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Legitimacy Pragmatism in International Arbitration: A Framework for Analysis

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(*)

I Introduction

This paper concerns itself with a 30,000-foot view of the legitimacy of lawmaking in international arbitration – where “lawmaking” is understood broadly as all the effects of a given arbitration regime.

But why should we care about legitimacy? What is the point of thinking about it? To be sure, legitimacy studies are fashionable on all matters international law. In some countries it appears to be truly de rigeur to debate the legitimacy of this or that area of international legal studies. Yet beyond that, seriously, why do we care about legitimacy?

The question isn't cynical. My claim is quite to the contrary. I think the question cuts to the heart of the conceptual equipment we use to conduct these debates. Indeed, what does legitimacy mean anyway? It actually depends on why we care about legitimacy, on what we want to get done with legitimacy discussions. So why we care about legitimacy is the sort of question that we should not only not be ashamed of asking, but that we actually should really ask.

I argue that one useful purpose of legitimacy preoccupations is that they help us understand the stability of a regime; its likelihood of change; the direction, velocity, extent, drivers of that change; its implications too. The simple point at the core of this paper is that a regime which is not legitimate to the actors who can change it is unlikely not to change, to be stable. Change and stability, in turn, are of interest to all of us, in the arbitration industry and beyond.

This particular purpose of legitimacy preoccupations calls for a certain understanding of the concept of legitimacy. The first part of this paper discusses this understanding. It considers it in the context of a broader reflection on how the purposes of concepts, their ● “cash-value” as some people put it, should in many situations frame the concepts as we use them, and not some quest for a universally valid, logically coherent, conceptually clean definition, some sort of conceptual truth. Thinking about legitimacy is worthwhile if it helps us understand or do something. And so the goal of understanding or doing should determine how we define the concept. If the goal is to understand a regime's stability and anticipate its changes – there are, of course, other goals – then an appropriate definition of legitimacy is one that takes into account reasons that would push certain actors to provoke change. It is, as we will see, a deliberately interest-based, output-oriented, and relative notion of legitimacy – relative in the sense that it depends on the perspective of a given actor, may vary from one actor to another, is only relative to the particular perspective of a particular actor. With this notion of legitimacy, nothing is per se legitimate or not; there are no universal standards of legitimacy.

The second part of the paper then addresses the question of the actors from whose perspective legitimacy matters – the overall point, of course, remains to determine a given regime's stability. I address that question from a general, theoretical perspective; not from the perspective of a particular, concrete regime. The point is to offer a framework or model to help us think about which actors can input what change, with what consequences, based on the reasons for change identified by the legitimacy considerations conducted in the earlier parts of the paper. That model, building on prior and ongoing work with colleagues, (1) is inspired by the concept of “political system” suggested by political scientist David Easton.

A simply take-away point of the model is that legitimacy issues in the sense used in this paper will likely lead to reactions in the form of input into the regime by actors to whom the regime is not legitimate (at least from a rational perspective, which admittedly has its limitations, which I will address later). These reactions are likely to continue until some equilibrium among the input-actors is reached, taking the regime through several probable iterations. For instance, if we apply this to the case of investment arbitration, taken as a regime, as a lawmaking system, we might expect it to go through several iterations, several rounds of change, until an equilibrium is found among states, the different powerful constituencies within states, investors, arbitrators, arbitration institutions, and possibly NGOs and other civil society representatives.

Perhaps that conclusion will sound forgone. Then again, the discussion helps clarify a useful area within the overall debate about the legitimacy crisis or legitimacy deficit of investment arbitration and other forms of international arbitration.

Clarification, I think, is needed. The legitimacy debate is occasionally somewhat wooly. It tends to echo the lament expressed from perspectives as different as James Crawford's and Martti Koskenniemi's: in Crawford's words, "In recent discourse there has been very little attempt to use [legitimacy] in a discriminating way"; and in Koskenniemi's: "legitimacy" [is a] mediate word[], rhetorically successful only so long as ● [it] cannot be pinned down either to formal rules or moral principles". (2) "Legitimacy", from their perspective, would just muddle rather than clarify. This tends to have the regrettable consequence, expressed by Crawford, that we lawyers can dispense with and actually shouldn't engage with legitimacy preoccupations at all: "Of legitimacy it is for others to judge." (3)

"Go home", in effect, would be Crawford and Koskenniemi's welcome to scholars and practitioners gathering to discuss legitimacy problems in arbitration.

It surely is an interesting thought – this idea that if it is unclear what we are talking about we should not be talking about it. That if there is no authoritative or generally accepted definition of "legitimacy", it is an unhelpful concept. But I don't think we should leave the question behind, not on that ground. Then again, we cannot simply take any definition of legitimacy and run with it. We should rather take Crawford and Koskenniemi's argument as an invitation to think for a moment about what's involved here: What are concepts meant to do? How do we define them? Can we define legitimacy in a constructive way, so that it isn't marked as unhelpful and quickly put away? I think this apparent detour on the way to debating legitimacy is not a detour at all, but is rather essential in giving meaning to the discussion. So this is where the paper will start.

The paper overall moves in five parts. The first three deal with the concept of legitimacy: the first discusses the purposes, or "jobs", of concepts generally; the second reviews possible jobs for the concept of legitimacy, what it might help us do; the third gives a particular job to the concept of legitimacy and defines it according to that job. The fourth part then suggests a political systems model to mark those actors whose legitimacy views matter, based on their capacity to provide input in international arbitration lawmaking regimes. The fifth part starts a discussion about how this paper's point might be used to anticipate backlashes and overreactions to legitimacy issues.

A caveat must be entered before we begin, although it is probably self-evident by now: much of this paper relies on theories which don't have their usual habitat in arbitration – pragmatic philosophy, the legitimacy literature in international law, and political science theories. The paper's approach, then, may be unusual for an arbitration publication. It may appear to have been written in a slightly foreign language. In some form of dialect of the arbitration discourse. But I think there are several important general points that come from thinking about arbitration from that particular approach, in that particular dialect. Then again, the hurried reader not too excited about polyglottism and in need of going straight to the point may jump ahead to Part V, ideally after a brief look at the chart at the end of Part IV. The other parts are for those who don't quite buy my point and want to know here it comes from; for those who want to understand why legitimacy in this discussion has nothing to do with morality or political ideals; and for those who would find either comfort or halt in the idea that what most people think most of the time about the legitimacy of arbitration is actually quite irrelevant.

II The Job of Concepts

To understand what meaning we should give to the concept of legitimacy, let us first take a step back and consider the question generically: how do we generally give meaning to concepts? What is the purpose of concepts anyway? What is their job in our cognitive economy?

Most philosophers, in particular analytic philosophers, consider that a given concept has a given meaning. One concept, one meaning. Our job then, as thinkers of all varieties, is to figure out what that meaning is, what the *proper* meaning of the concept is, to find certainty in the identification of its meaning. Once we who think analytically about the concept have agreed on a meaning, that meaning becomes authoritative, and that's that; everyone can move on to something else. The great advantages of such janitorial work for concepts are cleanliness, possibly logical coherence between concepts, and clarity in communication among thinkers – we know what we one another mean because we use the same concept with the same meaning. Fair enough.

And yet.... If we think about it, as Wittgenstein did, the problem with this approach is that it might separate analytic thinking from reality. Or, in the same direction but less far, it doesn't get much done. If I tell you "stay roughly here", accompanied by a vague pointing gesture, you know what I mean, even though "roughly here" is, well, only roughly defined. (4) There is not much point in defining it analytically, not much purpose in making it a "rigorously scientific" concept. (5) And if nevertheless we were to define it analytically, the definition likely wouldn't change anything for anybody, would not achieve anything. It might even evolve, congress after conference after workshop on "roughly here-ness", in a direction that takes it ever further from the way it actually is used in practice by actual people. "Legitimacy" might face the same fate.

As Wittgenstein put it, “My father was a businessman, and I am a businessman; I want my philosophy to be business-like, to get something done.” (6) From that perspective, the definition of a concept doesn't start from a pursuit of analytic cleanliness, but from a pursuit of what a concept can get done. The purpose and utility of a concept, its “cash-value”, are the starting point of its definition. (“Cash-value”: a term introduced by the philosopher and psychologist William James in 1898 in his advocacy of pragmatic doctrines, expressing the idea that philosophical conceptions really should try to make practical differences to individuals. (7) Unexpectedly this still both annoys and unnerves many philosophers.) The central argument for the validity of a concept's definition is not where it sits in the field among other concepts or whether it agrees with an authoritative understanding by a school of thought. It rather is its practical explanatory purchase, what explanation it can concretely “buy”, what it helps us do. “Let them, the pundits, solemnly pontificate; and we, let's get something done,” the pragmatic philosopher would say.

