The Shifting Boundaries of Legitimacy in International Law

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Abstract

Legitimacy has become a central concern in international law. This article analyses an important aspect of the concept, namely the often-presumed link between legitimacy and the stability of institutions and norms. The explanatory role of legitimacy hinges on the descriptive elements attributed to legitimacy because, only by fixing those ele- ments, a causal link can be established. The article contends that due to its conceptual features legitimacy cannot be circumscribed descriptively, making the tracing of its relationship to the stability of institutions and norms in the international legal order an intractable task. The article suggests that international lawyers should embrace the open-ended nature of legitimacy and focus on its dynamic dimension: legitimation. Legitimacy is treated as a rhetorical tool whereby actors try to pursue certain courses of action. The importance of legitimacy then lies in its employment for the shaping of perceptions with regard to how institutions ought to be.

Pure in their normativity, they are like those little gold stars you can stick on anything'
Christine Korsgaard[1]

[1] C.M. Korsgaard, *The Sources of Normativity* (Cambridge University Press, Cambridge, 1996), p. 71.

Over the course of the past decades, legitimacy has become a central concern to international law.[2] There is no field in which the vocabulary of 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 for this extraordinary interest in legitimacy, 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.[3] From a consensual normative order, centred on interstate relations, international law has evolved into a complex and dense normative framework encompassing subject areas 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.[4] Parts of these

[2] See, among others, D. Georgiev, 'Letter', 83:3 American Journal of International Law (1989)
pp. 554–557; T.M. Franck, The Power of Legitimacy among Nations (Oxford University Press, New York, 1990); D. Bodansky, 'The Legitimacy of International Governance: A Coming Chal- lenge for International Environmental Law?', 93:3 American Journal of International Law (1999) p. 596–624; P.B. Stephan, 'The New International Law: Legitimacy, Accountability, Authority, and Freedom in the New Global Order', 70:4 University of Colorado Law Review (1999) pp. 1555–1588; A. Buchanan, Justice, Legitimacy, and Self-Determination: Moral Founda- tions for International Law (Oxford University Press, Oxford, 2003); R. Wolfrum and V. Röben, Legitimacy in International Law (Springer-Verlag, Heidelberg, 2008); H. Charlesworth and J.-
M. Coicaud, Fault Lines of International Legitimacy (Cambridge University Press, Cambridge,
2009); J. Brunnée and S.J. Toope, Legitimacy and Legality in International Law: An Interac- tional Account (Cambridge University Press, Cambridge, 2010); S. Wheatley, The Democratic Legitimacy of International Law (Hart, Oxford, 2010); C.A. Thomas, 'The Uses and Abuses of Legitimacy in International Law', 34:4 Oxford Journal of Legal Studies (2014) pp. 729–758; D.
D. Caron, 'The Legitimacy of the Collective Authority of the Security Council', 87:4 American Journal of International Law (1993) pp. 552–588; O. Lienau, 'The Challenge of Legitimacy in Sovereign Debt Restructuring', 57:1 Harvard International Law Journal (2016) pp. 151–214

[3] *See* K. Jayasuriya, 'Globalization, Law, and the Transformation of Sovereignty: The Emergence of Global Regulatory Governance', 6:2 *Indiana Journal of Global Legal Studies* (1999) pp. 425– 455; N. Walker, *Intimations of Global Law* (Cambridge University Press, Cambridge, 2014).

[4] On the continuity and discontinuity of international law *see* J.H. Weiler, 'The Geology of International Law–Governance, Democracy and Legitimacy', 64 *Heidelberg Journal of International Law* (2004) pp. 547–562; N. Krisch, 'The Decay of Consent:

transformations involve the shift of authority from the state to the international and transnational realm, the emergence of new forms of law-making, with multiple actors actively shaping the novel arrangements, producing normativity and its enforcement.[5] The upshot of these developments[6] 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.'[7]

In light of the increasing influence of international law, for many the question of legitimacy has become impossible to ignore.[8] Traditionally, the consent of the state was the key criterion for legitimacy. This 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.[9] 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".[10]

International Law in an Age of Global Public Goods', 108:1 *American Journal of International Law* (2014) 1–40.

[5] J. Klabbers, 'Setting the Scene', in J. Klabbers, A. Peters, and G. Ulfstein, *The Constitutionalization of International Law* (Oxford University Press, Oxford, 2009) p. 1. G.-P. Calliess and M. Renner, 'Between Law and Social Norms: The Evolution of Global Governance', 22:2 *Ratio Juris* (2009) pp. 260–280; A.C. Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (Cambridge University Press, Cambridge, 2003).

[6] *See, e.g.*, M. Kanetake, 'The Interfaces between the National and International Rule of Law: A Framework Paper', in M. Kanetake and A. Nollkaemper (eds.), *The Rule of Law at the National and International Levels: Contestations and Deference* (Hart, Oxford, 2016) p. 11.

[7] M. Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis', 15:5 *European Journal of International Law* (2004) p. 912.

[8] A. Boyle and C. Chinkin, *The Making of International Law* (Oxford University Press, Oxford, 2007) p. 50; Bodansky, *supra* note 2.

[9] J.K. Cogan, 'The Regulatory Turn in International Law', 52:2 *Harvard International Law Journal* (2011) pp. 321–372.

[10] J. Friedrich, *International Environmental "Soft Law": The Functions and Limits of Non-binding Instruments in International Environmental Governance and the Law* (Springer-Verlag, Heidelberg, 2013) p. 386; B. Kingsbury and S.W. Schill, 'Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Adminis- trative Law', *New York University Public Law and Legal Theory Working Papers* (2009) p. 42

Some then argue that we are confronted with a widening legitimacy gap, making the legitimation of international law a pressing concern.[11]
Despite the widespread usage of legitimacy in international law, the concept is notoriously complex and ambiguous. In this article, I contest an important aspect of the concept, namely the often-presumed link between legitimacy and the stability and effectiveness of institutions and norms. To be more precise, the literature usually treats legitimacy as having a twofold dimension: a descriptive and an evaluative (or normative) part. The normative part refers to the obligation of achieving a certain standard; the descriptive part involves defining legitimacy as having such and such elements – for instance, accountability, transparency, fairness, consistency, etc. – which typically by themselves take a normative stance. The explanatory role of legitimacy with regard to the stability of a system in turn hinges on the descriptive elements attributed to legitimacy because, only by fixing those elements, it is possible to establish a causal link between legitimacy and the perseverance of institutions and norms. My key contention is that legitimacy as a concept is purely evaluative and that, as a result, it cannot be circumscribed descriptively and so cannot fulfil its presumed explanatory role. To make the case, I draw from philosophy of language and ethics, in particular on the distinction between thick and thin concepts. According to this literature, thin concepts are concepts such as 'good' and 'bad', which are purely evaluative in character and, in consequence, can be applied to any context. On the other hand, 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, I argue that legitimacy is a thin concept.
Two important consequences for the literature's treatment of the concept follow. First of all, there are no *a priori* grounds on which legitimacy can be delimited. As a result, no single account of the concept is better than another. 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 can explain everything and, hence, nothing: whenever a social arrangement is seen as stable it is due to legitimacy, when- ever a social arrangement is changing it is due to legitimacy, and whenever a social arrangement is collapsing it is due to legitimacy.[12]

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[11] S. Besson, 'The Authority of International Law – Lifting the State Veil', 31:3 *Sydney Law Review* (2009) pp. 346–47, footnote omitted.
[12] B. Barnes, *The Nature of Power* (University of Illinois Press, Champaign, 1988) p. 25.

