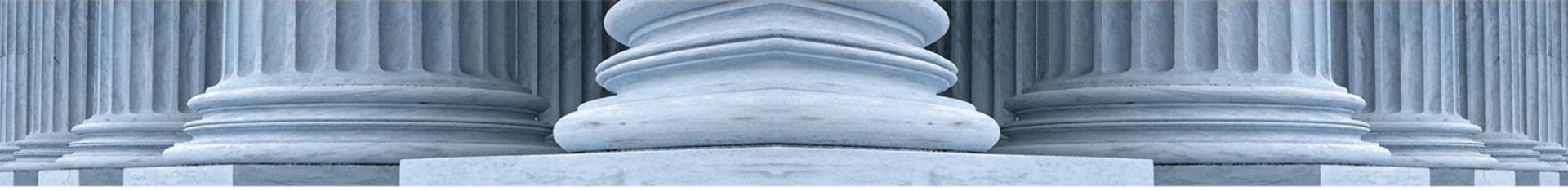

UiO : PluriCourts – The Legitimacy of the International Judiciary
University of Oslo

Are claims that investment tribunals face a legitimacy crisis justified?

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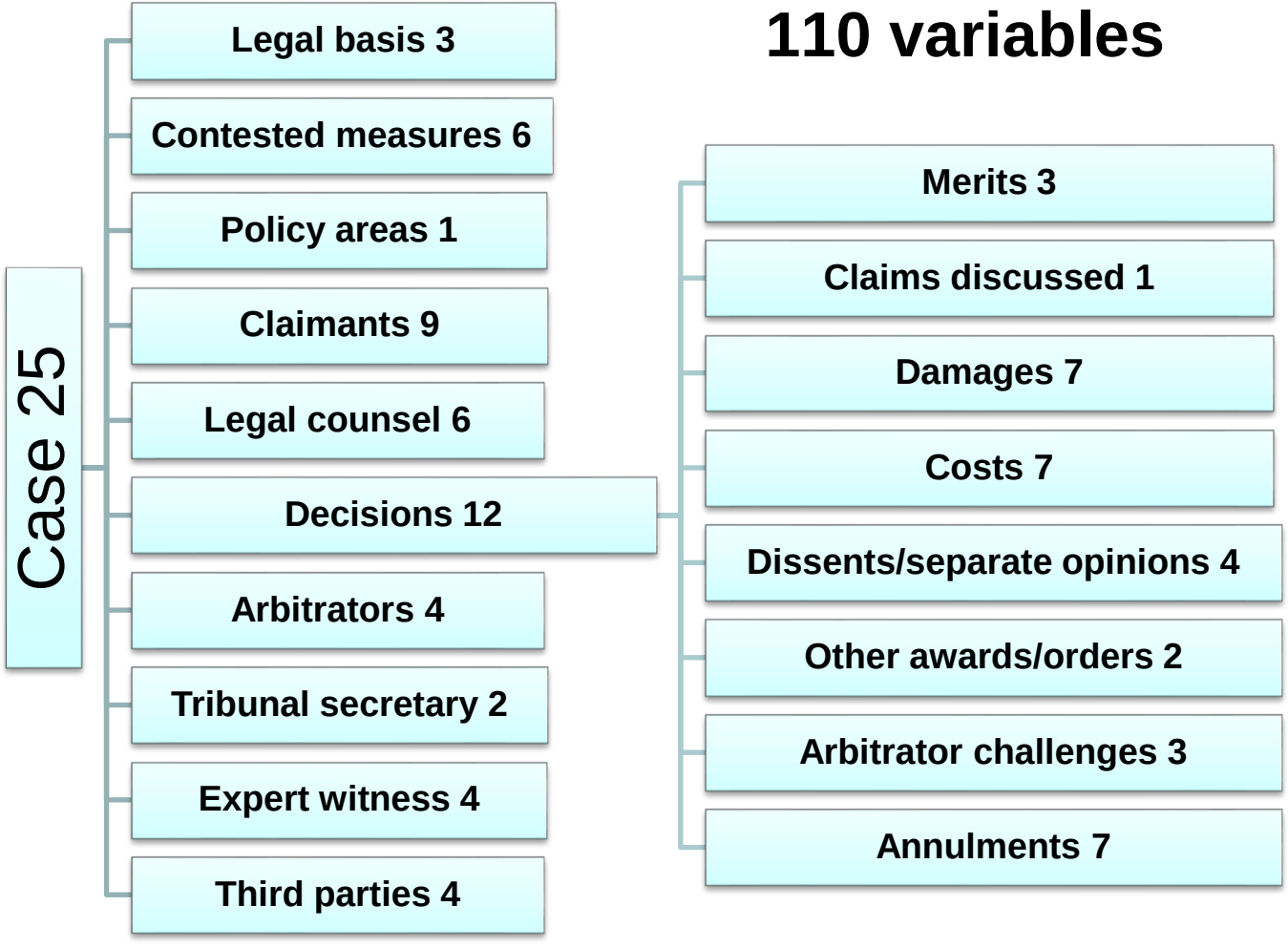
PLURI COURTS
Established by the Research Council of Norway
Norwegian Centre of Excellence

