

2017

International Investment Law's Unending Legitimation Project

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Recommended Citation

David Schneiderman, *International Investment Law's Unending Legitimation Project*, 49 Loy. U. Chi. L. J. 229 ().

Available at: <https://lawcommons.luc.edu/luclj/vol49/iss2/3>

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International Investment Law’s Unending Legitimation Project

“Power proves its legitimacy. . . .”

François Guizot (1851)

David Schneiderman*

Legitimacy problems continue to dog investment law, despite modest efforts at bridging its legitimacy gap. Drawing upon lectures by nineteenth century historian François Guizot, this Article argues that legitimacy problems do not simply dissipate over time. Securing and maintaining legitimacy, instead, requires continuous work. This Article takes up a justificatory frame for determining how well investment law is succeeding in securing legitimacy. As Guizot describes it, representatives invested with power on behalf of a majority must continually seek to justify their authority. Because rulers are fallible, exercises of authority must be open, public, and subject to endless questioning. The subsequent parts of the Article evaluate strategies that have been taken up by states and by arbitrators in light of this legitimacy frame. The Article asks whether these strategies offer up a means by which citizens can learn about, embrace, or resist the regime’s dictates of what is in the common interest. It is suggested that the state and arbitral strategies under discussion fall far short of this mark. More drastic reforms need to be entertained, many of which will be anathema to investment law’s norm entrepreneurs.

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* Faculty of Law and Department of Political Science (courtesy), University of Toronto. This is a revised and expanded text of a keynote lecture prepared for the *Loyola University Chicago Law Journal* Conference “Moving toward a ‘Global Super Court’?: Examining and Reshaping Investor-State Arbitration” (April 7, 2017). I am grateful to the editors of the *Journal* for the invitation, to participants for their helpful comments, and to the Social Science and Humanities Research Council for support.

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INTRODUCTION

International investment law overflows with legitimacy talk. Consider the role of legitimacy in the context of an expropriation claim. Only “legitimate regulatory responses” will absolve states of the responsibility to provide just compensation.¹ This is codified in annexes to post-2004 United States and Canadian bilateral investment treaties (“BITs”). Laws intended to “protect legitimate public welfare objectives” will, only in “rare circumstances,” give rise to an obligation to pay compensation.² Consider, too, the rise of “legitimate expectations” doctrine under fair and equitable treatment (“FET”) doctrine. Tribunals have been preoccupied with what expectations might be considered “legitimate,” demanding specific representations in some cases³ or looking to generalized expectations laid down in regulatory frameworks in others.⁴

1. See *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, ¶ 7.5.22 (Aug. 20, 2007) (finding that the provincial authorities of Tucumán violated the fair and equitable standard of the bilateral investment treaty); see also Allen S. Weiner, *Indirect Expropriations: The Need for a Taxonomy of “Legitimate” Regulatory Purposes*, 5 INT’L L. F. 166 (2003) (discussing the relevancy of regulatory purposes in determining whether an indirect expropriation has taken place).

2. The Model Canadian Annex provides, for greater certainty, that non-discriminatory measures intended to “protect legitimate” objectives associated with health, safety, welfare, and the environment are not indirect expropriations. See *infra* Part III (discussing arbitral strategies).

3. See, e.g., *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (May 29, 2003) (considering whether environmental and health protections are legitimate and warrant a denial to operate a landfill); see also *Clayton v. Canada*, Permanent Court of Arbitration (PCA) Case No. 2009-04, Award on Jurisdiction and Liability (Mar. 17, 2015) (alleging that there were in fact legitimate expectations by investors when Nova Scotia officials encouraged investing in a quarry in the area).

4. See *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award (May 12, 2005) (alleging that the legal and regulatory framework governing the license

Legitimacy also is conscripted to justify elevating investor protections to the level of international law. National political processes are described as insufficiently dedicated to the interests of foreign investors and, therefore, illegitimate as foreign investors are not represented within the host state political institutions.⁵ Local courts, too, are considered unreliable respecters of rights because, in the words of the *Clayton* tribunal, they do not offer “independence and detachment from domestic pressures.”⁶

Lastly, there are claims that there is an ongoing “legitimacy crisis” in investment arbitration.⁷ Legitimacy is in doubt not only with respect to the method for resolving investment disputes (investor-state dispute settlement or “ISDS”), but also with respect to the standards of protection available to investors—a sword with which investors are entitled to challenge all variety of legislative and policy prescriptions. As interpreted by investment tribunals, standards appear to be ever expanding and continually evolving.⁸ They exhibit little deference to local administrative or legislative processes⁹ and exceed the domestic public law protections of even developed states.¹⁰ They are intended, instead, to significantly dampen state policy space¹¹ beyond what is ordinarily deemed acceptable by the

provides for the right of the licensee to a fair and reasonable tariff); *see also* BG Group Public Limited Company v. Argentine Republic, Final Award (UNCITRAL Arb., Dec. 24, 2007) (similarly discussing whether the regulatory framework provides a licensee the right to tariffs collected from the services they provided).

5. *See Técnicas Medioambientales Tecmed S.A.*, ICSID Case No. ARB(AF)/00/2 (noting the duty to protect foreign investments); *see also* David Schneiderman, *Investing in Democracy? Political Process Review and International Investment Law*, 60 U. TORONTO L.J. 909 (2010) (noting that it has been claimed that the interests of foreign investors ordinarily will not be represented within a host state’s political processes).

6. *Clayton v. Canada*, Permanent Court of Arbitration (PCA) Case No. 2009-04, Award on Jurisdiction and Liability, ¶ 439 (Mar. 17, 2015).

7. For a representative view of this claim by a member of the arbitration bar, *see* Devashish Krishan, *Thinking About BITs and BIT Arbitration: The Legitimacy Crisis That Never Was*, in *NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW: IN MEMORIAM THOMAS WÄLDE* 107 (Todd Weiler & Freya Baetens eds., 2011).

8. Frederico Ortino, *Substantive Provisions, in IIAs and Future Treaty-Making: Addressing Three Challenges*, E15 TASK FORCE ON INVESTMENT POLICY (2015).

9. GUS VAN HARTEN, *SOVEREIGN CHOICES AND SOVEREIGN RESTRAINTS: JUDICIAL RESTRAINT IN INVESTMENT TREATY ARBITRATION* 74–75 (2013) (noting that arbitrators show little interest in deferring to democratic processes).

10. *See, e.g.*, Lise Johnson and Oleksander Volkov, *Investor-State Contracts, Host-State “Commitments” and the Myth of Stability in International Law*, 24 AM. REV. INT’L ARB. 361, 406 (2013) (noting a clear divergence between the two). This issue is further discussed *infra* Part I.B.

11. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, *WORLD INVESTMENT REPORT 2015: REFORMING INTERNATIONAL INVESTMENT GOVERNANCE* 125 (2015).

legal systems of capital-exporting states.¹² That there are legitimacy problems will be denied by some operating within the system. Judge Stephen Schwebel, for one, claims that criticisms giving rise to legitimacy concerns are “more colorful than they are cogent.”¹³ Denigrating critics of investment law seems to be a common reflex for this set of actors.¹⁴

Yet there is little doubt that the investment treaty regime faces a legitimacy deficit, if not a legitimacy crisis.¹⁵ The proliferation of complaints, channeled via media representations casting doubt on the legitimacy of ISDS or states and sub-regional units expressing doubt about the utility of ISDS, give voice to legitimacy concerns that are not well-addressed by the system’s norm entrepreneurs.¹⁶ This has prompted the United Nations Conference on Trade and Development (“UNCTAD”), which aggressively promoted the regime, to go so far as to declare that investment law is “at a crossroads.”¹⁷ The question for UNCTAD is not whether to reform, but the direction reform will take.¹⁸

The object of this Article is to examine the “invisible institution” of legitimacy within the context of investment law.¹⁹ Thoughtful discussion in this context has already been undertaken. Much of this literature, however, is preoccupied with restoring, or propping up, legitimacy. This literature adopts an internal perspective—advocating, for instance, for more consistency and coherence in arbitral decisionmaking.²⁰ This

12. As argued below. *See infra* notes 117–22 (analyzing the rights afforded to foreign investors).

13. Judge Stephen M. Schwebel, *Keynote Address: In Defence of Bilateral Investment Treaties*, in *LEGITIMACY: MYTHS, REALITIES, CHALLENGES* 6 (Albert J. van den Berg ed., 2015).

14. *E.g.*, The Honorable Charles N. Brower & Sadie Blanchard, *What’s in a Meme? The Truth About Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States*, 52 *COLUM. J. TRANSNAT’L L.* 689 (2014) (discussing alleged mistruths promoted by international investment law critics). I discuss examples of this anger in David Schneiderman, *The Paranoid Style of Investment Lawyers and Arbitrators: Investment Law Norm Entrepreneurs and Their Critics*, in *ALTERNATIVE VISIONS OF INTERNATIONAL ON FOREIGN INVESTMENT: ESSAYS IN HONOUR OF MUTHUCUMARASWAMY SORNARAJAH* 131 (C. L. Lim ed., 2016).

15. Or at the least a public relations problem. On the concept of legitimacy deficit, see Rüdiger Wolfrum, *Legitimacy of International Law from a Legal Perspective: Some Introductory Considerations*, in *LEGITIMACY IN INTERNATIONAL LAW* 4, 5 (Rüdiger Wolfrum & Volker Röben eds., 2008).

16. These are canvassed in Schneiderman, *supra* note 14.

17. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, *supra* note 11, at 170–71.

18. *Id.* at 171.