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Concepts, indeed, are instruments. They serve a purpose. The purpose may vary. It may vary from one concept to another, in the sense that different concepts may play different roles in our cognitive economy.

Some concepts help us simplify, some help us distinguish. Some help us understand, some help us argue. Some evoke, some lull. Some help us justify, some help us resist and object. Some help us assess, some help us decide. (8) Some provide camouflage for things we need to hide. Some stop the discussion, the inquiry, the argument, and thus place constraints on objectivity – constraints which often are indispensable, as Richard Rorty puts it, “because some particular social practice needs to block the road of inquiry, halt the progress of interpretations, in order to get something done”. (9)

Or, to offer a different typology from a different perspective, we might say that the purposes of concepts, their functions in our cognitive economy, their different possible cash-values, can at least be the following: To help us understand something; then their job is to explain; and explaining can be done in at least two ways: by simplifying knowledge and by complexifying it (achieved by introducing further distinctions). To help us decide; then their job is to act as proxies, to stop inquiries. To help us win arguments; then their job is to stop discussions, to act as rhetorical devices. To help us communicate; then their job is to generalize ideas so that it takes less nominal information to transmit them.

One way to put all this is that concepts have idiosyncratic functions – different functions are proper to different concepts. Now, better concepts serve their purpose, their function better. A concept is well defined if it serves its function well.

Consider a parallel to make the point clearer: the parallel is between concepts and genres of legal thought. Here's how Pierre Schlag puts it for legal thought: “it seems evident that what is required of the various genres of legal thought (knowledge, understanding, interpretation, edification, etc.) differs somewhat across the genres.” (10) Different types of legal scholarship have different purposes. What marks them as good scholarship varies across types and thus across purposes. The same is true of concepts: what marks them as good, well-defined concepts varies across functions.

This implies that to different functions correspond different defining principles. A concept meant to evoke is not well defined according to the same principles as a concept meant to distinguish is well defined: the former must, for example, connect to the contingent social and cultural symbolism of its audience (notice the concepts used in political statements); the latter must, for instance, be precise (notice the concepts used ● by engineers). A concept whose primary role in our cognitive economy is to simplify knowledge should, for example, be defined in a way that maximizes its capacity to explain as many things as possible, as accurately as possible, and as eloquently as possible (think of the concept of law, for instance). (11) A concept whose primary role is to help us decide should, by contrast, rather be defined in a way that maximizes its straightforwardness, its manageability, its “black-box-ness”, its accord with the core values we hold (think of the concept of comity, for example). (12)

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Then of course the purpose of concepts does not only vary from one concept to another as they play different roles in our cognitive economy. A single given concept may also play different roles in different cognitive economies: the same concept may have different purposes depending on what it is used for.

Consider this simple example: When we say to ourselves “this is a just decision”, “justice” is meant to help us decide, to help us stop thinking, to help us cope with the fact that, as Jacques Derrida put it, the just decision “cannot furnish itself with infinite information and the unlimited knowledge of conditions, rules or hypothetical imperatives that could justify it”. (13) When we need to make a decision, we need to stop thinking at some stage, even if more thinking could be done, and the purpose of “justice” is to allow us to do just that. Then again, the same concept of justice, in a different context, can be used to do a very different job: when we say to others “oh but this is unjust!”, the reference to “justice” is meant to gear us into thinking, into arguing, into finding knowledge. (14)

In the hope of making the point clearer by taking it into territory more familiar to lawyers, let us briefly consider how it applies to legal doctrines. Schlag again explains the point intelligibly, even though it might make us double back before we actually quite accept it:

“the [legal] academic will present his or her work as faithfully devoted to the analysis of some unitary object of inquiry – as if the invocation, for instance, of a legal doctrine meant the same thing in a law review article, in a lawyer’s conference call to the client, in a judicial opinion, in a legislative committee hearing, in a press conference. ● In all likelihood, the “same doctrine” will be invoked to mean different things in all those speech acts even if the speakers (incorrectly?) presume that it means the same thing.” (15)

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To make it yet brutally simpler, which should really not be taken as an accurate representation of the argument because it is meant to illustrate the argument and not enunciate it, take the concept or doctrine of good faith: it means different things in different legal systems; within a given legal system it tends to mean different things for different branches of the law; within a given branch of the law, it tends to mean different things for different uses, in different situations.

Legitimacy is a concept that falls within this category of concepts with multiple purposes. And quite squarely so. When Jutta Brunnée and Stephen Toope argue that “‘legitimacy’ can have a specific, legal meaning” (which they pin on Lon Fuller’s eight principles of inner morality), (16) they go in the right direction, but not far enough. The plural would have helped: legitimacy can and does have several specific meanings for lawyers. The different meanings of legitimacy correspond to its different uses and purposes, across disciplines but also within law, even within international law.

Let me restate the argument so far without the jargon, from a slightly different perspective and a lighter approach. Some concepts are fixed; they have a uniform meaning within a field, or even across fields. The point of departure for the use of such concepts should then be that meaning, be it only for the sake of clarity of statements made using the concept – that I don’t mean something else than you when we use the same concept. But that doesn’t work with legitimacy. Legitimacy is a concept that has a great variety of meanings, even within the comparatively narrow confines of the international law literature – at least one study, by Chris Thomas, has mapped that array of meanings well enough. (17) Put differently, legitimacy is characterized by clear and significant conceptual pluralism.

For its definition there is, then, no fixed starting point. Its starting point should rather be floating, relative. It should be its purpose, its use: the purpose or use of the concept of legitimacy. The questions we should start from should be: What is the purpose of the concept of legitimacy? What are we trying to do with the concept? What is it meant to capture? And then, how should we define legitimacy so that it serves that purpose as well as possible?

The starting point should not be, against much of the current practice, the definition of legitimacy offered by some well-known author because the author is well known. This would be inappropriate, even wrong argumentatively (it would be an argument by authority). To get an idea of how these discussions often go, consider this: Some people say that legitimacy is “the right to rule” and refer to Allen Buchanan and Robert Keohane’s authoritative, “classic” statement of this definition. (18) No, no, no, other people respond, this is quite wrong. The correct definition of legitimacy is necessarily one that ● marks a distinction between political normativity and applied morality, as Matt Sleat (19) and Bernard Williams (20) authoritatively pointed out. No, no, no, yet others respond: the definition of legitimacy must entail some combination of sociological elements and moral elements, they argue, and quickly enlist Jürgen Habermas’s good name for help. (21)

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What discussions like these don’t seem to acknowledge is that these different authors wanted to achieve different things with legitimacy, which call for different definitions. It is like asking which of an airplane, a motorbike, and a snowboard is the better transportation mode: you don’t usually use them for quite the same purposes; their fitness for the purpose in question is what makes them better. That nuance is of course easily lost if the only reference point for a definition is its author and the author’s authority in a field.

As the example also suggests, a search for *the* purpose of legitimacy would be misguided. It would lead us into a totalizing account of the concept, which is neither helpful nor required and would need to operate at such a level of generality that nothing useful remains. (22) In the end, the simple point is that the concept of legitimacy has several purposes, some firmly established, some we could find out and add.

Perhaps you find this trite. That would be good, in fact. But others won’t like it. Indeed my story so far has been, to borrow from Schlag once again, “dissonant with the pretence to certainty of the juridical style that remains so dominant in academic legal writing”. (23) My story would be more popular if it came with reassuring certainty. But I think Crawford and Koskeniemi were right: many of the discussions of legitimacy don’t seem to be going anywhere much. Embracing the uncertainty of the meaning of legitimacy while trying to tie it to a concrete job might be one way to go somewhere.

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III The Jobs of the Concept of Legitimacy

What are the purpose and utility, as I said, of the concept of legitimacy in the context of our discussion? What are we trying to achieve when we talk about the legitimacy of lawmaking in international arbitration?

You may still not buy my story about the variegatedness of the concept of legitimacy, despite my repetitions. You may still think that legitimacy means legitimacy and that my job should have been to simply find out what that meaning is. That with a little effort surely we can find an apodeictic definition of legitimacy (one that is undisputed, on which we can safely build). Granted, my story isn't an easy sell. It brings Humpty Dumpty to mind ("When I use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean — neither more nor less." "The question is," said Alice, "whether you can make words mean so many different things.") And that might not be entirely heartening.

So let me show you. By the end of the discussion, I will convince you that we can and must choose between different meanings, and that this choice should depend on the job we want to give to the concept of legitimacy. I hope you will agree with the choice I eventually make.

