

# How to approach ‘legitimacy’

for the book project

## Empirical Perspectives on the Legitimacy of International Investment Tribunals

Daniel Behn,<sup>1</sup> Ole Kristian Fauchald<sup>2</sup> and Malcolm Langford<sup>3</sup>

January 2015

### 1. Introduction

The purpose of this note is to provide a framework for how we approach legitimacy in our book project. We wish to provide a framework that is clear in the sense that it will be possible to trace and compare the various approaches to legitimacy of each individual author. At the same time the framework must be sufficiently flexible to let authors focus on the aspects of legitimacy that are most suitable to the topic in question or the author’s choice of discipline/s.

Our framework consists of questions that we would encourage you to consider when designing and carrying out research for your chapters. It is not necessary that you explicitly consider or respond to the questions in your contributions.

### 2. Subjects – objects

We ask you to consider the scope of “subjects” and “objects” of legitimacy for the purpose of your contribution.

By ‘**subjects**’ we refer to the entities that *are in need* or *are seeking* legitimacy. Given the focus of the book, the subjects of legitimacy will be the investment tribunals themselves. However, there may be differences in focus in the various contributions. Thus there may be:

- A focus on either specific categories of tribunals (e.g. ICSID tribunals) or all tribunals;
- Incorporation of the broader institutional and legal context in which the tribunals are operating, extending legitimacy considerations to:
  - institutions (e.g. ICSID, UNCITRAL, SCC);
  - procedural rules (e.g. ICSID Convention, UNCITRAL Arbitration Rules);
  - substantive rules (e.g. the ECT, BITs, model BITs, investment chapters in FTAs); or
  - enforcement mechanisms (e.g. the New York Convention).

We ask that you distinguish where relevant between the ‘institutional’ and ‘non-institutional’ aspects of a regime.<sup>4</sup>

---

<sup>1</sup> Postdoctoral Researcher in International Investment Law, PluriCourts, University of Oslo.

<sup>2</sup> Professor, PluriCourts, Department of Public and International Law, University of Oslo.

<sup>3</sup> Postdoctoral Researcher, PluriCourts, University of Oslo.

By '**objects**' we refer to the entities that are targets of efforts to increase (or decrease) legitimacy. In the case of investment tribunals, there are multiple actors which are either required to comply with their rules and rulings or possess particular interests in their design and functioning. While core objects are those actors who must directly comply with the ruling of a tribunal (i.e. the case specific host state and investor),<sup>5</sup> we ask you to consider to whether your contribution also focuses on, for example:

- All potential host states;
- Home states;
- Specific institutions and entities within home states and/or host states (e.g. courts, the executive, the legislative, the public);
- Transnational actors such as specific groups of investors (e.g. big multinationals, SMEs, investors within certain sectors), intergovernmental political and adjudicative institutions (e.g. human rights bodies, the ILO, the World Bank), and non-governmental organizations and movements; or
- Entities that advise states and investors (e.g. law firms, business associations, the OECD, UNCTAD).

If you decide to leave some relevant objects out of your legitimacy considerations, we encourage you to reflect on the implication this may have for your findings.

### 3. Purposes – factors

We further ask you to consider which **purposes** legitimacy may serve as well as the **factors** that contribute to or detract from legitimacy in the context of your contribution. Such a disaggregated approach is arguably relevant regardless of one's choice of analytical framework for legitimacy assessment – normative, sociological or political (see further section 4.)

---

<sup>4</sup> As Meyer and Sanklecha put it in the case of normative legitimacy analysis, between determining what the 'social ideal consists of' as opposed to how 'institutions ought to be designed.' L. Meyer and P. Sanklecha, 'Introduction: Legitimacy, Justice and Public International Law. Three Perspectives on the Debate' in L. Meyer (ed.) *Justice, Legitimacy and Public International Law* (Cambridge: Cambridge University Press, 2009), pp. 1-28, at 21.