19. The quoted phrase is from PIERRE ROSANVALLON, *DEMOCRATIC LEGITIMACY: IMPARTIALITY, REFLEXIVITY, PROXIMITY* 8–9 (Arthur Goldhammer trans., 2011).

20. *E.g.*, Jürgen Kurtz, *Building Legitimacy Through Interpretation in Investor-State Arbitration: On Consistency, Coherence and the Identification of Applicable Law*, in *THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW: BRINGING THEORY INTO PRACTICE* 257 (Zachary Douglas, Joost Pauwelyn, & Jorge E. Viñuales eds., 2014); Charles H. Brower II,

Article takes a different approach. First, it is not motivated by a desire to restore legitimacy. It offers an internal account only to the extent that it evaluates strategies adopted by some of the system's principal actors, namely, states and arbitrators.²¹ Second, the Article offers an external account insofar as strategies of legitimation are evaluated in light of legitimacy as a form of public reasoning about the common good. This is a perspective that is, for the most part, external to investment law's rationality. The Article also offers a distinctive perspective, as it treats legitimacy in modern polities as necessitating not only its initial realization, but also its continued maintenance.

Much of the legitimacy debate, too often preoccupied with correct legal processes or with state consent, elides the likelihood that legitimacy problems will not simply go away. They may dissipate, but such questions are never likely to be settled once and for all. This is because, in democratic societies, power, once conferred, must continually legitimize itself. This is a proposition advanced by the nineteenth century French historian François Guizot, the first systematic interpreter of government in the modern age.²² "As soon as the capacity [for power] is presumed or proved, it is placed in a position where it is open to a kind of legal suspicion, and where it must necessarily continue to legitimize itself, in order to retain its power," Guizot declared.²³ Legitimacy, from this angle, will remain precarious and, in the words of Guizot's modern interpreter, Pierre Rosanvallon, "always open to challenge." In other words, legitimacy concerns—though not always rising to the level of "crisis"—will continue to dog the regime. This will not end when

Structure, Legitimacy, and NAFTA's Investment Chapter, 36 VAND. J. TRANSNAT'L L. 37 (2003) (arguing that the commercial arbitration model has generated incoherent doctrine); William W. Burke-White, *The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System*, 3 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 199 (2008) (discussing the jurisprudence as deeply problematic); Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521 (2005) (discussing the uncertainty generated by investment arbitration).

21. The internal perspective is limited to discerning strategies that are revealing of "standards . . . actors actually use in assessing" their own legitimacy. It is about inferring views about legitimacy "from the arguments actors make." Daniel Bodansky, *Legitimacy in International Law and International Relations*, in INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART 332, 335 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013).

22. PIERRE ROSANVALLON, *LE BON GOUVERNEMENT* 282 (2015).

23. FRANÇOIS GUIZOT, *HISTORY OF THE ORIGIN OF REPRESENTATIVE GOVERNMENT IN EUROPE* 62 (Andrew M. Scobie trans., 2002). Regarding Guizot's fallibilist and meritocratic response to the French Revolution, see CLAUDE LEFORT, *WRITING: THE POLITICAL TEST* 85–108 (French Ministry of Culture trans., 2000); PIERRE ROSANVALLON, *DEMOCRACY PAST AND FUTURE* 117–26 (Samuel Moyn ed., 2006).

investment law's norms are internalized within host state national law, as is hoped for by the system's promoters.²⁴

In what follows, I first take up selective explanations of law's legitimacy (Part I). There is a vast extant literature on legitimacy, but helpful accounts identify multiple factors—a mix of the descriptive and the normative together with input- and output-oriented strategies²⁵—that are associated with legitimate legal orders.²⁶ Three different understandings of legitimacy are examined in order to foreground the discussion of strategies taken up by states (Part II) and then by arbitrators (Part III). As the Article's preferred understanding of legitimacy appeals to normatively desirable, but contingent, ends having to do with promotion of the common good, the object in Part II and Part III is to inquire into proposed strategies in light of this legitimacy frame. To be sure, there are well-founded concerns about the ways in which legitimacy discourse serves only to naturalize already existing forms of authority.²⁷ The discussion aims not to naturalize, but to scrutinize, strategies adopted by relevant actors that can be seen as a response to legitimacy concerns. The Article concludes with predictions about where this debate may lead.

I. THREE UNDERSTANDINGS OF LEGITIMACY

This Part takes up three ways of looking at legal legitimacy.²⁸ All three draw upon conceptions of legitimacy arising out of national political

24. E.g., Michael Hart & William Dymond, *NAFTA Chapter 11: Precedents, Principles, and Prospects*, in *WHOSE RIGHTS? THE NAFTA CHAPTER 11 DEBATE* 128, 168 (Laura Ritchie Dawson ed., 2002); Kenneth J. Vandeveld, *The Political Economy of a Bilateral Investment Treaty*, 92 *AM. J. INT'L L.* 621, 639 (1998) (advocating for a more liberal investment regime).

25. Scharpf describes input-oriented thought as “by the people” (associated with J.J. Rousseau) and output-oriented thought as “for the people” (associated with the Federalist Papers). FRITZ W. SCHARPF, *GOVERNING IN EUROPE: EFFECTIVE AND DEMOCRATIC?* 6–7 (1999). On the need for the presence of each in global legal production, see Anne Peters, *Dual Democracy*, in *THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW* 263, 340 (2009).

26. E.g., Bodansky, *supra* note 21, at 331 (discussing normative legitimacy); JUTTA BRUNNÉE & STEPHEN J. TOOPE, *LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW: AN INTERACTIONAL ACCOUNT* 52–55 (2010) (discussing the role of legitimacy in the construction of international law); Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 *ETHICS & INT'L AFF.* 405–37 (2006) (noting that legitimacy requires both the right to rule and belief that the institution has the right to rule).

27. By saying ‘legitimacy’ as often as possible and in connection with as many and as controversial political actions as possible, actions that cannot be seriously discussed in terms of their lawfulness or moral substance, receive a sense of acceptability and naturalness that is precisely the function of the ideology to attain.

Martti Koskeniemi, *Legitimacy, Rights, and Ideology: Notes Towards a Critique of the New Moral Internationalism*, 7 *ASS'NS: J. FOR LEGAL & SOC. THEORY* 349, 368 (2003).

28. For a survey of taxonomies, see Christopher A. Thomas, *The Uses and Abuses of Legitimacy in International Law*, 34 *OXFORD J. OF LEGAL STUD.* 729 (2014).

experiences. Concern has been expressed that such accounts do not translate well beyond national states—that they set too high a bar for transnational legal orders to secure and maintain legitimacy. For this reason, J.H.H. Weiler calls for “an altogether new discourse of legitimacy” to vindicate contemporary modes of international governance.²⁹ To be sure, there can be no simple translation of the mechanisms of legitimacy from the national to transnational levels. This will prove difficult, if not impossible, to achieve until such time as a viable global democracy, and accompanying global public sphere, is secured. National experiences, nevertheless, will continue to be relevant to such discussions,³⁰ the more so that transnational legal rules and institutions supplant functions formerly served by states.³¹ This heightens legitimacy concerns that may be experienced by investment law in addition to other international legal orders. National experiences offer critical evidence of how legitimacy has been secured, or has failed to be secured, in the past. If some would prefer not setting too high a bar for global legal norms and institutions, we should also avoid generating criteria that legitimacy-deprived supra-national legal orders can easily exceed. Instead, the bar should be set high enough to satisfy, legally and politically, the burden of exercising what is commonly understood as legitimate authority.³²

A. *Legitimacy as Legality*

This first understanding treats legitimacy as equivalent to *legality*. This positivistic understanding—that following correct legal processes gives rise to legitimate law—typically is traced to Max Weber’s multiple mentions of legitimacy in the sociological treatise *Economy and Society*. Legitimacy rested, he wrote, on “a belief in the legality of enacted rules and the right of those elevated to authority under such rules to issue commands.”³³ Every system, Weber observed, “attempts to establish and

29. J.H.H. Weiler, *The Geology of International Law – Governance, Democracy and Legitimacy*, 64 ZAÖRV 547, 553 (2004).

30. Neil Walker, *Postnational Constitutionalism and the Problem of Translation*, in EUROPEAN CONSTITUTIONALISM BEYOND THE STATE 27, 32 (J.H.H. Weiler & Marlene Wind eds., 2003).

31. Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L.J. 1490, 1511 (2005–06); Robert E. Hudec, Comment, in EFFICIENCY, EQUITY, LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM 297 (Roger B. Porter, Pierre Sauvé, Arvind Subramanian, & Americo Beviglia Zampetti eds., 2001).

32. For a “pessimistic” account that global public law as presently constituted will not attain democratic legitimacy, see Petra Dobner, *More Law, Less Democracy? Democracy and Transnational Constitutionalism*, in THE TWILIGHT OF CONSTITUTIONALISM? 141, 160 (Petra Dobner & Martin Loughlin eds., 2010).

33. MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 215

to cultivate the belief in its own legitimacy.”³⁴ Legitimacy grounded in belief and right is linked to Weber’s account of “domination,” based upon three ideal-typical sources of authority: traditional, charismatic, and rational-legal.³⁵ Weber envisaged this last category as having become predominant in the late nineteenth century, though he did not preclude the possibility that these other sources of legitimacy would contemporaneously be available.³⁶

Shared belief in the legality of legislative and administrative machinery is taken for granted within the national state. However, it is harder to sustain such “input-oriented legitimacy” in levels beyond it.³⁷ This is because there are few surrogates for the feedback mechanisms associated with democratically authorized law-making beyond the level of states. States do have the power to re-write treaty terms, but this will happen infrequently and only with the consent of negotiating partners.³⁸ With little likelihood of responsive feedback mechanisms materializing any time soon, such shared belief in legality is not likely to arise out of investment law’s domains.