Let us first look at what is around it, what it connects to. So: in the conceptual neighbourhood of legitimacy there live authority, fairness, justice, allegiance, conscientious adhesion, values, ethics, morality, but also crisis, opposition, resistance, and change. Legitimacy connects to all these neighbouring concepts. All these neighbouring concepts may help us see what legitimacy can be used for.

By way of illustration, for Max Weber the purpose of legitimacy is to explain authority, and the purpose of both (legitimacy and authority) is to explain social regularities: why people obey norms, perceived or real. Legitimacy and authority are here very close, to the point that Fuad Zarbiyev states that "the phrase "legitimate authority" denotes a redundancy." (24) Legitimacy helps define authority; authority helps define legitimacy. While the two concepts are discrete (in the sense that their meanings do not fully overlap, even if some overlap is possible), they are connected, at least from this particular perspective: thinking about authority may then help understand what the concept of legitimacy can be used for.

To take another example, legal validity arguably depends on one of three types of factors, or a combination of these factors: formalism in the positivistic tradition, effectiveness in the legal realist tradition, and indeed legitimacy in the natural law tradition. (25) Brutally simplified, the idea of the natural law tradition (which in truth very much permeates the way we practice law) is to bring to light the role of people's allegiance to rules, people, institutions, psychologically inevitable preoccupations with ethics when we declare rules and decisions valid or invalid, attempts to morally justify our actions when we draw the boundaries of what is lawful and what isn't. From that perspective, legitimacy is the conceptual device we use to anchor our law-related activities in our humanity. Deep down, our conscious and unconscious considerations of humanity, of the human condition, of the values we derive from it, they all contribute to making us take legal positions; legitimacy is the concept we tend to use to make these decisions or camouflage the reasoning leading there.

And a third example of how legitimacy connects to neighbouring concepts which in turn give purpose to the concept of legitimacy: as Chris Thomas puts it, "The language of legitimacy and the language of crisis have long been associated with each other, standing as they both do at the borders of order and chaos." He goes on to cite a string of publications which speak of "legitimacy crisis". (26) What does this tell us? First that systems, regimes, structures in which law is made are "in crisis" because of legitimacy problems; legitimacy is used to explain, possibly justify, why a regime changes or need to change. Too often, sadly, and to echo Crawford's and Koskeniemi's laments reported at the outset of this paper, the concept of legitimacy is often left under-defined, under-theorized in these publications – many essentially say that "something is wrong" with the regime, that it shows dysfunctions, which cause instability and urgent crisis-type change. If the purpose of "legitimacy" is to make us understand something about the neighbouring principle of "crisis", how then should we best define legitimacy?

Beyond the somewhat fuzzy conceptual neighbourhood of legitimacy, can we draw a more informed, a crisper typology of the uses and purposes of the concept of legitimacy? I suggest the following, which is strictly not meant to be exhaustive; it isn't a totalizing account, to use the words from above, of the uses and purposes of legitimacy.

1 Job One: Justification

The concept of legitimacy is often used for justificatory purposes. Notice that one of the definitions of legitimacy offered by the Oxford English language dictionary is this: the "ability to be defended with logic or justification" (emphasis added – somehow the authors of the Dictionary didn't consider that logic is a form of justification).

In this category, perhaps the most common example of something justified on the ground that it is "legitimate" is coercive power. A given regime coerces certain actors into doing something, but that is okay, justified, the regime is worthy of compliance by its actors and of non-interference by external forces, because it is a legitimate situation; the regime and its sway are legitimate. The concept of "legitimacy" is used to justify that coercive power.

Of course, the same reasoning applies to exercises of power not based on coercion, on force. Any regime, any power, anything that exercises normative effects can find justification for its existence and impact in arguments that it is legitimate.

Legitimacy refers here to the “right to rule”, broadly taken. (27) It serves to justify the power of one actor over another and the exercise of that power. As Chris Thomas puts it, “Questions about legitimacy may be understood as questions about the *justificatory frameworks* behind the expansion, contraction, formation, transformation, maintenance and dissolution of legal orders.” (28)

For instance, we could justify the power of arbitrators over the parties – from the issuance of procedural orders, to the creation of new rules for the case at hand and/or future cases – on the ground that it is legitimate. (Notice that, from this perspective, the question whether this power is legitimate would be the question whether arbitrators *should indeed* have this power.) Used in that sense, legitimacy might call for a standard found in party autonomy: the parties consented to arbitration, therefore it is legitimate that the arbitrators ... and so on.

A good definition of legitimacy, if it is used for that purpose, is one that resonates with the moral orientation of the particular audience to which one tries to justify something, a definition that is attuned to its rhetorical sensitivities. It could for instance be a definition of legitimacy that uses standards which tend to evoke values of order, obedience, peace, stability, anxiety of “the other”, anxiety of change, security, predictability, certainty.

The justificatory purposes of the concept of legitimacy also extend, beyond power and normative effects, to someone’s social position. As Zarbiyev puts it: “measured by sociological criteria, legitimacy is a matter of ‘social credibility and acceptability’ of a social position.” (29)

And legitimacy can of course also be used to justify an action. Thomas suggests the example of “Goldstone report’s memorable verdict that the NATO military intervention in Kosovo was ‘illegal but legitimate’.” (30)

2 Job Two: Objection

The concept of legitimacy may also be used to contest, to resist. To oppose, to object. To revolt. In many ways this is simply the flip side of justification: what is legitimate is justified, what is not should be contested, resisted. Zarbiyev summarizes some of the arguments on this use of legitimacy in the following way: “In another attempt to show that authority and legitimacy cannot be equated with each other, it is sometimes suggested that resistance to, and contestation of, authority cannot be properly accounted for without keeping authority and legitimacy separate.” (31)

This use of legitimacy is central to the natural law tradition, when it makes the point that one does not have a moral obligation to obey the law if the law is not legitimate. (32)

This use of legitimacy is also central to civil disobedience discourses, from Henry David Thoreau (illegitimate state), to the student revolts of the 1960s and 70s (illegitimate establishment), to the alter-globalization movements (illegitimate economic system), to the rhetoric of resistance to investment arbitration as a component of the global economic straightjacket (illegitimate geopolitical function). To take just one quick example, Muthucumaraswamy Sornarajah refers to “legitimacy” on roughly 10 percent of all the pages of his latest book – a significant building block of his overall argument. (33)

A good definition of legitimacy, if it is used for the purpose of resistance or opposition, is certainly one that, once again, resonates with the moral orientation of the particular audience one tries to stir into action, a definition that captures the general sense that injustice must not be condoned. It would be a definition that uses standards which tend to evoke values of freedom and independence and liberation, enough-is-enough-ness, unfairness, injustice, self-interest, inequity aversion, a sense of the possibility of change, joy in what is new, progress, hope. A good definition of legitimacy for the purposes of resistance or opposition would tend not to admit of degrees (something is legitimate or, indeed, illegitimate, not more or less legitimate) so that an attack on one piece of the architecture of an institution, or regime, or rule makes the entire construction collapse. A good definition for these purposes is probably also one that is quite blurry, which the audience can infuse with its own individual preferences, while being categorical.

Sornarajah, for example, considers that investment arbitration is illegitimate because of (a) the “democratic deficit that is involved in a law made by ad hoc tribunals” in the sense that “[a]rbitrators have no mandate to make the profound changes they have on the basis of hazy provisions in investment treaties” and (b) “There is also an absence of ethical values in the type of decisions that have been made. The legitimacy of an international norm must be based on fairness criteria.” (34) One might be tempted to ask in response what exactly democracy would entail in such a situation and why, and whether hazy abandonment of decision control by states necessarily is undemocratic. One might also be tempted to point out that ethical values and fairness criteria do permeate investment arbitration decisions and investment rules; they are simply not those values that Sornarajah seems to have in mind.

But who would get excited by such tedious responses? They would require tiresome discussions of the definition of legitimacy. And these don't quite trigger the same knockout oomph as does a well-turned call for freedom and justice.

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So it seems easier to point out a thing or two that investment arbitration obviously does not do well and call it illegitimate, to resist it, than to carefully review all its effects and call it on the whole legitimate, to positively justify its existence and overall functioning. To risk a brutal parallel, Trumpism and Brexitism face a much lower definitional duty in their arguments that the established order is illegitimate (contestation) than the opposite arguments that it is legitimate (justification).

Again, different uses of the concept of legitimacy simply call for different definitions if the point of the concept of legitimacy is to get something done. A definition of legitimacy that gets the thing better done, whatever the thing is, is a better definition.

3 Job Three: Explanation

The concept of legitimacy is also often used neither to justify something nor to contest and resist, which are both evaluative-normative claims (“it *should* stay as it is”, “it *should* change”), but rather to explain something.

