

ARTICLE

THE SEARCH FOR LEGITIMACY IN
INTERNATIONAL LAW:
THE CASE OF THE INVESTMENT REGIME

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I. INTRODUCTION

Trade agreements like the Transatlantic Trade and Investment Partnership (“TTIP”), the Trans-Pacific Partnership (“TTP”), or the Comprehensive Economic Trade Agreement (“CETA”), have been heralded as 21st century trade agreements. Besides traditional aims like lowering trade barriers, the agreements also cover issues ranging from e-commerce, intellectual property rights, public procurement, to service liberalization and new forms of regulatory cooperation within areas like food safety and, labour protection, etc.¹ The ambition and

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1. On the importance of agreements between ‘big powers’ for setting global standards, see generally DANIEL W. DREZNER, ALL POLITICS IS GLOBAL: EXPLAINING INTERNATIONAL

breadth behind these new trade agreements have not been overlooked but have been met with great resistance by parts of civil society and politicians. CETA had nearly been brought down towards the end of its negotiating process,² TPP might be all but dead, and TTIP's status is equally uncertain. Although the criticisms against the different trade agreements take on a wide range of issues,³ it is the investor-state dispute settlement system ("ISDS") that has probably seen the fiercest resistance, both at the societal level and within the international legal discourse.⁴

The criticisms brought against the investment regime—which refers to both international investment law and ISDS⁵—are diverse, yet they often share the common undertone of the investment regime being “the enemy of the state.”⁶ As Gus van Harten wrote, the investment regime has gained in notoriety in recent times as more “investors have brought aggressive claims against governments in matters of general public policy, as arbitrators have adopted expansive readings of their

REGULATION (2007); Alberto Alemanno, *The Regulatory Cooperation Chapter of the Transatlantic Trade and Investment Partnership: Institutional Structures and Democratic Consequences*, 18 J. INT'L ECON. L. 625 (2015); Jonathan B. Wiener & Alberto Alemanno, *The Future of International Regulatory Cooperation: TTIP as a Learning Process toward a Global Policy Laboratory*, 78 L. & CONTEMP. PROBS. 103, 103 (2015).

2. Jennifer Rankin, *Belgian Politicians Drop Opposition to EU-Canada Trade Deal*, THE GUARDIAN, (Oct. 27, 2016), <https://www.theguardian.com/world/2016/oct/27/belgium-reaches-deal-with-wallonia-over-eu-canada-trade-agreement> [https://perma.cc/7ZTN-R32K].

3. See, e.g., Chris Johnston, *Berlin Anti-TTIP Trade Deal Protest Attracts Hundreds of Thousands*, THE GUARDIAN (Oct. 10, 2015), <https://www.theguardian.com/world/2015/oct/10/berlin-anti-ttip-trade-deal-rally-hundreds-thousands-protesters> [https://perma.cc/N86B-WNY6]; Janosch Delcker & Cynthia Kroet, *More Than 150.000 Protest against EU-US Trade Deal*, POLITICO, (Oct. 10, 2015), <https://www.politico.eu/article/germany-mobilizes-against-eu-u-s-trade-deal-merkel-ttip-ceta/> [https://perma.cc/6T2A-Y59P].

4. See, e.g., Claire Provost & Matt Kennard, *The Obscure Legal System That Lets Corporations Sue Countries*, THE GUARDIAN, (Jun. 10, 2015), <https://www.theguardian.com/business/2015/jun/10/obscure-legal-system-lets-corporations-sue-states-ttip-icsid> [https://perma.cc/L2N2-VRH2]. For a more specific legal critique, see DAVID SCHNEIDERMAN, *RESISTING ECONOMIC GLOBALIZATION CRITICAL THEORY AND INTERNATIONAL INVESTMENT LAW* 1-17 (2013).

5. On the notion of investment regime, see Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 HARV. INT'L L.J. 427, 428-29 (2010).

6. José Alvarez & Gustavo Topalian, *The Paradoxical Argentina Cases*, 6 WORLD ARB. & MEDIATION REV. 491, 492 (2012). See *Public Statement on the International Investment Regime*, OSGOODE HALL LAW SCHOOL (Aug. 31, 2010) (available at <http://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010/>) [https://perma.cc/6PDG-VBET].

own jurisdiction and of substantive standards under the treaties, and as some very large awards have been issued against states.”⁷ The veracity of some of the criticisms has been called into question, because with the argument that the available evidence shows a different picture to that maintained by the critics. For instance, it is sustained that, contrary to the claim that the investment regime considerably restricts the policy space of states, it actually “leaves states the necessary leeway to implement their policy choices and to legislate in a self-determined and sovereign manner.”⁸

What unites both the critics and the supporters of the investment regime is a firm belief in the importance of the regime’s legitimacy. Both sides frequently utilize the vocabulary of legitimacy in the debate, touching ideas like legitimacy gap, legitimacy crisis, etc.⁹ Also, those contesting the critics acknowledge the relevance of legitimacy. For example, José Alvarez argues that following certain suggestions by the critics would harm the legitimacy of the investment regime, undermining it as a result.¹⁰ Hence, it comes as no surprise to see the association of legitimacy with the “success” and “longevity” of the investment regime in the literature.¹¹

7. Gus Van Harten, *Five Justifications for Investment Treaties: A Critical Discussion*, 2 TRADE L. & DEV. 19, 24 (2010) (footnotes omitted).

8. Charles N. Brower & Stephen W. Schill, *Is Arbitration a Threat or a Boom to the Legitimacy of International Investment Law*, 9 CHI. J. INT’L L. 471, 497-98 (2008).

9. See, e.g., David Schneiderman, *Legitimacy and Reflexivity in International Investment Arbitration: A New Self-Restraint?*, 2 J. INT’L DISP. SETTLEMENT 471 (2011); Charles H. Brower II, *Structure, Legitimacy, and NAFTA’s Investment Chapter*, 36 VAND. J. TRANSNAT’L L. 37 (2003); Ari Afilalo, *Towards a Common Law of International Investment: How NAFTA Chapter 11 Panels Should Solve Their Legitimacy Crisis*, 17 GEO. INT’L ENV’T L. REV. 51, 53 (2004); Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1523-24 (2005); Frank J. Garcia et al., *Reforming the International Investment Regime: Lessons from International Trade Law*, 18 J. INT’L ECON. L. 861 (2015); Muthucumaraswamy Sornarajah, *A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration*, in APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES 39 (Karl P. Suvant & Michael Cheswick-Patterson eds., 2008).

10. Alvarez & Topalian, *supra* note 6, at 536-37. See also Charles N. Brower & Sadie Blanchard, *What’s in a Meme—the Truth About Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States*, 52 COLUM. J. TRANSNAT’L L. 689, 759 (2013); David D. Caron & Esme Shirlow, *Dissecting Backlash: The Unarticulated Causes of Backlash and Its Unintended Consequences*, in THE JUDICIALIZATION OF INTERNATIONAL LAW: A MIXED BLESSING? 160 (Geir Ulfstein & Andreas Follesdal eds., 2018).

11. Charles N. Brower et al., *The Coming Crisis in the Global Adjudication System*, 19 ARB. INT’L 415, 440 (2003); Barnali Choudhury, *International Investment Law as a Global Public Good*, 17 LEWIS & CLARK L. REV. 481, 498 (2013).

The legitimacy-talk is of course far from exclusive to the investment regime. Legitimacy has become central to international law.¹² Since the end of the Cold War, there has been a skyrocketing interest in the concept.¹³ There is no field in which legitimacy does not appear: international conflict and security law, international criminal law, international economic law, international environmental law, and so forth. Although various explanations can be given about this extraordinary interest in legitimacy,¹⁴ it is no coincidence that the spike in attention to the question of legitimacy falls into a time of important institutional and normative transformations taking place within the international legal order and beyond.¹⁵ From a consensual normative order centered on interstate relations, international law has evolved into a complex and dense normative framework encompassing subject areas

12. See, *inter alia*, Dencho Georgiev, *Letter*, 83 AM. J. INT'L L. 554 (1989); THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990); Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. INT'L L. 596 (1999); Paul B. Stephan, *The New International Law: Legitimacy, Accountability, Authority, and Freedom in the New Global Order*, 70 U. COLO. L. REV. 1555 (1999); James D. Fry, *Legitimacy Push: Towards a Gramscian Approach to International Law*, 13 UCLA J. INT'L L. & FOREIGN AFF. 307 (2008); LEGITIMACY, JUSTICE AND PUBLIC INTERNATIONAL LAW (Lukas H. Meyer ed., 2009); Jean d'Aspremont & Eric De Brabandere, *Complementary Faces of Legitimacy in International Law: The Legitimacy of Origin and the Legitimacy of Exercise*, *The*, 34 FORDHAM INT'L L. J. 190 (2010); Christopher A. Thomas, *The Uses and Abuses of Legitimacy in International Law*, 34 OXFORD J. LEGAL STUD. 729 (2014).

13. As far as I am concerned, the databases that I could use – Web of Science, Hein Online, JSTOR, or Lexis Nexis – almost always gave me the end of the 1980s as the oldest reference to international law and legitimacy. There are, of course, references to legitimacy much earlier, but these referred to legitimacy regarding children, which is a different thing.

14. One possibility relates directly to the end of the Cold War. This point is raised by Martti Koskenniemi who argues that the end of the Cold War was treated by the majority of international lawyers as a return to situation "where the rules of civilised behaviour would come to govern international life." Martti Koskenniemi, *'The Lady Doth Protest Too Much' Kosovo, and the Turn to Ethics in International Law*, 65 MODERN L. REV. 159, 160 (2002). Accordingly, discussions in more overtly moral tones were deemed appropriate and necessary, which in turn explains the rise of legitimacy discourses. *Id.* Another possibility relates with the so-called "de-formalization" of international law in light of the turn to "managerialism." See Martti Koskenniemi, *The Politics of International Law—20 Years Later*, 20 EUR. J. INT'L L. 7 (2009). As many authors have noticed, Koskenniemi being the most prominent one, with the rise of managerialism, international law is becoming de-formalized. *Id.* at 14-15. The sources of international law are becoming less important, and rules are norms are losing their "legal" quality, making it harder to discuss international law in legal terms. *Id.* As a result, legitimacy-talk allows to evaluate international legal institutions as it goes beyond legality.

15. See Kanishka Jayasuriya, *Globalization, Law, and the Transformation of Sovereignty: The Emergence of Global Regulatory Governance*, 6 IND. J. GLOBAL LEGAL STUD. 425 (1999); NEIL WALKER, INTIMATIONS OF GLOBAL LAW 1-25 (2014).

that, until recently, seemed alien to international law. While elements of the consensual order still exist, they are being supplemented and, in some instances, replaced by novel forms of authority.¹⁶ Parts of these transformations include: the shift of authority and sovereignty from the state to the supranational realm—the European Union (“EU”) being a paradigmatic example of such case; the emergence of new forms of law-making into being such as supply-chain contracts;¹⁷ the influence of multiple actors such as industry associations or semi-governmental regulatory commissions, among others, in shaping regulation and in how it is enforced;¹⁸ the novel arrangements, producing normativity and its enforcement.¹⁹ The upshot of these developments is the further intrusion of international law in national political and legal processes and the exertion of “pressure on nations not in compliance with its norms.”²⁰

The investment regime is a prime example of those wide-ranging transformations. It is a “hybrid” system where not only the law but also

16. On the continuity and discontinuity of international law, see Joseph H.H. Weiler, *The Geology of International Law—Governance, Democracy and Legitimacy*, 64 HEIDELBERG J. INT'L L. 547 (2004); Nico Krisch, *The Decay of Consent: International Law in an Age of Global Public Goods*, 108 AM. J. INT'L L. 1 (2014); Myres S McDougal, *The Impact of International Law Upon National Law: A Policy-Oriented Perspective*, 4 S.D. L. REV. 25 (1959).

17. Fabrizio Caffagi, *Regulation Through Contracts: Supply-Chain Contracting and Sustainability Standards*, 12 EUR. REV. CONT. L. 219, 219-20 (2016), available at http://www.responsibleglobalvaluechains.org/images/PDF/Cafaggi_Regulation-through-contracts.pdf [<https://perma.cc/5824-QX33>].

18. See generally Fabrizio Cafaggi, *The Regulatory Functions of Transnational Commercial Contracts: New Architectures*, 36 FORDHAM INT'L L. J. 1557 (2013) (where he discusses how industry-wide standards are becoming increasingly legally binding obligations).

19. See generally Jean L Cohen, *A Global State of Emergency or the Further Constitutionalization of International Law: A Pluralist Approach*, 15 CONSTELLATIONS 456 (2008); Jan Klabbers, *Setting the Scene*, in THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW 1, 5, 15 (Jan Klabbers, et al., 2009); Graf-Peter Calliess & Moritz Renner, *Between Law and Social Norms: The Evolution of Global Governance*, 22 RATIO JURIS 260, 261 (2009); A. CLAIRE CUTLER, PRIVATE POWER AND GLOBAL AUTHORITY: TRANSNATIONAL MERCHANT LAW IN THE GLOBAL POLITICAL ECONOMY 183 (2003).

