UiO : PluriCourts – The Legitimacy of the International Judiciary
University of Oslo

Empirical findings regarding investment treaty arbitration

PluriCourts Annual Conference, 9 June 2017

Ole Kristian Fauchald

PLURI COURTS
Established by the Research Counsil of Norway
Norwegian Centre of Excellence

Topics

1) Our work on collection of data

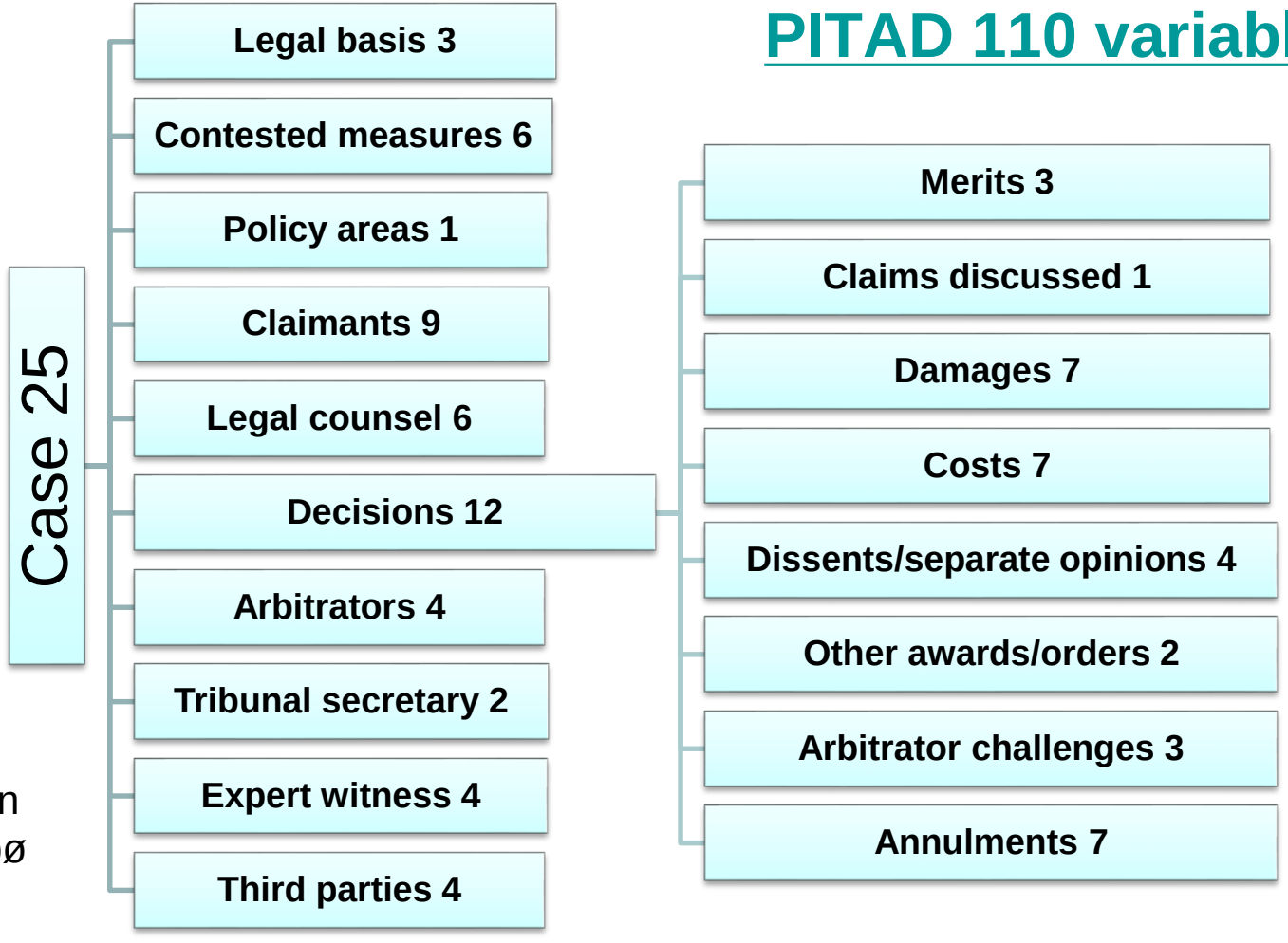
2) Main findings so far

3) Plans for further research

1) The investment pillar – collection and publication of data

- PITAD – a database containing 1078 cases, each coded for 110 variables
  - To be made publicly available before the end of the year
  - Forms the basis for most of our research
  - Empirically based research, combining law and political science
- Participation in coding project on investment treaties
- Literature surveys – currently undertaking one regarding the discourse on the «legitimacy crisis»
- Historic materials associated with ICSID

PITAD 110 variables



Daniel Behn
Maxim Usynin
Tori L. Kirkebø
Runar H. Lie

2) Main empirical findings

1. The origin of investor-state dispute settlement (ISDS)

   IIAs and arbitration were originally not intended to facilitate investment, and they were not initially created because of investor demand. International officials were the initiators of ISDS. Views on the functions of IIAs and ISDS have changed over time.