Perhaps the most obvious thing that legitimacy is used to explain is authority: someone or something has authority, which means that it will tend to be obeyed even in the absence of coercive power, self-interest, habit, and error, if it is considered legitimate. In that sense, the concept of legitimacy is almost an empty container, a placeholder for whatever the individuals who are obeying happen to value and respect. As Julia Black puts it: “the relevant criteria ... are not those which an external observer (including a commenting academic) would see to be normatively valid or valuable; the relevant criteria are those being used by those who are interacting with the actor in order for them to accept ... its authority.” (35)

A good definition of legitimacy, in this context, is one that clearly keeps out coercion, self-interest, habit, and error (or any other reasons-for-action depending on the typology at hand), in order to isolate legitimacy as an independent reason-for-action. (36) Legitimacy and authority then largely overlap. (37) Simply put, the purpose of the concept of legitimacy here is to explain why people obey certain rules or orders even if they are not forced to, gain nothing from it, don't simply do it routinely, and are not mistaken about any of this.

For instance, one might wonder why parties comply with law made in international arbitration – from precedents to procedural orders – if they are not coerced to do so, if it is not in their interest to do so, if they don't do it out of habit, and if they didn't misunderstand something: the answer would be because they find the relevant norms or orders legitimate, and thus grant them authority. This use of the concept of legitimacy would for instance point the way to studies on why exactly and under which conditions the parties do that.

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A variant of this use of legitimacy is the simpler distinction between coercion and other reasons-for-action: if I am not coerced to do something but nevertheless do it, I do it because I think it is “legitimate”. The point of the concept of legitimacy here is to get a general picture of how people, or any other subjects of any rule, regime, etc., likely exercise their freedom, where “freedom” simply means non-coerced space, generically. From that perspective one can indeed say, as Daniel Bodansky does, that “one of the reasons why states might agree to subject themselves to the authority of an international institution, and consider its authority legitimate, is that they think such institutions are in their self-interest”. (38) What I think is in my interest I would tend to find legitimate. Whether this is a better or worse definition than the preceding definition (which opposes legitimacy not only to coercion but also to self-interest, habit, and error) depends entirely on what the purpose of the concept of legitimacy is in the analysis at hand, what it seeks to explain, to get done.

4 Other Jobs: Assessment, Acceptable Expression of Emotions, Thinking

Legitimacy can also do a number of other jobs, which I can but mention in passing.

Legitimacy can be used to assess. To assess the morally cherishable character of something. For example to assess if the something satisfies Kantian criteria, or Habermasian criteria, or rule of law criteria if rule of law is taken as a moral-political ideal. Or if it promotes liberal values, communitarian aspirations, global justice ideals, a neoliberal agenda, ... – you get the point. In such cases, the purpose of the concept of legitimacy is often to lull the critical sense of the audience, to prevent the discussion from going into a certain direction – namely the direction of a proper comparison, in political philosophy, of the respective moral-political advantages of liberalism vs communitarianism vs neoliberalism, etc. (Think “lawmaking in international arbitration is illegitimate because it promotes a neoliberal agenda”, which says nothing about the undesirability in this particular case or even in general of the pursuit of such a neoliberal agenda.)

It can be used to assess our own work also. As Chris Thomas puts it: “as international lawyers, global actors and human beings, we have a responsibility to reflect on the motivations for our actions and to take responsibility for our role in propagating particular constellations of power and subjugation”. (39) Is what we do legitimate? Which should lead

us to ask: What are the effects of what we do (assuming it has any, of course)? Are we quite content with the structures of power we propagate as we fulfil the functions assigned to us by “the system”?

Then legitimacy can also be used as a socially accepted way of banging on the table: if I think something really has to stop I can use “This is not legitimate!” to express that emotion.

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Legitimacy can further be used to free lawyers from the narrow confines of mechanical black letter law thinking, by unlocking human questioning beyond legality and lawfulness: it is legal but is it quite legitimate? It is illegal but is it nevertheless legitimate?

The list could go on. But I think the point has been reached where it is clear enough that the concept of legitimacy can be given one of a number of different possible jobs.

IV One Understanding of Legitimacy and its Implications

So we are quite free in defining the concept of legitimacy; what matters is to decide what we want to use it for, what we want to get done with the concept, and then define it accordingly. (Clearly, I repeat but the point is important, this paper forgoes conceptual truth, and on this particular question of legitimacy, it posits that actually *there is no* conceptual truth.)

As I said at the outset of this paper, my purpose in using legitimacy is to help us understand and assess the stability of structures of lawmaking (regimes, systems, orders, spaces, etc.) in international arbitration, when and how these structures are likely to change, where the impetus may come from, etc.

To be very clear, my purpose in using legitimacy is not to justify any regime; not to resist it; not to oppose it; not to assess its moral laudability; not to say what political agenda it does, should or shouldn't promote; not to make us ponder our responsibility in propagating the power structure it implies; not to bang on any table. I'm not arguing that these aren't important questions or valuable endeavours. I'm not claiming either that the question I am asking is more important than any of these other questions. But again the one thing we have to be wary about is the temptation to offer a totalizing account, an account that would try to capture all of these aspects of legitimacy, all of the purposes of the concept. To say the least, an article-length treatment of legitimacy cannot encompass all these variants of legitimacy. And it must not try. It is, then, patently a choice to focus on this use of legitimacy in this particular paper, a choice determined by altogether contingent factors – which like all contingent factors come into being and pass out of being.

Now, what does this imply for our understanding of legitimacy? The first point is hackneyed and obvious, but important: a regime is easier to sustain, more stable, if it reflects the self-interests of its addressees. For the chosen use of the concept of legitimacy, anchoring it in self-interest is then apt. To be clear, I'm talking about self-interest not as a reason to comply with a regime but as a reason to input or not input change.

This further means that the perspective is relative: for that particular use of legitimacy, there is no universal standard, it all depends on the relative perspective of the actors concerned. A given regime may be legitimate from the perspective of a given actor, because it advances its self-interests, and illegitimate from the perspective of another actor because it doesn't advance its interest as it thinks it should. To paraphrase Ian Hurd, the idea is that actors make decisions on whether to input change or not based on “an instrumental and calculated assessment of the net benefits of [change] versus ● [stability], with an instrumental attitude toward social structures and other people”. (40) Julia Black uses the idea of “legitimacy communities” to make a different point in a different context (the exercise of interpretive control) but which echoes this reliance on relativism. She first says this: “whilst regulatory actors can compete for legitimacy, whether they are accepted, and by whom, depends on whether their legitimacy communities will endow them with the legitimacy and authority they seek”. And then she draws this consequence: regulatory actors “can adopt various strategies to ‘solidify’ their position by gaining legitimacy from different legitimacy communities. Legitimacy in turn affects their ability to exercise authority, and their ability to function.” (41) From these perspectives – Hurd's, Black's, and the perspective advanced here – the legitimacy of a given normative structure is always only relative to a given addressee, varies from one “ruled” to another.

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To be clear, we as observers have plainly no judgment to pass on this. It is beside the point whether we think that it is ethically or morally or historically or legally right or wrong that the interests of this or that actor are furthered – the chosen use of the concept of legitimacy excludes the relevance of such judgments. Put technically, the perspective is axiologically agnostic.

If the perspective is relative and depends on the actors' perspective, which actors are relevant? Recall: we are interested in stability, so the relevant actors are those who can change the regime in question. Think of political realism à la Henry Kissinger: as he put it, “An international order, the basic arrangements of which are accepted by all the major Powers, may be called ‘legitimate’.” (42) The international order is stable if the major

players consider it legitimate – the *major* players, the others we don't care about. A given instance of arbitral lawmaking is stable if the major actors consider it legitimate – “major” in the sense of those that have the power to change it.

Eventually it might rejoice us lawyers: if asked whether a given arbitral regime is legitimate, the answer would have to be “it depends”. It depends on the different actors' perspective. Certain types of parties might find that a given regime is not legitimate, others will; arbitrators in turn might find it legitimate; perhaps states won't find it legitimate; and so on. Why are these different actors' perspectives relevant? Because they can change the regime, because they can affect its stability: if the regime is not legitimate to them, they might try to alter it, which is what we want to know.