In light of this argument, the article advocates a re-evaluation of legitimacy, more consistent with its conceptual features. There are various ways in which this can be undertaken, of which I sketch one. In particular, I argue that we should focus on the dynamic aspect of legitimacy, that is, to move away from legitimacy and to focus on legitimation.[13]13 In contrast to legitimacy, which is concerned with the normative attributes that make a social arrangement legitimate, legitimation puts the emphasis on the processes by which the meanings of legitimacy 'are asserted and contested'.[14] While my suggestion is motivated by the particular problems surrounding legitimacy in international law, it draws from a variety of disciplines. The shift from legitimacy to legitimation entails a change of focus away from order and stability to the contestation surrounding legitimacy and its irreducible social character. In particular, it centres on the justificatory force of the concept: legitimacy is treated as a rhetorical tool whereby actors try to pursue certain courses of action.[15] The importance of legitimacy lies, then, in its employment for the shaping of the boundaries of actions. Differently put, the language of legitimacy needs to be conceived as being part of "strategic games of action and reaction, of question and response, [and] of domination and evasion".[16] The advantage of such an alternative understanding of legitimacy is that the concept does not posit any particular content, nor does it assume a necessary role concerning stability.

In order to illustrate my claims, I will sometimes focus on the case of the investment regime as part of international law. The investment regime represents a paradigmatic instance of the broader transformations undergoing the international legal order. Moreover, the

[13] *E.g.*, N. Berman, 'Intervention in a "Divided World": Axes of Legitimacy', 17:4 *European Journal of International Law* (2006) pp. 743–769; S. Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (Oxford University Press, Oxford, 2003); M. Koskenniemi, 'Legitimacy, Rights, and Ideology: Notes Towards a Critique of the New Moral Internationalism', 7:2 *Associations: Journal for Legal and Social Theory* (2003) pp. 349–374

[14] A. Sarat, 'Authority, Anxiety, and Procedural Justice: Moving from Scientific Detachment to Critical Engagement', 27:3 *Law & Society Review* (1993) p. 660.

[15] For a similar understanding *see* D. Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton University Press, Princeton, 2016).

[16] A. I. Davidson, 'Structures and Strategies of Discourse: Remarks Towards a History of Foucault's Philosophy of Language', in A.I. Davidson (ed.), *Foucault and His Interlocutors* (University of Chicago Press, Chicago, 1997) p. 5.

debate concerning the legitimacy of the investment regime is symptomatic of the ways in which legitimacy appears in the literature and how it is conceived of. The focus on the investment regime therefore allows me to concretize some of my conceptual criticisms, which otherwise apply to a much broader spectrum of fields within international law.

Before proceeding, it is important to clarify two points. Firstly, the purpose of this article is not to advocate a rejection of legitimacy altogether. I readily acknowledge that the concept plays an important role in the evolution of international law. My misgivings are not against the term being used, but rather against *how* it is used when debating the stability of international law in its various dimensions.[17] My aspiration is to shed some light on the analytical aspects of legitimacy that are currently obscured in the literature. Secondly, my object of analysis is not restricted to any particular type of legitimacy, such as the legitimacy of international legal norms, institutions, decisions, and so forth. Instead, I want to highlight how different accounts of legitimacy in international law, regardless of their particular focus, share some common assumptions concerning the role of legitimacy for stability. Yet, the proposed account of legitimation entails a natural focus on actions as the main objects of legitimacy, though the international rules and institutions setting the boundaries of such actions are transgressed by the legitimacy discourses shifting them.

The article is structured as follows. The first section explains the general view on legitimacy and social order and maps out the usual approach to the concept in international law, both in theory and in practice. The following section presents the distinction between thin and thick concepts and argues that legitimacy is a thin one. I then flesh out the consequences of accepting legitimacy as a thin concept, in particular how this affects the debate in the literature. Finally, the article discusses the alternative approach to legitimacy as part of our legal and political vocabulary and its implications for international law.

International Law and Legitimacy: The Traditional View

The Problem of Order

For many international lawyers, the appeal of legitimacy in

[17] R. Brubakers and F. Cooper, 'Beyond "Identity"', 29:1 *Theory and Society* (2000) p. 6.

International law can be traced to one of the fundamental questions within social science and humanities: *the problem of order, or what makes a society hold together*.[18] The puzzle is that humans can, at the same time, be extensively social creatures and susceptible to anti-social forms of action.[19] In international law, the problem of order has normally arisen in connection with the question of compliance.[20] Similarly to the conundrum regarding individual behaviour, it is a puzzle that states largely abide to international law and engage in cooperative behaviour, when at the same time they engage in non-cooperative behaviour like violating international law or going to war.[21]

So how does order arise? Following Max Weber's canonical account, the literature presents us with three categories: coercion, self-interest, and legitimacy.[22] Coercion, which is sometimes discussed as power, indicates the use of compulsion in order to induce compliance with an order. Under self-interest, order arises as "a consequence of individually maximizing behaviour under the correct set of institutional circumstances".[23] As the language suggests, this vocabulary is 'economically' inspired and focuses on the interests of agents.[24] Lastly, legitimacy captures the idea of a "sense of duty, obligation, or 'oughtness' towards rules, principles or commands" (or institutions) that emerges because they are normatively justified.[25] Usually, it is sustained that, even though the three elements interact, legitimacy is the critical component

[18] 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* A. Abbott, 'The Idea of Order in Processual Sociology', 2 *Cahiers Parisiens* (2006) p. 318.

[19] J. Heath, *Following the Rules: Practical Reasoning and Deontic Constraint* (Oxford University Press, Oxford, 2008) p. 42.

[20] Brunnée and Toope, *supra* note 2; T.M. Franck, 'Why a Quest for Legitimacy', 21:3 *Uc Davis Law Review* (1987) pp. 535–548; H.H. Koh, 'Why Do Nations Obey International Law?', 106:8 *Yale Journal of International Law* (1997) pp. 2599–2659; J.L. Goldsmith and E.A. Posner, *The Limits of International Law* (Oxford University Press, New York, 2005).

[21] There is the added 'in the absence of sovereign', but that is less relevant than noticing how the puzzles are identically structured.

[22] M. Weber, *Economy and Society* (California University Press, Berkeley, 1978) p. 212 *et seq*.

[23] Heath, *supra* note 19, p. 43.

