panelists and ICSID Arbitrators: The Creation of International Legal Fields](#), Oñati Socio-Legal Series, Vol. 1, No. 4, (2011).
- Ole K. Fauchald, [The Legal Reasoning of ICSID Tribunals—An Empirical Analysis](#), 19 EUROPEAN JOURNAL OF INTERNATIONAL LAW 301 (2008).
- Susan D. Franck, [Rationalizing Costs in Investment Treaty Arbitration](#), 88 WASHINGTON UNIVERSITY LAW REVIEW 769 (2011).
- Susan D. Franck, [The ICSID Effect? Considering Potential Variations in Arbitration Awards](#), 51 VIRGINIA JOURNAL OF INTERNATIONAL LAW 825 (2011).
- Susan D. Franck, [Book Review: The Public International Law Regime Governing International Investment](#), by Jose E. Alvarez, *The Hague: Hague Academy of International Law, 2011*, Pp. 502, 106 AMERICAN JOURNAL OF INTERNATIONAL LAW 890 (2012).
- Susan D. Franck, [Empirical Modalities: Lessons for the Future of International Investment](#), 105 AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS 33 (2010).
- BRYANT GARTH & YVES DEZALAY, [Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order](#) (1996).

- ICSID, *THE ICSID CASELOAD – STATISTICS* ([2013](#)).
- ICSID, *THE ICSID CASELOAD – STATISTICS* ([2012](#)).
- Kathleen S. McArthur & Pablo A. Ormachea, [International Investor-State Arbitration: An Empirical Analysis of ICSID Decisions on Jurisdiction](#), 28 REVIEW OF LITIGATION 559 (2009).
- Michael D. Ramsey, [The Empirical Dilemma of International Law](#), 41 SAN DIEGO LAW REVIEW 1243 (2004).
- Gregory Shaffer & Tom Ginsburg, [The Empirical Turn in International Legal Scholarship](#), 106 AMERICAN JOURNAL OF INTERNATIONAL LAW 1 (2012).
- Beth A. Simmons & Andrew B. Breidenbach, [The Empirical Turn in International Economic Law](#), 20 MINNESOTA JOURNAL OF INTERNATIONAL LAW 198 (2011).
- United Nations Conference on Development, [Recent Developments in Investor-State Dispute Settlement \(ISDS\)](#), IIA Issues Note No. 1, May 2013.
- United Nations Conference on Development, [Latest Developments in Investor-State Dispute Settlement](#), IIA Issues Note No. 1, April 2012.

### III. CLASSROOM PROCEDURES

Class will be held from 10:00-10:50 am. Classes will occur at l'Université Panthéon-Assas in Room 214 at 92 Rue d'Assas.

#### Audio or Video Recordings:

Students may not record classes.

#### Use of Technology:

The use of phones, pagers or similar electronic devices (such as Androids, Blackberries, iPhones, iPad, iTouch, etc) in class is prohibited. Any of these devices must be turned off before you enter the classroom.

Given the need to focus on material—much of which may be new and unusual for lawyers, even those with existing expertise on international arbitration--computers may be used in class *only* for purposes directly related to the class.

Game playing, tweeting, Skyping, surfing the Internet, instant messaging, reading or sending email, or doing any work not related to this class is prohibited. **Unauthorized use of computers or other may result in loss of privilege to use laptops in class for all students.**

#### IV. ASSIGNMENTS

Date	Issues Covered	Required Activities
<p><b><u>Monday</u></b>  July 8:</p>	<p><b>Introduction to Empiricism for International Investment Lawyers:</b></p> <ul style="list-style-type: none"> <li>• Sources of Knowledge</li> <li>• Why bother with empiricism</li> <li>• Types of Empirical Knowledge</li> <li>• The Research Loop</li> <li>• Standards for generating quality <i>ex ante</i> research</li> </ul>	<p><b>Reading:</b> Babbie Casebook, Chapter 1 [focus on pages 4-20, 29]; Lawless Casebook, Chapter 2; Franck, Empiricism</p> <p><b>Activity:</b></p> <ul style="list-style-type: none"> <li>• Come fully caffeinated</li> </ul>
<p><b><u>Tuesday</u></b>  July 9:</p>	<p><b>Introduction to Empiricism (Cont.):</b></p> <ul style="list-style-type: none"> <li>• Standards for generating quality <i>ex ante</i> research</li> <li>• Types of Variables and Biases</li> </ul> <p><b>Descriptive Hypotheses</b></p> <ul style="list-style-type: none"> <li>• Definition and types</li> <li>• Application to investment treaty disputes</li> </ul>	<p><b>Reading:</b> Lawless Casebook, Chapter 2; Franck, Evaluating Claims</p> <p><b>Activity:</b></p> <ul style="list-style-type: none"> <li>• Identify a descriptive hypothesis</li> </ul>
<p><b><u>Wednesday</u></b>  July 10:</p>	<p><b>Descriptive Hypotheses (Cont.)</b></p> <ul style="list-style-type: none"> <li>• Application to investment treaty disputes and considering the normative implications</li> </ul> <p><b>Associative Hypotheses</b></p> <ul style="list-style-type: none"> <li>• Definitions and Tests</li> <li>• Understanding Null Hypothesis Significance Testing</li> </ul>	<p><b>Reading:</b> Lawless Casebook, Chapter 9</p> <p><b>Activity:</b></p> <ul style="list-style-type: none"> <li>• Consider Exercises 1 and 3 on page 243 of the Lawless Casebook</li> </ul>
<p><b><u>Thursday</u></b>  July 11:</p>	<p><b>Associative Hypothesis Testing</b></p> <ul style="list-style-type: none"> <li>• Application to investment treaty disputes</li> <li>• Consideration of links between arbitration outcomes and other critical variables</li> </ul>	<p><b>Reading:</b> Franck, Development</p> <p><b>Activity:</b></p> <ul style="list-style-type: none"> <li>• Identify an associative hypothesis</li> </ul>
<p><b><u>Friday</u></b>  July 12</p>	<p><b>Causal Hypothesis Testing</b></p> <ul style="list-style-type: none"> <li>• Definitions and Types</li> <li>• Avoiding “Lies”, “Damn Lies” and “Statistical Lies”</li> </ul> <p><b>The Future of Empirical Insights for Investment Treaty Arbitration</b></p> <ul style="list-style-type: none"> <li>• Consideration of your hypotheses and opportunities for future research</li> </ul>	<p><b>Reading:</b> None.</p> <p><b>Activity:</b></p> <ul style="list-style-type: none"> <li>• Identify a causal hypothesis</li> <li>• Consider methodologies for conducting empirical research or obtaining evidence-based insights for international investment law</li> </ul>