There is some debate about whether Weber’s understanding of legality is too focused on formality and, therefore, bereft of normativity.³⁹ I take the view that Weber presupposes law to embody values that he associates with commercial life.⁴⁰ This is a legal order that facilitates certainty,

(Guenther Roth & Claus Wittich eds., 1st vol. 1978).

34. *Id.* at 953 (2d vol., 1978).

35. THE MAX WEBER DICTIONARY 189–91 (Richard Swedborg & Ola Agevall eds., 2d. ed. 2016).

36. ANDREAS ANTER, MAX WEBER’S THEORY OF THE MODERN STATE: ORIGINS, STRUCTURE AND SIGNIFICANCE 54 (2014) (“the concept [of legitimacy] is defined nowhere in his writing”).

37. See SCHARPF, *supra* note 25, at 187.

38. Kathryn Gordon & Joachim Pohl, *Investment Treaties Over Time – Treaty Practice and Interpretation in a Changing World*, (OECD Working Papers on International Investment, Working Paper No. 2015/02 40), <http://www.oecd.org/investment/investment-policy/WP-2015-02.pdf> (“International law makes numerous options available to treaty partners wishing to influence treaty interpretation, but few countries seem to avail themselves of these options.”). On the difficulty of securing the consent of powerful exporting states to alternative treaty text, see the discussion of the negotiations between the U.S. and South Africa in David Schneiderman, *Promoting Equality, Black Economic Empowerment, and the Future of Investment Rules*, 25 S. AFR. J. HUM. RTS. 246 (2009).

39. WOLFGANG MOMMSEN, MAX WEBER AND GERMAN POLITICS: 1890–1920 404 (Michael S. Steinberg trans., 1984).

40. See David Schneiderman, *International Investment Law as Formally Rational Law: A Weberian Analysis*, in RESEARCH HANDBOOK ON THE SOCIOLOGY OF INTERNATIONAL LAW (Moshe Hirsch & Andrew Lang eds., forthcoming 2018) (analyzing the challenge of Weber’s view to keep substantive values from creeping into formal law’s domains); David Schneiderman, *Judging in Secular Times: Max Weber and the Rise of Proportionality*, 63 SUP. CT. L. REV. 557 (2013) (discussing Weber’s embrace of a model of “formal” legal rationality focused on means-ends analysis).

predictability, and calculability, and so embodies an “ethical minimum.”⁴¹ Whatever one’s view of this, the claim that legality begets legitimacy is an argument that one hears from time to time in investment law circles. Most will acknowledge, however, that something more is required.⁴²

B. Legitimacy as Deliberation

Even as the discussion at the level of states remains contested, the stakes in identifying legitimate political-legal orders have been amplified by the spread of transnational regimes like investment law. This leads to a second understanding of legitimacy. This is a deliberative democratic account whereby we understand legitimate law as the product of democratic *processes* that include all affected.⁴³ This mirrors Jürgen Habermas’ “procedural” account of law premised upon the principle of democracy: that law is the product of self-legislation by citizens.⁴⁴ Unhappy with Weber’s circular account⁴⁵ or accounts which generate legitimacy by virtue of the law’s “generality” (or its *a priori* moral content) and which Habermas previously endorsed,⁴⁶ Habermas offers the “most prominent input-based normative” account.⁴⁷ This is a deliberative model of law-making that generates chains of legitimacy from local to supranational institutions. If the genesis of law is the product of inclusive republican institutions, it is that process, rather than its form or moral content, which generates legitimacy. This is how Habermas explains away legitimacy problems associated with the rise of the World Trade Organization. The mechanisms of opinion and will formation within states generate the “chain of legitimation” with which transnational legal institutions can produce binding law.⁴⁸ Such

41. WOLFGANG SCHLUCHTER, *THE RISE OF WESTERN RATIONALISM: MAX WEBER’S DEVELOPMENTAL HISTORY* 114 (Guenther Roth trans., 1981).

42. ANTER, *supra* note 36, at 59, 63.

43. A proceduralist account of legitimacy in international law can be found in THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 30–46 (1995) (noting that the indicators are determinacy, symbolic validation, coherence, and adherence).

44. JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 120 (William Rehg trans., 1996); *see* Bodansky, *supra* note 21, at 330 (discussing the procedural and substantive factors that arguably contribute to normative legitimacy); ROBERT A. DAHL, *AFTER THE REVOLUTION? AUTHORITY IN A GOOD SOCIETY* 49 (rev. ed. 1970) (similarly referring to the “principle of affected interests”).

45. JÜRGEN HABERMAS, *THEORY OF COMMUNICATIVE ACTION, VOLUME ONE: REASON AND THE RATIONALIZATION OF SOCIETY* 265 (Thomas McCarthy trans., 1984) (explaining that belief in legality generates legitimacy which, in turn, bolsters belief).

46. HABERMAS, *supra* note 44, at 102.

47. Bodansky, *supra* note 21, at 331.

48. Jürgen Habermas, *The Constitutionalization of International Law and the Legitimation*

agreements, he writes, were “the product of political voluntarism.”⁴⁹ They were not imposed unilaterally by any one state, but were the consequence of “negotiated path-dependent cumulative decisions.”⁵⁰ The problem with Habermas’ account is that it presupposes that treaties that give rise to transnational norms are produced under conditions of democratic deliberation. This is not often the case. Robert Dahl observes that it is “notoriously difficult for citizens to exercise effective control over many key decisions” in the realm of foreign relations.⁵¹ These are matters often concentrated within the executive branches of operative democracies—the most effective branch, one could say.

C. Legitimacy as Justification

A third version looks to the role of *justification* in generating and maintaining legitimacy. This is an approach advanced by political theorist David Beetham, who isolates three distinct and demanding elements to any legitimacy claim:⁵² conformity with established rules, justification with reference to beliefs shared by dominant and subordinate classes, and, finally, evidence of consent by the subordinated to the power relation.⁵³ The first rules-based step resonates in the positivistic account attributed to Weber—an account rooted in appeals to past conduct rather than an appeal to justification.⁵⁴ The third step, evidence of consent, might be understood as satisfying Habermas’ call for democratic authorship. The distinctiveness of the second step is that it requires a shared belief not only in legality, but also in exercises of power that can be justified in order to secure legitimacy.⁵⁵ It is an account of political authority where power is fused with “legitimate social purpose.”⁵⁶ Beetham devotes

Problems of a Constitution for World Society, 15 CONSTELLATIONS 444, 447 (2008).

49. Jürgen Habermas, *Euroskepticism, Market Europe, or a Europe of (World) Citizens?*, in TIME OF TRANSITIONS 81 (Ciaran Cronin & Max Pensky eds. & trans., 2006).

50. *Id.*

51. Robert A. Dahl, *Can International Organizations Be Democratic? A Skeptic’s View*, in DEMOCRACY’S EDGES 19, 23 (Ian Shapiro & Casiano Hacker-Cordón eds., 1999).

52. It is more demanding than Scharpf’s output-oriented perspective suggests and so looks more like the mix one finds in democratic nation states. See SCHARPF, *supra* note 25, at 11–12 (discussing legitimacy requirements).

53. DAVID BEETHAM, THE LEGITIMATION OF POWER 16 (2d ed. 2013).

54. Hannah Arendt bifurcates legitimacy from justification in *On Violence*, in HANNAH ARENDT, CRISES OF THE REPUBLIC 103, 151 (1969). See also A. John Simmons, *Justification and Legitimacy*, in JUSTIFICATION AND LEGITIMACY: ESSAYS ON RIGHTS AND OBLIGATIONS 122, 156 (2001) (finding that, insofar as they are not genuinely “voluntary association[s],” no “existing states are legitimate”).

55. BEETHAM, *supra* note 53, at 17.

56. JOHN GERALD RUGGIE, CONSTRUCTING THE WORLD POLITY: ESSAYS ON INTERNATIONAL INSTITUTIONALIZATION 64 (1998).

considerable attention to identifying the authoritative sources out of which one can derive justificatory beliefs.⁵⁷ For the purposes of this discussion, I focus on one of them: that power is justifiably exercised in the service of the “common interest.” This is a rhetorical strategy to which elites often have recourse. Beetham maintains that, “[p]rovided the resource or skill they command has been acquired according to the rules, making [power] available to others for a consideration will seem less like an extortion racket than a public service, and the price demanded as their legitimate reward for performing it.”⁵⁸ This is an account congenial to legitimate rule by competent elites. It bears a family resemblance to the dominant discourse of “good governance,” in which authorities are expected to govern in accordance with rules laid down by experts.⁵⁹

The early nineteenth century historian and politician François Guizot had a similar, functional understanding of legitimacy that called for continuous justification. Guizot turns out to be an apt guide to thinking about legitimacy in this context,⁶⁰ as he disparaged universal suffrage in favor of rule by a competent elite.⁶¹ It was the “third estate,” represented by the newly emergent bourgeoisie, who were Guizot’s “true legitimate aristocracy.”⁶² He was suspicious, in other words, of the capacity of ordinary citizens to participate in self-rule, a theme common to nineteenth century liberal thought⁶³ and a sentiment commonly on display in

57. BEETHAM, *supra* note 53, at 69–97.

58. *Id.* at 83.