20. Mattias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 EUR. J. INT'L L. 907, 912 (2004). For an overview of these developments, see generally Machiko Kanetake, *The Interfaces between the National and International Rule of Law: A Framework Paper*, in THE RULE OF LAW AT THE NATIONAL AND INTERNATIONAL LEVELS: CONTESTATIONS AND DEFERENCE (Machiko Kanetake & André Nollkaemper eds., 2016); Anne Peters, *Supremacy Lost: International Law Meets Domestic Constitutional Law*, 3 VIENNA J. INT'L CONST. L. 170 (2009).

the institutional structure comprises private and public law elements.²¹ It is a complex web of interlocking and overlapping “rules and rule-enforcing structures,”²² with the juxtaposition of “hard law”—e.g., bilateral, regional, and multilateral agreements—with “soft law”—e.g., the World Bank’s *Guidelines on the Legal Treatment of Foreign Investment*.²³ This Article finds important private and public actors, states, and international institutions (including the World Bank, the Organisation for Economic Cooperation and Development (“OECD”), the United Nations Conference on Trade and Development (“UNCTAD”), or the International Center for Settlement of Investment Disputes (“ICSID”). This article also finds important multinational corporations and Non-Governmental Organizations (“NGOs”).²⁴ Finally, the investment regime has had a sizable impact on the normative evolution of regulation. By now, it is clear that the investment regime is not a mere resolution system for private disputes, but that it is an integral part of global governance. The various institutions of the regime are setting standards for States in the internal administrative process. Similarly, Investor-State arbitration functions as a review mechanism to assess the balance a government has struck in a particular situation between investor protection and other important public purposes. Additionally, decisions made *ex post* by tribunals with regard to such balances may influence what later

21 . See generally Zachary Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74 *BRITISH Y.B. INT’L L.* (2004); Gus Van Harten, *Private Authority and Transnational Governance: The Contours of the International System of Investor Protection*, 12 *REV. INT’L POL. ECON.* 600, 606-08 (2005); Asha Kaushal, *Revisiting History: How the Past Matters for the Present Backlash against the Foreign Investment Regime*, 50 *HARV. INT’L L.J.* 491 (2009). On the public/private distinction in law, see generally, Hilary Charlesworth, *The Public/Private Distinction and the Right to Development in International Law*, 12 *AUSTRALIAN Y.B. INT’L L.* 190 (1989).

22 . DAVID SCHNEIDERMAN, *CONSTITUTIONALIZING ECONOMIC GLOBALIZATION: INVESTMENT RULES AND DEMOCRACY’S PROMISE* 25 (2008).

23 . See generally IBRAHIM F.I. SHIHATA, *LEGAL TREATMENT OF FOREIGN INVESTMENT: “THE WORLD BANK GUIDELINES”* 40-43, 63-64, 55, 88-90, 110-12 (1993).

24 . MUTHUCUMARASWAMY SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 60-69 (2010); GUS VAN HARTEN, *REVIEW OF INTERNATIONAL POLITICAL ECONOMY* 606, 608 (2005); JESWALD W SALACUSE, *THE LAW OF INVESTMENT TREATIES* 31-35 (2d ed. 2015).

tribunals will do, and may influence *ex ante* the behavior of States and investors.²⁵

In light of the vast impact of the investment regime, the question of legitimacy has become impossible to ignore.²⁶ Traditionally, the consent of the state was the ultimate legitimacy criterion. That criterion seemed appropriate when treaties, either bilateral or multilateral, were considerably simpler and their execution depended entirely on states. However, the significant expansion of international law's regulatory reach and the dissolution of the national/international divide have created a new reality.²⁷ As a consequence, the "chain of legitimacy from the national to the international level established at least in part by the general consent of states . . . is attenuated."²⁸ Some then argue that we are confronted with a widening legitimacy gap, making the legitimation of international law a pressing concern.²⁹

Despite the ongoing debate about legitimacy, it is relatively difficult to pinpoint the reasons for why the notion of legitimacy is so paramount. Besides some implicit or explicit references to "effectiveness," the concept is presented as self-evident in the literature. Legitimacy appears as if its meaning were generally understood, and our arguments proceed as if the audience must share this understanding. Legitimacy seems to signify some crucial and reasonably discrete feature of political (and legal) life, something that political (and legal) actors want, that they ought to be and are eager to seek, and that the rest of us (subjects, citizens, peers) will recognize and respond to.³⁰ This creates a situation where there are many

25. Benedict Kingsbury & Stephan W Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law*, 1 (N.Y.U. Pub. L. & Legal Theory Working Papers, Paper No. 146, 2009).

26. See generally Bodansky, *supra* note 12; ALAN BOYLE & CHRISTINE CHINKIN, *THE MAKING OF INTERNATIONAL LAW* 24-30, 50 (2007).

27. Jacob K Cogan, *The Regulatory Turn in International Law*, 52 HARV. INT'L L. J. 321, 333 (2011).

28. JÜRGEN FRIEDRICH, *INTERNATIONAL ENVIRONMENTAL "SOFT LAW": THE FUNCTIONS AND LIMITS OF NONBINDING INSTRUMENTS IN INTERNATIONAL ENVIRONMENTAL GOVERNANCE AND THE LAW* 386 (2013).

29. Samantha Besson, *The Authority of International Law - Lifting the State Veil*, 31 SYDNEY L. REV. 343, 346-47 (2009) (footnotes omitted).

30. Shane P. Mulligan, *The Uses of Legitimacy in International Relations*, 34 MILLENNIUM 349, 351 (2006).

arguments *about* legitimacy but not *over* legitimacy, some exceptions notwithstanding.³¹

The appeal of legitimacy can be traced to one of the fundamental questions within social science and humanities: *the problem of order*.³² The problem of order—or what makes a society hold together—has puzzled scholars of various stripes for centuries.³³ Some have traced the question all the way back to Thomas Hobbes and his discussion of the sovereign in *Leviathan*.³⁴ The puzzle is that humans can, at the same time, be extensively social creatures and susceptible to anti-social forms of action.³⁵ This duality makes human societies “vulnerable to possible dissolution” and creates situations where “[o]rder is never so fully present in concrete social reality as to exclude all deviations, unpredictabilities, mistaken perceptions, and accidents. Nor is it ever so utterly absent that completely random behavior, unremitting total conflict, or social interaction confined to the minimum required by biological necessity prevails.”³⁶

Within international law, one of the most prevalent debates concerns the question of compliance or why states routinely follow international law.³⁷ Similar to the conundrum regarding individual

31. FRANCK, *supra* note 12, at 16. See generally Bodansky, *supra* note 12; Daniel Bodansky, *The Concept of Legitimacy in International Law*, in LEGITIMACY IN INTERNATIONAL LAW (Rüdiger Wolfrum & Volker Röben eds., 2008); BRUNNÉE & TOOPE, *supra* note 12; Christopher A. Thomas, *The Uses and Abuses of Legitimacy in International Law*, 34 OXFORD J. LEGAL STUD. 729 (2014); Odette Lienau, *The Challenge of Legitimacy in Sovereign Debt Restructuring*, 57 HARV. INT'L L.J. 151 (2016).

32. Sometimes it is also discussed under ‘stability.’ I will use both ‘order’ and ‘stability’ interchangeably. The notion of order adopted here is minimal and formal. Order is understood to be the ‘absence of conflict and unpredictability,’ see Andrew Abbott, *The Idea of Order in Processual Sociology*, 2 CAHIERS PARISIENS 315, 318 (2006). I have equally stated ‘overwhelmingly’ because while legitimacy is generally linked with order, it is not a necessary one or should be treated as most important relationship, see Mulligan, *supra* note 30.

33. JOSEPH HEATH, FOLLOWING THE RULES: PRACTICAL REASONING AND DEONTIC CONSTRAINT 42 (2008); DENNIS WRONG, PROBLEM OF ORDER 3-4 (1994).

34. This is the argument famously articulated by Talcott Parsons. See TALCOTT PARSONS, TALCOTT PARSONS ON INSTITUTIONS AND SOCIAL EVOLUTION 82 (1982). Although his interpretation of Hobbes has been severely criticized, see Robert van Krieken, *The paradox of the ‘two sociologies’: Hobbes, Latour and the Constitution of modern social theory*, 38 Journal of Sociology 255, 258-62 (2002).

35. HEATH, *supra* note 33, at 42.

36. WRONG, *supra* note 33, at 3, 11.

37. See Thomas M Franck, *Why a Quest for Legitimacy*, 21 U.C. DAVIS L. REV. 535 (1987) (where he discusses debates about legitimacy with how international laws are obeyed); Harold H Koh, *Why Do Nations Obey International Law?*, 106 YALE J. INT'L L. 2599 (1997)

behavior, it is a puzzle that states largely abide to international law and engage in cooperative behavior, when at the same time they engage in non-cooperative behavior like violating international law or going to war.³⁸

So how does order arise? The conventional categories are: coercion, self-interest or instrumental rationality, and legitimacy.³⁹ Coercion is straightforward. It indicates the use of compulsion to induce compliance with an order. Coercion does not have to be equated solely with the use of force. Rather, it can entail other types of sanctions like those of an economic or shaming nature.⁴⁰ Under self-interest or instrumental rationality, order arises as “a consequence of individually maximizing behavior under the correct set of institutional circumstances.”⁴¹ As the language suggests, this vocabulary is “economically” inspired and focuses on the interests of agents.⁴² In particular, the notion of order here is reminiscent of the market economy and its ability to “supply a system of incentives that seamlessly integrates the interests of instrumentally rational individuals in such a way as to produce mutually beneficial outcomes.”⁴³ Last but not least, order can be explained by considerations of legitimacy, which tend to encompass all normative concerns. To be more precise, legitimacy captures the idea of a “sense of duty, obligation, or ‘oughtness’ towards rules, principles or

(where he discuss the compliance with international law through an iterative process of incorporation of international law).

38. See, e.g., MARY ELLEN O’CONNELL, *THE POWER AND PURPOSE OF INTERNATIONAL LAW* 17-150 (2011). There is the added “in the absence of sovereign,” but that is less relevant than noticing how the puzzles are identically structured. Plus, the fact that there is a “sovereign” at the domestic level has not stopped commentators to discuss the problem. Hence, whether there is a sovereign or not, it is irrelevant.

39. See Thomas, *supra* note 31, at 4; Bodansky, *supra* note 12, at 603. There are other possibilities such as habit, but these are less prominent.

40. Outcasting, for instance, could be considered a sort of coercion. See Oona Hathaway & Scott J Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 *YALE L. J.* 252, 258 (2011).

41. HEATH, *supra* note 33, at 43.

42. Robert O. Keohane, *International Relations and International Law: Two Optics, in POWER AND GOVERNANCE IN A PARTIALLY GLOBALIZED WORLD* 119, 124 (2002).

43. HEATH, *supra* note 33, at 43. International lawyers with a penchant for economic analysis have tried to explain order following this language. See generally ANDREW T GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* (2008).

commands” that emerges because they are normatively justified.⁴⁴ It is usually sustained that, even though the three elements interact, legitimacy is the critical component for the stability of any social order—the “invisible institution” gluing society together.⁴⁵ More precisely, it is asserted that, while a social order may be maintained through coercion or self-interest for a period of time, this cannot work in the long run. That is, coercion and self-interest cannot be considered to provide a reliable basis for the durability or stability of any set of institutions if legitimacy is missing.⁴⁶

What drives the argument for legitimacy is a simple but powerful intuition: humans are motivated by normative considerations. In particular, it is widely believed that we have a sort of moral compass and that we react if we consider some situations to be against our own normative commitments.⁴⁷ An example of this can be seen in the protests against TTIP. Many of the criticisms raised have been couched in normative languages like democracy, fairness, or justice.

The idea behind the workings of legitimacy is multifaceted. For example, because individuals act according to normative considerations, they “more easily follow rules and accept roles that can be justified . . . in normative terms” which implies vice versa that political and social orders that are not normatively justified “have difficulties in securing acceptance.”⁴⁸ In situations where everyone shares and accepts the same normative considerations, it then follows that any particular legal, political, or social order will be more stable and effective if the institution is based on those normative

44. Martin E Spencer, *Weber on Legitimate Norms and Authority*, 21 *BRITISH J. SOC.*, 123, 126 (1970). Obviously the list of “things” to be legitimate is not exhaustive.

45. See generally PIERRE ROSANVALLON, *DEMOCRATIC LEGITIMACY: IMPARTIALITY, REFLEXIVITY, PROXIMITY* 9 (Arthur Goldhammer trans. 2011); Brian Barry, *John Rawls and the Search for Stability*, 105 *ETHICS* 874 (1995); Besson, *supra* note 29.

46. At this point it should be remarked that it does not matter whether we are talking about a durable order because it is normatively legitimate or whether it is accepted as legitimate by a certain group of actors. It is possible to have both interpretations in mind to the idea of stability connected with legitimacy. See MAX WEBER, *MAX WEBER ON LAW IN ECONOMY AND SOCIETY* 125 (Max Rheinstein & Edward Albert Shils trans. 1954); FRANCK, *supra* note 12, at 15; Bodansky, *supra* note 12, at 603; David D Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 *AM. J. INT'L L.*, 552, 558 (1993).

47. See generally John Mikhail, *Universal moral grammar: theory, evidence and the future*, 11 *TRENDS in Cognitive Science* 143, at 143-44 (2007).

48. Xavier Marquez, *The Irrelevance of Legitimacy*, 5-6 (2012) (unpublished manuscript) (on file with author) (Available at SSRN 2027249, 2012).

considerations. In that case, actors accept the rules of the arrangement as part of their own normative “worldview” and act accordingly.⁴⁹ In summation, an explanation of order based on legitimacy presupposes a fundamental connection between legitimacy and the stability and effectiveness of a regime.