Once more on this idea of relativism: among the many things that legitimacy is *not* used for in this paper is the search for any form of “absolute” assessment of political morality, where “absolute” means that the view is meant to exclude the validity of other views. Such a view would be, for instance, that a given instance of international arbitration lawmaking is legitimate, in the sense of morally justified, not from any actor's point of view, but from the point of view of an observer, according to some ● metaphysically determined standard. Party autonomy and consent, for instance, form one such metaphysical standard of legitimacy: arbitration's lawmaking is legitimate because the parties have consented to it; the effects of BITs as applied by arbitrators are legitimate because states have agreed to them: these are notions of legitimacy that are based on an “absolute”, metaphysical standard. Standards such as these belong into an entirely different discussion than the one I'm offering here. Indeed party autonomy and consent, which figure prominently in many debates on legitimacy in international arbitration, have per se no place in the current discussion: party autonomy and consent are not determinants of stability. (I recognize that *indirectly* they may have a role to play, for instance through sunset clauses, which have an impact on regime stability, but this is a different matter.)

To situate it in the literature, the understanding of legitimacy used in this paper is, then, different from the usual three understandings Thomas identifies in his extensive compilation of the literature on legitimacy in international law. It is not legal legitimacy, because it doesn't concern itself with whether lawmaking by international arbitration is lawful, whether the parties to international arbitrations, or anyone else, have a legal obligation to submit to the relevant international arbitration regime. It is not moral legitimacy because it doesn't concern itself with universal, metaphysical assessments; it doesn't concern itself with the question whether the parties to international arbitrations, or anyone else, have a moral obligation to submit to the relevant international arbitration regime. It is not social legitimacy, although it comes close to it, because it doesn't concern itself with actors' beliefs that a regime is legally or morally legitimate; it doesn't quite try, as social legitimacy tends to do, to “account for legitimacy's capacity to motivate obedience even for those who are consistently disadvantaged by the system”. (43) To the contrary, the point is rather to ask how the actors are likely to react when they understand whether they are advantaged or disadvantaged by the system, assuming that they react rationally. It thus concerns itself with the interests the different actors of the systems actually have, regardless whether they currently happen to perceive and understand these interests.

If the understanding of legitimacy used in this paper required a label specifying its basis, to situate it more precisely in the literature, it would be called interest-based or outcome-based or output legitimacy. (44) It might then be compared in the literature to Ernst Haas's approach, when he writes that “[o]rganizational legitimacy exists when the membership values the organization and generally implements collective decisions because they are seen to implement the members' values”. (45) It might also be likened to output legitimacy in Sharpf's classification of “the functions of input-oriented and output-oriented legitimating arguments in liberal democracies”. (46) Output legitimacy, in Sharpf's classification, refers to “government *for* the people” (47) – in the language of this ● paper, we would say “lawmaking *for* the actors of the regime”. It understands legitimacy as the capacity to “generally represent effective solutions to common problems of the governed” (48) – in the language of this paper, we would say “advance the interests of the addressees of the regime”, more precisely those addressees who are also actors of the regime, who can effectively change it. A failure of output legitimacy is a failure to satisfy the self-interests of the regime's actors; it will usually trigger attempts to alter the system's workings.

V Modelling Actor Input in International Arbitration Lawmaking

The chosen purpose of the use of legitimacy, as explained abundantly in the preceding sections, is to help us elaborate a framework that will allow us to better assess the stability and better predict the evolution of different instances of international arbitration lawmaking, different arbitral regimes broadly speaking. Brutally simplified, if a given arbitral regime is good to a given actor, it will be understood as legitimate from that actor's perspective, and that actor is unlikely to input much change; conversely, if the regime is not legitimate to an actor who can change it, it likely will try to alter it. If the regime is not legitimate to an actor who cannot change it, probably nothing much will happen.

Can we, then, model this simple idea, provide a model that can be applied to analyze discrete actual instances of international arbitration lawmaking? I argue, based on prior

and ongoing work with Cédric Dupont and Jason Yackee, (49) that David Easton's model of a political system is a good starting point. (50)

Easton developed a model of political systems based on Harold Laswell's straightforward idea that politics is the question of “who gets what, when, how” (51) – in other words whose self-interests are furthered, when, and how. In the model, actors influence a system through so-called “inputs”.

Inputs are attempts to make the system do the bidding of the actors providing the input, to make it maximize their self-interests. The system then aggregates these inputs and transforms them into so-called “outputs”.

Outputs are effectively determinations of who gets what, when, and how; they are determinations of whose self-interests are advanced when and how; they are authoritative allocations of values, as Easton puts it; they are normative outcomes in the sense that they say what things ought to be, in principle with some power to make things be that way.

Once the cards have thus been dealt, some actors will of course be unhappy because their self-interests are not as maximized as they wanted or because their self-interests have been harmed by the input of another actor. These disgruntled actors then adapt ● their input or provide new input. This reaction Easton calls feedback loops from output to input.

The result is a constant competition among the actors to influence the system. Such a political system is thus dynamic, constantly evolving through reactions to its own outputs.

To put this technically, political systems in Easton's sense are organic collective mechanisms of steps in value-allocation decision-making, transforming certain types of input into certain types of output, thereby furthering certain goals by effectively allocating values. The output in turn feeds back to the actors providing the input, leading them to adapt that input in order to continuously seek the maximization of their own interests.

To put this in the language used earlier in this paper, a political system is a regime which produces normative outcomes (lawmaking, regulation, for instance). The regime's actors are those who have the power to influence it, to shape it. Each actor influences, tries to shape the regime in such a way that the regime is as legitimate as possible to the actor in question, which means that it advances its self-interests as much as possible. If the regime doesn't advance the interests of a given actor, or doesn't advance it enough, that actor tries to change the regime, it adapts the way in which it influences it, how it tries to shape it. Each influence successfully exercised on the regime alters the normative outcomes it produces, modifies the interests it advances, therefore at least possibly harming one actor's self-interests while better advancing another actor's self-interests. This reallocation of interests will thus make the regime less legitimate for one actor, who is likely to push back and try to vary the regime, back to its original position or onwards to a new position, so that it again maximizes its self-interests. These iterations stop if an equilibrium is reached in which each actor's self-interests are maximized to an extent that corresponds to their power to influence the regime. The regime is then in a situation of stability lasting until an actor discovers what self-interests it could make the regime maximize or until the power play changes.

The model, of course, assumes purely rational utilitarian behaviour on the part of the actors and tends to assume that we are in a situation of finite resources where one's gain is another's loss. Clearly none of these assumptions is systematically true in the real world. But I take it to be reasonably representative of the purpose of the entire analysis, which, as explained above, is to assess the stability of a regime. A more complete, and ultimately more accurate model would factor in the respective weights of altruistic and self-serving pursuits, as well as other behavioural distortions of rationality, such as cognitive biases, in each actor's attempts to shape the regime into what it would like it to be. Such a more complete, behavioural model, however, would most likely become unwieldy to the point of being unusable, as the proportion of altruistic/self-serving pursuits is highly variable from one individual or institution to another, as are cognitive biases.

Easton himself applied his model to national, typically parliamentary politics, and to international political systems such as NATO, the UN, and the Southeast Asia Treaty Organization (SEATO). But his model can in fact be applied to everything that aggregates input and allocates who gets what: from international organizations, to “the” international system, to companies, law firms, university departments, families, all manner of regimes, policy spaces, groups, institutions.

Importantly, what the model is applied to – the “system” – does not have to be an actual, real, naturally demarcated, independently existing system per se, in the sense that the human body is, for example. It doesn't have to be a truly discrete system because the purpose of Easton's model, its heuristic value as it were, is not to make us see the separateness of the “system”, that it has a specific, distinct identity. It lies instead in encouraging us to focus on identifying the main actors who can modify the system by shaping and influencing the rules it produces and thus the values it allocates. It also helps us see the overall incentive structure in which they operate, which combines both rule creation and experiencing the consequences of these rules.

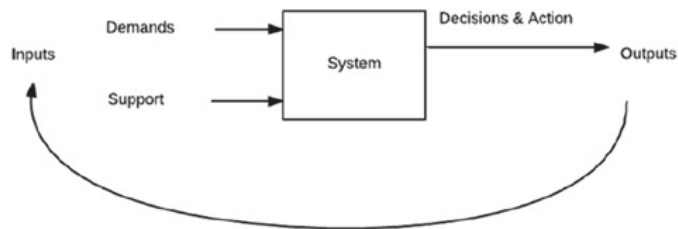


Figure 1. David Easton's model of a political system - Dupont, Schultz & Yackee, "Investment Arbitration and Political Systems Theory", Oxford Handbook of International Arbitration, forthcoming.