[24] R.O. Keohane, 'International Relations and International Law: Two Optics', in *Power and Governance in a Partially Globalized World* (Routledge, London, 2002) p. 119. For interna- tional law applications *see* e.g., A.T. Guzman, *How International Law Works: A Rational Choice Theory* (Oxford University Press, New York, 2008).

[25] M.E. Spencer, 'Weber on Legitimate Norms and Authority', 21:2 *British Journal of Sociology* (1970) p. 126.

for the stability of any social order.[26] Coercion and self-interest cannot provide a reliable basis for the durability of any set of institutions, if legitimacy is missing.[27]

What drives the argument for legitimacy is a simple but powerful intuition: humans are motivated by normative considerations. It is widely believed that we have a sort of moral compass and that we react if we consider some situation to be against our own normative commitments.[28] The idea behind the workings of legitimacy goes as follows. Since 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".[29] 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 considerations.[30] Thus, an explanation of order based on legitimacy presupposes a fundamental connection between legitimacy and the stability and effectiveness of a regime.

In international law, the various theoretical accounts that have dealt with the issue of legitimacy tend to follow the logic of the argument just displayed. The problem of order not only appears in the discussion about the importance of legitimacy for the effective functioning of institutions[31]31 but also in the debate about the compliance with international legal norms.[32] For in- stance, Franck argues that "legitimacy promises order in return for compliance", and that the

[26] Besson, *supra* note 11; P. Rosanvallon, *Democratic Legitimacy: Impartiality, Reflexivity, Proximity* (Princeton University Press, Princeton, 2011) p. 9.

[27] 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* M. Rheinstein (ed.), *Max Weber on Law in Economy and Society* (Harvard University Press, Cambridge, 1954) p. 125. In international law see, e.g., Bodansky, *supra* note 2, at 603; Caron, *supra* note 2, at 558; Franck, *supra* note 2, at 15.

M. Johnson, *Morality for Humans: Ethical Understanding from the Perspective of Cognitive Science* (University of Chicago Press, Chicago, 2014).

[28] M. Johnson, *Morality for Humans: Ethical Understanding from the Perspective of Cognitive Science* (University of Chicago Press, Chicago, 2014).

[29] T.M. Franck, *Fairness in International Law and Institutions* (Oxford University Press, Oxford, 1995) p. 26.

[30] Marquez, *supra* note 29, p. 33.

[31] Bodansky, *supra* note 2, p. 603.

[32] Franck, *supra* note 2; Brunnée and Toope, *supra* note 2.

survival of any community "depends upon the existence of rules which are complied with because of their manifest *legitimacy*".[33] Brunnée and Toope argue that the ability of powerful actors in dominating legal relationships becomes diminished and constrained when "power is exercised arbitrarily and without legitimacy".[34] Lastly, for Bodansky the legitimacy of international institutions is critical because the more legitimate an institution is or the more it is perceived to be legitimate, 'the more stable and effective it is likely to be.'[35] Accordingly, the long-term success of international institutions hinges crucially on their legitimacy.[36] In order to provide some bite to legitimacy, it is then posited that legitimacy has a particular content.[37] Franck, for instance, identifies four 'objective' properties attached to norms making them legitimate: determinacy, symbolic validation, coherence and adherence.[38] Brunnée and Toope, following Lon L. Fuller's account on the 'inner morality of law',[39] identifies eight criteria: legal norms must be of general character; they have to be publicly propagated; laws cannot be retroactive but must be prospective; laws must be clear on what is expected from citizens; laws cannot be contradictory; laws must be realistic; they cannot demand the exceptional or the impossible; laws must be constant so as to allow for stable expectations; and, finally, there has to be congruence between the legal norms and the actions of the officials acting under the law.[40] Finally, Bodansky, even though he is not invested in a specific account, connects legitimacy with democracy,[41] tradition, procedural fairness, the desired outcomes, or expertise.[42]

The Traditional View in Practice: The Investment Regime

In recent years, the investment regime has become one of the most contentious areas of international law. The criticisms brought against the investment regime – which refers to both international investment law

[33] Franck, *supra* note 2, pp. 46, 239.
[34] Brunnée and Toope, *supra* note 2, p. 93.
[35] Bodansky, *supra* note 2, p. 603; Franck, *supra* note 2, p. 49.
[36] Bodansky, *ibid*.
[37] Otherwise the risk is of ending up with a circular definition of legitimacy *see* Franck, *supra* note 2, p. 23; M. Koskenniemi, '*The Power of Legitimacy among Nations*, by Thomas M. Franck', 86:1 *American Journal of International Law* (1992) pp. 175–178.
[38] Franck, *supra* note 2.
[39] L.L. Fuller, *The Morality of Law* (Yale University Press, New Haven, 1977, rev. ed.).
[40] Brunnée and Toope, *supra* note 2, pp. 29–30.
[41] Bodansky, *supra* note 2, pp. 599–601.
[42] *Ibid*., at 612; for a similar take see Lienau, *supra* note 2.

and ISDS[43] – are diverse, yet they often share the common undertone of the investment regime being "the enemy of the state".[44] As Gus Van Harten argues, the investment regime has gained notoriety as investors have brought aggressive claims against governments in matters of general public policy, as arbitrators have adopted expansive readings of their own jurisdiction and of substantive standards under the treaties, and as some very large awards have been issued against the state.[45]

Unsurprisingly, this has led to a 'backlash' against the investment regime,[46] with many commentators coming to the conclusion that the investment regime is suffering a legitimacy crisis.[47] The criticisms against the regime take various forms, of which I will mention a few. One concern against the investment regime focuses on the normative quality of international investment agreements and the arbitral awards.[48] It is argued that agreements are often badly written and riddled with ambiguities and inconsistencies.[49] The literature contends that, by not producing textual clarity, those addressed by the norms do not know beforehand how to conform to the rule and that this leads to unpredictability and destabilisation of expectations of those involved in the investment

[43] On the notion of investment regime *see* J.W. Salacuse, 'The Emerging Global Regime for Investment', 51:2 *Harvard International Law Journal* (2010) pp. 427–473.
[44] J. Alvarez and G. Topalian, 'The Paradoxical Argentina Cases', 6:3 *World Arbitration & Mediation Review*, (2012) p. 494; *see* G. van Harten *et al., Public Statement on the International Investment Regime*, 31 August 2010, <https://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010/>, visited on 30 January 2018.
[45] G. Van Harten, 'Five Justifications for Investment Treaties: A Critical Discussion', 2:1 *Trade Law & Development* (2010) p. 24, footnote omitted.
[46] D.D. Caron and E. Shirlow, 'Dissecting Backlash: The Unarticulated Causes of Backlash and its Unintended Consequences', in G. Ulfstein and A. Follesdal (eds), *The Judicialization of International Law-a Mixed Blessing?* (Oxford University Press, Oxford, 2018).
[47] See e.g., D. Schneiderman, 'Legitimacy and Reflexivity in International Investment Arbitration: A New Self-Restraint?', 2:2 *Journal of International Dispute Settlement* (2011) pp. 471–495; C. H. Brower II, 'STRUCTURE, LEGITIMACY, AND NAFTA'S Investment Chapter', 36 *Vanderbilt Journal of Transnational Law* (2003) pp. 37–94; S.D. Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatising Public International Law through Inconsistent Decisions', 73 *Fordham Law Review* (2005) pp. 1521–1625.
[48] W.W. Burke-White and A. Von Staden, 'Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations', 35 *Yale Journal of International Law* (2010), p. 300.
[49] A. Afilalo, 'Meaning, Ambiguity and Legitimacy: Judicial (Re-) Construction of NAFTA Chapter 11', 25:2 *Northwestern Journal of International Law & Business* (2004) pp. 279–314.