Despite the universal acceptance of legitimacy in international law, this Article contests the usual explanatory role given to the concept.⁵⁰ This Article argues that, due to its conceptual peculiarities, legitimacy cannot fulfill the role it is expected to play. Usually, the literature treats legitimacy as having a twofold dimension: a descriptive and an evaluative (or normative) part. The descriptive part involves defining legitimacy as having such and such elements. For instance, accountability, transparency, fairness, and consistency—which typically by themselves take a normative stance. This Article’s contention is instead that legitimacy as a concept is a purely evaluative and that, as a result, it cannot be circumscribed.⁵¹ To make the case, this Article draws from philosophy of language and ethics. In particular, this Article focuses on the distinction between thick and thin concepts. Thin concepts are concepts such as “good” and “bad” which are purely evaluative in character and, as a result, can be applied to any context. In contrast, thick concepts, such as “friendly” and “rude,” are simultaneously evaluative and descriptive and are thus limited in their scope of application. Based on this classification, this Article argues that legitimacy is a thin concept.

In light of this argument, there are two important consequences for the treatment of the concept. First, since *a priori* there are no grounds on which legitimacy can be delimited, no account of the concept is better than another. Instead, any two accounts have equal standing. Secondly, due to the lack of conceptual boundaries, there is no possibility of empirically tracing a causal relationship between legitimacy and order. The concept is so expansive that it is explanatory for everything and, hence, nothing. Meaning, whenever a social

49. *Id.* at 15.

50. Thus, the contention is a narrow one as it only focuses on the explanatory relationship between legitimacy and order.

51. My conceptual claim should be separated from a *sociological* analysis of legitimacy. To analyze how legitimacy operates within a particular community and its alleged influence is independent from what one thinks conceptually of legitimacy. Hence to argue that legitimacy is a purely evaluative concept does not need to affect any sociological analysis.

arrangement is seen as stable it is due to legitimacy; whenever a social arrangement is changing it is also due to legitimacy; and whenever a social arrangement is collapsing it is yet again due to legitimacy.⁵²

This Article advocates a re-evaluation of the concept and its usage. There are various ways in which this can be undertaken, of which this Article sketches one. The inspiration for this alternative approach to legitimacy is taken from international law, yet it draws from a variety of disciplines. The proposal relies on the justificatory force of the concept: legitimacy is treated as a rhetorical tool whereby actors try to pursue certain courses of action. Following this argument, the importance of legitimacy lies in its employment for the shaping of perceptions with regard to how institutions and norms ought to be. The advantage of such alternative understanding of legitimacy is that the concept does not posit any particular content nor does it assume a necessary role concerning order.⁵³ Therefore, the approach is an analytical, rather than a normative, one.

To illustrate my claims, this Article will analyze the case of the investment regime. As previously argued, the investment regime represents a paradigmatic instance of the broader transformations undergoing the international legal order. The debate concerning the legitimacy of the investment regime shows the usual ways in which legitimacy appears in the literature and how it is conceived. Thus, the investment regime provides a fruitful arena in which to discuss some of the conceptual criticisms that are put forth here. It follows that, although the Article's focus is primarily on the investment regime due to its central role in international law and global governance, the Article also aspires to shed light on parallel debates within international law.

Part I maps out the legitimacy debate with respect to the investment regime. This is accomplished twofold. First, the Article presents one of the most influential legitimacy accounts within the literature of international law, proposed by Thomas Franck.⁵⁴ Although

52. See BARRY BARNES, *THE NATURE OF POWER* 25 (1988).

53. It is worth remarking here that the claim just adduced refers to the idea of order as existent in the world. This is different from the relationship between legitimacy and order as conceived through legitimacy as a logical, theoretical, or aspirational one. That is to say, if one conceives legitimacy as comprehending a particular set of liberal values, then the vision of order that one takes from that understanding of legitimacy is that of a liberal order.

54. For Franck's writings on legitimacy, see generally Franck, *supra* note 37; Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705 (1988); FRANCK, *supra* note 12; THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1995).

Franck did not write expansively about the investment regime, the literature on international investment law has drawn extensively from his writings.⁵⁵ His account provides a focal point from which we can observe and analyze the frequent assumptions on legitimacy made implicitly or explicitly in the debate at later points throughout the Article.⁵⁶ The section finishes by mapping out the various elements that typically fall under the umbrella of legitimacy in the literature. This

55. The only exception found is his chapter on 'Fairness in International Investment Law' in FRANCK, *supra* note 54, ch. 14. He conceives legitimacy as part of fairness as a more general normative category.

56. On the impact of Franck, see, *inter alia*, Franck, *supra* note 9, at 1584-87; Choudhury, *supra* note 11, at 497; JÜRGEN KURTZ, THE WTO AND INTERNATIONAL INVESTMENT LAW: CONVERGING SYSTEMS 251 (2016); Brower II, *supra* note 9, at 51-52; Brower & Schill, *supra* note 8, at 471; Susan D. Franck, *The Nature and Enforcement of Investor Rights under Investment Treaties: Do Investment Treaties Have a Bright Future?*, 12 U.C. DAVIS J. OF INT'L L. AND POL'Y 47, 79 (2005); Jeffery Atik, *Repenser NAFTA Chapter 11: A Catalogue of Legitimacy Critiques*, 3 ASPER REV. INT'L BUS. & TRADE L. 2, 3-4 (2004); Debra P. Steger, *Enhancing the Legitimacy of International Investment Law by Establishing an Appellate Mechanism*, in IMPROVING INTERNATIONAL INVESTMENT AGREEMENTS 1, 7, 9 (Armand de Mestral & Céline Lévesque eds., 2012); Roland Klager, *Fair and Equitable Treatment: A Look at the Theoretical Underpinnings of Legitimacy and Fairness*, 11 J. WORLD INV. & TRADE 435, 436 (2010); Graham Mayeda, *Playing Fair: The Meaning of Fair and Equitable Treatment in Bilateral Investment Treaties*, 41 J. WORLD TRADE 273, 284 (2007); René Urueña, *You'd Better Listen: Notes on the Mainstreaming of Public Participation in Foreign Investment Arbitration*, 16 INT'L L. - REVISTA COLOMBIANA DE DERECHO INTERNACIONAL 294, 305-06 (2010); Rahul Singh, *The World Trade Organization and Legitimacy: Evolving a Framework for Bridging the Democratic Deficit*, 42 J. WORLD TRADE 347, 349-50 (2008); Garcia et al., *supra* note 9, at 862; Matthew C Porterfield, *An International Common Law of Investor Rights?*, 27 U. PA. J. INT'L ECON. L. 79, 99-100 (2006); José Gustavo Prieto Muñoz, *International Investment Disputes in South America: Rethinking Legitimacy in the Context of Global Pluralism/Las Controversias Sobre Las Inversiones Internacionales En Sudamérica: Repensar La Legitimidad En El Contexto De Pluralismo Global*, in INT'L INV. L. IN LATIN AMERICA/DERECHO INTERNACIONAL DE LAS INVERSIONES EN AMÉRICA LATINA 130, 133 (Attila Tanzi et al. eds., 2016); Graham Mayeda, *International Investment Agreements between Developed and Developing Countries: Dancing with the Devil: Case Comment on the Vivendi Sempra and Enron Awards*, 4 MCGILL INT'L J. OF SUSTAINABLE DEV. L. & POL'Y, 189, 208 (2008); Mojtaba Dani & Afshin Akhtar-Khavari, *The Uncertainty of Legal Doctrine in Indirect Expropriation Cases and the Legitimacy Problems of Investment Arbitration*, 22 WIDENER L. REV. 1, 32 (2015); Elizabeth Whitsitt, *The Role of Canadian Courts in the Legitimization of NAFTA Chapter Eleven Tribunal Decisions*, 65 UNB L. J. 126, 132 (2014); William W. Burke-White & Andreas Von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35 YALE J. INT'L L. 283, 285 (2010); Aristidis Tsatsos, *ICSID Jurisprudence: Between Homogeneity and Heterogeneity a Call for Appeal?*, 6 TRANSNAT'L DISP. MGMT. 1, 6 (2009); Julia Hueckel, *Rebalancing Legitimacy and Sovereignty in International Investment Agreements*, 61 EMORY L. J. 601, 611 (2011); Tai-Heng Cheng, *Power, Authority and International Investment Law*, 20 AM. U. INT'L L. REV. 465, 499 n.152 (2005); JORUN BAUMGARTNER, TREATY SHOPPING IN INTERNATIONAL INVESTMENT LAW 34, 50-51 (2016).

Article will take the validity of the criticisms against the investment regime at face value since, for the purposes of this Article, it is immaterial whether or not the criticisms are correct. What matters instead is what *is* associated to legitimacy. The following section presents the distinction between thin and thick concepts and argues that legitimacy is a thin one. Then, this Article will flesh out the consequences of accepting legitimacy as a thin concept. In particular, how this affects the literature on international investment law. Finally, this Article will discuss how to approach legitimacy as part of our legal and political vocabulary and what this entails with regard to the investment regime and international law. The Article will conclude by summing up the main points.

II. THE INVESTMENT REGIME AND ITS EVER CONTESTED LEGITIMACY

It is well established that the investment regime is one of the most burgeoning components of the international legal order. Indeed, according to the United Nations Conference on Trade and Development (“UNCTAD”), seventy-one cases were initiated in various state-investor arbitration tribunals in 2018.⁵⁷ In contrast, it took a bit more than thirty years to reach a similar amount of cases since the International Centre for Settlement of Investment Disputes (“ICSID”) was established in 1966.⁵⁸ The normative density of investment law has grown with similar force. What Jeswald W. Salacuse calls the “*treatification* of international investment law”⁵⁹ has amounted to 2,912 investment treaties, about which 2,354 are currently active, as of 2019.⁶⁰ Similarly important, in 2018, the global flows of investment have reached the number of \$1.3 trillion,⁶¹ which has led some scholars

57. U.N. CONFERENCE ON TRADE & DEVELOPMENT, WORLD INVESTMENT REPORT 2019: SPECIAL ECONOMIC ZONES xii (2019), *available at* https://unctad.org/en/PublicationsLibrary/wir2019_en.pdf [https://perma.cc/ZS69-U8QR] [hereinafter UNCTAD].

58. *See Concluded Cases with Details*, ICSID, <https://icsid.worldbank.org/en/Pages/cases/ConcludedCases.aspx?status=c> [https://perma.cc/H84E-PB9D] (last visited Sept. 30, 2019).

59. SALACUSE, *supra* note 5, at 4.

60. *Investment Policy Hub*, UNCTAD, <http://investmentpolicyhub.unctad.org/IIA> [https://perma.cc/S4AK-HGFU] (last visited Sept. 30, 2019).

61. UNCTAD, *supra* note 57 at 2.

to argue that the investment regime represents one of the “building blocks” of the global economy.⁶²

Although the numbers seem to suggest that the investment regime is a recent treaty-based phenomenon, its history is much older.⁶³ It is true that the regime has remained institutionally and normatively underdeveloped until quite recently,⁶⁴ nevertheless, some elements associated to the regime date back to the 10th century.⁶⁵ While a historical reconstruction of the evolution of the investment regime is out of the scope of this Article, it is worth emphasizing that the history of international investment law is one of hybridity, contradictions, and contestation.⁶⁶ At the heart of the regime lies the dispute between the protection of foreign investors from the capriciousness of the host state and a state’s sovereignty and freedom of action.⁶⁷ Although the arguments brought forth against and in favor of the investment regime are diverse, some focus on institutional components, others on procedural elements, and others on substantive matters, most emerge from that basic tension.

While the discussion of the investment regime is often couched in terms of legitimacy, it is typically not complemented by an account of the concept. With some notable exceptions, the usual approach is to argue that, the investment regime is suffering a legitimacy crisis because it lacks X, Y, or Z. Apart from a few brief paragraphs stressing

62. See, e.g., STEPHAN W SCHILL, *THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW* 3-5 (2009).

63. KATE MILES, *THE ORIGINS OF INTERNATIONAL INVESTMENT LAW: EMPIRE, ENVIRONMENT AND THE SAFEGUARDING OF CAPITAL* 19 (2013); SURYA P. SUBEDI, *INTERNATIONAL INVESTMENT LAW: RECONCILING POLICY AND PRINCIPLE I* (2008).

64. See SUBEDI, *supra* note 63, at 1; Guillermo Aguilar Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 *YALE J. INT’L L.*, 365, 367-368 (2003); Jeswald W Salacuse & Nicholas P Sullivan, *Do BITs Really Work: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 *HARV. INT’L L. J.*, 67, 68 (2005).

65. SALACUSE, *supra* note 5, at 89.

66. See SCHNEIDERMAN, *supra* note 23, at 26.

67. See, e.g., SORNARAJAH, *supra* note 25; Jan Wouters et al., *International Investment Law: The Perpetual Search for Consensus*, in *FOREIGN DIRECT INVESTMENT AND HUMAN DEVELOPMENT - THE LAW AND ECONOMICS OF INTERNATIONAL INVESTMENT AGREEMENT* 11 (Olivier De Schutter, et al. eds., 2013); O. Thomas Johnson & Jonathan Gimblett, *From Gunboats to BITs: The Evolution of Modern International Investment Law*, 2010/2011 *YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY* 691 (2010); Alex Mills, *Antinomies of Public and Private at the Foundations of International Investment Law and Arbitration*, *J. INT’L ECON. L.* 469 (2011). Mills pinpoints that it is possible to identify also a “progressive” narrative in the literature instead of the conflicting one. However, the majority of accounts highlight the conflict in the field. *Id.*

the overall importance of legitimacy, little else is to be found. This makes the reconstruction of the concept of legitimacy within the literature intricate; most assumptions underlying its usage remain implicit. Nevertheless, due to the profound influence of Franck's writing on the matter, we can put forth a sufficiently representative account of legitimacy, as used in the literature of international investment law and beyond.