Easton's model can be represented as shown in Figure 1. (52)

With Dupont and Yackee we have applied the model to investment arbitration. (53) There it means that states, investors, arbitrators, and arbitration institutions all constantly, to the best of their bounded rationality, attempt to push the regime in a given direction so that it best produces their own investment-law demands. The cumulative result of these influences is the existing, evolving investment arbitration case law. We used the chart in Figure 2 to represent this. (54)

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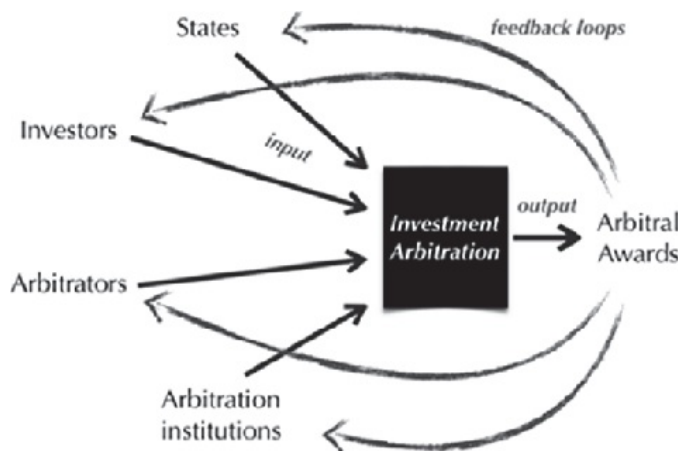


Figure 2. Investment arbitration as a political system, showing only actors able to make changes directly in the system – Dupont & Schultz, Towards a New Heuristic Model, JIDS 2016.

All the actors providing input on the charts are represented there because they have the power to change the regime. As I said above, what makes them actors is precisely the fact that they can modify the regime.

The "input" arrows on the charts represent attempts, real or likely, to make the regime advance their self-interests, to make it legitimate from their perspective.

A quick and partial example, which we've used elsewhere: (55) a state may consider that international investment law is legitimate if it reflects an understanding of the fair and equitable treatment (FET) standard in line with the *Neer* decision, which assumably serves the state's self-interest. The state provides an input into the system by arguing to an arbitral tribunal that its decision should articulate that particular understanding, as an authoritative statement and application of the law. The decision of the tribunal to articulate a certain understanding of FET is the "output" of the system. The system itself can be viewed as the place of interactions between the system's various actors; it consists of the processes through which their various inputs are aggregated into the system's outputs.

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The states' input is their consent to investment arbitration, the ways in which they express that consent, their treaty-making activity, their contractual practices with foreign investors, and their domestic legislative actions (when a national "investment code" contains an offer to arbitrate addressed to foreign investors). Another type of states' input relates to their behaviour during and in relation to arbitration procedures. Yet another is their role in choosing arbitrators for institutional lists.

The investors' input is the claims they file or threaten to file, the conditions under which they do so, against which states, the procedural rules or institution they use, what they seek to obtain in doing so, how they frame their claims, and so on. Another type of investors' input relates, here too, to their behaviour during arbitration procedures.

The arbitrators' input is their choices, conscious or not, in framing and determining the awards and orders they render.

The arbitration institutions' input is their drafting of their own procedural rules and their residual capacity in appointing arbitrators.

The system's output is the arbitral awards, taken in the aggregate, including all their variegated effects, from the determination of rights, to their precedential value, to their actual financial implications for all actors involved, to their impact on the reputation of all actors involved, and including all forms of legal, economic, social, and political dimensions.

The awards, either individually or in the aggregate, feed back into the system as they have effects on the actors, who react to it by, for example, changing the content or intensity of their level of support, by changing their input.

Then of course there are also indirect actors: actors who cannot directly change the system, cannot provide direct input into it, but who can influence the actors who can change it directly. We have referred to them elsewhere as “the public”. (56) Luke Nottage calls them “society at large”. (57) They include NGOs, academia, various institutionalized forms of expression of civil society, various forms of expression of various industries (including of course the arbitration industry and ICCA, one of its expressions), occasionally particularly motivated individuals, the media.

Moreover, the different actors tend to try to influence one another, with the ultimate purpose of shaping the investment regime.

With this additional layer of complexity, the model looks as shown in Figure 3.

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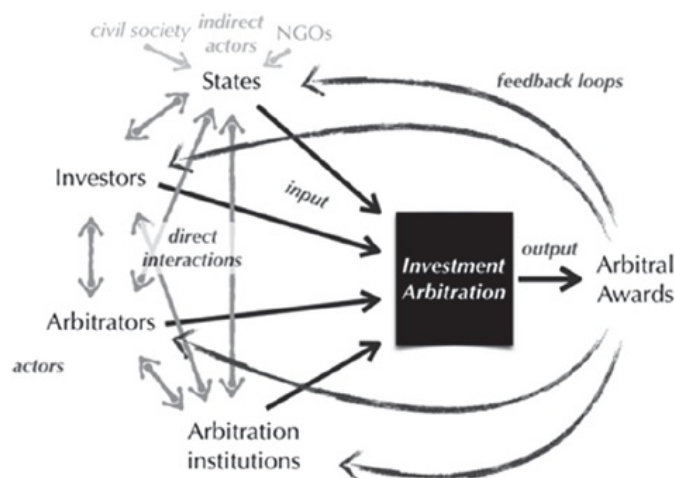


Figure 3. Investment arbitration as a political system, showing both actors able to make changes directly in the system and indirect actors - Dupont & Schultz, Towards a New Heuristic Model, JIDS 2016.

Of course this still remains quite schematic. That is the point. It keeps the model simple. Then again, when concretely applied, the model might call for some disaggregation. Most obviously, and this tends to be a pervasive problem in international relations, attributing an intention to a state is not much better than attributing an intention to “women” or to “men”, collectively. States, obviously, are collectivities made up of constituent units with different interests, and different pathways and powers to express that interest. For instance, a state's foreign ministry or trade ministry may have very different ideas about what investment arbitration should do than the ministry whose actions are being challenged. Likewise, the output of the system may be disaggregated into customary international law, arbitral case law, treaty interpretation. Moreover, one might debate whether other key actors should enter the picture: *amicus curiae*, for instance, may be considered to provide direct input into the system. (58) But again, one of the purposes of the model is to simplify the complications of reality in order to see a more general picture.

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The legitimacy question, in this situation, would be this: to what extent do states, investors, arbitrators, arbitration institutions consider that investment arbitration, as a regime of international arbitration lawmaking, is legitimate for them, to what extent does it advance their self-interests? From that perspective – I repeat the point but it is important – the question of the legitimacy of investment arbitration has nothing to do with the fact that states consented to it, or did not consent to some of it; it has also nothing to do either with the fact that the regime promotes a neoliberal agenda (if indeed it does). The fact that the system of investment arbitration exhibits inconsistencies, to the extent it does, is not an argument relevant to its legitimacy either – not per se, it would be relevant if it were demonstrated that the sort of inconsistency we are talking about here harms the interests of one of the regime's actors.

If we now asked whether the current investment arbitration regime is stable, on the grounds that it is legitimate from the perspective of its actors, the answer would likely be some shade of grey: it might be that it isn't legitimate to many states but it might well be to many investors, to arbitrators, and to arbitration institutions. The resultant of these different forces, of these different attempts to make the regime legitimate for its respective actors, might well be small, not terribly far from nil, which would mean that the

regime is indeed stable, unlikely to move.

As I said above, this entire approach is grounded in realism, not in any form of normativism such as morality or historical intent or even legal objectives. So the argument that investment arbitration was never meant to promote the self-interests of arbitrators is irrelevant, beside the point. It uses a different understanding of legitimacy which would itself serve a different purpose. It doesn't answer the question posed, which concerns stability. Whether investment arbitration should or should not promote the interests of arbitrators to the expense of, say, states is simply not this perspective's concern. (59)

Applied to international arbitration lawmaking generically (not all arbitration lawmaking as a whole, but generically to all individual instances of arbitration lawmaking), the model would look as represented in Figure 4.

In this chart, states, parties, transnational soft-law producers, arbitrators, and arbitration institutions are all input-actors, as I called them at the outset of this paper. Here I alternatively label them "change-empowered actors", in the sense that they are empowered to procure change: they are the actors who can change the international arbitral regime by providing direct input, by doing something that will have an immediate effect in the regime. "Society at large", to use Nottage's terminology, is an array of indirect actors, who cannot directly change the international arbitral regime in question but can exercise various forms of influence on the change-empowered actors.

One might note similarities between the change-empowered actors vs. indirect actors dichotomy and Emmanuel Gaillard's "service providers" vs. "value providers" distinction. While there are overlaps, the fault line falls at a quite different place. "Service providers" are those actors who "do" arbitration, in the sense of practicing it, while "value providers" are those actors who say how it should be done. (60) In these terms, change-empowered actors are those who "make" arbitration – make it be, make it what it is – while indirect actors are those who inform and influence the makers. All of the actors in my suggested distinction try, do, or could influence the normative structure of international arbitration – the "law" produced for and through international arbitration. The fault line marks the difference in their power to do it.