T. St John: *The Rise of Investor-State Arbitration: Politics, Law, and Unintended Consequences*, OUP (forthcoming 2018)

2. Legitimacy concerns – developing countries

   There appears to be a structural bias against less developed respondent states in ISDS. The reason seems to be pro-developed state deference among tribunals.

D. Behn, T. Berge and M. Langford: Poor States or Poor Governance: Explaining Outcomes in Investment Treaty Arbitration in *Northwestern J for Intl Law and Business* (forthcoming 2017)

3. Legitimacy concerns – environment

Tribunals increasingly sensitive to environmental policy considerations but challenges remain regarding their ability to embrace the dilemmas and compromises that national authorities face, including increasingly strong emphasis on subsidiarity and local decision-making processes.

D. Behn and M. Langford: Trumping the Environment? An Empirical Perspective on the Legitimacy of Investment Treaty Arbitration, in *J of World Investment and Trade*, 18(1), 2017, 14-61

4. Legitimacy concerns – integrity of arbitrators

The normative concerns with «double hatting» are partly substantiated as a select and significant group of individuals score high on our «double hatting index».

D. Behn, M. Langford and R. Lie: The Revolving Door in International Investment Arbitration, *J of Intl Economic Law* (forthcoming 2017)

5. Legitimacy concerns – consistency with int'l trade rules

Study of renewable energy projects indicates that potential conflict between the trade and investment regimes is possible, but that the context of the different disputes means less overlap than could be conceptually theorized

D. Behn and O.K. Fauchald: Govenments under Cross-Fire? Renewable Energy and International Economic Tribunals, *Manchester J of Intl Economic Law*, 12(2), 2015, 117–139

6. State responses – strategies

Very few states have become absolute opponents by following strategies to exit the regime. In general, states use weak tactics as designers and increasingly use strong tactics as litigants.

M. Langford, D. Behn and O. K. Fauchald: Tempest in a Teapot? The International Investment Regime, in Aalberts and Gammeltoft-Hansen (eds): *The Changing Practices of International Law: Sovereignty, Law and Politics in a Globalising World* (forthcoming CUP 2017)

7. State responses – investment chapters in FTAs

Most US, Canadian, Japanese and Australian FTAs include investment chapters; numbers are rapidly rising in Chinese, Indian, some South American and EU FTAs; not much is happening with African FTAs. Reasons for the variation in development trajectories are multiple.

S. Gáspár-Szilágyi and M. Usynin: Trade Agreement Overload. Why is it "Trendy" to Include Investment Chapters? *Netherlands YB Intl Law* (submitted)