Franck's interest in understanding legitimacy within the international legal order is based on the classic questions of obligation and compliance and of the impact of international law on international relations. He proposes the following definition of legitimacy: "Legitimacy is a property of a rule or rulemaking institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process."⁶⁸

Franck identifies and describes four "objective" properties attached to rules: determinacy, symbolic validation, coherence, and adherence. He posits that, "to the extent a rule, or rule process, exhibits these four properties it will exert a strong pull on states to comply."⁶⁹ Vice versa, he states that when "these properties are not present, the institution will be easier to ignore and the rule easier to avoid by a state tempted to pursue its short-term self-interest."⁷⁰

For Franck, determinacy refers to the extent to which the content of international rules is clearly identifiable.⁷¹ There are two ways in which an international rule can achieve determinacy and, in consequence, a greater degree of legitimacy. First, determinacy requires textual clarity, meaning that the norm, linguistically speaking, clearly states the conduct that is or is not allowed. Secondly, determinacy, according to Franck, can be achieved through a process of clarification. The idea is that a rule, despite being textually unclear

68. Franck, *supra* note 12, at 24. Those multiple criteria falling under legitimacy and which apply to national communities can be also adapted for the international community. *Id.* at 19.

69. *Id.*

70. *Id.* at 49.

71. *See id.* at 52.

or vague, can become determinate through a process of interpretation, undertaken by an authority or on a case-by-case basis.⁷²

Symbolic validation as a criterion for legitimacy refers to the cultural and anthropological dimensions of law. Franck asserts that the ability to “exert a pull to voluntary compliance” is based on the ability to communicate, not so much through content but in terms of authenticity: this can be “the voluntary acknowledged authenticity of a rule or a rule-maker, or, sometimes the authenticity (validity) bestowed on a symbolic communication’s recipient.”⁷³ Meaning, the will to follow an authority might be based on a belief about that authority, which in turn might be based on some tradition or other factors. Here, Franck especially points to rituals and pedigree. By ritual Franck refers to ceremonies, “which provide unenunciated reasons for compliance with the commands of persons and institutions,”⁷⁴ while with pedigree he emphasizes, “the venerable historic and social origins and continuity of rule standards, and rule-making or rule-applying institutions.”⁷⁵

The third element of Franck’s typology, coherence, categorizes a norm or institution as legitimate if it can be validated by “the test of coherent generalization.”⁷⁶ Franck argues that if a rule or the application of a rule is viewed as incoherent, it is less likely to be followed. The last category, adherence, is related to the notion of international law as a proper system: there exist primary rules, secondary rules, and even the ultimate rule of recognition.⁷⁷ Adherence then refers to the idea that a norm exerts a stronger pull to compliance if it is validated by a “hierarchy of secondary rules . . . establishing normative standards that define how rules are to be made, interpreted, and applied.”⁷⁸

Although Franck adheres broadly to a procedural conception of legitimacy, he acknowledges that legitimacy can cover substantive grounds. To begin, he discusses his procedural conception of legitimacy in terms of “right process.”⁷⁹ Accordingly, legitimacy encompasses both procedural and substantive elements: it not only

72. *Id.* at 61.

73. *Id.* at 91.

74. *Id.* at 92.

75. *Id.* at 94.

76. *Id.* at 138, 152.

77. *Id.* at 183-187.

78. *Id.* at 184.

79. FRANCK, *supra* note 54, at 7. Chapter 2 expands what constitutes right process.

matters “how a ruler and a rule were chosen, but also . . . whether the rules made, and commands given, were considered in the light of all relevant data, both objective and attitudinal.”⁸⁰ Put differently, it is not enough that a rule was made according to the accepted ways of doing things,⁸¹ but that the rule can be expected to be adhered to *by others* because it was made based on the “right process.”⁸² Thus, considerations like equality or free participation are part of the underlying account of legitimacy, even if Franck discusses at length the four indicators presented above.⁸³

Finally, for Franck, legitimacy should not be “muddled” with justice, its “symbiotic cousin.” Legitimacy refers to perception, whereas justice is oriented towards outcomes. Nevertheless, the use of the word “symbiotic” is intended to convey the idea that “the principles of justice need infra-structural support from principles of legitimacy.”⁸⁴ He sustains that legitimacy can be understood as substantive justice. Here, Franck points, although not exclusively, to neo-Marxist philosophers. This group posits that, for a system to validate itself, it needs to “be defensible in terms of the equality, fairness, justice, and freedom.”⁸⁵

More generally, the arguments regarding legitimacy in the international law literature can roughly be divided into the following four categories: 1) legality or rule of law; 2) substantive values; 3) technical knowledge; and 4) effectiveness.⁸⁶ A great majority of Franck’s criteria are connected to legality. Discussions of substantive values refer to tenets like justice, autonomy or democracy, among others. Thus, legitimacy is not only deployed for arguing whether a certain norm or institution was made “according to the usual, recognised, prevailing ways of doing things,”⁸⁷ but also whether that rule or institution has substantive standing.⁸⁸ With respect to epistemic

80. FRANCK, *supra* note 12, at 17.

81. RAYMOND GEUSS, *HISTORY AND ILLUSION IN POLITICS* 35 (2001).

82. FRANCK, *supra* note 54, at 26.

83. *Id.* at 29.

84. Thomas M. Franck & Steven W. Hawkins, *Justice in the International System*, 10 *MICH. J. INT’L L.*, 161 (1989).

85. FRANCK, *supra* note 12, at 18.

86. This follows somewhat Andrew Hurrell’s classification. See Andrew Hurrell, *Legitimacy and the Use of Force: Can the Circle Be Squared?*, 31 *REV. INT’L STUD.* 15 (2005).

87. GEUSS, *supra* note 81, at 35.

88. Friedrich V. Kratochwil, *On Legitimacy*, 20 *INT’L RELATIONS* 303 (2006). For discussion of the clearest case of understanding legitimacy in terms of substantive values in

legitimacy, scholars reflect on the quality of certain norms and judicial decisions in terms of whether a given decision is justifiable in accordance with a given set of epistemic criteria (formal epistemic legitimacy), or if a given community believes that it is so justifiable (social epistemic legitimacy).⁸⁹ Lastly, effectiveness captures the idea that an institution can be considered legitimate if it produces certain benefits or delivers a solution to particular problems.⁹⁰ We shall now see how the different elements of legitimacy described above are reflected in the criticisms raised against the investment regime.⁹¹

The first important criticism concerns the normative quality of international investment agreements and arbitral awards.⁹² It is argued that agreements are often badly written and riddled with ambiguities and inconsistencies.⁹³ It is further sustained that the interpretation given to the texts or norms are enormous and that this can potentially create an overreach.⁹⁴ Clearly, such concerns fall into Franck's category of determinacy. Indeed, by not producing textual clarity, those addressed by the norms do not know beforehand how to conform to the rule. This leads to unpredictability and destabilization of expectations of those involved in the investment regime, which in turn facilitates non-compliance.⁹⁵

Another criticism against the investment regime regards its decentralized nature. The regime is composed of a patchwork of investment agreements, each of them with their own particularities.⁹⁶ The means of settling a dispute is arbitration which, unlike a judicial system, is flexible and temporary. Each time a dispute between two

international law, see Dencho Georgiev, *Politics or Rule of Law: Deconstruction and Legitimacy in International Law*, 4 EUR. J. INT'L L. 1 (1993).

89. Christopher A. Thomas, *Of Facts and Phantoms: Economics, Epistemic Legitimacy, and WTO Dispute Settlement*, 14 J. INT'L ECON. L., 295, 298-99 (2011).

90. A different way of discussing this issue is that of output-legitimacy. The classic statement appears in FRITZ W SCHARPF, *GOVERNING IN EUROPE: EFFECTIVE AND DEMOCRATIC?* ch. 1 (1999).

91. Much of the following analysis is owed to Brower II's application of Franck's account on the investment regime. See generally Brower II, *supra* note 9. Also it should be noted that the list is not exhaustive.

92. Burke-White & Von Staden, *supra* note 56, at 300.

93. Ari Afilalo, *Meaning, Ambiguity and Legitimacy: Judicial (Re-) Construction of NAFTA Chapter 11*, 25 NW. J. INT'L L. & BUS. (2004).

94. Sornarajah, *supra* note 9, at 43, 45, 51ff.

95. Brower II, *supra* note 9, at 52; FRANCK, *supra* note 54, at 30-32.

96. MUTHUCUMARASWAMY SORNARAJAH, *RESISTANCE AND CHANGE IN THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 38 (2015).

parties emerges, a new arbitral tribunal is set up with potentially different arbitrators and procedures. The award rendered by the tribunal is only binding for the parties and the tribunal is subsequently disbanded. With almost three thousand treaties with investment protection, this has led to issues of incoherence. Because each arbitral tribunal is only concerned with the dispute as presented by the parties, it decides on the particulars of the dispute without taking into consideration the systemic effects of the decision. As a result, the various arbitral tribunals, dealing with overlapping normative concerns, sometimes lead to differing results.⁹⁷ As an illustrative example, we can consider the scope of freedom given to the State for regulation – the so-called “policy space” under the Fair and Equitable Treatment (“FET”) clause.⁹⁸ On one extreme, there is *TECMED v. Mexico*, where the tribunal found that Mexico had violated the FET clause and thereby followed a very restrictive understanding of policy space.⁹⁹ On the other extreme, we have *Parkerings–Compagniet AS v. Republic of Lithuania*, a case where the tribunal found Lithuania to not have violated the FET clause, sustaining that investors should expect changes to the regulatory environment as new circumstances arise.¹⁰⁰

97. Franck, *supra* note 9, at 1545-46; Hueckel, *supra* note 56, at 611. See generally David Schneiderman, *Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes*, 30 *NW. J. INT'L L. & BUS.* 383 (2010).

98. On policy space see generally Jörg Mayer, *Policy Space: What, for What, and Where?*, 27 *DEV. POL'Y REV.* 373 (2009)

99. *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (May 29, 2003), 19 *ICSID REV.* 158 (2004) [hereinafter *TECMED v. Mexico*]. Tecmed, a Spanish company with two Mexican subsidiaries, brought a claim against Mexico alleging several violations of the Spain-Mexico BIT. These violations concerned Tecmed's investment in a waste landfill acquired in 1996. Tecmed alleged to have lost the landfill in 1998 as a result of the non-renewal, by Mexican authorities, of a license necessary to operate the landfill. Tecmed argued that as a result of this arbitrary and non-substantiated decision of Mexico, the investment was completely lost, as it ceased to represent any economic value as an ongoing business. This, in Tecmed's view, constituted expropriation. See also Caroline Henckels, *The Role of the Standard Review of the Importance of Deference in Investor-State Arbitration*, in *DEFERENCE IN INTERNATIONAL COURTS AND TRIBUNALS: STANDARD OF REVIEW AND MARGIN OF APPRECIATION* 113, 127 (Lukasz Gruszczynski & Wouter Werner eds., 2014).

100. *Parkerings–Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, ¶ 335-36 (Sept. 11, 2007) [hereinafter *Parkerings v. Lithuania*]. *Parkerings-Compagniet AS* was a Norwegian corporation with principal business activity consists in the development and operation of parking facilities. *Parkerings* entered into an agreement with Vilnius Municipality to construct and operate car parks in the city. The city rejected *Parkerings*'s proposed project on the Gedimino site because the project was situated in the Old Town, a culturally protected area designated by the UNESCO. *Parkerings* brought a claim under Norway-

Accordingly, the State has the right to deal with the new contingencies and to alter, if necessary, the regulatory framework.¹⁰¹ Here we observe two comparable cases in terms of facts and how their diverging legal interpretations leads to generally incoherent judgments. The fact that two incompatible interpretations of the same norm can arise follows from the feature that an interpretation can be done in accordance with different underlying principles.¹⁰² While the *TECMED* case was solved according to the principle of protecting investor's rights, *Parkerings-Compagniet AS* was resolved in favor of the principle of state sovereignty. It is argued that such incoherence upsets the expectations of actors and thereby affects the legitimacy of the investment regime.¹⁰³

Next, there are criticisms that highlight certain deficiencies of arbitral tribunal procedures in comparison to how judicial institutions normally operate.¹⁰⁴ These can be viewed as belonging to Franck's category of *symbolic validation*, in particular pedigree. One such criticism centers on the limited options of appealing an award. In a practice that departs from how national judiciaries operate, a decision by an arbitral tribunal is final, except in very particular cases.¹⁰⁵ While initially this feature of international arbitration has been viewed positively, lately it has received substantive criticism. Particularly, critics argue that tribunals may render awards of dubious legality, incorrect in reasoning or application.¹⁰⁶ Especially because arbitral bodies often deal with issues of public law nature, the lack of space for a review of an award, even when it has important consequences for the regulatory space of a state, has come under attack.¹⁰⁷

Lithuania BIT. Parkerings contended that Lithuania violated the fair and equitable treatment standard because, among other failings, Lithuania failed to maintain a stable and predictable legal framework and consequently frustrated Parkerings' legitimate expectations.

101. See Moshe Hirsch, *Between Fair and Equitable Treatment and Stabilization Clause: Stable Legal Environment and Regulatory Change in International Investment Law*, 12 J. WORLD INV. & TRADE 738, 795 (2011).

102. FRANCK, *supra* note 54, at 621.

103. See Brower II, *supra* note 9, at 90. .

104. See generally Gus Van Harten, *Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law*, in INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW (Stephan W Schill ed. 2010).