59. On rule by experts as contributing to legitimacy, see Daniel Halberstam, *Local, Global and Plural Constitutionalism: Europe Meets the World*, in *THE WORLDS OF EUROPEAN CONSTITUTIONALISM* 150, 173 (Gráinne de Búrca & J.H.H. Weiler eds., 2012), and, on a more skeptical note, Peters, *supra* note 25, at 339. For the multiple connotations of “good governance,” see Jonathan Bonnitcha, *The Principle of Good Governance in the Reasoning of Investor-State Arbitral Tribunals*, in *SUSTAINABLE DEVELOPMENT PRINCIPLES IN THE DECISIONS OF INTERNATIONAL COURTS AND TRIBUNALS: 1992–2012* 583 (Marie-Claire Cordonier Segger & H.E. Judge C.G. Weeramantry eds., 2017); SAMULI SEPPÄNEN, *GOOD GOVERNANCE IN INTERNATIONAL LAW* (2003).

60. This is not because he was preoccupied with the treatment of aliens abroad. Nor was Guizot a liberal who preferred governments that governed least. “Laissez faire, laissez passer,” he declared, “informs, but gives no guidance.” FRANÇOIS GUIZOT, *DES MOYENS DE GOUVERNEMENT ET D’OPPOSITION DANS L’ÉTAT ACTUEL DE LA FRANCE* 129 (Claude Lefort ed., 1988), translated in PIERRE MANENT, *AN INTELLECTUAL HISTORY OF LIBERALISM* 97 (Rebecca Balinksi trans., 1994).

61. AURELIAN CRAIUTU, *LIBERALISM UNDER SIEGE: THE POLITICAL THOUGHT OF THE FRENCH DOCTRINAIRES* 68 (2003).

62. *Id.* at 224.

63. Aurelian Craiutu, *Guizot’s Elitist Theory of Representative Government*, in 15 *CRITICAL REVIEW* 261, 267 (2003).

investment treaty arbitration.⁶⁴ The content of rulings often display ambivalence, if not outright contempt, for the output of legitimate democratic processes.⁶⁵

Guizot's distaste for universal suffrage was a response to the terror that followed upon the heels of the French Revolution. It was time to bring the Revolution to an end and to stabilize the irreversible march of liberty and social equality.⁶⁶ What was once democracy, Guizot complained, was now turning into "anarchy."⁶⁷ By limiting the franchise to competent elites, representative democracy could produce rule by those with the requisite "degree of independence and intellectual development" to govern in the general interest.⁶⁸ It was from among the ranks of the third estate that representatives would be chosen and expected to govern according to Guizot's triptych of "reason, truth and justice."⁶⁹ Rule by reason, truth, and justice represented the "true law"—one that Guizot likens, on occasion, to "divine law" and the "law of God."⁷⁰

There was no right to rule, however, merely by sheer force of numbers—by securing a majority of votes from among a limited franchise.⁷¹ In order for rule to be legitimate, power needs to "justify itself both before it is assumed and all the time that it is exercised."⁷² Self-rule, even with a cramped franchise, was fallible and so was

64. Schneiderman, *supra* note 5, at 915–21 (pointing to discussions of democracy in investment treaty arbitration).

65. *Id.* Where "elections or democracy were mentioned by arbitrators," Van Harten finds in his content analysis of 162 arbitration awards, "it was often to suggest that politics had contributed to unsound decisions and that the arbitrators' role was to ensure that investors were compensated." VAN HARTEN, *supra* note 9, at 73. Democratic regimes are even more likely to face investor claims at a statistically significant level. Zoe Williams, *Domestic Demands and International Agreements: What Causes Investor Disputes?*, in THE ROLE OF THE STATE IN INVESTOR-STATE ARBITRATION 187, 207 (Shaheez Lalani & Rodrigo Polanco Lazo eds., 2015).

66. FRANÇOIS FURET, REVOLUTIONARY FRANCE 1770–1880, 291 (Antonia Nevill trans., 1992); M. GUIZOT, DEMOCRACY IN MODERN COMMUNITIES 14 (2d. ed. trans., 1838); PIERRE ROSANVALLON, LE MOMENT GUIZOT 26 (1985); Pierre Rosanvallon, *Guizot*, in A CRITICAL DICTIONARY OF THE FRENCH REVOLUTION 938, 941 (François Furet & Mona Ozouf eds., Arthur Goldhammer trans., 1989).

67. GUIZOT, *supra* note 66, at 15–16 ("It has recruited and engaged in its service power more brutal, passions more gross, ideas more narrow, and pretensions more blind.").

68. GUIZOT, *supra* note 23, at 334.

69. *Id.* at 61.

70. *Id.* at 54, 295.

71. *Id.* at 60. The franchise law of 1817 limited the electorate to 90,000 citizens out of a population of 29 million. CRAIUTU, *supra* note 61, at 232–33. Guizot acknowledged that the population having the capacity to govern by reason was not fixed but was fluid. GUIZOT, *supra* note 23, at 334. It was open to each individual as they attained the requisite capacity. *Id.*

72. GUIZOT, *supra* note 23, at 58.

continually vulnerable to error and arbitrariness.⁷³ In order to secure the requisite legitimacy, voters should continually have available to them publicly available reasons for the exercise of power over them. This is why Guizot, together with his political allies, the *Doctrinaires*, insisted upon education, openness, and publicity.⁷⁴ In this way, the principles of reason, justice, and truth—the very ones that would guide government—would be discoverable by all.⁷⁵ “Electoral precautions, the debates in the deliberative assemblies, the publication of these debates, the liberty of the press, the responsibility of ministers,” Guizot explained,

all these arrangements have for their object to insure that the majority shall be declared only after it has well authenticated itself, to compel it ever to legitimize itself, in order to its own preservation, and to place the minority in such a position as that it may contest the power and the right of the majority.⁷⁶

These amounted to the application of a series of “tests” by which governors continually demonstrated the degree to which the exercise of power conformed to the demands of justice.⁷⁷ With education, openness, and publicity, power could be subject to “endless questioning” and its legitimacy rendered secure.⁷⁸ Guizot’s account is helpful, not because investment tribunals should be treated as equivalent to representative bodies, but because he underscores the critical roles that transparency and contestability play in supporting legitimacy claims once power is assumed and continuously exercised.⁷⁹

One can imagine that subordinated groups which have been the subject of power relations might come to believe, over time, that power-holders

73. *Id.* 60–61.

74. FRANÇOIS GUIZOT, *THE HISTORY OF CIVILIZATION IN EUROPE* 49 (William Hazlitt trans., 1997).

75. *Id.*

76. GUIZOT, *supra* note 23, at 63, 372.

77. *Id.* at 296.

78. CRAIUTU, *supra* note 61, at 200. Rosanvallon traces this model of “continuous process of interaction and reflection between the people and the representatives” to Condorcet in PIERRE ROSANVALLON, *LA DÉMOCRATIE INACHEVÉE: HISTOIRE DE LA SOUVERAINETÉ DU PEUPLE EN FRANCE* 62 (2000); see Marquis de Condorcet, *On the Principles of the Constitutional Plan Presented to the National Convention (1793)*, in CONDORCET: *SELECTED WRITINGS* 143, 147 (Keith Michael Baker ed., 1976) (discussing the merits of deliberative openness); see also Andrew Jainchill & Samuel Moyn, *French Democracy Between Totalitarianism and Solidarity: Pierre Rosanvallon and Revisionist Historiography*, 76 *J. MOD. HIST.* 107, 132 (2004) (discussing Rosanvallon and his analysis of Condorcet).

79. See also ARMIN VON BOGANDY AND INGO VENZKE, *IN WHOSE NAME? A PUBLIC LAW THEORY OF INTERNATIONAL ADJUDICATION* 194 (Ruth Mackenzie et. al. eds., Thomas Dunlap trans. 2014) (describing how the courts draw on democratic legitimacy that is generated by the legislative process).

serve the general interest. Such a “constructivist” dimension promotes legitimacy because it confirms that experience under the claim to legitimate rule is credible.⁸⁰ That legitimacy can build over time is underscored by Jutta Brunnée and Stephen Toope’s interactional account, which understands legitimacy as requiring “continuous practice.” “[A] very particular kind of practice is required to make and sustain international legal norms,” they maintain.⁸¹ Legitimacy, in short, is an ongoing project.⁸² It is acquired by “hard work.”⁸³

With this understanding of legitimacy as a continuous project in mind, it is instructive to examine empirical research regarding public support for the United States Supreme Court (“SCOTUS”). Caution is required, however, as American public opinion is comprised, in part, of a unique cultish “faith” in the Constitution that is not replicated, for instance, in many other capital-exporting states.⁸⁴ Propping up the Court is yet another layer of legitimacy ascribed to a constitutional founding that is associated with popular sovereignty. This feature further distances national constitutional experiences from international realms that have no equivalent legitimating foundations.⁸⁵ That experience, nevertheless, is helpful insofar as public support for the institution is understood to fluctuate. This is conveyed in the empirical literature by distinguishing between “diffuse” and “specific” support.⁸⁶

When an institution like the Supreme Court generates a “reservoir of goodwill,” it prolongs the longevity of its support.⁸⁷ This is labeled “diffuse support,” and it enables the Court to get away with occasionally unpopular decisions. In the course of SCOTUS issuing decisions that may lack widespread support, public opinion may dip in a direction away from the Court, resulting in a decline of “specific support.” Specific support

80. BEETHAM, *supra* note 53, at 106 (explaining how a system of power relations shapes the expectations of subordinate groups, making justifications for the rules of power credible).