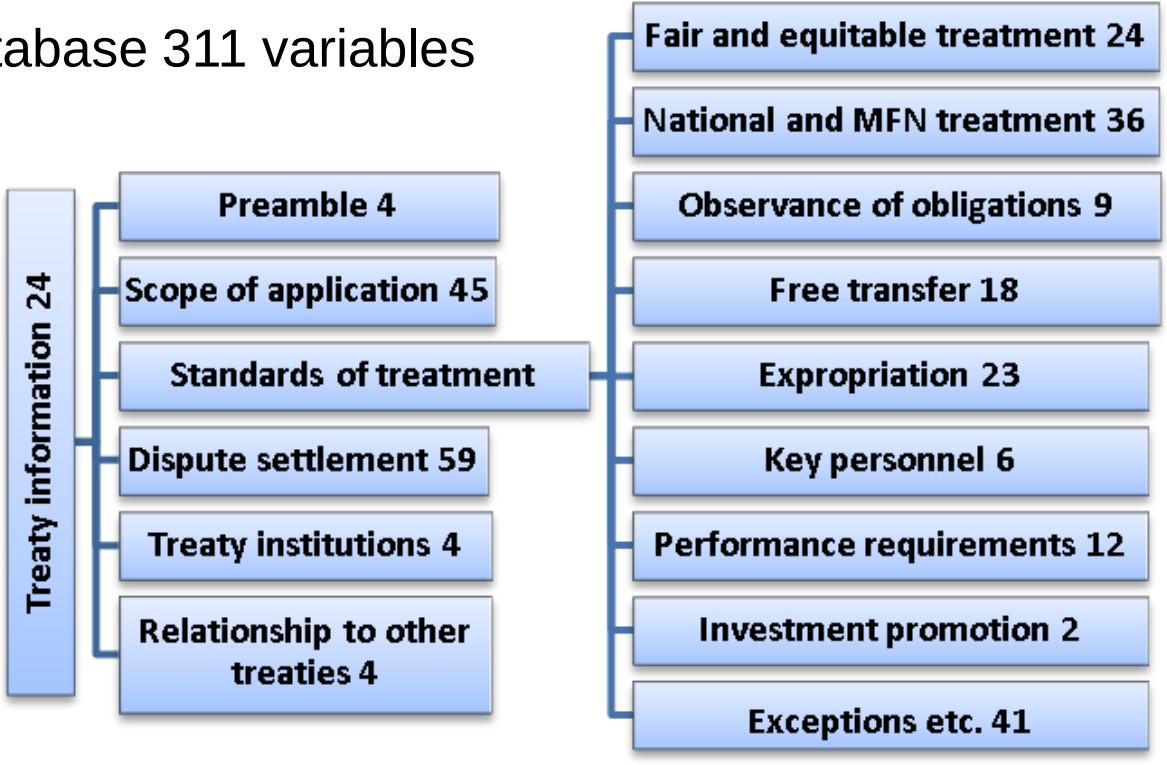
8. Tribunal responses – responsiveness to state criticism

Significant decreases in investor win rates after signals by states that the status quo was not sustainable and significant decline in the number of cases that have been rejected on jurisdictional grounds in recent years, countering the trend of lower win-rates for investors. The reduced dismissal on jurisdictional grounds seems to be due to efforts by tribunals and secretariats to prevent unfounded investor claims.

M. Langford and D. Behn, Managing Backlash: The Evolving Investment Treaty Arbitrator, *European J of Intl Law* (forthcoming 2017)

3) Future research: New database on investment treaties

IIA database 311 variables



Tarald L. Berge
Daniel Behn

Theoretical frameworks for future research – state responses

Acts as litigants	Acts as principals: Strong	Acts as principals: Weak or none
Strong	Absolute opponents	Reluctant compliers
Weak or none	Principled opponents	Compliers

M. Langford, D. Behn and O. K. Fauchald: Tempest in a Teapot? The International Investment Regime, in Aalberts and Gammeltoft-Hansen (eds): *The Changing Practices of International Law: Sovereignty, Law and Politics in a Globalising World* (forthcoming CUP 2017)

Mapping state responses as principals

	Strong acts as principals (absolute or principled opponents)	**Weak acts as principals** (reluctant compliers or compliers)
Exit	Systemic termination of treaties Systemic termination of ISDS provisions Systematically refraining from ratifying signed treaties	Sporadic termination of treaties Sporadic termination of ISDS provisions Sporadic refrain from ratifying signed treaties
Voice	Withdrawal from ICSID Attempting forced treaty renegotiation Systemic political delegitimisation New model treaties	Sporadic treaty renegotiation Sporadic clarifications of treaties Sporadic adoption of new model treaty clauses

Mapping state responses as litigants

	Strong acts as litigants (possible absolute opponents or reluctant compliers)	**Weak acts as litigants** (principled opponents or compliers)
(Ab)using position as sovereign	Abusing criminal proceedings during disputes Refusing to enforce or satisfy arbitral awards Reinterpretation of treaty after a dispute is filed	Active enforcement of domestic law against investor Initiating negotiations with source state as a response to dispute
Obstruction	Vigorous litigation tactics to delay proceedings or make them costly Delaying enforcement of awards	Vigorous litigation tactics within the parameters of the 'equality of arms' principle

Arbitrators' integrity – establishing relevant indices

- Simultaneous vs. sequential – so far a focus on simultaneous
- So far «double hatting index»
  - Overlap between being arbitrator and counsel in a given year
- Future developments
  - Include additional functions? Expert witnesses, secretary functions, functions in law firms involved in arbitration
  - Develop an index for integrity issues raised in a sequential context; focusing on positions that