105. These being: unfair procedure, lack of independence of the arbitrator, and lack of jurisdiction.

106. Elsa Sardihna, *The Impetus for the Creation of an Appellate Mechanism*, 32 ICSID REV. 503, 504 (2017)

107. Van Harten, *supra* note 104, at 631.

Similarly, parts of the literature further criticize how arbitral tribunals are established, in particular the role of arbitrators.¹⁰⁸ Unlike judges in courts, arbitrators are not fixed in their position but only serve for the duration of a dispute. It follows that every time parties go to arbitration, they need to choose *ex novo* the members of the tribunal. This situation has created a “revolving door” where lawyers alternatively act as lawyers and arbitrators.¹⁰⁹ It has been argued that this incentivizes lawyers to favor the enterprises: if lawyers write awards that are favorable to enterprises, those very same enterprises may rely on them afterwards, either as a lawyer or as an arbitrator.¹¹⁰ As a result, arbitrators may write biased decisions which undermine the rule of law, and the regime’s legitimacy.¹¹¹

Additionally, the lack of transparency throughout the proceedings has been criticized.¹¹² The criticism usually takes two forms, related to confidentiality and participation. Arbitration gives ample flexibility to the parties in how to organize the proceedings, not only with regard to the choice of the arbitrators but also with regard to the procedure. One possible way of configuring the procedures is to make the process and award confidential.¹¹³ This has become an issue because there are times when the outcome of the dispute affects third parties outside of the proceedings. This is especially the case when the judgment deals with public law considerations. Further, third parties cannot participate in arbitral proceedings. In particular, within international investment arbitration, only one type of claimant (the investor) can bring claims

108 . Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration’s Engagement of the Public Interest Contributing to the Democratic Deficit?*, 41 *VAND. J. TRANSNAT’L L.* 775, 787 (2008); Hueckel, *supra* note 56, at 612; Choudhury, *supra* note 11, at 498.

109 . *See generally*, Malcom Langford et al., *The Revolving Door in International Investment Arbitration*, 20 *J. INT’L ECON. L.* 301 (2017).

110 . Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 *EURO. J. INT’L L.* 121, 148 (2006).

111 . Van Harten, *supra* note 104, at 657-58.

112 . *See, e.g.*, Julie A. Maupin, *Transparency in International Investment Law: The Good, the Bad, and The Murky*, in *TRANSPARENCY IN INTERNATIONAL LAW* 153-154, 160-162 (Andrea Bianchi & Anne Peters eds., 2013); Nigel Blackaby & Caroline Richard, *Amicus Curiae: A Panacea for Legitimacy in Investment Arbitration*, in *THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY* 253-74 (Michael Waibel et al. eds., 2010); Choudhury, *supra* note 108.

113 . Abdullah Al Faruque, *Mapping the Relationship between Investment Protection and Human Rights*, 11 *J. WORLD INV. & TRADE* 539, 559-60 (2010).

against a state.¹¹⁴ The lack of participation of third parties can become a troubling issue when the dispute affects public law issues that can have repercussions throughout society. Their arguments and views are left out, which can lead to a problematic award since not all possibilities may have been discussed during the arbitration.¹¹⁵ Taken together, these practices have been criticized because of their lack of symbolic validation. More specifically, by departing from widespread practices at the national level, the attributes of the investment tribunals do not “signal its significant part in the overall system of social order.”¹¹⁶

Lastly, the investment regime has been criticized for its lack of *adherence* to certain fundamental values of the international community.¹¹⁷ Some critics argue that the investment regime suffers from a democratic deficit, that it breaches the sovereignty of the state, or that it is ambivalent towards democracy.¹¹⁸ These arguments are based on the fact that the investment regime is not a simple composite of private arbitral bodies dealing with private matters, but that the investment regime has powers that affect the degree to which states can pursue certain policy objectives. Meaning, the investment regime is “a uniquely internationalized arm of the governing apparatus of states, one that employs arbitration to review and control the exercise of public authority.”¹¹⁹ The problem is that, despite the arbitral bodies’ influence on the host state’s ability in regulating public matters, they are not accountable. Even though there are similarities between the functions of investment tribunals and “administrative agencies, certain democratic restraints on administrative agencies do not apply to investment arbitral tribunals.”¹²⁰ There is no review mechanism

114. As Choudhury argues, public intervention has remained more the exception than the rule. See Choudhury, *supra* note 108, at 786-87.

115. See generally Nicolás M Perrone, *The International Investment Regime and Local Populations: Are the Weakest Voices Unheard?*, 7 *TRANSNAT'L LEGAL THEORY* 383-405 (2016). There have been some reforms so third party actors might participate through *amicus curiae*. See generally Eric De Brabandere, *Amicus Curiae (Investment Arbitration)*, Grotius Centre Working Paper Series, no 2018/080-IEL, available at <https://ssrn.com/abstract=3265970> [<https://perma.cc/LYU6-AR75>].

116. See Franck, *supra* note 48, at 34.

117. Brower II, *supra* note 9, at 71.

118. Blackaby & Richard, *supra* note 111, at 253; Kingsbury & Schill, *supra* note 25, at 42; David Schneiderman, *Investing in Democracy - Political Process and International Investment Law*, 60 *U. TORONTO L. J.* 909 (2010).

119. Van Harten, *supra* note 109, at 124.

120. Choudhury, *supra*, note 108, at 787.

controlling or ensuring that the various arbitral bodies act within their delegated authority. As a result, the considerations of the polity of a state may be pushed aside by the private interests of an enterprise. A further way in which the investment regime may violate basic universal principles is related to the precedence given to economic reasons in lieu of other values.¹²¹ The investment regime is viewed to prioritize market rationality over other considerations such as human rights or environmental concerns.¹²² As Choudhry writes, “public interest regulations embody deeply embedded democratic values held by a state’s populace. To give less credence to these values, or to simply ignore them . . . is to establish a hierarchy in which investment values trump non-investment values, no matter what the effect.”¹²³

In summation, the investment regime has been criticized on a variety of fronts. The different criticisms relate to the various elements ascribed to legitimacy, many of those appearing in Franck’s or related legitimacy accounts.

III. THIN AND THICK CONCEPTS: THE CASE OF LEGITIMACY

By now it should be clear that when framing debates in terms of legitimacy, very different ideas are invoked. The sheer diversity of the concept makes it difficult to discern the substance of legitimacy or to find a common core that unites the elements. Moreover, the multidimensionality of the concept allows us to draw different conclusions.¹²⁴

121. Paul Michael Blyschak, *State Consent, Investor Interests and the Future of Investment Arbitration: Reanalyzing the Jurisdiction of Investor-State Tribunals in Hard Cases*, 9 *ASPER REV. INT’L BUS. & TRADE L.* 99, 117 (2009).

122. See, e.g., Moshe Hirsch, *Interactions between Investment and Non-Investment Obligations in International Investment Law*, in *OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW* 180-82 (Peter Muchlinski et al. eds., 2008).

123. Choudhury, *supra* note 108, at 807. A similar line of criticism highlights not only the economic side of investment arbitration but the hegemonic influence of US norms and standards. See Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment-NAFTA’s Investment Protections and the Misguided Quest for an International Regulatory Takings Doctrine*, 78 *N.Y.U. L. REV.* 30, 51 (2003).

124. Rogers Brubaker & Frederick Cooper, *Beyond “Identity”*, 29 *THEORY & SOCIETY* 8 (2000). The authors raise those issues in relation to the concept of identity, but it is suggested here that the same issues afflict legitimacy.

The observation that legitimacy is a highly complex multifaceted concept has made legitimacy an object of concern among prominent international lawyers. David D. Caron notes that the concept is loosely used, and that it is rather “nebulous.”¹²⁵ In particular, he posits that the circumstances under which a particular process is deemed “illegitimate” are hard to ascertain “because they reflect subjective conclusions, perhaps based on unarticulated notions about what is fair and just, or perhaps on a conscious utilitarian assessment of what the process means for oneself.”¹²⁶ The point regarding the imprecise status of legitimacy as a concept is also raised by James Crawford, who criticizes the surge of “legitimacy-speak” with its inherent “fuzziness and indeterminacy.”¹²⁷ Lastly, for Martti Koskenniemi, the indeterminacy of legitimacy “dissimulates a substantive void that blunts legal and political criticism and lets power redescribe itself as authority *on its own terms*.”¹²⁸

Nevertheless, large parts of the literature have adopted the concept enthusiastically. This does not mean that legitimacy is generally used thoughtlessly. Indeed, scholars acknowledge the ambiguity surrounding legitimacy, which sometimes leads them to their own attempt at fixing legitimacy.¹²⁹ This typically entails a redefinition of the concept by determining its scope of reference and a set of criteria according to which legitimacy is judged.¹³⁰ Given such definitions, authors can then pose the “question of whether some practice or institutions accords with” the determined set of criteria.¹³¹ For example, international lawyers evaluate the EU proposal concerning modifications to TTIP’s ISDS in relation to a set of pre-defined standards such as the public law theory of international adjudication, as advocated by Ingo Venzke, whereby any international institution must exercise public authority through democratic means.¹³² Having

125. Caron, *supra* note 46 at 556.

126. *Id.* at 557.

127. James Crawford, *The Problems of Legitimacy-Speak*, 98 PROC. OF THE ANN. MEETING (AM. SOC’Y OF INT’L L.) 271 (2004).

128. Martti Koskenniemi, *Legitimacy, Rights and Ideology: Notes towards a Critique of the New Moral Internationalism*, 7 ASS’NS 349, 367 (2003).

129. See, e.g., Lienau, *supra* note 31, at 151, 153-54; Thomas, *supra* note 12.

130. See, e.g., Brower et al., *supra* note 11, at 418.

131. Mulligan, *supra* note 30, at 351.

132. See, e.g., Ingo Venzke, *Investor-State Dispute Settlement in TTIP from the Perspective of a Public Law Theory of International Adjudication*, 17 J. WORLD INV. & TRADE 374, 376-78 (2016).

identified a legitimacy “deficit” according to a particular definition, one can then find suggestions for how to “improve” the afflicted institutions or norms so as to make them legitimate. For instance, the proposal of an appeals tribunal within investment arbitration aims to remedy possible legitimacy “deficiencies” of the investment regime.¹³³

The implicit idea of fixing legitimacy by settling its content is misguided. Due to the conceptual characteristics of legitimacy, any attempt of delimiting the concept will necessarily fall short of capturing important elements and considerations connected to legitimacy.¹³⁴ To sustain this point, it becomes necessary to explain the analytical distinction between “thin” and “thick” concepts as developed in philosophy of ethics and language.¹³⁵

When philosophers talk of thin concepts, they raise words like *good, bad, right, wrong, pro, con, or justified*. While for exemplifying thick concepts, they mention words like *discreet, cautious, industrious, lewd, honest, brutal, or courageous*.¹³⁶ What differentiates the concepts associated to these words? Although the answer is not always clear, the basic idea is that thin concepts are purely evaluative, whereas thick concepts “hold together” evaluation and description. We will first see the distinction in more detail and then turn our focus back to legitimacy.

Thick concepts are composed of two elements: an evaluative and a descriptive one.¹³⁷ When someone says that Susan is courageous, one not only states that Susan has the strength and endurance to confront something – the descriptive part, but there is also a certain kind of

133. See, e.g., Afilalo, *supra* note 9, at 82.

134. Furthermore, even if we were able to stabilize legitimacy’s meaning, the outcome will be a concept so extensive that it cannot bear any explanatory role as anything can fall under legitimacy, see Mulligan, *supra* note 30, at 353.

135. See BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* 140-41 (1985). The distinction between both concepts is generally attributed to Bernard Williams, who coined the term “thick concept.” *Id.* Likewise discussions on thick and thin concepts are not only restricted within ethics but it also shows up in aesthetics and epistemology.

136. PEKKA VÄYRYNEN, *THE LEWD, THE RUDE AND THE NASTY: A STUDY OF THICK CONCEPTS IN ETHICS* 1 (2013); Michael Smith, *On the Nature and Significance of the Distinction between Thick and Thin Ethical Concepts*, in *THICK CONCEPTS* 97 (Simon Kirchin ed., 2013); Matti Eklund, *What Are Thick Concepts?*, 41 *CANADIAN J. PHIL.* 1, 1 (2011).

137. Allan Gibbard & Simon Blackburn, *Morality and Thick Concepts*, 66 *PROCEEDINGS OF THE ARISTOTELIAN SOCIETY SUPPLEMENTARY VOLUMES* 267, 273 (1992); VÄYRYNEN, *supra* note 136, at 36. The exact relationship between the evaluative and the descriptive has been a contentious matter in the philosophical literature. However, for the purposes of the article, it is irrelevant how to demarcate the relationship.

appraisal – the evaluative part. The evaluative statement does not necessarily have to be positive. For example, to posit that someone is lewd not only provides a certain description of the person, but also incorporates a negative evaluation. Hence, thick concepts allow us to “get purchase on people, actions, and things that we encounter, and which become understandable and categorizable to us because of how we describe them.”¹³⁸

International law is full of thick concepts. For instance, *coercion*. Article 52 of the Vienna Convention of the Law of Treaties establishes that a treaty is void if its conclusion has been procured by threat or the use of force.¹³⁹ The notion of coercion has a descriptive part, which is the use of threats or sanctions to induce an action. At the same time, coercion conveys a negative evaluation of actions that comprise the use of force. Closer to international investment law, take the case of FET. According to a recent UNCTAD report on FET, the concept has been interpreted as to cover a state’s obligation to act consistently, transparently, reasonably, without ambiguity, arbitrariness or discrimination, in an even-handed manner, to ensure due process in decision-making and respect investors’ legitimate expectations.¹⁴⁰ Thus, the concept has a descriptive part. It helps us in understanding certain characteristics about the State, as well as an evaluative component, in this case we have a clear positive connotation.