81. BRUNNÉE & TOOPE, *supra* note 26, at 54.

82. Jürgen Neyer pursues a similar argument at the European level. See JÜRGEN NEYER, *THE JUSTIFICATION OF EUROPE: A POLITICAL THEORY OF SUPRANATIONAL INTEGRATION* 86–87 (2012) (stating that “discourses of justification are of necessity never-ending . . . [serving as] instruments for legitimating political action”).

83. VON BOGANDY & VENZKE, *supra* note 79, at 152.

84. CHERYL WELCH, *DE TOCQUEVILLE* 251 (2001).

85. VON BOGANDY & VENZKE, *supra* note 79, at 20. Paul Kahn describes the American Supreme Court as deriving its legitimacy from “its capacity to speak in the voice of a transhistorical popular sovereign” in PAUL KAHN, *POLITICAL THEOLOGY: FOUR NEW CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 13 (Dick Howard ed., 2011).

86. DAVID EASTON, *A SYSTEMS ANALYSIS OF POLITICAL LIFE* 273 (1965).

87. JAMES L. GIBSON & GREGORY A. CALDEIRA, *CITIZENS, COURTS, AND CONFIRMATIONS: POSITIVITY THEORY AND THE JUDGMENTS OF THE AMERICAN PEOPLE* 65 (2009).

may decline, for instance, when the Court is perceived as engaging less in “law” and more in partisan politics. Survey respondents typically will be more supportive of the Court as an institution when they understand it as having recourse to judicial methods—when it is seen to be conducting its affairs independently of politics.⁸⁸ This is how support for the Court was sustained in the aftermath of the ruling in *Bush v. Gore*, which declared the Florida recount of votes in violation of the Equal Protection Clause and, as a consequence, handed the presidency to George W. Bush.⁸⁹ Though there was a subsequent decline in specific support for the Court, diffuse support helped to sustain the Court’s legitimacy through this rough patch.⁹⁰ From these empirical observations regarding SCOTUS, we can better understand legitimacy as requiring ongoing maintenance and work over time.

Brigitte Stern downgrades legitimacy problems to a “so-called crisis” which, given the regime’s youthfulness, she likens to a “teenager’s crisis.”⁹¹ Seen in light of the empirical evidence regarding SCOTUS, this is not something that an institution merely outgrows. Instead, legitimacy is a value that an institution must continually cultivate.

In the following parts of this Article, I take up a select number of strategies that have been embraced by state actors as well as arbitrators. These strategies mostly have arisen, expressly or impliedly, as a way of addressing legitimacy concerns. They are not necessarily distinct—they often appear in combination and have been raised, on occasion, both by states and arbitrators. Nor is the discussion meant to be exhaustive—there are many other strategies that could be taken up.⁹² The inquiry is focused on the question of whether these strategies respond to concerns raised by “legitimacy as justification.” Do these strategies offer up a means by which citizens can learn about, embrace, or resist the regime’s dictates of what is in the common interest? I suggest that the state and arbitral

88. *Id.* at 113.

89. *Bush v. Gore*, 531 U.S. 98, 123 (2000) (Stevens, J., dissenting).

90. James L. Gibson et. al., *The Supreme Court and the US Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?*, 33 BRIT. J. POL. SCI. 535 (2003).

91. Brigitte Stern, *The Future of International Investment Law: A Balance Between the Protection of Investors and the States’ Capacity to Regulate*, in THE EVOLVING INTERNATIONAL INVESTMENT REGIME: EXPECTATIONS, REALITIES, OPTIONS 175 (José E. Alvarez & Karl Sauvant eds., 2011).

92. A helpful suite of reforms is suggested by Karl P. Sauvant & Frederico Ortino, *Improving the International Law and Policy Regime: Options for the Future* (2013), <http://ccsi.columbia.edu/files/2014/03/Improving-The-International-Investment-Law-and-Policy-Regime-Options-for-the-Future-Sept-2013.pdf>.

strategies under discussion fall far short of this mark.

It might be thought unfair to ask this of a regime that draws upon dispute resolution mechanisms associated with private commercial arbitration. It is, after all, a model adapted and “taken over” by the commercial arbitration community, which runs it “as a new form of commercial arbitration business.”⁹³ If the discussion below is revealing of anything, it is that such a dispute resolution mechanism is ill-suited to respond to legitimacy concerns. If there are legitimacy problems, much of the blame should lie at the feet, then, of the regime’s norms entrepreneurs—state officials, lawyers, and arbitrators. The discussion signals that it is time to rethink the foundations of international investment law with a view to rendering it more fit for the role it is expected to play in the public life of citizens and states. Given the investment regime’s continuing instability and long-term legitimation difficulties, this is a task that, sooner or later, will need attending.⁹⁴

II. STATE STRATEGIES

The investment treaty and arbitration regime would not have been able to secure even a semblance of legitimacy without the active participation of national states. States, after all, are the authors of this regime of binding legality.⁹⁵ They also have sought to justify adhesion to investment law norms and the accompanying diminution in policy space with reference to a number of strategies. These are in the nature of what Sassen calls “state work” in the service of new “legalities.”⁹⁶ This is because what we describe as “global,” including the strategic functions necessary to structure and maintain economic globalization, are nested within national legal systems.⁹⁷ In this Part I run through a few of these strategies—two of them discursive and the other a proposal for institutional reform—that have been offered up by states to legitimate the investment treaty regime.

93. Thomas Wälde, *The Specific Nature of Investment Arbitration*, in *NEW ASPECTS OF INTERNATIONAL INVESTMENT LAW* 43, 87 (Philippe Kahn & Thomas W. Wälde eds., 2007).

94. My own modest contribution to this endeavor is found in David Schneiderman, *Listening to Investors (and Others): Audi Alteram Partem and the Future of International Investment Law*, in *SECOND THOUGHTS: INVESTOR-STATE ARBITRATION BETWEEN DEVELOPED DEMOCRACIES* 131 (Armand de Mestral ed., 2017).

95. For a book-length discussion about the states and their relationship to investment law see DAVID SCHNEIDERMAN, *RESISTING ECONOMIC GLOBALIZATION: CRITICAL THEORY AND INTERNATIONAL INVESTMENT LAW* (2013).

96. SASKIA SASSEN, *TERRITORY, AUTHORITY, RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES* 231 (2006).

97. SASKIA SASSEN, *LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION* 13 (1996).

A. Rule of Law

The typical formulation of this strategy is that investment law facilitates the rule of law in global spheres. Whereas relations of force previously determined the outcome of economic disputes, now legal rules, providing “predictability and stability” and applied by dispassionate tribunals, rule the day.⁹⁸ And, whereas politics determined when states would espouse the claims of their nationals, the regime is now “depoliticized” and exercises its rule at some distance from politics.⁹⁹

There is a lot packed into these claims. Brian Tamanaha, after all, has identified a surfeit of constituent elements associated with the rule of law, of which only a few may be advanced by investment law.¹⁰⁰ The difficulty is that those having recourse to this rhetoric in the investment law context tend to not be very precise about what they mean by the rule of law¹⁰¹—few “ever articulate precisely what it means.”¹⁰² When there is specific articulation of its premises, such discussion tends to reproduce a laundry list of both formal and substantive conceptions that purport to represent essential elements of the rule of law in “major domestic legal systems.”¹⁰³ Rather than respond to each element here, I prefer to emphasize the weight such accounts have placed on the ways of the lawyer as corresponding to rule of law promotion. If the object of the investment law regime is to constrain state capacity, lawyers are well placed to structure politics so as to limit power in ways that protect the interests of property and contract. As Alexis de Tocqueville observed in

98. JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 109–11 (2d ed. 1997).

99. On the depoliticization claim, see generally David Schneiderman, *Revisiting the Depoliticization of Investment Disputes*, in *YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY* 2010–2011 693 (Karl P. Sauvant ed., 2012).

100. BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* 91 (2004).

101. *E.g.*, JAN PAULSSON, *THE IDEA OF ARBITRATION* 2 (2013) (“So we accept what we call ‘the rule of law’. Yet there is much hesitation in that acceptance.”); Brower and Blanchard, *supra* note 14, at 698–99 (characterizing the rule of law as encompassing access to international adjudication); Charles N. Brower & Lee A. Steven, *Who Then Should Judge? Developing the International Rule of Law under NAFTA Chapter 11*, 2 *CHI. J. INT’L L.* 193 (2001) (discussing the rule of law in the context of NAFTA Chapter 11); Thomas W. Wälde, *Renegotiating acquired rights in the oil and gas industries: Industry and political cycles meet the rule of law*, 1 *J. WORLD ENERGY L. & BUS.* 55, 57 n.11 (2008) (relying on TAMANAHA, *supra* note 100, and a study by Friedrich von Hayek).

102. TAMANAHA, *supra* note 100, at 3.

103. *E.g.*, Stephan Schill, “*Fair and Equitable Treatment*” as an Embodiment of the Rule of Law, in *THE INTERNATIONAL CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES (ICSID): TAKING STOCK AFTER 40 YEARS* 31, 41–42, 61 (Rainer Hofmann & Christian Tams eds., 2007) (listing seven specific normative principles).

the early nineteenth century, lawyers have “inclinations natural to the privileged class” and so offer a “counterpoise” to the democratic element.”¹⁰⁴

If the object is to “juridicalize” disputes between capital-exporting and capital-importing states, it needs to be acknowledged that this can be achieved in ways that do not require the construction and maintenance of a legal order beyond the reach of national judiciaries. Rather, development of rule of law norms and institutions in states that do not have them could, instead, be a priority. It is so for scholars working within the field of law and development. After a review of the empirical evidence, Kevin Davis and Michael Trebilcock conclude that it is preferable to “emphasize reforms that enhance the quality of institutions charged with the responsibility for enacting laws and regulations,” rather than merely focus on improving the enforcement of contract or property rights.¹⁰⁵ Proposals made by the World Bank Investment Climate Unit, similarly, aim to forestall conflict with foreign investors by having states adopt certain “conflict management mechanisms.”¹⁰⁶ This entails the adoption of institutional techniques and mechanisms with which to respond to investor claims before they rise to the level of an international dispute.