<sup>5</sup> International courts and tribunals have much weaker coercive aspects than national courts. The coercive aspects of investment tribunals are a complex topic. The coerciveness of their decisions is dependent on the law and courts of host states as well as the possibility of achieving enforcement within other jurisdictions. While such coercion may be an element of establishing the peculiarity and force of investment tribunals, it may not primarily account for all of their influence on states' behavior. However, this coercive view of law and courts has been strongly challenged. For instance, Hart argued that the role of law is primarily normative, providing reasons to act: rules provide the 'reason and justification' for any use of coercive authority, Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961). Raz has claimed that law is essentially an authoritative social institution that affects the calculus of our practical reason and action, J. Raz, 'Law, Authority and Morality', in J. Raz (ed.), *Ethics in the Public Domain* (Oxford: Oxford University Press, 1994). Alternatively, and downplaying individual agency, legal norms may be simply acculturated: R. Goodman and D. Jinks, 'Incomplete Internalization and Compliance with Human Rights Law', *European Journal of International Law*, Vol. 19 No. 4 (2008), pp. 725-48. Thus, the legitimacy of investment tribunals may be relevant for or compel compliance even where important elements of coercion is available.

It may be useful first to reflect on the **purposes** that legitimacy could serve. Legitimacy analyses - whether normative, sociological or political – are often guided by a particular understanding of the purpose of a regime, and this is especially critical in framing ‘output’ legitimacy (see below).

Viewed broadly, there is significant disagreement concerning the purposes of investment tribunals, and consequently also disagreement regarding the purposes that legitimacy could serve. Some argue that investment tribunals only serve to resolve disputes between investors and states (and in some instances between states). Others argue that investment tribunals contribute to building a coherent body of case law in the field of international investment law. Some also argue that such a body of case law contributes to establish customary rules of international law. Yet others argue that investment tribunals contribute to the effectiveness and status of international investment law when applied along with other rules of international law. From a broader perspective (than law), it can be argued that investment tribunals aim at promoting investment, increasing predictability for investors and provide stable investment climates.

Against this background, we may take as a starting point that there would be agreement that the core purpose that legitimacy may serve for investment tribunals is to influence disputing parties to voluntarily comply with decisions. To many, the purpose could extend further. One aspect is the willingness of third parties affected by the conclusions of investment tribunals (e.g. local populations, employees, and the investors’ home states) to respect the conclusions of the tribunal. Another aspect is the extent to which other relevant actors (see the list of ‘objects’ above) respect the analytical approach, the interpretations, and/or the conclusions of the investment tribunal as authoritative.

We also ask you to consider which **factors** contribute to or detract from legitimacy. The chapters may differ significantly in their approach to relevant factors. While some authors may focus on specific factors, other contributions may seek to identify all factors of relevance to legitimacy. Factors may be closely interrelated and interdependent in terms of their effects on legitimacy. Examples of factors that may be relevant include:

- Selection of arbitrators;
- Transparency of proceedings and judgments;
- Participation of third parties in proceedings;
- Diversity in terms of investors bringing cases;
- Diversity in terms of host states being sued;
- The role of law firms in promoting disputes;
- The quality and consistency of the legal reasoning of tribunals; and
- Systemic bias towards particular states or investors.

#### **4. Normative, sociological and political legitimacy**

There is no authoritative or generally accepted definition of ‘legitimacy’; but there does seem to be general consensus on the differing types. The two principal ways of conceptualizing legitimacy

are normative and sociological. We ask you to consider which analytical approach(es) you take to legitimacy in light of the distinctions drawn up in the following.

Buchanan and Keohane define '**normative legitimacy**' in the context of global governance institutions as: 'the right to rule, understood to mean both that institutional agents are morally justified in making rules and attempting to secure compliance with them and that people subject to those rules have moral, content-independent reasons to follow them and/or to not interfere with others' compliances with them.'<sup>6</sup> This normative conception of legitimacy concerns the rightness of an institutions' exertion of power within a society: it is a set of moral standards by which an institution or regime is judged or justified. In the context of legal institutions, normative legitimacy may also carry claims about legal authority that according to some (i.e. exclusive positivists) are not based on moral justification.

Normative legitimacy is closely related to *legal legitimacy*. The latter is grounded in an institution's observance of its legally constrained mandate. This notion is clear in Abi-Saab's attack on the use of normative legitimacy assessments: 'I would discard from the discourse of legitimacy any attempt to use it as a means to dodge or get around the law; as a *passé-droit*, a licence trumping legality or a 'justification' of its violation.'<sup>7</sup> While his assumption that normative legitimacy is usually more expansive than legal legitimacy is doubtful, the point is clear. Yet, positive law remains highly relevant to one constituent element of normative legitimacy: the fundamental role of consent in international law. Any application of normative legitimacy needs to take seriously the existence of legal mandates and jurisdictional constraints. In the field of investment treaty arbitration, part of the debate is precisely concerned with the scope of the legal mandate.