Also thin concepts are evaluative but, in contrast to thick concepts, they do not “have much or any descriptive conceptual content: we get little if any sense of what the object is like beyond the fact that the user of the concept likes (or dislikes) it, thinks others should do the same, and so on.”¹⁴¹ As Thomas M. Scanlon writes, the most relevant characteristic of a thin concept “lies first and foremost in the abstractness, hence relative emptiness, of the ethical ideas that they

138. Simon Kirchin, *Introduction: Thick and Thin Concepts*, in THICK CONCEPTS 3 (Simon Kirchin ed., 2013).

139. Vienna Convention on the Law of Treaties art. 52, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (“A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations”).

140. U.N. CONFERENCE ON TRADE AND DEVELOPMENT, FAIR AND EQUITABLE TREATMENT: UNCTAD SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS II xiii (2011).

141. Kirchin, *supra* note 138, at 2.

involve.”¹⁴² Thin concepts can only get their purchase in connection with other concepts, normally thicker,¹⁴³ but what those concepts are is left unspecified.¹⁴⁴ As Daniel Y Elstein and Thomas Hurka state,

[t]he mark of a thin concept like “right” is that it says nothing about what other properties an item falling under it has . . . [W]hile the claim “x is right” says or implies that x has *some* right-making properties, it says nothing about what in particular they are.¹⁴⁵

Therefore, the crucial difference between thin and thick concepts lies in the “emptiness” of thin concepts. Specifically, while thick concepts are constrained by their descriptive content, thin concepts are not. They “do not carry with them any necessary ontological commitments and are not confined to a particular practice.”¹⁴⁶ Take the example between “caring”—a thick concept—and “good”—a thin concept. For example, when we say that Mary is a caring person, we are referring to a specific way of acting. We could also say that Mary is a good person but, while being a caring person connotes a particular form of behavior, being a good person has no similar constraints. To say that Mary is good would require further clarification since good could mean many things, including to be caring.¹⁴⁷

This Article contends that legitimacy is a thin concept, while the literature overwhelmingly treats it as a thick one. As mentioned above, a typical mode of proceeding is to argue that legitimacy involves “such and such” to then evaluate the institution or norm of interest based on the specified criteria.¹⁴⁸ Thus, by implicitly assuming that legitimacy involves both evaluation and description, legitimacy is widely deployed as a thick concept. This understanding of legitimacy appears explicitly in Franck’s account. He sustains that there is a hypothetical possibility of determining legitimacy by “identifying” non-coercive factors that create adherence to international law.¹⁴⁹ At the same time, he treats those factors as the normative substance of legitimacy, which

142. Thomas M. Scanlon, *Thickness and Theory*, 100 J. PHIL., 275, 276-77 (2003).

143. See, e.g., ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* 98 (1995).

144. Smith, *supra* note 136, at 117.

145. Daniel Y. Elstein & Thomas Hurka, *From Thick to Thin: Two Moral Reduction Plans*, 39 CANADIAN J. PHIL. 515, 516 (2009).

146. JOHN G. GUNNELL, *POLITICAL THEORY AND SOCIAL SCIENCE: CUTTING AGAINST THE GRAIN* 139-40 (2011).

147. Kirchin, *supra* note 138, at 1-2.

148. GUNNELL, *supra* note 146, at 139.

149. FRANCK, *supra* note 12, at 22.

in turn allows for an identification of international legal norms that fall short of these criteria.¹⁵⁰ The investment regime literature closely follows this template. Take Brower *et al*'s analysis. They argue that arbitral tribunals like NAFTA may enter into a crisis of legitimacy on the basis of comparing the arbitral tribunals with national judiciaries. The line of reasoning is to descriptively connect legitimacy with the characteristics that one might infer by observing national judiciaries and to then make an evaluation of international arbitration based on those descriptive elements.¹⁵¹

It is precisely the way in which legitimacy appears in the literature that shows the hallmark of a thin concept. To start with, legitimacy is regularly invoked together with other concepts like transparency, accountability, sovereignty, independence, fairness, or efficiency to gain some purchase. Furthermore, among the different accounts, there is “no sharp distinction between the combinations of conditions that are, and those that are not, necessary or sufficient for its application.”¹⁵² It is not surprising then to find accounts according to which sovereignty is opposed to legitimacy and others whereby sovereignty is part of legitimacy.¹⁵³ In general, the claim that “x is legitimate” does not tell us much about the properties or characteristics of x, apart from the fact that we approve of x or think that x should be approved of. As a result, there seems to be no conceptual limits on what the properties of x could be.

To press the point somewhat dramatically, when discussing international regimes and their power, it is normally believed that the only legitimate mode of governance is that of democracy.¹⁵⁴ However, one could equally argue that the only legitimate mode of governance is epistocracy, for instance.¹⁵⁵ There is nothing conceptually wrong with such statement. The general upshot is that “[t]here is no single right

150. *Id.* at 20-23.

151. Brower *et al.*, *supra* note 11, at 418ff.

152. Heather D. Battaly, *Thin Concepts to the Rescue: Thinning the Concepts of Epistemic Justification and Intellectual Virtue*, in *VIRTUE EPISTEMOLOGY: ESSAYS ON EPISTEMIC VIRTUE AND RESPONSIBILITY* 98, 104 (Abrol Fairweather & Linda Trinkaus Zagzebski eds., 2001).

153. See Julia Hueckel, *supra* note 56, at 610-13; Choudhury, *supra* note 108, at 778 (although therein he does not directly associate the curtailment of the state's democratic expression (which is part of its sovereignty), it follows from the remainder of the discussion in which he discusses how to make investment more legitimate, that is, by respecting or extending the democratic processes of the state outwards).

154. See Bodansky, *supra* note 12, at 599.

155. See generally JASON BRENNAN, *AGAINST DEMOCRACY* (2016).

way to fill [legitimacy] in, it will be misguided” to determine which the *real* legitimacy is.¹⁵⁶

IV. LEGITIMACY'S LIMITS

If legitimacy is a thin concept, this affects its explanatory power and by extension the appeal of the concept within the literature. The first and clearest consequence is that any attempt to pin down the substance of the concept—to determine what legitimacy *really* is—will irremediably fail. Following this argument, the implicit assumption that legitimacy has a certain “discreet quality that can be observed” is flawed.¹⁵⁷ There are no rational grounds on which one can sustain that a particular account is correct or better than others. Evidently, accounts based on different assumptions can lead to different conclusions when applied to a particular question. In fact, it is not difficult to find two accounts of legitimacy, based on different sets of criteria, making opposite predictions with regard to the legitimacy of a certain institution or rule. Take, for instance, the long-lasting debate on whether foreign investors should be treated according to the international minimum standard, or be treated the same as any national of the host state. Those pushing for the international minimum standard relied on the idea of the existence of a minimum of justice and equity that states had to follow if their laws were not up to those standards. Because states were part of the international legal order, they were bound by certain obligations. In particular, the argument was grounded on state responsibility, which provided protection against injury to both aliens and alien property. Those advocating investors being treated as equal as the nationals of the host state, based their arguments on the premises of sovereign and sovereign equality. Hence, investors could only enjoy the same rights as those enjoyed by the nationals of the host state, no more, no less.¹⁵⁸ Accordingly, legitimacy’s thinness makes an identification of legitimate versus non-legitimate norms, actions or institutions difficult at best, arbitrary at worst.

A plausible objection against this claim might be that, even if legitimacy is a thin concept and as such “empty” of substance, this does not necessarily mean that its scope is boundless. What can be

156. Battaly, *supra* note 152, at 105.

157. Mulligan, *supra* note 30, at 353.

158. *See* Subedi, *supra* note 63, at 8-11.

considered legitimate will depend on particular practices and will be based on recognized, shared criteria.¹⁵⁹ Meaning, “[i]f we know the other evaluations that someone who asserts this claim has made, we may be able to guess what [legitimacy-making] properties he has in mind now; if we know the general evaluative practices of his culture.”¹⁶⁰

At first glance, this response seems to be compelling. By observing the social practices of a particular society, we can identify which criteria are treated as belonging to legitimacy. In Heather D. Battaly’s (slightly counter-intuitive) terminology this would make legitimacy a *maximally thin concept*, whereby “fluent speakers will have enumerated several seemingly relevant conditions of its application, but will not have agreed on any combination of them (short of the whole) that is sufficient or necessary for its application.”¹⁶¹ Accordingly, legitimacy would be whatever a community, group, or society decide it to be. In principle, this is an intuitive way to solve the conundrum. However, as we will see next, it is easier said than done.

The first step in identifying the elements constituting legitimacy would be to figure out who the fluent speakers are. Let us think of the investment regime, our main object of study. In light of the wide impact of the investment regime on various individuals, societies, etc., it is difficult to find sufficient grounds on which to eliminate certain groups in determining the substance of legitimacy within a certain society. In particular, since the investment regime plays an important role in the States’ ability to regulate different issues, whoever is affected by the regulatory framework of the State needs to be accounted for.¹⁶² In light of this, excluding specific groups may have unintended consequences. For example, suppose we argue that only international lawyers are the

159. Kratochwil, *supra* note 88, at 305 (although he talks of ‘use’, it is the same as practice). Philip Pettit makes a similar claim but he focuses on domination instead of legitimacy. See PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 57 (1997).

160. Elstein & Hurka, *supra* note 145, at 516. Within international investment law, this argument is put by Brower II, drawing explicitly on Franck, see Brower II, *supra* note 9, at 53-57.

161. Battaly, *supra* note 152, at 105.

162. The idea of those affected recalls Jürgen Habermas’s discourse ethics, or (D) principle, whereby a norm can only be valid when it could meet the approval of all affected by the norm, see JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* (1992). For a similar understanding within International Relations, see generally Christian Reus-Smit, *International Crises of Legitimacy*, 44 INT’L. POL. 157 (2007).

fluent speakers. Under this restriction, any conception of legitimacy would end up representing the particular preferences and biases of international lawyers,¹⁶³ making it hardly representative. This should illustrate that the problem of demarcation is dauntingly complex, especially in an intricate area such as the investment regime. And, if what constitutes legitimacy is already contested within states, the situation becomes exponentially more complicated once we move towards the international domain.¹⁶⁴

The problems do not stop here. Let us assume there is agreement on the relevant fluent speakers. The next step would be to survey them so as to find out the shared criteria and practices. There are various ways of doing so: reviewing the literature, interviewing practitioners, reading judgments, etc. Either exercise would present us with a list of elements associated to legitimacy. Now, do we accept them all? Those only accepted by the majority? What type of majority? These are difficult questions, which highlight that the decision on what falls in and out of legitimacy is far from straightforward. More importantly, even if we were to settle on a number of shared criteria by identifying “several seemingly relevant conditions of . . . application,” the emerging list might be incoherent, in tension, or in contradiction, leaving the ambiguity afflicting legitimacy unsolved.

Finally, the typical criteria linked to legitimacy such as democracy, legality, accountability, and so forth, are complex and varied concepts themselves and are thus subject to similar concerns—if to a lesser extent—as the ones outlined above. The fact that everyone might share democracy as a value does not automatically entail that there is substantive agreement on the matter. In fact, what constitutes a democracy is often subject to significant contestation.¹⁶⁵ Hence, the argument that the investment regime is illegitimate because it is

163. In fact, it is contested from neighbouring disciplines the importance of law in legitimacy. See discussion in Jose E. Alvarez, *The Quest for Legitimacy: An Examination of the Power of Legitimacy among Nations* by Thomas M. Franck, 24 N.Y.U. J. INT'L L. & POL'Y 199, 227 (1991).

164. See TERRY NARDIN, *LAW, MORALITY, AND THE RELATIONS OF STATES* (1983).

165. I take this insight from Raymond Geuss. Instead of democracy, he discusses the example of a society where it is accepted that society is naturally hierarchical with a king at the head, and that there should be an established church. He argues that the existence of that belief is perfectly “compatible with disagreement about who is to be king, what the king’s specific powers are, and how the king is to be related to the established church,” Geuss, *supra* note 81, at 6.

“undemocratic” is sustained on not so uncontroversial premises. Taken together, even though the idea of reducing legitimacy to a set of shared practices within a given society might seem reasonable, there are many conceptual and practical hurdles that substantially diminish its relevance.

Legitimacy’s thinness equally undermines its explanatory power. The issue is a methodological one; it concerns the causal relationship between legitimacy and the stability of institutions and norms. Surprisingly, this question is rarely discussed explicitly in the literature. The working assumption is that legitimacy is critical to institutions and norms.¹⁶⁶ Luckily, Franck tackles the question in more detail, so his discussion will serve us to point out some of the problems with regard to legitimacy’s explanatory role.