regime, which in turn facilitates non-compliance.[50] Parts of the literature further criticize the lack of transparency throughout the proceedings.[51] Parties have the option to make the dispute as well as the award confidential,[52] which has become an issue because there are times at which the outcome of a dispute is not only relevant to the parties directly involved but affects public law issues that have repercussions throughout society.[53]

Another criticism focuses on the overall coherence of the regime. Because each investment 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 might decide similar cases using identical principles differently.[54] It is then sustained that such incoherence upsets the expectations of actors and thereby affects the legitimacy of the investment regime.[55]

Most importantly, the investment regime has been criticized as suffering from a democratic deficit or being ambivalent towards democracy, thereby undermining its legitimacy and, hence, its stability.[56] The argument is based on the facts that the investment regime has powers that affect the degree to which states can pursue certain policy

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[50] Brower, *supra* note 47, p. 52; Franck, *supra* note 29, pp. 30–32.

[51] *See, e.g.*, J.A. VanDuzer, 'Enhancing the Procedural Legitimacy of Investor-State Arbitration through Transparency and Amicus Curiae Participation', 52:4 *McGill Law Journal* (2007) pp. 681–723; N. Blackaby and C. Richard, 'Amicus Curiae: A Panacea for Legitimacy in Investment Arbitration', in M. Waibel *et al.* (eds.), *The Backlash against Investment Ar- bitration: Perceptions and Reality* (Kluwer Law International, Alphen aan den Rijn, 2010) p. 253.

[52] A. Al Faruque, 'Mapping the Relationship between Investment Protection and Human Rights', 11:4 *Journal of World Investment and Trade* (2010) pp. 539–560.

[53] B. Choudhury, 'Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?', 41:3 *Vanderbilt Journal of Trans- national Law* (2008) pp. 786–787.

[54] Franck, *supra* note 47, p. 1545 *et seq.*; J. Hueckel, 'Rebalancing Legitimacy and Sovereign- ty in International Investment Agreements', 61 *Emory Law Journal* (2011) p. 611; J. Kurtz, 'Building Legitimacy through Interpretation in Investor-State Arbitration: On Consistency, Coherence and the Identification of Applicable Law', in Z. Douglas, J. Pauwelyn, and J.E. Viñuales (eds.), *The Foundations of International Investment Law: Bridging Theory into Practice* (Oxford University Press, Oxford, 2014) p. 258.

[55] *See* Brower, *supra* note 47.

[56] Choudhury, *supra* note 53; Blackaby and Richard, *supra* note 51, p. 253; D. Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (Cambridge University Press, Cambridge, 2008).

objectives and that the arbitral tribunals are not accountable due to the unavailability of "certain democratic restraints".[57] Some are also concerned with the precedence given to economic reasons in lieu of other values.[58] In particular, the investment regime is viewed to prioritize market rationality over other normative considerations such as human rights or environmental concerns.[59]

As a response to the criticisms, several reforms have been undertaken. Taking the case of transparency, for instance, in contrast to earlier practice where arbitral awards were private, the majority of them are now made public.[60] While the changes are of interest in themselves, what is central to this article is the observation that the arguments raised against the investment regime reflect the structure of the general accounts discussed above. In particular, they share two common features: (i) the presupposition that there is a fundamental connection between the functioning and stability of the investment regime and its legitimacy; and (ii) the idea that the lack of specific properties such as textual clarity, coherence, democracy, etc. implies a lack of legitimacy. Hence, even though most of the discussions concerning the investment regime are not accompanied by an explicit account of legitimacy,[61] the arguments regarding legitimacy are profoundly shaped by the described conceptual assumptions. In the following section I will tackle these assumptions starting with point (ii): the substance of legitimacy.

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[57] Choudhury, *supra* note 53, p. 787; G. Van Harten and M. Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law', 17:1 *European Journal of International Law* (2006) p. 123.

[58] O. Chung, 'The Lopsided International Investment Law Regime and Its Effect on the Future of Investor-State Arbitration', 47:4 *Vanderbilt Journal of International Law* (2006)
pp. 953–976.

[59] *See* e.g., Choudhury, *supra* note 53, p. 807; M. Hirsch, 'Interactions between Investment and Non-Investment Obligations in International Investment Law', in P. Muchlinski, F. Ortino, and C. Schreuer (eds.), *Oxford Handbook of International Investment Law* (Oxford University Press, Oxford, 2008), 155.

[60] *See* Julie A. Maupin, 'Transparency in International Investment Law: The Good, the Bad, the Murky', in A. Bianchi and A. Peters (eds.), *Transparency in International Law* (Cambridge University Press, Cambridge, 2013) p. 142; D. Euler, M. Gehring, and M. Scherer (eds.), *Transparency in International Investment Arbitration: A Guide to the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration* (Cambridge University Press, Cambridge, 2015).

[61] Exceptions being, *e.g.*, Kingsbury and Schill, *supra* note 10; Brower, *supra* note 47; Franck, *supra* note 47; Hueckel, *supra* note 47.

Thin and Thick Concepts: The Case of Legitimacy

By now, it should be clear that when framing debates in terms of legitimacy, various elements come into play, which makes it difficult to discern the substance of legitimacy or to find a common core that unites the different elements together. The observation that the vocabulary of legitimacy is rather open and sometimes ambiguous has made legitimacy an object of concern among some prominent international lawyers. David D. Caron notes that the concept is loosely used and that it is rather 'nebulous.'[62] James Crawford, equally criticizes the surge of 'legitimacy-speak' with its inherent 'fuzziness and indeterminacy.'[63] 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*".[64]

Nevertheless, large parts of the literature have adopted the concept enthusiastically. This does not mean that legitimacy is generally used unreflected. Indeed, scholars acknowledge the ambiguity surrounding the concept, which sometimes leads them to their own attempt at 'fixing' legitimacy.[65] 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, as for example in Brower II *et al.*'s definition of what makes a judiciary legitimate.[66] With such a definition at hand, authors can then pose the 'question of whether some practice or institutions accord with' the determined set of criteria.[67] Following this pattern, international lawyers have, for instance, evaluated the EU proposal concerning modifications to TTIP'S ISDS according to a set of pre-defined standards such as the ones appearing in the public law theory of international adjudication, as advocated by Ingo Venzke, whereby any international

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[62] Caron, *supra* note 2, p. 556.