Rule of law promotion appears mostly to be a rhetorical strategy, not all that convincing in the case of host states with viable judicial systems having independence and impartiality. The strategy is intended to not only remove jurisdiction over investment disputes from national judicial systems, but also the role of citizen oversight in the conduct and resolution of disputes. It falls well short of a viable and ongoing strategy of legitimation.

B. Constitutional Rights

Constitutional strategies often are allied with rule of law strategies.¹⁰⁷

104. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 205–06 (Henry Reeve trans., 3d ed. vol. 11 1946). On Tocqueville’s understanding of the role of lawyers in a democracy, see David Schneiderman, *Against Constitutional Excess: Tocquevillian Reflections on International Investment Law*, U. CHI. L. REV. (forthcoming 2017).

105. Kevin E. Davis & Michael J. Trebilcock, *Legal Reforms and Development*, 22 *THIRD WORLD Q.* 21, 33 (2001).

106. World Bank Group Investment Climate Unit, *Investor-State Conflict Management: A Preliminary Sketch*, E15 TASK FORCE ON INVESTMENT POLICY (Nov. 2015), <http://e15initiative.org/wp-content/uploads/2015/09/E15-Investment-World-Bank-Group-FINAL.pdf>.

107. Andreas Paulus, *The International Legal System as a Constitution*, in *RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW AND GLOBAL GOVERNANCE* 69, 109 (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009).

Stretching the constitutional analogy beyond the nation states to transnational legal spheres is considered a surefire way to prop up institutions with weakened legitimacy having global ambitions.¹⁰⁸ It has been a strategy pursued by state actors predominantly in the United States, but also in Europe. When American presidents recently have sought Trade Promotion Authority (“TPA”)—President Bush in 2002 and President Obama in 2015—supporters of TPA maintained that investment rules resembled the constitutional law of the United States.¹⁰⁹ Investment protections, Republican Senator Phil Gramm declared on the floor of the Senate, “were modeled on familiar concepts of American law [and] became the standard for protection of private property and investment around the world.”¹¹⁰

As a consequence of persistent concerns being expressed in Congress, the Trade Promotion Authority Act of 2002 directed the executive branch to ensure that foreign investors were not “accorded greater substantive rights” than U.S. citizens in the United States.¹¹¹ In 2015, the United States Trade Representative (“USTR”) again maintained that investment “obligations and U.S. investment agreements are based on the same legal principles available under the U.S. Constitution and the U.S. legal system.”¹¹² For the USTR, this helped to explain the perfect U.S. win record (thirteen for thirteen) as a respondent state in investment disputes launched under the North American Free Trade Agreement (“NAFTA”).¹¹³ This was also the rhetorical tack adopted by a group of some fifty law professors who declared that while investor rights “are similar to those guaranteed by the U.S. Constitution, . . . [which] might not be guaranteed in foreign countries.”¹¹⁴ In the course of so arguing, proponents acknowledged that NAFTA was a version of hegemonic U.S. constitutional law and not some denationalized version of customary international law. This also was the strategy adopted by the Trump

108. CHRISTOPHER MAY, *THE RULE OF LAW: THE COMMON SENSE OF GLOBAL POLITICS* 138 (2014).

109. IAN F. FERGUSSON, CONG. RESEARCH SERV., RL33743, *TRADE PROMOTION AUTHORITY (TPA) AND THE ROLE OF CONGRESS IN TRADE POLICY* 7 (2015).

110. 107 CONG. REC. S4595 (daily ed. May 21, 2002).

111. Bipartisan Trade Promotion Authority Act of 2002, 19 U.S.C. § 3802(b)(3) (2017).

112. FACT SHEET: Investor-State Dispute Settlement (ISDS), Office of the United States Trade Representative (Mar. 2015), <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds>.

113. North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 15, 1992, 32 I.L.M. 289 and 605 (1993).

114. Payam Akhavan et al., *An open letter about investor-state dispute settlement*, MCGILL FORTIER CHAIR IN INT’L ARB. & INT’L COM. L. (Apr. 20, 2015), <https://www.mcgill.ca/fortier-chair/isds-open-letter>.

administration during NAFTA renegotiations—an agreement that candidate Donald Trump characterized as a “disaster.”¹¹⁵ According to USTR’s “Summary of Objectives” in renegotiating NAFTA, the object is to have U.S. investors secure “important rights consistent with U.S. legal principles and practice, while ensuring that NAFTA country investors in the United States are not accorded greater substantive rights than domestic investors.”¹¹⁶

There remains some doubt, however, about the degree to which investment law mirrors U.S. constitutional law. Simply by virtue of the variety and scope of economic interests that are protected by investor rights, the latter exceed by some margin U.S. constitutional protections. Indeed, investor rights seem hard to contain. Beyond regulations of “property,” ordinarily understood, treaties secure the protection of interests well beyond rational basis review in the case of run-of-the-mill economic regulation, all of which points in the direction of rights that exceed those available to U.S. citizens.¹¹⁷

Europe, too, has been preoccupied with ensuring that foreign investors have no greater rights than those available to European citizens. To this end, the European Union (“EU”) has also made “no-higher-than-domestic-standards” arguments.¹¹⁸ The EU Parliament was pressed to declare that “Union agreements should afford foreign investors the same high level of protection as Union law and the general principles common to the laws of the member states grant to investors from within the Union, *but not a higher level of protection.*”¹¹⁹ Yet, a comparison of EU national and regional law with obligations that were likely to arise in a stalled U.S.-EU agreement (the Transatlantic Trade and Investment Partnership, or “TTIP”) concludes that Europe will have created a different type of liability, giving foreign investors a different right than EU investors.¹²⁰

115. See *Transcript: Donald Trump’s Foreign Policy Speech*, N.Y. TIMES (Apr. 27, 2016), <https://www.nytimes.com/2016/04/28/us/politics/transcript-trump-foreign-policy.html> (“NAFTA, as an example, has been a total disaster for the United States.”).

116. OFFICE OF THE U.S. TRADE REPRESENTATIVE, SUMMARY OF OBJECTIVES FOR THE NAFTA RENEGOTIATION 9 (2017).

117. For further discussion, see David Schneiderman, *Writing the Rules of the Global Economy: How America Defines the Contours of International Investment Law* (unpublished) (on file with author).

118. Catharine Titi, *International Investment Law and the European Union: Towards a New Generation of International Investment Agreements*, 26 EUR. J. INT’L L. 639, 651 (2015).

119. *Id.* (emphasis added).

120. Lauge Poulsen et al., *Transatlantic Investment Treaty Protection*, in RULE-MAKERS OR RULE-TAKERS? EXPLORING THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP 139, 173 (D Hamilton & J Pelkmans eds., 2015); Jan Kleinheisterkamp, *Investment Treaty Law and the Fear for Sovereignty: Transnational Challenges and Solutions*, 78 MOD. L. REV. 793 (2015).

The Joint Interpretative Declaration on CETA, intended as a response to opposition to ISDS emanating from the Belgian region of Wallonia, declares that “CETA will not result in foreign investors being treated more favourably than domestic investors.”¹²¹ From either a Canadian or European perspective, this simply will not be the case.¹²² To the extent that investment claims are within the purview of specialized tribunals, modeled upon private commercial arbitration, and in excess of constitutional rights available to the citizens of leading developed states, legitimacy becomes more, not less, difficult to justify.

C. Investment Court

Specific legitimization problems arose in the course of negotiating the TTIP between the EU and U.S. After hitting the pause button on negotiations of the investment chapter and undertaking a European-wide online consultation, the EU Commission returned with a proposal for a new “investment court” having a tribunal of first instance and another tribunal to hear appeals.¹²³ Reports indicated that U.S. negotiators did not welcome the EU proposal. According to leaked documents reporting on the state of play, the EU and U.S. negotiators did not even broach the subject in one of their last round of talks.¹²⁴

Though not originally a part of the Canada and EU investment chapter in CETA, the newly elected Canadian Liberal government was intent on rapidly finalizing the agreement. Adopting the European proposal for an investment court during the course of the mandatory legal scrubbing of treaty text appears to have been a part of the Canadian strategy of smoothing CETA’s passage. The CETA text was quickly amended to include elements of the EU proposal—the one originally proposed for the

121. General Secretariat of the Council, *Joint Interpretative Declaration on the Comprehensive Economic and Trade Agreement (CETA) Between Canada and the European Union and its Member States*, at 5 (Oct. 6, 2016), <http://www.politico.eu/wp-content/uploads/2016/10/Joint-EU-Canada-declaration-1.pdf> [hereinafter CETA Joint Interpretive Instrument].

122. For the Canadian scene, see Armand de Mestral & Robin Morgan, *Does Canadian Law Provide Remedies Equivalent to NAFTA Chapter Eleven Arbitration?*, in *SECOND THOUGHTS: INVESTOR-STATE ARBITRATION BETWEEN DEVELOPED DEMOCRACIES* 155 (Armand de Mestral ed., 2016) (explaining that, in most disputes, there is “no arguable domestic claim equivalent” to the NAFTA one); see also discussion in DAVID SCHNEIDERMAN, *CONSTITUTIONALIZING ECONOMIC GLOBALIZATION: INVESTMENT RULES AND DEMOCRACY’S PROMISE* 119–20 (2008).