Status

- Staff: Expanded from 3 to 8 researchers (three part time)
- Some 850 known cases
- Vast literature on legitimacy issues
- How to approach legitimacy
  - The interaction between legitimacy of the legal regime and that of tribunals
  - Looking at legitimacy from a dynamic perspective – legitimation
  - Input (who can raise cases, jurisdiction), process and output
- Establish a robust empirical basis for assessing legitimacy claims
- Database work: PITAD and IIA

110 variables



Some examples

Case level 25 variables, incl.

- Economic sector
- Counterclaims
- Procedural orders
- Discontinued / settled
- Enforcement

Contested measure 6 variables

- Public interest
- Domestic measure
- Parallel cases

Legal counsel 6 variables, incl.

- Firm and location

Claimant 9 variables, incl.

- Parent company
- Third party funder
- Type of business area

Decisions 12 variables, incl.

- Hearings

Expert witness 4 variables

- Legal experts

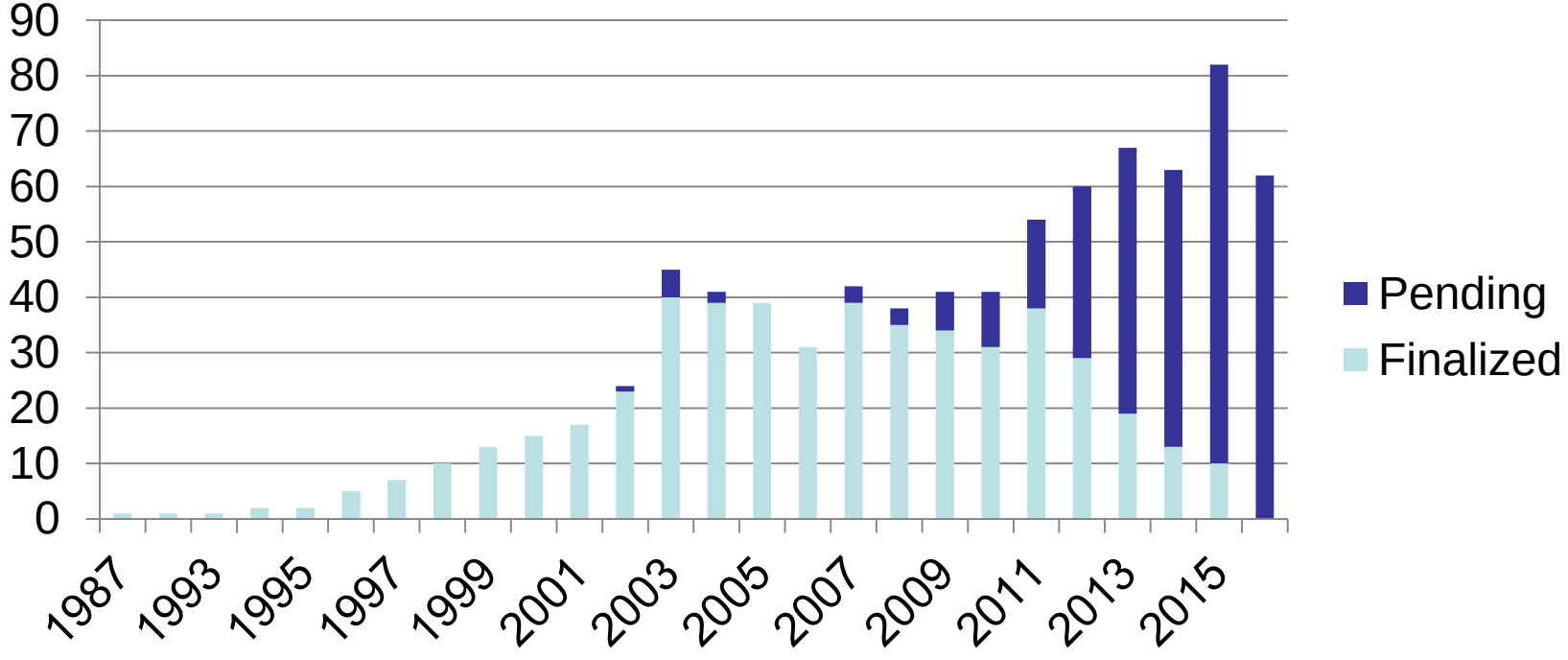
Merits 3 variables, incl.