[63] J. Crawford, 'The Problems of Legitimacy-Speak', 98 *Proceedings of the Annual Meeting of the American Society of International Law* (2004) pp. 271–273 at p. 271, doi:10.1017/ S0272503700061425.

[64] M. Koskenniemi, 'Miserable Comforters: International Relations as New Natural Law', 15:3 *European Journal of International Relations* (2009) p. 367.

[65] *See*, *e.g.*, Lienau, *supra* note 2; Thomas, *supra* note 2.

[66] C.N. Brower, C.H. Brower II, and J.K. Sharpe, 'The Coming Crisis in the Global Adjudication System', 19:4 *Arbitration International* (2003) pp. 415–440.

[67] S.P. Mulligan, 'The Uses of Legitimacy in International Relations', 34:2 Millennium (2006) p. 351.

institution must exercise public authority through democratic means.[68] In my view, the implicit idea of fixing legitimacy by settling its content is misguided. In particular, due to the conceptual characteristics of legitimacy, any attempt to delimit the concept will necessarily fall short of capturing important elements and considerations connected to legitimacy.[69] To sustain this point, it becomes necessary to explain the analytical distinction between 'thin' and 'thick' concepts, as developed originally at the crossroads between philosophy of ethics and language[70] and later on in other fields such as epistemology,[71] aesthetics,[72] political philosophy,[73] and philosophy of law.[74]

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*.[75] What differentiates the concepts associated to these words? Although the answer is not always clear-cut, 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.[76]76 When someone says that Susan is courageous, one

[68] I. Venzke, 'Investor-State Dispute Settlement in TTIp from the Perspective of a Public Law Theory of International Adjudication', 17:3 *The Journal of World Investment & Trade* (2016) pp. 374–400.

[69] Mulligan, *supra* note 67, p. 353.

[70] The distinction between both concepts is generally attributed to Bernard Williams, who coined the term 'thick concepts', *see* B. Williams, *Ethics and the Limits of Philosophy* (Rout- ledge, Abingdon, 1985 [2006]) pp. 140–41.

[71] See the 2008 special issue of the *Journal of Philosophical Papers*, volume 37, issue 3.

[72] N. Zangwill, 'The Beautiful, the Dainty and the Dumpy', in *The Metaphysics of Beauty* (Cor- nell University Press, Ithaca, 2001).

[73] M. Walzer, *Thick and Thin: Moral Argument at Home and Abroad* (Notre Dame Press, Notre Dame, 1994).

[74] D. Enoch and K. Toh, 'Legal as a Thick Concept', in W. Waluchow and S. Sciaraffa (eds.), *Philosophical Foundations of the Nature of Law* (Oxford University Press, Oxford, 2013) p. 257.

[75] P. Väyrynen, *The Lewd, the Rude and the Nasty: A Study of Thick Concepts in Ethics* (Oxford University Press, Oxford, 2013) p. 1; M. Smith, 'On the Nature and Significance of the Dis- tinction between Thick and Thin Ethical Concepts', in S. Kirchin (ed.), *Thick Concepts* (Oxford University Press, Oxford, 2013), p. 97; M. Eklund, 'What Are Thick Concepts?', 41:1 *Canadian Journal of Philosophy* (2011) pp. 25–49.

[76] A. Gibbard and S. Blackburn, 'Morality and Thick Concepts', 66 *Proceedings of the Aristo- telian Society, Supplementary Volumes* (1992) p. 273. Väyrynen, *supra* note 75, p. 36.

not only states that Susan has the strength and endurance to confront something – the descriptive part, but there is also a certain kind of appraisal – the evaluative part. The evaluative statement does not necessarily have to be positive: 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".[77]

International law is full of thick concepts, take for example *coercion*. Article 52 of the Vienna Convention of the Law of Treaties (VCLT) establishes that a treaty is void if its conclusion has been procured by threat or the use of force. 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 concepts belonging to the norm of Fair and Equitable Treatment (FET). According to a recent UNCTAD Report on FET, the concept has been interpreted so 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.[78]

The concepts *fair* and *equitable* clearly have a descriptive part – they help us in understanding certain characteristics about the treatment of investors – 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.'[79] The most relevant characteristic of a thin concept "lies first and foremost in the abstractness, hence relative emptiness, of the ethical

[77] S. Kirchin, 'Introduction: Thick and Thin Concepts', in Kirchin (ed.), *supra* note 75, p. 3.
[78] UNCTAD, *Fair and Equitable Treatment – UNCTAD Series on Issues in International Invest- ment Agreements ii* (United Nations, Geneva, 2012), p. xiii.
[79] Kirchin, *supra* note 77, p. 2.

ideas that they involve".[80] Thin concepts can only get their purchase in connection with other concepts, normally thicker,[81] but what those concepts are is left unspecified.[82] 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.[83]

The crucial difference between thin and thick concepts lies therefore in the 'emptiness' of thin concepts. More specifically, while thick concepts are con- strained 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".[84] Take the example between 'caring' – a thick concept – and 'good' – a thin concept. 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 per- son but, while being a caring person connotes a particular form of behaviour, 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.[85]

My contention is 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 principles in order to then evaluate the institution or norm of interest based on the specified criteria. Thus, by implicitly assuming that legitimacy involves both evaluation and description, legitimacy is widely deployed as a thick concept.[86] This understanding of legitimacy appears

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[80] T.M. Scanlon, 'Thickness and Theory', 100:6 *The Journal of Philosophy* (2003) pp. 276–77. Williams, *supra* note 70; Kirchin, *supra* note 77, p. 4.

[81] E. Anderson, *Value in Ethics and Economics* (Harvard University Press, Cambridge, 1995), p. 98.

[82] Smith, *supra* note 75, p. 117.

[83] D.Y. Elstein and T. Hurka, 'From Thick to Thin: Two Moral Reduction Plans', 39:4 *Canadian Journal of Philosophy* (2009) p. 516.

[84] J.G. Gunnell, *Political Theory and Social Science: Cutting against the Grain* (Palgrave- Macmillan, New York, 2011) pp. 139–140.

[85] B. Cline, 'Moral Explanations, Thick and Thin', 9:2 *Journal of Ethics & Social Philosophy* (2015) p. 6.

[86] F.V. Kratochwil, 'On Legitimacy', 20:3 *International Relations* (2006) p. 305.