123. European Commission, *Commission Proposes New Investment Court System for TTIP and Other EU Trade and Investment Negotiations*, EUROPEAN COMMISSION (Sept. 16, 2015), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1364>.

124. Greenpeace, *Note-Tactical State of Play of the TTIP Negotiations*, TRADELEAKS BY GREENPEACE 24 (Mar. 2016), <https://trade-leaks.org/?s=tactical>.

Americans.¹²⁵ Canada is now on the front lines of the EU initiative (along with Vietnam, which adopted a similar proposal in the 2015 EU-Vietnam Free Trade Agreement), one that both parties have committed to transforming into a multilateral mechanism by negotiating similar terms with other trading partners.¹²⁶ “CETA’s approach has the best claim to legitimacy in any treaty to date,” Tony VanDuzer writes.¹²⁷

The new model of dispute settlement included in CETA—both tribunal and appellate decisionmaking—looks little like a “court,” however.¹²⁸ It seems not quite right, then, to characterize it as “inspired by the principles of public judicial systems in the European Union and its Member States and Canada.”¹²⁹ The proposal, instead, appears to be modeled more upon WTO dispute-settlement mechanisms than on U.S. or EU judicial systems.¹³⁰ Despite joint Canada-EU claims that it is “radical,”¹³¹ the

125. See Barrie McKenna, *Canada, EU revise trade deal, add investor-state dispute tribunal*, THE GLOBE & MAIL (Feb. 29, 2016), <https://beta.theglobeandmail.com/report-on-business/industry-news/the-law-page/ottawa-says-legal-review-of-canada-eu-free-trade-deal-completed/article28946075/?ref=http://www.theglobeandmail.com> (stating that the changes in the free-trade agreement were “aimed at appeasing European critics”).

126. In pursuit of this goal, Canada and the European Union jointly sponsored a “Meeting on Possible Creation of a Multilateral Investment Court” at the Fourteenth Session of the United Nations Conference on Trade and Development in Nairobi. The July 9, 2016, event was not open to all participants; it was by invitation only. The programme is available at *World Investment Forum 2016 Programme*, UNCTAD <http://unctad-worldinvestmentforum.org/programme2016/>. The initiative was repeated the week of December 12, 2016, in Geneva. See News Release, Global Affairs of Canada, *Canada, a Leader in Progressive Dispute-Resolution Mechanisms for International Trade* (Dec. 14, 2016), <https://www.canada.ca/en/global-affairs/news/2016/12/canada-leader-progressive-dispute-resolution-mechanisms-international-trade.html>.

127. Gabrielle Kaufmann-Kohler & Michele Potestà, *Can the Mauritius Convention Serve as a Model for the Reform of Investor-State Arbitration in Connection with the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism? Analysis and Roadmap*, CIDS – GENEVA CTR. FOR INT’L DISPUTE SETTLEMENT, para. 28, 122, http://www.uncitral.org/pdf/english/CIDS_Research_Paper_Mauritius.pdf; J.A. VanDuzer, *Investor-State Dispute Settlement in CETA: Is it the Gold Standard?*, C.D. HOWE INSTITUTE COMMENTARY No. 459, 17 (Oct. 2016).

128. Gus Van Harten, *Key Flaws in the European Commission’s Proposals for Foreign Investor Protection in TTIP*, 12 OSGOODE HALL L. SCH. LEGAL STUD. RES. PAPER SERIES, Paper No. 16 (2016), <https://ssrn.com/abstract=2692122>.

129. Andrew Newcombe, *Canadian Investment Treaty Policy: Stay the Course on Progressive Developments*, in THE ART OF THE STATE VOLUME VI: REDESIGNING CANADIAN TRADE POLICIES FOR NEW GLOBAL REALITIES 411, 433 (Stephen Tapp, Ari Van Assche & Robert Wolfe eds., 2016).

130. August Reinisch, *The European Union and Investor-State Dispute Settlement: From Investor-State Arbitration to a Permanent Investment Court*, in SECOND THOUGHTS: INVESTOR-STATE ARBITRATION BETWEEN DEVELOPED DEMOCRACIES 333, 355 (Armand de Mestral ed., 2017).

131. CETA Joint Interpretive Instrument, *supra* note 121, at 6.

new mechanism offers so modest a change in dispute resolution, observes Céline Levesque, that it is unlikely to make much of a difference to arbitral outcomes.¹³²

As the German Magistrate's Association complains, the personnel eligible for appointment to the new arbitral mechanism are no different from those already steering ISDS in problematic directions.¹³³ Members of the tribunal of first instance as well as the appellate tribunal are expected to have "demonstrated expertise" in public international law and international investment law, in particular.¹³⁴ Though arbitrators are on retainer for periods of up to ten years, the financial incentive for interpreting standards expansively remains—they earn substantial income when sitting as tribunals, after all, and they will continue to seek employment as arbitrators after their appointment under CETA lapses.¹³⁵ Limited grounds will be available to appellate tribunals to modify or reverse a tribunal's award, expanding slightly upon those already laid down for annulment under the ICSID Convention.¹³⁶ While a new code of ethics may reduce conflicts of interest, there is much baked into the system that will be hard to reverse. For instance, a quantitative study of the behavior of investment tribunal chairs reveals that, where an arbitrator has previously served on tribunals at the behest of claimants, he or she is likely to be "partial" by ruling in favor of investors. The reverse turns out not to be the case—chairs serving previously at the behest of respondent states are likely to be impartial.¹³⁷ The authors of this study recommend, as a consequence, that tribunal presidents be selected from a pool of candidates who have not systematically served as claimant-appointed arbitrators.¹³⁸ It is not clear that selecting presiding arbitrators from a

132. Céline Lévesque, *The European Commission Proposal for an Investment Court System: Out with the Old, In with the New?*, in *SECOND THOUGHTS: INVESTOR-STATE ARBITRATION BETWEEN DEVELOPED DEMOCRACIES* 59, 75 (Armand de Mestral ed., 2017).

133. German Magistrates Association, *Opinion on the establishment of an investment tribunal in TTIP – the proposal from the European Commission on 16.09.2015 and 11.12.2015*, No. 04/16 (Feb. 2016), https://www.foeeurope.org/sites/default/files/eu-us_trade_deal/2016/english_version_deutsche_richterbund_opinion_ics_feb2016.pdf.

134. David A. Gantz makes no reference to the latter, more particular, qualification in this volume. David A. Gantz, *The CETA Ratification Saga: The Demise of ISDS in EU Trade Agreements?*, 49 *LOY. U. CHI. L.J.* 229, 366 (2017).

135. These retainer fee and ICSID fee schedules, apparently, are low enough to act as a "deterrent," according to Reinisch, *supra* note 130, at 352.

136. So as to include grounds under the New York Convention. See Reinisch, *supra* note 130, at 352.

137. Julian Donaubauer et al., *Winning or Losing in Investor-to-State Dispute Resolution: The Role of Arbitrator Bias and Experience* 8 (Kiel, Working Paper No. 2074, 2017), <https://www.econstor.eu/bitstream/10419/156236/1/882674609.pdf>.

138. *Id.* at 19.

roster proposed by the CETA model will check these sorts of tendencies. This is why it is accurate to describe the EU initiative as “in essence . . . (still) formally committed to the ‘traditional’ model” of ISDS.¹³⁹

There is an additional rhetorical strategy accompanying the promotion of the investment court model that has been embraced by both Canada and the EU. They have repeatedly characterized CETA as a “progressive” agreement.¹⁴⁰ In the Joint Interpretative Declaration on CETA, the parties announced that it “is a modern and progressive trade agreement” in which “investment rules and dispute resolution will offer a progressive path forward for future agreements around the world.”¹⁴¹ In a relatively short speech delivered in Ottawa on March 21, 2017, EU Trade Commissioner Celia Malmström invoked the adjective “progressive” twelve times.¹⁴² A progressive trade and investment agenda, she declared, “promotes values”—progressive trade policy recognizes that “trade can bring benefits for both sides.”¹⁴³ In a shot across the bow of Brexit and Trump ethno-nationalism, Malmström declared, “[i]n an age when some want to rebuild walls, reimpose barriers, restrict people’s freedom to move we stand open to progressive trade with the world.”¹⁴⁴ These claims are making their way into scholarly writing as well.¹⁴⁵

If we were to ask the leadership of NGOs skeptical about the benefits of ISDS to self-identify politically, they likely would style themselves as “progressives.” Walking in the footsteps of early twentieth century reform movements,¹⁴⁶ they are seeking to tame the influence of large private enterprise, particularly in the developing world. They would not

139. Steffen Hindelang & Teoman M. Hagemeyer, *In Pursuit of an International Investment Court: Recently Negotiated Investment Chapters in EU Comprehensive FTA in Comparative Perspective* 22, 198 (July 4, 2017), [http://www.europarl.europa.eu/thinktank/en/document.html?reference=EXPO_STU\(2017\)603844](http://www.europarl.europa.eu/thinktank/en/document.html?reference=EXPO_STU(2017)603844)

140. See CETA Joint Interpretive Instrument, *supra* note 121, at 2 (noting that CETA “is a modern and progressive trade agreement which will help boost trade and economic activity”).

141. CETA Joint Interpretive Instrument, *supra* note 121, at 6.

142. Cecilia Malmström, *Progressive Trade Policy in a More Protectionist World*, CANADA2020 (Mar. 21, 2017), <http://canada2020.ca/malmstrom-progressive-trade-policy-in-a-more-protectionist-world/>.