Franck acknowledges that legitimacy is a broad concept, in particular that the use of legitimacy refers to “many integral factors, which are related but different and which must be investigated by reference to different social data.”¹⁶⁷ He also recognizes that his proposed criteria for legitimacy are not in themselves sufficient for providing a full account of why nations obey international rules. “How rules are made,” Franck writes, “interpreted, and applied is part of a dynamic, expansive, and complex set of social phenomena.”¹⁶⁸ Additionally, he sustains that legitimacy is not an on/off property of rules. More precisely, for him, “legitimacy is not merely a matter of assembling readily available ingredients and mixing them in the right proportions.”¹⁶⁹ Instead, he argues that there is high variability in levels of legitimacy and that the degree to which an international rule produces compliance depends on how much the relevant properties appear in the particular rule.¹⁷⁰ In sum, legitimacy is a matter of degree whereby the “degree correlates with an “X” factor or factors which inhere in the rule or rule-making institution itself.”¹⁷¹

166. See e.g., Brower II, *supra* note 9, at 51; Franck, *supra* note 9, at 1584. Someone like Bodansky go as far as saying that it might be impossible to determine the influence of legitimacy. See Bodansky, *supra* note 12.

167. Franck, *supra* note 12, at 18.

168. *Id.* at 49. Thus, he adds that justice is also an important property. What is left unclear is the particular relationship between justice and legitimacy. Franck only adds that it is a complex relationship, but never delves further on the matter.

169. *Id.* at 25.

170. *Id.* at 41-49.

171. *Id.* at 48.

This intuition is plausible and it seems to be shared by wide parts of the literature. However, as Brian Barry argues, “[t]here is . . . a great distance between an intuitive feeling that many things affect many others and a serious attempt to estimate *how much* part a given factor plays in the processes.”¹⁷² This concern should not be dismissed as a mere methodological problem, as Franck’s writings seem to suggest. Without a way of assessing how much the various legitimacy factors affect the stability of a norm or institution, the actual relevance of legitimacy remains elusive. Importantly, despite Franck’s pre-emptive warnings that legitimacy cannot be achieved by finding the right mix of ingredients, his account seems to suggest otherwise. In particular, Franck is committed to a view of legitimacy whereby each component of legitimacy affects the institution or norm and some components are more important than others.¹⁷³ That is to say, there is an underlying commitment to measurement and estimation. This is where the acknowledgment that legitimacy is a thin concept, and therefore does not have a determinable core, becomes crucial. For any estimation, a minimum knowledge of the set of explanatory variables is crucial. Adding or leaving away possible components will typically not only affect the estimation of the importance of other components comprising legitimacy, but also the overall assessment of the effect of legitimacy on stability. The literature is largely silent on the question of how one could undertake such analysis in practice.¹⁷⁴ Although the lack of an estimation of the effects of legitimacy does not necessarily imply that one has to deny the presence of legitimacy or its effects,¹⁷⁵ without any actual possibility of a valid assessment we are ultimately confronted with a very convenient theory that can justify any outcome *ex-post*.¹⁷⁶

In summation, the thinness of the concept undermines the causal connection between legitimacy and the stability of an institution. The

172. BRIAN BARRY, *SOCIOLOGISTS, ECONOMISTS, AND DEMOCRACY* 95 (1978).

173. He expressly talks of legitimacy being “measurable by a multi-dimensional formula.” Franck, *supra* note 12, at 44.

174. See, e.g., Franck, *supra* note 9; Kingsbury & Schill, *supra* note 24.

175. Cf. Geoffrey Sayre-McCord, *Normative Explanations*, 6 *PHIL. PERSPECTIVES* 55, 67 (1992). For a similar take see Hurrell, *supra* note 86, at 17.

176. Although Barry’s remark on the lack of estimation within the social sciences was written in 1978, the situation has not changed much since then. In a recent article on legitimacy, Xavier Marquez has noticed how the recent social sciences literature on legitimacy still struggles in identifying the ‘influence’ of the concept, see Xavier Marquez, *The Irrelevance of Legitimacy*, 64 *POLITICAL STUDIES*, 20, 22-23 (2016).

alleged link is predicated on the assumption that it is possible to circumscribe legitimacy, since only by determining legitimacy beforehand, an analysis of the relationship between the stability of an institution and legitimacy can be envisaged.¹⁷⁷ However, if legitimacy cannot be constrained or if what falls under legitimacy is immensely extensive, it cannot fulfill its explanatory role in how to discriminate stable systems from instable ones. The upshot is that legitimacy ends up being an *ad hoc* fallacy wherein any change in any institution or norm can be attributed to legitimacy or the lack thereof.¹⁷⁸ In more drastic words, if legitimacy explains everything, then it explains nothing.¹⁷⁹

V. LEGITIMACY AS BOUNDED ACTION

There are two reasons which help to understand the enduring power of legitimacy.¹⁸⁰ First, the quest for legitimacy is not only a quest for normative desirability, but also for order. International lawyers tend to value the idea of order as it is associated with predictability. For instance, an element of the rule of law frequently

177. See Franck, *supra* note 12, at 48.

178. Thus, it is usual to see the formulation that the legitimacy of an institution is based on such and such except when it is not. Within the literature, we see this type of argument in Brower II's account. Brower II argues that the legitimacy of international institutions depends on predictability, conformity with historical practices, and the inclusion of fundamental values shared by the members of the governed community. From the text it is not clear how important each of the various elements is. However, after having presented those elements, he goes on to argue in any case international institutions might become legitimate by only acting predictably, without the need of conformity with historical practices or inclusion of fundamental shared values. Or international institutions might achieve legitimacy only with pedigree, without the need of incorporating fundamental values, Brower et al., *supra* note 11, at 57-58. Lienau's account operates similarly. She also presents various elements that belong to legitimacy but it is not clear from her account how important each of the elements is. At the end of her account she discusses consistency as a criterion for legitimacy. However, she then emphasizes that consistency should not be taken as part of legitimacy, especially when in connection with a problematic mechanism. Accordingly, she argues that consistency might be a secondary standard in the context of her article – sovereign debt restructuring. Thus, Lienau structures the argument similarly to that of Brower II, whereby consistency is relevant for legitimacy except when it is not, see Lienau, *supra* note 31, at 170-171. On the general idea of 'it applies when it applies' see Stephen Turner, *Where Explanation Ends: Understanding as the Place the Spade Turns in the Social Sciences*, 44 *STUD. IN HIST. & PHIL. SCI.* 532, 536 (2013).

179. For the view that perhaps legitimacy is always present, see RODNEY S. BARKER, *LEGITIMATING IDENTITIES: THE SELF-PRESENTATIONS OF RULERS AND SUBJECTS* (2001).

180. For the title of this Part, I take it from Patrick Thaddeus Jackson, *Rethinking Weber: Towards a Non-Individualist of World Politics*, 12 *INT'L REV. SOC.* 439, 456 (2002).

highlighted as beneficial is predictability.¹⁸¹ The positive stance towards predictability is part of what Judith Shklar dubbed “legalism,” a particular ethical attitude common among lawyers. Legalism comprises four interrelated elements:¹⁸² (a) moral conduct and relationships established in terms of rights and duties as determined by more general rules; (b) a view of law as something “out there,” separate from society, something that can be grasped through legal training and education; (c) the possibility of separating law from morality or politics; and (d) the fear of arbitrariness. It is the last element from which we can explain part of the attraction to legitimacy. If legitimacy fosters order—and hence predictability—arbitrariness disappears.¹⁸³ If the investment regime tackles its crisis of legitimacy, or so it is argued, the regime becomes stable and arbitrariness no longer is a concern.¹⁸⁴

A related, yet more subtle, contributing factor for legitimacy’s pull can be attributed to its normative connotation.¹⁸⁵ Legitimacy brings with itself a specific “attitude.”¹⁸⁶ To assert that an institution or norm is legitimate signals something about its authoritativeness; the implicit claim states that the institution or norm is worthy of our approval and of our obedience – or the opposite.¹⁸⁷ As Hanna Pitkin writes, it is built into the grammar of English that “a legitimate authority is such that one ought to consent.”¹⁸⁸ Thus, the argument that particular arbitral tribunals need to be accountable suggests that there is something defective about the way these arbitral tribunals work and, as a consequence, that they are not worthy of our compliance. This

181. See, e.g., Brower II, *supra* note 9, at 52. Within legal theory one famous exponent is Lon L. Fuller’s account of law in *The Morality of Law*. The whole account regarding the internal morality of law and the eight minimal conditions refers to predictability and consistency in one way or another, see generally LON L. FULLER, *THE MORALITY OF LAW* (Revised ed. 1977).

182. The four elements are taken from Shklar’s account of legalism in JUDITH N SHKLAR, *LEGALISM: LAW, MORALS, AND POLITICAL TRIALS* 1-28 (1986 [1964]). For its widespread acceptance within international law see Wouter Werner, *International Law: Between Legalism and Securitization*, in *SECURITY: DIALOGUE ACROSS DISCIPLINES* (Philippe Bourbeau ed. 2015).

183. See, e.g., FRANCK, *supra* note 54, at 25.

184. See, e.g., Brower II, *supra* note 9, at 52.

185. See generally, FRANCK, *supra* note 12.

186. I take the notion of ‘attitude’ from Quentin Skinner, see Quentin Skinner, *Language and Social Change*, in *MEANING AND CONTEXT: QUENTIN SKINNER AND HIS CRITICS* (James Tully ed., 1988). See also Mulligan, *supra* note 30, at 368.

187. HANNA F. PITKIN, *WITTGENSTEIN AND JUSTICE: ON THE SIGNIFICANCE OF LUDWIG WITTGENSTEIN FOR SOCIAL AND POLITICAL THOUGHT* 280 (1972).

188. Hanna Pitkin, *Obligation and Consent—II*, 60 *AM. POL. SCI. REV.* 39, 44 (1966).

signaling function cannot be detached from legitimacy even when we discuss it descriptively. In sum, what a legitimacy statement concerning a particular practice entails is not so much a claim of knowledge as it is a claim of judgment.¹⁸⁹

By the conjunction of both factors the literature, not only on the investment regime but on international law more generally, has been captivated by the concept. However, as George Orwell wrote sixty years ago, “[t]he worst thing one can do with words is surrender to them.” If language is to be “an instrument for expressing and not for concealing or preventing thought” one should “let the meaning choose the word and not the other way about.”¹⁹⁰ As much as legitimacy might be alluring, this Article advocates for the need for a fundamental revision of the concept. This does not necessarily entail eliminating legitimacy from our legal and political vocabulary altogether. Indeed, abandoning legitimacy may impoverish our way of thinking, especially in light of legitimacy’s rich history and centrality in our legal and political life.¹⁹¹ This Article instead demands a reappraisal of legitimacy, one that takes into consideration the thinness of the concept. In what follows, this Article sketches an alternative understanding of legitimacy, which avoids some of the pitfalls encountered in the literature and which may help us in confronting the transformations of international law and the investment regime.¹⁹²

The literature on legitimacy and international law gives us some initial resources from which the concept can be reconstructed. A first hint can be found in the writings of Daniel Bodansky on the legitimacy of international governance. He posits that “[w]e call a regime ‘legitimate’ in order to persuade people (or states) to accept it, and we criticize it as ‘illegitimate’ in the hope of undermining its authority.”¹⁹³ A similar intonation appears in Koskenniemi’s analysis of legitimacy. He belongs to those scholars that have met legitimacy with a more critical view. In particular, Koskenniemi criticizes that the language of legitimacy is used instrumentally: once the language of legitimacy is

189. Mulligan, *supra* note 30, at 368.

190. George Orwell, *Politics and the English Language*, in *ESSAYS* 444-45, (1946).

191. See Mulligan, *supra* note 30, at 356.

192. As it is implied from the text, there are other ways in which legitimacy can be used. One would be to “return” to the approach taken by political philosophers and to simply normatively evaluate institutions and to see whether they are legitimate, but without taken into consideration the issue of order in explanatory terms.

193. Bodansky, *supra* note 12, at 601.

deployed, “[t]he normative framework is in place. The action has been decided. The only remaining issue is how to reach the target with minimal cost and delay.”¹⁹⁴ These comments put the focus on how legitimacy is *used* rather than on what legitimacy’s content may be. Hence, the might of legitimacy seems not to come so much from its explanatory power as from its *justificatory force*,¹⁹⁵ from how legitimacy claims are deployed to pursue certain courses of action. Put differently, when we talk about legitimacy, we should focus on how the language of legitimacy is used to understand “how the limits of acceptability are drawn.”¹⁹⁶

The concept of justificatory force should not be regarded as the possibility of reaching rational agreement through justification,¹⁹⁷ but rather as highlighting the role of contestation and permanent disagreement. This Article advocates viewing the language of legitimacy through the lens of contestation instead of consensus. This entails the acknowledgment that actors will not only have explicit disagreements but that they “will have a motivation [to] exploit existing conflicts or ambiguities in shared beliefs and values.”¹⁹⁸

This understanding of legitimacy is consistent with Bodansky’s and Koskenniemi’s remarks on the contestedness of legitimacy. Legitimacy needs to be understood as a “tool in struggles,” connected to certain values, principles, or morals.¹⁹⁹ Thus, legitimacy does not represent so much a statement “about the world than [a] . . . weapon of debate.”²⁰⁰ By implication, the relevance of legitimacy does not lie in legitimacy’s “real” content, whose discovery supposedly tells us about the source of order, but in how it is deployed within particular contexts as part of a continuous struggle in favor of a particular outcome or new institutional and normative re-arrangement. As a result, we are

194. Martti Koskenniemi, *Formalism, Fragmentation, Freedom: Kantian Themes In Today’s International Law*, 4 *NO FOUNDATIONS* 7, 16 (2007).

195. Geoffrey Sayre-McCord, *Moral Theory and Explanatory Impotence*, 12 *MIDWEST STUD. PHIL.* 433 (1988).

196. PATRICK THADDEUS JACKSON, *CIVILIZING THE ENEMY: GERMAN RECONSTRUCTION AND THE INVENTION OF THE WEST* 24-25 (2006).

197. The idea of reaching rational agreement is most famously linked with Jürgen Habermas, but this is a widespread sentiment in both political philosophy and on international law. See e.g., HABERMAS, *supra* note 162.