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.[87] At the same time, he treats those factors as the normative substance of legitimacy, which in turn allows for an identification of international legal norms that fall short of these criteria.[88] The investment regime literature closely follows this template. Take Charles Brower *et al.*'s analysis. They argue that arbitral tribunals like NAFTA might 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 from observing national judiciaries and to then make an evaluation of international arbitration based on those descriptive elements.[89]

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 in order 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".[90] It is not surprising then to find accounts according to which sovereignty is opposed to legitimacy and others whereby sovereignty is part of legitimacy.[91]91 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. In other words, there seem 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.[92] However, one could equally argue that the only legitimate mode of governance is epistocracy, for instance.[93] There is

[87] Franck, *supra* note 2, p. 22.
[88] Franck, *ibid.*, pp. 20–23.
[89] Brower, Brower II, and Sharpe, *supra* note 66.
[90] H.D. Battaly, 'Thin Concepts to the Rescue: Thinning the Concepts of Epistemic Justification and Intellectual Virtue', in A. Fairweather and L.T. Zagzebski (eds.), *Virtue Epistemol- ogy: Essays on Epistemic Virtue and Responsibility* (Oxford University Press, Oxford, 2001) p. 104.
[91] *See* Hueckel, *supra* note 47; Choudhury, *supra* note 47.
[92] *See* Rosanvallon, *supra* note 26; Bodansky, *supra* note 2, p. 596.
[93] *See* J. Brennan, *Against Democracy* (Princeton University Press, Princeton, 2016).

nothing conceptually wrong with such a statement. The general upshot is that "[t]here is no single right way to fill [legitimacy] in, it will be misguided" to determine which the *real* legitimacy is.[94]

To maintain that legitimacy is a thin concept does not entail that legitimacy is meaningless. It is intelligible to argue that arbitration tribunals are legitimate or illegitimate. In other words, when someone uses the notion of legitimacy its meaning will not be in doubt. What we do not know, however, are the substantive features the person is attributing to the concept and it is only in connection with other concepts that legitimacy gains some bite. Likewise, legitimacy, being a thin concept, does not entail that it has no normative appeal. As we shall see in Section 4, there are grounds for keeping the concept as part of our vocabulary, and one of the reasons is its normative force.

Consequences of Legitimacy's Thinness

If legitimacy is a thin concept, this affects its explanatory power and by extension the appeal of the concept within the literature. Following my argument, the implicit assumption that legitimacy has a certain "discreet quality that can be observed" is flawed.[95] 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 as determined by international law or the same as any national of the host state. Those pushing for the international minimum standard rely on the idea that legitimacy involves norms such as justice and equity. If a state's laws are not able to guarantee these standards, investors should be afforded the protection determined by international law. Those advocating that investors be treated equally to the nationals of the host state base their arguments on the premises of sovereignty and sovereign equality. Hence, investors can only enjoy the same rights as those enjoyed by the nationals of the host state, no more, no less. This should illustrate that an identification of legitimate versus non-legitimate

[94] Battaly, *supra* note 90, p. 105.

[95] Mulligan, *supra* note 67, p. 353.

norms, actions or institutions is difficult at best, arbitrary at worst.
A plausible objection against this claim might be that even if legitimacy is indeed a thin concept and as such 'empty' of substance, this does not necessarily entail that its scope is boundless. What can be considered legitimate will depend on particular practices and will be based on recognised, shared criteria.[96] At first glance, this response seems to be compelling. By observing the social practices of a particular society or community, 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 a particular combination of them (short of the whole) that is sufficient or necessary for its application".[97]97 Accordingly, legitimacy would be whatever a community, group, or society decide it to be. In principle, this is an intuitive and commonsensical way to solve the conundrum. However, as we will see, 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. 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. In light of this, excluding specific groups may have unintended consequences. Suppose for example we would argue that only international lawyers are the fluent speakers. Under this restriction, any conception of legitimacy would end up representing the particular preferences and biases of international lawyers, 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.[98]98

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[96] Kratochwil, *supra* note 86; Gunnell, *supra* note 84; Elstein and Hurka, *supra* note 83, p. 516.
[97] Battaly, *supra* note 90, at 105.
[98] *See* T. Nardin, *Law, Morality, and the Relations of States* (Princeton University Press, Princ- eton, 1983).

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 with 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 within the relevant community there was agreement on a number of shared criteria, the emerging list might still 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.[99] Hence, the argument that the investment regime is illegitimate because it is '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.

The impossibility of determining legitimacy's substance crucially undermines its explanatory power, i.e. the causal relationship between legitimacy and the stability of institutions and norms. Surprisingly, this question is rarely discussed explicitly in the literature. As we have seen, the working assumption is that legitimacy is critically important for the adequate functioning of institutions and norms.[100] 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".[101] He also recognizes that his proposed criteria for legitimacy are

[99] I adapt the example from R. Geuss, *History and Illusion in Politics* (Cambridge University Press, Cambridge, 2001) p. 6.

[100] *See, e.g.*, Brower, *supra* note 47; Franck, *supra* note 47.

[101] Franck, *supra* note 2, p. 18.

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".[102] 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".[103] 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.[104] 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".[105]

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".[106]

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.[107] 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. 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.[108] There is an underlying commitment to measurement and estimation. This is where the acknowledgment that legitimacy is a thin concept, and therefore does

[102] Franck, *ibid.,* p. 49.
[103] Franck, *ibid.,* p. 25.
[104] Franck, *supra* note 2, pp. 41–49.

[105] Franck, *ibid.*, p. 48. A slightly different problem is provided by Bodansky. He argues that 'pure' cases of legitimacy separated from coercion or self-interest rarely happens. Therefore, to identify the relative importance of legitimacy becomes 'extremely difficult, if not impossible, task', *see* Bodansky, *supra* note 2, p. 603.
[106] B. Barry, *Sociologists, Economists, and Democracy* (University of Chicago Press, Chicago, 1978) p. 95.
[107] *Ibid*.
[108] He expressly talks of legitimacy being 'measurable by a multi-dimensional formula', *see* Franck, *supra* note 2, p. 44.

not have a determinable core, becomes crucial. For any estimation, a minimum knowledge of the set of explanatory variables is crucial. The literature is largely silent on the question of how one could undertake an analysis in practice.[109] 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,[110] without any actual possibility of a valid assessment, we are ultimately confronted with a very convenient theory that can justify any outcome ex-post.[111]

To sum up, the thinness of the concept undermines the causal connection between legitimacy and the stability of an institution. The 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.[112]112 However, if legitimacy cannot be constrained or if what falls under legitimacy is immensely extensive, it cannot fulfil its explanatory role in how to discriminate stable systems from unstable 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. In more drastic words, if legitimacy explains everything, then it explains nothing.

From Legitimacy to Legitimation: Shaping the Boundaries of Action in International Law[113]

There are two reasons which help to understand the enduring power of legitimacy. First, the quest for legitimacy is not only a quest for normative desirability but also for order. International lawyers tend to value the idea

[109] Neither do the literature, *see, e.g.*, Franck, *supra* note 47; Kingsbury and Schill, *supra* note 10; Brunnée and Toope, *supra* note 2.

[110] G. Sayre-McCord, 'Normative Explanations', 6 *Philosophical Perspectives* (1992) p. 67; A. Hurrell, 'Legitimacy and the Use of Force: Can the Circle Be Squared?', 31:S1 *Review of International Studies* (2005) p. 15.

[111] In a recent article, Xavier Marquez has noticed how the recent social sciences literature on legitimacy still struggles in identifying the 'influence' of the concept, *see* Marquez, *supra* note 29, pp. 22–23.