- Claimants pleadings
- Respondent
- Outcome

The legitimacy debate

- Background:
  - Unequal treaties, colonialism and fairness of the international economic order
  - Protection of property under human rights treaties
  - Insufficiency of diplomatic protection
  - Link to commercial arbitration
- Treaty arbitration
  - Concerns emerged during the 1990s
  - Academic discourse took off in the 2000s
  - Several hundred articles, dozens of books – mostly legal scholars
  - Is the current regime legitimate, and if no: how can relevant deficiencies be remedied?

Annual number of cases registered – PITAD



Is arbitration a viable mechanism for settling disputes regarding state interests? (input)

- Quantitative analysis indicates that choice of lawyers is a key factor in determining arbitral outcomes
- Composition of tribunals
  - The importance of selection of arbitrators and the tribunal chair; favoring strategic actors
- Multiple hats and networks
  - Arbitrators, legal counsel, experts, secretaries, secretariats
  - Limited number of highly influential and very visible actors that have several roles
  - This is no longer dominating the entire regime – diversification

Transparency and participation (process)

- Not many cases that are totally unknown (10-15 %)
  - Limited knowledge about a significant number of cases – academic and NGO interest makes it hard to keep cases entirely secret
  - Lack of knowledge regarding settlements
- Increased transparency of claims and proceedings?
  - Common interest among states and investors in secrecy?
  - The Mauritius Convention (2014) – not even signed by Norway
  - Competition among arbitration institutions
  - Consequences of increased recourse to commercial arbitration

