



Universität St.Gallen

Comment on
Yas Banifatemi
Andrea Bjorklund

Anne van Aaken

WTI 2011

Convergence and Coherence

- n Institutional (how and who makes rules? (Bjorklund)): rather given, no appeals system, no centralized arbitral system and no one in sight
- n Thus: means for coherence are substantive norms by treaty drafting or interpretation (content of rules)

An Economic Approach (I)

- n Optimization problem: predictability/security (for investors and states) vs flexibility (for states)
- n From a contract theory perspective
 - delegation problem: the more indeterminate the terms, the more delegation takes place: principal agent problem!
 - the more delegation takes place, the more the system is unpredictable, given the institutional decentralization and the more power is given to arbitrators

An Economic Approach (II)

- n Is complete convergence desirable?
- n Both are sceptical and I would agree
- n Individual circumstances and preferences of states would be levelled
- n Learning processes would be stopped and reactions by states would be stopped
- n What functional mechanisms are there to optimize the trade-offs, given the current institutional structure?
- n Or: Other means of creating more legal security without having the downsides?



An Economic Approach (III)

- n Precedents as legal security mechanism?
(Banifatemi)
- n Annulment procedure not as far going as precedents, but functionally same: correction possible
- n Control the delegation to tribunals!
 - NAFTA/WTO: interpretation by state parties
(Banifatemi)
 - if both states agree on an interpretation in a dispute
(hear home state): should be binding (Banifatemi)
 - And: it also allows for interpretational convergence



An Economic Approach (IV)

- n Textual convergence by treaty making (MAI, WTO, Model Agreements, Plurilateral Agreements) (Bjorklund)
- n From an economic perspective: common negotiations desirable in order to mitigate possible power disequilibria and the Prisoners' dilemma game in negotiations (Guzman 1998)
- n But: too much of convergence?
 - Plurilateral approach mitigates
 - Additionally then differentiation in the Annexes (\approx WTO schedules) in order to retain autonomy and flexibility for states