[112] Franck, *supra* note 2, p. 48.

[113] Although the notion of shaping boundaries of action appears implicitly in various litera- tures, this has been formalized by Jackson in P.T. Jackson, 'Rethinking Weber: Towards a Non-Individualist Sociology of World Politics', 12:3 *International Review of Sociology* (2002) pp. 439–468.

of order as it is associated with predictability.[114] The positive stance towards predictability is part of what Judith Shklar dubbed 'legalism', a particular ethical attitude common among lawyers. She noticed how lawyers fear arbitrariness more than tyranny and that, if they fear tyranny, it is because of arbitrariness not because of its repressiveness.[115] A related, yet more subtle, contributing factor for legitimacy's pull can be attributed to its normative connotation.[116] Legitimacy brings with itself a specific 'attitude'.[117] To assert that an institution or norm is legitimate signals something about its authoritativeness; the implicit claim is that the institution or norm is worth of our approval and of our obedience – or the opposite.[118] As Hanna Pitkin writes, it is built into the grammar of English that "a legitimate authority is such that one ought to consent".[119] For instance, 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 signalling function – its normative side – cannot be detached from legitimacy even when we discuss it descriptively. Hence, what a legitimacy statement entails is not so much a claim of knowledge as it is a claim of judgment.[120]

By the conjunction of both factors, the literature on international law has become 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 around".[121] As much as legitimacy might be alluring, I hope that the arguments put forth in the previous sections convinced the reader

[114] *See e.g.* Fuller, *supra* note 39.

[115] J. N. Shklar, *Legalism: Law, Morals, and Political Trials* (Harvard University Press, Cam- bridge, 1986 [1964]) pp. 14–16. For its widespread acceptance within international law see W. Werner, 'International Law: Between Legalism and Securitization', in P. Bourbeau (ed.), *Security: Dialogue across Disciplines* (Cambridge University Press, Cambridge, 2015).

[116] Franck, *supra* note 2.

[117] I take the notion of 'attitude' from Q. Skinner, 'Language and Social Change', in J. Tully (ed.), *Meaning and Context: Quentin Skinner and His Critics* (Princeton University Press, Princeton, 1988) p. 119.

[118] Also *see* Mulligan, *supra* note 67, p. 368.

[119] H. Pitkin, 'Obligation and Consent—II', 60:1 *American Political Science Review* (1966) p. 44.

[120] Mulligan, *supra* note 67, p. 368; Koskenniemi, *supra* note 13.

[121] G. Orwell, 'Politics and the English Language', *Essays* (Penguin, London, 2000 [1946]), pp. 444–445.

of the need for a revision of the concept. This does not necessarily entail eliminating legitimacy from our legal and political vocabulary altogether. Abandoning legitimacy might in fact impoverish our way of thinking, especially in light of legitimacy's rich history and centrality in our legal and political life.[122] Likewise, it is clear that legitimacy plays a role in how institutions evolve. The recent changes undergoing the investment regime are related to the various legitimacy criticisms put forth. What the above analysis demands is instead a reappraisal of legitimacy, one that takes into consideration its conceptual characteristics. There are different ways in which the task can be undertaken. For instance, one can analyse legitimacy as a pure normative concept without assuming any relationship with order. Although legitimacy and order seem to go hand in hand, it is not obvious why one should prioritize that connection, as David Enoch has asserted.[123] Alternatively, we can still treat legitimacy as providing certain explanations, but differently from how it has been predominantly used so far. In what follows, I will follow the latter approach.

In my opinion it would be fruitful to shift the focus on the dynamic aspect of legitimacy, that is, on legitimation. The idea behind legitimation is to look at

> processes through which beliefs in legitimacy come to be held, the interests those beliefs serve, and the ways they induce acceptance of a set of social conditions which are less necessary and less just than they are made to appear.[124]

This understanding goes back to Karl Marx, Sigmund Freud, and Friedrich Nietzsche among others[125] and has been advanced in international law, for instance, by Susan Marks. She defines legitimation as "the process by which authority comes to seem valid and appropriate".[126]

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[122] *See* Mulligan, *supra* note 67, p. 356.

[123] D. Enoch, 'Taking Disagreement Seriously: On Jeremy Waldron's *Law and Disagreement*', 39:3 *Israel Law Review* (2006) pp. 22–35.

[124] Sarat, *supra* note 14, p. 663.

[125] They are normally referred together as the 'school of suspicious' following Paul Ricoeur's famous description, *see* P. Ricoeur, *Freud and Philosophy: An Essay in Interpretation* (Yale University Press, New Haven, 1970) p. 32.

[126] Marks, *supra* note 13, p. 19. Koskenniemi, *supra* note 13. For a general discussion on the matter see M. Rosen, *On Voluntary Servitude: False Consciousness and the Theory of Ideology* (Polity, Cambridge, 1996).

I believe that the insistence on processes in how social conditions come into being and the role of contestation and conflict that underlie these processes are of crucial importance. Nevertheless, I would depart from existing accounts of legitimation in that legitimation discourses highlight the role of powerful actors in imposing their beliefs on others, who then passively accept current social arrangements as 'legitimate.' I am not interested in determining whether "those living in a given situation… actually believe in … the terms of legitimation, or whether they cynically act as if they do in order to advance their own self-interest or other private goals".[127] Rather, I want to focus on how the legitimation discourses in international law shape the boundaries of action in that field.

The literature on legitimacy in international law gives us some initial resources from which the concept can be reconstructed. A first hint can be found in Bodansky's account 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 criticise it as 'illegitimate' in the hope of undermining its authority".[128] A similar intonation appears in Koskenniemi's analysis of legitimacy. In particular, he criticizes that the language of legitimacy is used instrumentally: once the language of legitimacy is 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".[129] These comments emphasize how legitimacy is *used* rather than on what legitimacy's content might be. Hence, the might of legitimacy seems not to come so much from its explanatory power as from its *justificatory force*,[130]130 from how legitimacy claims are deployed in order to pursue certain courses of action. We should therefore focus on how the language of legitimacy is used in order to understand "how the limits of acceptability are drawn".[131]
Insisting on the justificatory force of legitimacy should not be interpreted as a presumption of the possibility of reaching rational agreement through justification,[132] but rather as stressing the role of dispute and

[127] Jackson, *supra* note 113, p. 449.
[128] Bodansky, *supra* note 2, p. 602fn.
[129] Koskenniemi, *supra* note 13, p. 369.
[130] G. Sayre-McCord, 'Moral Theory and Explanatory Impotence', 12:1 *Midwest Studies in Phi- losophy* (1988) pp. 433–457.
[131] P.T. Jackson, *Civilizing the Enemy: German Reconstruction and the Invention of the West* (University of Michigan Press, Ann Arbor, 2006) p. 25
[132] The idea of reaching rational agreement is most famously linked with Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and*

disagreement, one of legitimation's basic tenets. This entails the acknowledgement 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.'[133] Legitimacy needs to be understood as a 'tool in struggles', connected to certain values, principles, or morals.[134] Accordingly, legitimacy does not rep- resent so much a statement 'about the world than [a] … weapon of debate.'[135] 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 an argument in favour of a particular outcome or new institutional and normative re-arrangement. We will then be confronted with different and sometimes non-compatible 'legitimacies.'[136] In fact, any

dispute cannot seek to secure legitimacy simple, 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.[137]

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".[138] The different sets of claims and justifications are thus centred 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".[139] Differently put, 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".[140] In order to establish, sustain or modify the boundaries of actions one needs to make claims and justifications. Legitimacy can thus be viewed as

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Democracy (Polity, Cambridge, 1996).