'**Sociological legitimacy**' is a conception of legitimacy that is behavioral, empirical, or descriptive. It asks whether 'the governed' believe and accept that an institution has, or maintains, the power to rule over them. In this Weberian sense, we ask whether individuals affirm 'a system of authority' and lend it 'prestige,' such that obedience may follow.'<sup>8</sup> This type of legitimacy is descriptive in the sense that its purpose is to empirically catalogue belief systems of those subject to a particular legal system, institution or set of rules. It does not claim to evaluate whether those beliefs are normatively justified.

International lawyers and international relations scholars sometimes conflate normative and sociological conceptions. Some may argue that the two go together in practice and that the former is a proxy for the latter (e.g. if an institution is normatively legitimate it is likely to be accepted as such). This is a questionable approach: actor beliefs may diverge significantly from the results of a principle-based analysis. This divergence is often apparent for judges and arbitrators:

---

<sup>6</sup> A. Buchanan and R. Keohane, 'The Legitimacy of Global Governance Institutions' in R. Wolfrum and V. Röben (eds.), *Legitimacy in International Law* (Berlin: Springer, 2008), pp. 25-62, at 25.

<sup>7</sup> G. Abi-Saab, 'Security Council as Legislator and as Executive in its Fight Against Terrorism and Against Proliferation of Weapons of Mass Destruction', in *ibid.*, pp. 109-130, at 116.

<sup>8</sup> M. Weber, *The Theory of Social and Economic Organization* (New York: Free Press, 1964), 382.

certain decisions or reasoning may build sociological legitimacy but weaken normative legitimacy, and vice-versa.

Nonetheless, following Habermas and others, it is important to underline that sociological perspectives can sharpen normative theory.<sup>9</sup> If, contrary to normative expectations, an institution or regime is unable (or able) to maintain legitimacy in practice, those very expectations may require reconsideration. A sociological perspective can therefore heighten awareness of the real as opposed to imagined powers of institutions and provide ‘alternative pathways to legitimate rule.’<sup>10</sup> Likewise, the framing of sociological legitimacy is dependent or ‘conceptually parasitic’ on some *a priori* conception of normative legitimacy.<sup>11</sup>

To these two standard conceptions, we could add what could be crudely labelled **political legitimacy**. In political science we often find studies of the strategies of actors to legitimate themselves, particular institutions, or particular norms. The aim of such actors is often to strengthen normative or sociological legitimacy. The focus of research interest is how these actors behave. As this might be relevant to a number of the proposed empirical chapters, we would also encourage contributions that focus on the politics of building legitimacy. And, of course, such studies would provide indications of the grounded and contextual elements of normative and sociological legitimacy.

## 5. Elements of legitimacy

The respective elements of **normative legitimacy** and their relevant weight are a matter of long debate in political theory as well as in political science and law. They can be framed and disaggregated in multiple ways within and across different disciplines and traditions.<sup>12</sup> It is not particularly controversial to disaggregate normative legitimacy into three elements: input, process (‘throughput’), and output.

1. **Input** or consent legitimacy refers to the constitutive process for establishing and maintaining institutions or regimes. In relation to investment tribunals, this element can be evaluated against standards of consent and participation.

---

<sup>9</sup> J. Habermas, *Communication and the Evolution of Society* (Boston: Beacon Press, 1979), 205.

<sup>10</sup> B. Gilley, *The Right to Rule* (New York: Cambridge University Press, 2009), xiii cited in J. Kane and H. Patapan, ‘Recovering Justice: Political Legitimacy Reconsidered’, *Politics & Policy*, Vol. 38 No. 3 (2010), pp. 589-610, at 605.

<sup>11</sup> D. Bodansky, ‘Legitimacy in International Law and International Relations’ in J. Dunoff and M. Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations* (Cambridge: Cambridge University Press, 2013), pp. 321-343, at 327.