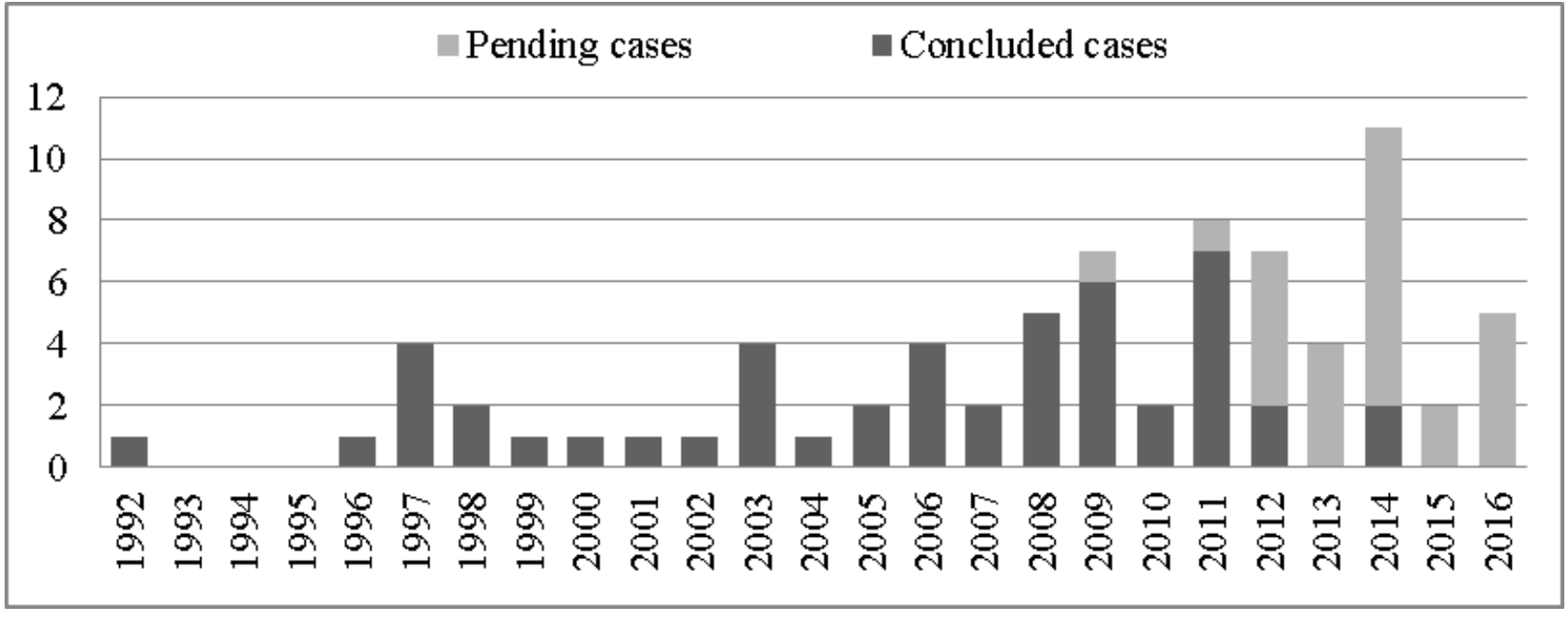
Is investment treaty arbitration biased against developing countries? (output)

- There is difference in win-rate between developing and developed countries
- It is very hard to identify why this is the case – we have tried to examine a number of possible reasons
  - Corruption
  - Rule of law
  - Good governance …
- Not related to characteristics of developing countries, but seems related to deference to developed countries
  - Increase deference to developing countries or reduce deference to developed countries? The opposite seems to be happening!

Policy space – protection of the environment

- Developed country perspective
- Even with a narrow definition of environmental cases, there remains a significant number of such cases
- Tribunals have become increasingly sensitive to environmental policy considerations – win rates go down
- Challenges remain regarding ability to embrace dilemmas and compromises that face national authorities
  - Increasing emphasis on local decision-making
- Treaty reforms and recent case law suggest increasing potential for investment treaty arbitration to contribute to environmental performance of states and investors

Environmental cases – narrowly defined



Biased in favor our powerful investors?

- Significant decrease in investor win rates after signals by states
- Countered by significant decline in the number of cases that have been rejected on jurisdictional grounds
  - The reduced number of cases dismissed on jurisdictional grounds seems to be due to efforts by tribunals and secretariats to reduce frivolous investor claims
- Surprisingly diverse group of investors that make use of the regime
- Costs of cases is going down
- New funding options

Mapping of state responses to arbitration

- Litigation-related
  - Getting increasingly experienced and cunning in defending their interests
  - Harassment of investor claimants
  - Changing the rules of the game
  - Use of annulment procedures
- Compliance-related
  - Fighting compliance in domestic courts
- Design-related
  - Exit from the regime – stickiness of obligations
  - Renegotiations

Examples of other main issues

- Initiating cases as exit strategy?
- Chilling effect?
  - Difficulty of determining what takes place in the «shadow» of tribunals
- Contribute to rule of law?
- Handling of major crises?
- Compliance with rulings?