[133] Geuss, *supra* note 99, pp. 5–6.

[134] Mulligan, *supra* note 67, p. 373.

[135] Q. Skinner, 'Rhetoric and Conceptual Change', 3:1 *Redescriptions: Political Thought, Conceptual History and Feminist Theory* (1999) p. 62.

[136] Geuss, *supra* note 99, p. 5.

[137] Mulligan, *supra* note 67, p. 369, footnote omitted.

[138] Jackson, *supra* note 113, p. 452.

[139] Jackson, *ibid*., pp. 449, 453.

[140] Jackson, *supra* note 131, p.16.

part of 'vocabularies of motive'.[141] 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".[142] 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.[143] 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".[144] Such rhetorical 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".[145] 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."[146]

This account of legitimacy seems to provide a more consistent view of the debate about legitimacy within international law. The struggle for legitimacy in international investment law is exemplary: 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 in order to push for their agenda. This extends to the different criticisms presented earlier. While those who think the investment regime is simply suffering from 'growing pains' frame legitimacy in a way that leads us to conclude

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141 C.W. Mills, 'Situated Actions and Vocabularies of Motive', 5:6 *American Sociological Review* (1940) pp. 904–913.

142 Mills, *supra* note 141, pp. 905, 908.

143 J. Weldes, *Constructing National Interests: The United States and the Cuban Missile Crisis* (University of Minnesota Press, Minneapolis, 1999) pp. 117–118.

144 F.V. Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge University Press, Cambridge, 1989) p. 210.

145 Jackson, *supra* note 131, p. 28.

146 Marks, *supra* note 13, p. 22.

that criticisms against the regime can be overcome, those who oppose the investment regime tout court 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.[147] 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. And these 'starting-points' are located within a "substantive set of common understandings that provide for the crucial connections within the structure of the argument".[148] A legitimacy claim should therefore be viewed as a way of creating and reacting to the world at the same time.[149] 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. A controversially discussed topic is the role arbitrators in investment tribunals play for the balance between the rights of investors, in particular the protection of their investments, and the ability of states in pursuing policy objectives with high public stakes, such as environmental regulations. The issue is highly complex and fiercely contested, evidence included: my interest, however, does not lie in the veracity of any of the discussed arguments but rather in the narrative that is constructed in order to delimit or to 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. His criticism is based on how arbitrators are appointed. He argues that, since arbitrators are appointed by the involved parties and since they have an interest in being reappointed, the current system of appointment and the lack of institutional safeguards entails that arbitrators are not independent, leading to a bias in favour of business interests.[150] According to Van Harten, the upshot is that the states'

[147] Jackson, *supra* note 131, p. 29; B. Barnes, 'Thomas Kuhn and the Problem of Social Order in Science', in T. Nickles (ed.), *Thomas Kuhn* (Cambridge University Press, Cambridge, 2003) p. 128.

[148] Kratochwil, *supra* note 144, p. 219.

[149] Jackson, *supra* note 131, p. 30.

[150] G. Van Harten, 'Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law', in S.W. Schill (ed.), *International Investment Law and Comparative Public Law* (Oxford University Press, Oxford, 2010) p. 627.

ability to pursue their own policies is severely circumscribed. Although in his 2013 book *Sovereign Choices and Sovereign Constraints* Van Harten does not frame his criticisms in the language of legitimacy, elsewhere he has explicitly linked the way arbitrators are appointed with the weakening of the legitimacy of the investment regime.[151] To back up 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 to- wards 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".[152] Van Harten concludes that the current *status quo* of how arbitrators institutionally operate needs to changes:[153] only then the system will 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".[154]

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, runs against what he views the current investment regime to be. What follows then is that the system needs to be restrained or modified, which in turn signifies changing the boundaries of what can be done within the investment regime.[155] In other words, through the

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[151] 'The focus here is not actual bias but rather institutional aspects of the system that weaken *its claims to legitimacy* regardless of the integrity and competence of its participants', G. Van Harten, 'Perceived Bias Undermine in Investment Arbitration Treaty', in Waibel *et al.* (eds.), *supra* note 51, p. 433.

[152] G. Van Harten, *Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration* (Oxford University Press, Oxford, 2013) p. 164.

[153] Van Harten, *ibid.*, pp. 18, 164; Van Harten, *supra* notes 45 and 150.

[154] Van Harten, *supra* note 152, p. 18.

[155] Van Harten, *supra* note 45.

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.

The approach here advocated can be reconciled with legitimacy as a thin concept. By treating legitimacy as a means of opening or foreclosing certain courses of action, 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 emphasises the provisional.

What this entails 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 from which new disputes will emerge. As Andrew Abbot 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.[156]

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.[157]

We, international lawyers, are aware that the existence of law goes hand in hand with the existence of conflict and disagreement. Law serves

[156] A. Abbott, 'Social Order and Process', in *Processual Sociology* (University of Chicago Press, Chicago, 2016) p. 202.

[157] As Patrick T. Jackson writes: '[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', *see* Jackson, *supra* note 131, p. 253.

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.[158]158 We should therefore accept the unavoidability of disagreement and contestation. A reconceptualization of legitimacy along the lines here suggested might be a step towards this challenge.

Conclusion

The article has aimed to provide a different understanding of legitimacy within international law. Starting from the observation that there is an almost absolute agreement about the importance of legitimacy, I first discuss the traditional view of legitimacy in the literature and show how it is reflected in the debate on legitimacy and the investment regime. From this debate, it can be readily seen that the concept comprises a large number of co-existing elements, such as accountability, transparency, legality, and so forth, making it difficult to discern the actual substance of legitimacy. I argue that the apparent openness is inherent to the concept. More specifically, drawing on the distinction between thin and thick concepts, as developed in philosophy of ethics, I contend that legitimacy should be regarded as 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. If, instead, we 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 would be impossible to determine what the actual role of legitimacy is. Legitimacy would become a catch-all term with no analytical edge. In light of this, the 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 not attached to any particular substance, it is dynamic, and it disposes of the idea of stability. Based on this thought, I argue that international lawyers should embrace the open-ended nature of legitimacy, which entails the acceptance of conflicting views.

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[158] *See* M. García-Salmones Rovira, *The Project of Positivism in International Law* (Oxford Uni- versity Press, Oxford, 2013).