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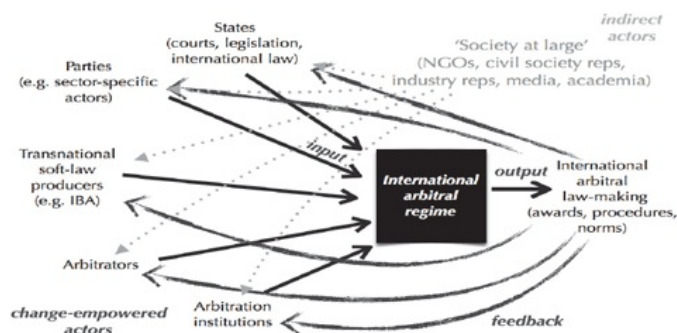


Figure 4. International arbitration lawmaking modelled as a political system

VI Anticipating Backlashes and Overreactions to Legitimacy Issues

Let us go back to the initial question this paper asked: Why do we care about the legitimacy of international arbitration lawmaking?

Surely we all have an interest in occupying ourselves with what we find morally right or wrong, because we naturally do tend to want the world to be a morally better place. But let us put these lofty aspirations aside. As I suggested above, such questioning would require that we engage seriously with moral or political philosophy, which would be a very different discussion than what I've offered in this paper. To be clear, I'm not arguing that this is a more important discussion, or a less important one; my point is simply that separate discussions should be kept separate. Discussions too should better not be totalizing.

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One pragmatic reason to care about the legitimacy of international arbitration lawmaking, as I have suggested above, is that a given regime of arbitration lawmaking that is not considered legitimate by an actor that has the capacity to change the regime is unlikely to remain unchanged in the longer run. A typical, but of course not exclusive, reason for an actor to think a regime illegitimate is its failure to serve the actors' self-interests. Hence my hinging of legitimacy on self-interest.

Then again, if different actors, all of which can change the regime, have different views on its legitimacy, and are thus all likely at some stage to try to pull it in a different direction, its likelihood and direction of change will depend on the cumulative effects of these different pulls. Hence the model of a political system I've suggested.

What, now, does that mean for us? If we care about arbitration, for whatever reason (egotistic, altruistic, academic), we probably should care about its stability, about how it might evolve. We should then, first, identify the relevant actors who can change international arbitration (international arbitration in general or a specific regime of international arbitration). Who can make it be something different, for better or worse.

Who can affect its stability. And understand how exactly they can change it. Second, we should clarify what exactly the effects of arbitral regimes are on its different actors, which would tend to call for empirical research, ideally conducted by individuals with as little self-interest in the system as possible. Obviously, the findings of such research should then be communicated to the relevant actors. This should be done even if the findings are negative, even if they are disappointing about what international arbitration effectively does for these actors: only this can avoid that these actors overreact to wrong appreciations of these effects, that they overreact to wrongly perceived legitimacy issues.

Brutally simplified, to illustrate the idea with just one example: some states are currently probably overreacting to what they (mis)understand to be the effects of investment arbitration on them, thinking it is not a legitimate system for them. Others are probably under-reacting. Yet others are probably reacting in a way that is beside the point, that doesn't address the problem. None of this is good. I said "probably": there is not yet quite enough empirical research on the complex question of the socio-economic effects of investment arbitration to really say that the reactions are adequate or not.

It is tempting to paraphrase Stavros Brekoulakis's words of caution. As he put it, "Arbitration lawyers often seem to have been under the self-reassuring delusion that arbitration's contribution to the public is somehow axiomatic, namely that arbitration is there to serve the business community, and by extension it serves the interests of the public too. However, the prevailing perception of arbitration by a critical mass of the public is often quite different." (61) Paraphrased in the language of this paper, it would be: "Those who are centrally occupied with international arbitration often seem to have been ● under the self-reassuring delusion that arbitration's contribution to those actors who can change it is somehow axiomatic, namely that arbitration either serves the interests of a given actor, or the actor is unable to do any harm, to change the regime. However, the prevailing perception of arbitration by a critical mass of change-empowered actors is often quite different, namely that arbitration is not legitimate from their perspective."

Possibly many if not most of these perceptions are not grounded in fact. But do we really know? It certainly seems unwise to respond, off the cuff, that there are no problems, without evidence to back up such statements. It also seems unwise to respond to such concerns by arguing that states, or other parties, consented to the regime so it is their problem: that might be morally and legally true, but it is beside the point if the preoccupation is stability. It relies on a different concept of legitimacy which belongs in a different discussion.

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- *) Thomas Schultz: Professor of Law, King's College London; Professor of International Arbitration, University of Geneva; Of Counsel, Penvern & Corniglion. Particular thanks go to Fuad Zarbiyev for a treasure trove of references and ideas. Many thanks also to Andrea Bianchi and Stephan Schill for comments on earlier drafts. This paper builds on earlier and ongoing work with Cédric Dupont and Jason Yackee.
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- 6) Reported by Maurice O'Connor DRURY, "Conversations with Wittgenstein" in Rush RHEES, ed., *Recollections of Wittgenstein* (OUP 1984) p. 110.
- 7) William JAMES, "Philosophical Conceptions and Practical Results", paper presented at the 1898 Berkeley Philosophical Union, reported and discussed in George COTKIN, "William James and the Cash-Value Metaphor", *Et Cetera* (1985) p. 37.
- 8) This quasi-typology conspicuously eschews the question of the purpose of knowledge. Let me explain: arguably, the purpose of every concept is to do something with knowledge. Then the question might be posed of what the purpose of knowledge is: Is it to understand? Is it to decide? One might recall Foucault's insistence on the view that "knowledge is not made for understanding; it is made for cutting [in the sense of deciding, from the original in French "trancher"]": Michel FOUCAULT, "Nietzsche, Genealogy, History" in *Essential Works of Foucault, 1954-1984 (Aesthetics, Method, and Epistemology)* (The New Press 1998) p. 380. But can one really be so categorical? Is there really no evolutionary or psychological drive to understand for the sake of understanding?
- 9) Richard RORTY, *Consequences of Pragmatism* (University of Minnesota Press 1982) p. xli.