198. GEUSS, *supra* note 81, at 5-6.

199. Mulligan, *supra* note 30, at 373.

200. Quentin Skinner, *Rhetoric and Conceptual Change*, 3 *REDESCRIPTIONS: POL. THOUGHT, CONCEPTUAL HIST. & FEMINIST THEORY* 60, 62 (1999).

confronted with different and sometimes non-compatible “legitimacies.”²⁰¹ In fact, any dispute cannot seek to simply secure legitimacy, but seeks to secure one legitimacy over another. The game of legitimacy is a bit like “tag,” where “it” passes from one player to another: the game is on so long as “it” remains in operation.²⁰²

Under this reading, legitimacy becomes “a matter of shaping action indirectly by changing the contours of the social environment into and out of which action arises.”²⁰³ The different sets of claims and justifications are thus centered on circumscribing “action to a certain conceptual region and thereby helping to ensure that actual behaviour remains more or less within a certain range variation.”²⁰⁴ Put differently, the deployment of legitimacy is concerned with “*bounding actions*”: it is an activity that contingently determines “the boundaries of acceptable action, making it possible for certain policies to be enacted.”²⁰⁵

To establish, sustain, or modify the boundaries of actions, one needs to make claims and justifications. Legitimacy can thus be viewed as part of “vocabularies of motive.”²⁰⁶ The motives that justify or criticize a given action link that action to certain situations and thereby “integrate one man’s action with another’s, and line up conduct with norms.”²⁰⁷ Intimately related to such vocabulary of motive are public justificatory claims, regarded as public encounters which we use to defend or condemn certain actions. Legitimacy claims, as part of more general public justificatory claims, are then rhetorical arguments that rely on cultural or social resources and that are destined to enable or curtail particular actions.²⁰⁸ They are directed at “gaining adherence to an alternative in a situation in which no logically compelling solution is possible but a choice cannot be avoided.”²⁰⁹ Such rhetorical

201. GEUSS, *supra* note 81, at 5.

202. Mulligan, *supra* note 30, at 369.

203. Jackson, *supra* note 180, at 452.

204. *Id.* at 449, 453.

205. JACKSON, *supra* note 196.

206. C. Wright Mills, *Situated Actions and Vocabularies of Motive*, 5 AM. SOC. REV. 905 (1940).

207. *Id.* at 905, 908.

208. JUTTA WELDES, *CONSTRUCTING NATIONAL INTERESTS: THE UNITED STATES AND THE CUBAN MISSILE CRISIS* 117-118 (1999).

209. FRIEDRICH V. KRATOCHWIL, *RULES, NORMS, AND DECISIONS: ON THE CONDITIONS OF PRACTICAL AND LEGAL REASONING IN INTERNATIONAL RELATIONS AND DOMESTIC AFFAIRS* 210 (1989).

arguments take as resources the discourses “already in circulation and link them to particular policies, legitimating those policies and attributing them as actions to some particular actor.”²¹⁰ The purpose is to “naturalize” some “existing social arrangements” so they come “to seem obvious and self-evident, as if they were natural phenomena belonging to a world ‘out there.’”²¹¹

Such an alternative approach to legitimacy provides a more consistent view of the debate within international law, and the investment regime in particular. The different appeals concerning the investment regime belong to a conceptual discourse wherein actors attempt to pursue one course of action over another. The basic tension at the core of international investment law, the tension between the protection of foreign investors and the sovereignty of the states in determining their own policies, gives rise to different ways legitimacy claims can be framed—and none of them is superior to the other from a justificatory point of view. Actors then use the various resources—events, cases, jurisprudence, etc.—at their reach to push their agenda. This extends to the different criticisms presented earlier. Those that think the investment regime is simply suffering from “growing pains” frame legitimacy in a way that leads us to conclude that criticisms against the regime can be overcome. While, those that oppose the investment regime pursue legitimacy arguments that call for more radical conclusions.

Furthermore, the resources on which legitimacy claims are built do not in themselves determine any specific course of action, and thus do not enable predicting in advance which course of action will prevail.²¹² This is not to say that discourses can be stretched indefinitely. There exist limits, however weak, within which arguments can be deployed and resources can be strained. Depending on the setting, there are distinctive “starting-points” from which arguments can be established. These “starting-points” are located within a “substantive set of common understandings that provide for the crucial connections within the structure of the argument.”²¹³ A legitimacy

210. JACKSON, *supra* note 196.

211. SUSAN MARKS, *THE RIDDLE OF ALL CONSTITUTIONS: INTERNATIONAL LAW, DEMOCRACY, AND THE CRITIQUE OF IDEOLOGY* 22 (2003).

212. JACKSON, *supra* note 196; Barry Barnes, *Thomas Kuhn and the Problem of Social Order in Science*, in THOMAS KUHN 128 (Thomas Nickles ed., 2003).

213. KRATOCHWIL, *supra* note 209, at 219.

claim should therefore be viewed as a way of creating and reacting to the world at the same time.²¹⁴

To illustrate this within the debate about the legitimacy of the investment regime, consider the issue of the “policy space” of states, that is, what actions states can pursue domestically. As previously mentioned, a controversially discussed topic is the role arbitrators in investment tribunals play regarding the balance between the rights of investors, and the ability of states to pursue high-stake policy objectives. The issue is highly complex and fiercely contested. This Article’s interest does not lie in the veracity of any of the discussed arguments, but rather in the narrative that is constructed to delimit or expand the workings of the investment regime.

Regarding the role of arbitrators in the system, it is useful to examine the account of Gus van Harten, one of the foremost critics of the investment regime. First and foremost, his criticism is based on how arbitrators are appointed. He argues that, since arbitrators have an interest in being reappointed, the current system of appointment entails that arbitrators are not independent, leading to a bias in favor of business interests.²¹⁵ According to Van Harten, the upshot is that the states’ ability to pursue their own policies is severely circumscribed. To support this argument, Van Harten conducts a thorough analysis of the investment jurisprudence, wherein he finds that even in situations where arbitrators could have shown more restraint towards a state’s freedom of action, they often did not. He concludes that the investment regime has created “a shift in priorities towards the interests of foreign owners of assets and away from those of other actors whose direct representation and participation is limited to other processes and institutions.”²¹⁶ Van Harten concludes that the current *status quo* of how arbitrators institutionally operate needs to change.²¹⁷ Only then will the system be “well-suited to determining [sic] the decision-making role of legislatures, governments, and courts and, by extension, the content and structure of sovereign authority.”²¹⁸

214. JACKSON, *supra* note 196.

215. VAN HARTEN, *supra* note 104, at 643–48.

216. GUS VAN HARTEN, SOVEREIGN CHOICES AND SOVEREIGN CONSTRAINTS: JUDICIAL RESTRAINT IN INVESTMENT TREATY ARBITRATION 164 (2013).

217. VAN HARTEN, *supra* note 7; VAN HARTEN, *supra* note 104; VAN HARTEN, *supra* note 216, at 164.

218. VAN HARTEN, *supra* note 216, at 18.

Let us take a step back and observe how Van Harten constructs his argument in light of the different resources at his disposal. The starting point is to be found in the jurisprudence of the various arbitral tribunals—the legal materials that allow the author to present a particular narrative. These resources are connected to particular discourses within the legitimacy debate – in our case independence and sovereign authority. Within these conceptual discourses, Van Harten argues how we should interpret the findings. In particular, he draws from the existing discussion to associate the lack of independence and sovereign authority to illegitimacy and concomitantly instability of the system as it stands. His interpretation of what independence or sovereign authority should be, implicitly or explicitly, contrasts with what he views the current investment regime to be. What follows then is that the system needs to be restrained or modified, which in turns signifies changing the boundaries of what can be done within the investment regime.²¹⁹ Meaning, through the legitimacy discourse, Van Harten aims at creating a particular view of the world so as to alter the existing normative boundaries of the investment regime.

This Article's approach to legitimacy can be easily reconciled with legitimacy as a thin concept. By treating legitimacy as means of opening or foreclosing certain courses of actions, the account is not committed to any particular substantive understanding of legitimacy. It acknowledges the existence of conflicting usages of legitimacy, or at least, the possibility of tension between the various approaches. Secondly, it helps to understand the appeal of legitimacy and provides context for its usage. Instead of fixing legitimacy, the proposed account acknowledges that what can be ascribed to the concept is ever-shifting and open-ended. Thus, it abandons the idea of some "foundational" basis for stability of a norm or institution, and instead emphasizes the provisional.²²⁰

What this entails for the investment regime, and for international law more generally, is that stability is never achieved but should be viewed as an ongoing process. Any event or action will create certain intended and unintended consequences to which actors will react and

219. See generally Van Harten, *supra* note 7. The article addresses five justifications normally given in defense of the investment regime. He submits then to critical discussion and implicitly arguing for a different route of the investment regime.

220. See Nathaniel Berman, *Intervention in a 'Divided World': Axes of Legitimacy*, 17 *EURO. J. INT'L L.* 743 (2006).

from which new disputes will emerge. As Andrew Abbott has phrased it, “[i]nstitutions . . . are not fixed beings that can succeed one another, but lineages of events strung together over time, to which new things are always bound, and from which old things are always being detached.”²²¹ An illustrative example of the ongoing flow of the international investment regime is the latest round of negotiations about how to reform the UNCITRAL ISDS regime. As Anthea Roberts shows, the process of negotiation is quite contentious, and there are disagreements over how to proceed. The reform in itself is the product of the legitimacy crisis in which the regime finds itself. Within that context, disputes abound about how to proceed. Much of the process of the reform aims to “address” some of the legitimacy concerns such as transparency and participation. Hence, the “European Union, Germany and Switzerland have replenished a travel fund administered by UNCITRAL to enable representatives from developing states to attend the meetings.” Similarly, UNCITRAL has allowed participants beyond state representatives to attend the meetings. However, these measures are only part of the longer game in which states are trying to modify and alter the system. As the quote of Abbott suggests, some things will change, such a possible investment appeals tribunal, while others remain the same. In that larger process, states and other actors will keep pushing for their strategies and objectives, and for that legitimacy will be instrumental.²²²

Thus, the importance of the outcome of an event—let us say a particular judgment of an arbitral body—lies in the limits it establishes, however vague, with regard to what can be achieved in the future. This idea should resonate with international lawyers. Precedence is a legal technique which formalizes the past jurisprudence and circumscribes the available options in the future. Because of the relative openness of past cases, precedence does not provide a unique way in which a solution might be reached. The same applies more generally.²²³ International lawyers are aware that the existence of law goes hand-in-

221. Andrew Abbott, *PROCESSUAL SOCIOLOGY* 202 (2016).

222. Anthea Roberts, *UNCITRAL and ISDS Reforms: The Divided West and the Battle by and for the Rest*, *EJIL: TALK!* (Apr. 30 2019), <https://www.ejiltalk.org/uncitral-and-isds-reforms-the-divided-west-and-the-battle-by-and-for-the-rest/> [<https://perma.cc/2MEP-35Q2>].

223. See JACKSON, *supra* note 196, at 253 (“[t]he possibilities of any given moment are, in this sense, indebted to the actions undertaken in the previous moment; the actualization of one of those possibilities shapes the possibilities characteristic of the next moment”).

hand with the existence of conflict and disagreement. Law serves many “functions” but surely one of them is the management of struggle. Many of our more towering figures, Sir Hersch Lauterpacht or Hans Kelsen, among many others, tried to grapple with the inevitability of conflict at the international level.²²⁴ Therefore, we should accept the unavailability of disagreement and contestation. A reconceptualization of legitimacy is a step towards this challenge.

VI. CONCLUSION

This Article sought to provide a dynamic understanding of legitimacy within international law, with a particular focus on the investment regime. Starting from the observation that, despite the various disagreements about the state of the investment regime, there is an almost absolute agreement about the importance of legitimacy for the investment regime’s stability. The Article, first discussed the variety of procedural, substantive, and institutional considerations with regard to legitimacy. One obtains an extensive list of co-existing elements comprising legitimacy, often in tension and sometimes in outright contradiction with each other. This Article argued that the apparent openness of legitimacy is inherent to the concept. More specifically, drawing on the distinction between thin and thick concepts, as developed in philosophy of ethics, that legitimacy is a thin concept, that is, a purely evaluative concept detached from any particular substance. As a consequence, any attempt to circumscribe legitimacy will irremediably fail.

More precisely, since there is no such thing as one “correct” account, any particular proposal determining legitimacy will be unable to fend off alternative schemes. Instead, if we were to simply aggregate the conceivable elements comprising legitimacy, we would not only end up with an incoherent list but also with explanatory problems. Because legitimacy refers to so much, it becomes impossible to discern what the actual role of legitimacy is. Legitimacy becomes a catch-all term with no analytical edge. In light of this, this Article proposes an alternative understanding of legitimacy, which acknowledges its thinness and avoids some of the problems built into other accounts.

Legitimacy is understood as justificatory force, used to pursue certain courses actions. The advantage of this account is threefold: it is

224 . See MÓNICA GARCÍA-SALMONES ROVIRA, *THE PROJECT OF POSITIVISM IN INTERNATIONAL LAW* (2013).

not attached to any particular substance, it is dynamic, and it does not assume the existence of stability. Based on this thought, this Article argues that international lawyers should embrace the open-ended nature of legitimacy, which entails the acceptance of conflicting views and the ever transformational nature of the international legal order.