<sup>12</sup> For different perspectives on disaggregating normative legitimacy, see A. Føllesdal, ‘Survey Article: The Legitimacy Deficits of the European Union’, *The Journal of Political Philosophy* Vol. 14 No. 4 (2006), pp. 441–468, D. Bodansky, ‘The Legitimacy of International Governance: A Coming Challenge for International. Environmental Law?’, *American Journal of International Law*, Vol. 93 No. 3 (1999), pp. 596-624, G. Ulfstein, ‘Do We Need a World Court of Human Rights?’ in O. Engdahl and P. Wrangé (eds.), *The Law as it was and the Law as it Should Be* (2008), pp. 261-272, M. Thatcher and A. Stone Sweet, ‘Theory and Practice of Delegation to Non-Majoritarian Institutions’, *West European Politics*, Vol. 25 No. 1 (2002), pp. 1-22.

2. **Process** (or throughput) legitimacy generally refers to the process by which rules, decisions, and actions are made, applied, or interpreted. Investment tribunals may be (or be viewed as) legitimate if they fulfil certain criteria such as transparency, accountability, and due process or contribute to more effective participation (commonly referred to as standards of procedural justice or fairness).<sup>13</sup>
3. **Output** legitimacy generally refers to the instrumental or substantive justifications for an institution; and how outcomes from a tribunal's decision-making process are to be evaluated. Different aspects of output may be relevant, ranging from the negative (e.g. avoidance of 'extreme injustice')<sup>14</sup> to the positive (e.g. the fulfilment of a moderate range of public goods)<sup>15</sup> through to thick optimal and just outcomes.<sup>16</sup> In addition, there may be positive and negative outputs and the definitions of each may be highly contested. There are questions over whether we can count output that is far-removed from the intended purpose of the tribunal as positive.<sup>17</sup>

As to the elements of **sociological legitimacy**, more inductive approaches are necessary. While the elements of normative legitimacy can provide a starting point, these elements may not be relevant to a particular actor's view on an institution's legitimacy. For sociological legitimacy, it may be important to identify:

- Which actors or audiences are the subject of the legitimacy elements (see the subject – object discussion above);
- Whether the assessment relates to general or specific aspects about the tribunal (e.g. a particular decision or aspects of its rules of procedure);
- The advantages and disadvantages of different methods in ascertaining the actors' beliefs;
- Whether beliefs are stable or not; and
- Whether there are particular background conditions for the formation of beliefs.<sup>18</sup>

## 6. Balancing elements of legitimacy

One of the most critical questions in a legitimacy assessment concerns balancing: can one of the elements of legitimacy be traded-off against the other elements? Trade-offs between the different elements of legitimacy seem plausible but the degree of permissible balancing is arguably constrained and context-dependent. In this sense, legitimacy remains an overall binary measure (something is legitimate or not legitimate) but the weight or contribution of its elements may

---

<sup>13</sup> Bodansky n. 8 above.

<sup>14</sup> Buchanan and Keohane n. 3 above at 44.

<sup>15</sup> Gilley n. 7 above at xiv, 220 as discussed in Kane and Patapan n. 7 above at 605.

<sup>16</sup> F. Peter, 'Political Legitimacy' in E. N. Zalta (ed.) *Stanford Encyclopedia of Philosophy* (2010), pp. 13-14.

<sup>17</sup> Buchanan and Keohane n. 3 above at 47-49 discuss this institutional integrity dilemma although their case studies largely focus on harms. The dilemma is most acute when a tribunal produces overall or different benefits but not the targeted or intended benefit.

<sup>18</sup> See, e.g., J. Gibson, G. Caldeira and V. Baird, 'On the Legitimacy of National High Courts', *American Political Science Review*, Vol. 92 No. 2 (1998), pp. 343-358, at 351 and updated results in J. Gibson, 'The Legitimacy of the U.S. Supreme Court in a Polarized Polity', *Journal of Empirical Legal Studies*, Vol. 4 No. 3 (2007), pp. 507-538.

operate on a scale. Importantly, this disaggregated approach allows one to assess the scope and size of the legitimacy gap and how one might address it in context. We might for example ask whether diminished input or process legitimacy can be offset by higher output legitimacy. And, is a procedurally cautious investment tribunal legitimate if it fails to fulfil its substantive mandate?