- 10) Pierre SCHLAG, "The Knowledge Bubble—Something Amiss in Expertopia" in Justin DESAUTELS-STEIN and Christopher TOMLINS, eds., *In Search of Contemporary Legal Thought* (CUP 2017) p. 428, at p. 445.
- 11) Karl POPPER, "A Note on Verisimilitude", 27 *British Journal of the Philosophy of Science* (1976) p. 147; François OST, "Science du droit" in André-Jean ARNAUD, ed., *Dictionnaire encyclopédique de sociologie et de théorie du droit* (1993) p. 540; Jean LADRIERE, "Les sciences humaines et le problème de la scientificité" in Patrick de NEUTER and Jean FLORENCE, eds., *Sciences et Psychanalyse* (1985). For an application to the concept of law, see Thomas SCHULTZ, "Non-Analytical Obstacles to Stateless Law", 43 *North Carolina Journal of International Law* (2018) p. 182.
- 12) Thomas SCHULTZ, Jason MITCHENSON and Niccolò RIDI, *The Principle of Comity in Public and Private International Law* (CUP, forthcoming 2019); Thomas SCHULTZ and Niccolò RIDI, "Comity and International Courts and Tribunals", 50 *Cornell International Law Journal* (2017) p. 577; Thomas SCHULTZ and Jason MITCHENSON, "Navigating Sovereignty and Transnational Commercial Law: The Use of Comity by Australian Courts", 12 *Journal of Private International Law* (2016) p. 344.
- 13) Jacques DERRIDA, "Force de loi: le fondement mystique de l'autorité", 11 *Cardozo Law Review* (1989) p. 920, p. 967.
- 14) One could of course argue that concepts that are nominally the same are functionally different – same name for a concept, different use – and should thus really be considered different concepts, so that we remain with the idea that one concept has one purpose. But this is just a semantic debate.
- 15) SCHLAG, "The Knowledge Bubble", p. 433.
- 16) Jutta BRUNNÉE and Stephen J. TOOPE, *Legitimacy and Legality in International Law* (CUP 2010) p. 34.
- 17) Christopher A. THOMAS, "The Uses and Abuses of Legitimacy in International Law", 34 *Oxford Journal of Legal Studies* (2014) p. 729.
- 18) Allen BUCHANAN and Robert O. KEOHANE, "The Legitimacy of Global Governance Institutions", 20 *Ethics & International Affairs* (2006) p. 405.
- 19) Matt SLEAT, "Legitimacy in Realist Thought: Between Moralism and Realpolitik", 42 *Political Theory* (2014) p. 314.
- 20) Bernard WILLIAMS, *In the Beginning Was the Deed: Realism and Moralism in Political Argument* (Princeton University Press 2005).
- 21) Jürgen HABERMAS, *Legitimation Crisis* (Polity Press 1988); Jürgen HABERMAS, *Between Facts and Norms: Contribution to a Discourse Theory of Law and Democracy* (MIT Press 1996).
- 22) For an example of such a (nearly) totalizing account: Terry MACDONALD, "Political Legitimacy in International Border Governance Institutions", 14 *European Journal of Political Theory* p. 409, at p. 418, who offers this definition: "The legitimacy of an institutionalised subject S tracks reasons R for agents A to engage in conduct C in relation to S." The definition is based on this (remarkable) argument: "all analysis of legitimacy is concerned with evaluating an institutionalised subject (such as a state, law or international governance regime) to determine whether there are sufficient reasons (understood as considerations that count in favour of an action, in the sense of either motivating or justifying it) for particular agents within the institutional scheme (such as citizens, legal subjects or states) to engage in particular forms of conduct (such as political participation, legal compliance or cooperative engagement) towards the subject of the legitimacy evaluation." (Emphasis added.)
- 23) SCHLAG, "The Knowledge Bubble", p. 449.
- 24) Fuad ZARBIYEV, "Saying Credibly What the Law Is: On Marks of Authority in International Law", 9 *JIDS* (2018) p. 291.
- 25) François OST and Michel van de KERCHOVE, *De la pyramide au réseau?* (Publ FUSL 2002) pp. 361-363.
- 26) Christine GRAY, "A Crisis of Legitimacy for the UN Collective Security System", 56 *ICLQ* (2007) p. 157; Manfred ELSIG, "The World Trade Organization's Legitimacy Crisis: What Does the Beast Look Like?", 41 *JWT* (2007) p. 75; Jason WIENER, "The World Trade Organization's Identity Crisis: Institutional Legitimacy and Growth Potential in the Developing World", 2 *MJIEL* (2005) p. 54; Susan D. FRANCK, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions", 73 *Fordham L Rev* (2005) p. 1521; Ari AFILALO, "Towards a Common Law of International Investment: How NAFTA Chapter 11 Panels Should Solve Their Legitimacy Crisis", 17 *Geo Int'l Env'tl L Rev* (2004) p. 51; Robert KAGAN, "America's Crisis of Legitimacy", 83 *Foreign Affairs* (2004) p. 65; A. Claire CUTLER, "Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy", 27 *Rev Int'l Stud* (2001) p. 133.
- 27) BUCHANAN and KEOHANE, "The Legitimacy of Global Governance Institutions".
- 28) THOMAS, "The Uses and Abuses of Legitimacy in International Law", pp. 757-758.
- 29) ZARBIYEV, "Saying Credibly What the Law Is", citing Julia BLACK, "Says Who?" *Liquid Authority and Interpretive Control in Transnational Regulatory Regimes*, 9 *International Theory* (2017) p. 292. See also Michael BARNETT and Martha FINNEMORE, *Rules for the World. International Organizations in Global Politics* (Cornell University Press 2004) p. 20.
- 30) THOMAS, "The Uses and Abuses of Legitimacy in International Law", p. 732.

- 31) ZARBIYEV, "Saying Credibly What the Law Is", citing Michael ZÜRN, Martin BINDER and Matthias ECKER-EHRHARDT, "International Authority and its Politicization", 4 *International Theory* (2012) p. 83; Birgit PETERS and Johan Karlsson SCHAFFER, "The Turn to Authority Beyond States", 4 *Transnational Legal Theory* (2013) p. 334.
- 32) John FINNIS, *Natural Law and Natural Rights* (2nd edn, Oxford University Press 2011), pp. 25-29.
- 33) Muthucumaraswamy SORNARAJAH, *Resistance and Change in the International Law on Foreign Investment* (CUP 2015).
- 34) *Ibid.*, p. 390.
- 35) Julia BLACK, "'Says Who?' Liquid Authority and Interpretive Control in Transnational Regulatory Regimes", 9 *International Theory* (2017) p. 293.
- 36) See, e.g., THOMAS, "Uses and Abuses of Legitimacy in International Law", p. 753: "it is important to clearly distinguish between legitimacy as a reason for action and alternative reasons for compliance, including coercion, self-interest and habit." The addition of "error" is my own.
- 37) ZARBIYEV, "Saying Credibly What the Law Is".
- 38) Daniel BODANSKY, "The Concept of Legitimacy in International Law" in Rüdiger WOLFRUM and Volker RÖBEN, eds., *Legitimacy in International Law* (Springer 2008) p. 309, p. 312, citing Robert KEOHANE, "Discussion Following Presentations by Rüdiger Wolfrum, Robert Keohane, Alain Pellet and Anthony D'Amato" in Rüdiger WOLFRUM and Volker RÖBEN, eds., *Legitimacy in International Law* (Springer 2008) p. 93, p. 104.
- 39) THOMAS, "Uses and Abuses of Legitimacy in International Law", p. 732.
- 40) Ian HURD, *After Anarchy: Legitimacy and Power in the United Nations Security Council* (Princeton University Press 2007) p. 37. In Hurd's original version, the words "input" and "stability" read "compliance" and "non-compliance".
- 41) BLACK, "'Says Who?'" p. 306.
- 42) Henry KISSINGER, "Reflections on American Diplomacy", 35 *Foreign Affairs* (1956) p. 37, p. 43 (emphasis added). See further Vanessa LISHINGMAN, "Henry Kissinger's Contribution to the Conception of International Relations Legitimacy, Consensus and Order: the Foreign Policy of Moderation", 1 *Glendon Journal of International Studies* (2000).
- 43) THOMAS, "Uses and Abuses of Legitimacy in International Law", p. 741.
- 44) FRANCK, *The Power of Legitimacy Among Nations*, pp. 17-18 (process-based, procedural-substantive and outcome-based legitimacy).
- 45) Ernst HAAS, *When Knowledge Is Power: Three Models of Change in International Organizations* (University of California Press 1990) p. 87.
- 46) Fritz SHARPF, "Problem-Solving Effectiveness and Democratic Accountability in the EU", MPIFG Working Paper 03/1, February 2003.
- 47) *Ibid.*
- 48) *Ibid.*
- 49) See below, from notes 52 onwards.
- 50) David EASTON, *A Systems Analysis of Political Life* (Wiley 1965); David EASTON, *The Political System: An Inquiry into the State of Political Science* (Knopf 1953).
- 51) Harold D. LASSWELL, *Politics: Who Gets What, When, How* (P. Smith 1950 [1936]).
- 52) DUPONT, SCHULTZ and YACKEE, "Investment Arbitration and Political Systems Theory".
- 53) *Ibid.*, and DUPONT and SCHULTZ "Towards a New Heuristic Model".
- 54) DUPONT and SCHULTZ "Towards a New Heuristic Model".
- 55) DUPONT, SCHULTZ and YACKEE, "Investment Arbitration and Political Systems Theory".
- 56) DUPONT, SCHULTZ and YACKEE, "Investment Arbitration and Political Systems Theory".
- 57) Luke R. NOTTAGE, "International Arbitration and Society at Large" in Andrea BJORKLUND, Franco FERRARI, and Stefan KROELL, eds., *Cambridge Compendium of International Commercial and Investment Arbitration* (CUP forthcoming).
- 58) This is discussed at some length in DUPONT, SCHULTZ and YACKEE, "Investment Arbitration and Political Systems Theory" and DUPONT and SCHULTZ "Towards a New Heuristic Model".
- 59) To be clear, I do not argue that arbitrators only seek to promote their self-interest in their decision-making; as I've argued elsewhere, arbitrators are like any other individual: they promote in part the interests of others and in part their own interests, this is only human: Thomas SCHULTZ, "Arbitral Decision-Making: Legal Realism and Law & Economics", 6 *JIDS* (2015) p. 231.
- 60) Emmanuel GAILLARD, "Sociology of International Arbitration", 31 *Arbitration International* (2015, no. 1) p. 4, p. 5, p. 7: in Gaillard's words, service providers are the "social groups who dedicate their activity exclusively, or almost exclusively, to international arbitration" and value providers those who "provide guidance as to the way international arbitration should develop and arbitral social actors should behave"; he adds a third category of "essential actors", who are "the actors without which international arbitration would not exist [namely] the parties and the arbitrators".
- 61) Stavros BREKOULAKIS, "Introduction: The Evolution and Future of International Arbitration" in Stavros BREKOULAKIS, Julian LEW and Loukas MISTELIS, eds., *The Evolution of International Arbitration* (Kluwer 2016) p. 13.

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