143. *Id.*

144. See *id.* (emphasizing the progressive nature of the EU to bring benefits).

145. See Newcombe, *supra* note 129, at 433 (discussing how CETA is a modern and progressive trade agreement).

146. See generally LOUIS D. BRANDEIS AS PROJECTED BY CLARENCE M. LEWIS, *THE CURSE OF BIGNESS: MISCELLANEOUS PAPERS OF LOUIS D. BRANDEIS* (Osmond K. Fraenkel ed., 1934) (discussing capitalism and the concentration of economic power); MICHAEL MCGERR, *A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA, 1870–1920*, xiv (2003) (discussing the Progressive Era at the dawn of the twentieth century).

consider themselves operating, for instance, in the tradition of Adam Smith, who invoked “progress” as a way of understanding gains from trade—what he calls the “progress of opulence.”¹⁴⁷ It is as a consequence of its multiple meanings that George Orwell famously wrote, “[w]ords of this kind [of which he included the word ‘progressive’] are often used in a consciously dishonest way.”¹⁴⁸ What has emerged is a governmental strategy that consciously appropriates the terminology of the opposing side. It is designed to steer discussions in directions that build legitimacy anew.

III. ARBITRAL STRATEGIES

Arbitrators, like high court judges, operate strategically within their specific institutional environments.¹⁴⁹ Political scientist Walter Murphy laid the foundations for this genre of positivistic political science that is helpful in decoding arbitral behavior. Murphy described “complex judicial systems” within which judges operate that compel those who act rationally—who strive to achieve their policy objectives—to “weigh a number of factors in addition to the specific legal issues in individual cases.”¹⁵⁰ Judicial output is determined, in other words, partly by factors external to what we ordinarily label “law.”¹⁵¹ Their behavior is explained, in part, by an institutional desire to build diffuse and secure specific support. In such circumstances, courts will want to issue reasons that are seemingly more legal than political, but which do not stray too far from what is politically feasible.¹⁵² Arbitrators also can be expected to issue decisions that anticipate responses from their various audiences that both secure legal objectives and enhance their legitimacy.¹⁵³ We can expect

147. See generally 1 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 336 (1910) (analyzing how the accession of wealth results from the progress of nations).

148. GEORGE ORWELL, *Politics and English Language*, in SHOOTING AN ELEPHANT AND OTHER ESSAYS 77, 83 (1950) (mentioning the words “progressive,” “reactionary,” and “bourgeois,” by way of example).

149. David Schneiderman, *Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes*, 30 NW. J. INT’L L. & BUS. 383, 403–07 (2010).

150. WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 199 (1964).

151. These factors include structural and cultural constraints. See Rogers M. Smith, *Political Jurisprudence, the “New Institutionalism” and the Future of Public Law*, 82 AM. POL. SCI. REV. 89, 100 (1988) (discussing the influence of structural contexts and their impact on discretion).

152. TOM S. CLARK, THE LIMITS OF JUDICIAL INDEPENDENCE 21–22 (2011) (explaining what he calls the “politics-legitimacy paradox”).

153. Pablo T. Spiller & Rafael Gely, *Strategic Judicial Decision-Making*, in THE OXFORD HANDBOOK OF LAW AND POLITICS 34, 35–36 (Gregory A. Caldeira, R. Daniel Kelemen, & Keith E. Whittington eds., 2008).

these objectives, however, to occasionally be in tension. The resulting trade-offs help to explain arbitral outcomes that seek to enhance legitimacy, but rub against dominant trend lines.

A. Audience Effects

One strategic concern that likely factors into arbitral decisionmaking is how state parties may react, particularly those powerful capital-exporting states that help set the agenda for investment law as the regime moves forward. I am thinking here, principally, of the U.S. Congress. The outcome in the *Loewen* dispute is difficult to explain without reference to the fact that the American judicial system was under scrutiny and that an adverse decision would result in blowback from Congress.¹⁵⁴ This is what the respondent appointee, Judge Abner Mikva, advised a law school audience: If the U.S. lost *Loewen*, it could lose NAFTA.¹⁵⁵ Mikva may have parlayed these concerns to his fellow panelists because they were, he informs us, intent on finding for Loewen.¹⁵⁶ The tribunal consequently went out of its way to incorporate the customary international law rule of “continuous national[ity]” so as to preclude taking jurisdiction in the *Loewen* dispute.¹⁵⁷ As if aiming to describe the mechanics of strategic decisionmaking, Noah Rubins characterizes the *Loewen* ruling as one in which “the arbitrators had broader concerns in mind than the resolution of the dispute before them.”¹⁵⁸

Similar influences may have been at play in the *Methanex* ruling.¹⁵⁹ *Methanex* is another case in which the United States was the respondent and where the tribunal, rubbing against dominant trend lines, appeared to describe the threshold for expropriation in exceptionally narrow terms.

154. See generally *The Loewen Group, Inc. & Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, (June 26, 2003) (concluding that the NAFTA claims should be dismissed). For more discussion see Schneiderman, *supra* note 149, at 404–05.

155. Judge Abner Mikva, Audio tape: Symposium on Environmental Law and the Judiciary, Pace Law School (Dec. 6–8, 2004) (on file with author).

156. *Id.*

157. *Loewen*, ARB(AF)/98/3, ¶ 225.

158. Noah Rubins, *Loewen v. United States: The Burial of an Investor-State Arbitration Claim*, 21 ARB. INT'L 1, 2 (2005). Noting that the ruling has been subject to “intense scrutiny and criticism,” McLachlan, Shore, and Weiniger describe the *Loewen* tribunal’s discussion of continuous nationality as “too strict and unsupported” in CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 153–54 (Loukas Mistelis ed., 2007).

159. See generally *In the Matter of an International Arbitration Under Chapter 11 of the North American Free Trade Agreement and the UNCITRAL Arbitration Rules (Methanex Corporation v. United States of America)*, Final Award on Jurisdiction and Merits, (Aug. 2005) (concluding that the tribunal had no jurisdiction and that the Claimant’s claims should also be dismissed on the merits).

These will typically require, the tribunal declared, an “intentionally discriminatory regulation,” in which case, non-discriminatory regulations for a public purpose typically will not qualify unless “specific commitments” have been made by the regulating authority and communicated to the investor.¹⁶⁰ As the result diverged from extant case law, *Methanex* was denounced by leading scholars in the field and was not followed in subsequent tribunal decisionmaking.¹⁶¹ The tribunal also applied an exceptionally narrow understanding of NAFTA’s “in like circumstances” requirement in determining whether there had been a violation of national treatment.¹⁶² The comparator for the purposes of discrimination analysis is “domestically owned” investments that will be like the claimant “in all relevant respects, but for nationality.”¹⁶³ This resulted in the *Methanex* tribunal comparing the claimant’s treatment with that of a non-competitor that produced methanol, but not for use as a gasoline additive, a use that was banned by the State of California and which gave rise to the NAFTA claim.¹⁶⁴ Rudolf Dolzer and Christoph Schreuer, for this reason, caution against tribunals behaving as they did in *Methanex* by casting the net of comparison “too narrowly.”¹⁶⁵

The outcomes in both disputes indicate that something more than mere “application” of the law was at play. We might better understand these two disputes as producing outcomes partial to U.S. interests and more congenial to views held by congressional leadership. They were less likely, in other words, to attract blowback.

We might consider other high-profile disputes, such as those concerning regulation of tobacco product advertising, in a similar light—as the product of strategic decisionmaking. On those occasions where states, journalists, and NGOs are focused on disputes that seek to reverse a highly valued public policy choice, one expects tribunals to have their gaze fixed not solely on the claimant or the respondent state, but also on a much larger—one could even say global—audience. It is for this audience, perhaps, that the tribunal in *Phillip Morris v. Uruguay*—a dispute challenging Uruguay’s tobacco advertising policy—drew out what it described as “a consistent trend in favor of differentiating”

160. *Id.* at Part IV, Chapter D, ¶ 7.

161. Kyla Tienhaara & Todd Tucker, *Regulating Foreign Investment: Methanex Revisited*, in *ALTERNATIVE VISIONS OF THE INTERNATIONAL LAW ON FOREIGN INVESTMENT: ESSAYS IN HONOUR OF MUTHUCUMARASWAMY SORNARAJAH* 255, 258, 288 (C. L. Lim ed., 2016).

162. *Methanex*, Part IV, Chapter B, ¶¶ 14–16.

163. *Id.*

164. *Id.* at ¶¶ 18–24.

165. RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 180 (2008); Kurtz, *supra* note 20, at 278.

between expropriations and exercises of police power authority.¹⁶⁶ This is somewhat misleading, as in only one prior case was the state absolved from responsibility because it exercised its police powers.¹⁶⁷ It is more accurate to say, as the *Phillip Morris* tribunal also admitted, that the distinction between compensable expropriations and non-compensable exercises of police powers “did not find immediate recognition in investment treaty decisions.”¹⁶⁸

Tribunals have used other techniques with the apparent objective of bringing more legitimacy to their decisionmaking functions. We can view the introduction of the *Salini* criteria and the criterion of “contribution to host state economic development,” in particular, as aiming to shrink the legitimacy gap. If interest in promoting economic development was intended to guide tribunals whether to accept jurisdiction under the ICSID Convention,¹⁶⁹ the concern was a fleeting one. Tribunals appear to have since abandoned this criterion.¹⁷⁰ As an interpretive matter, it is said that giving primacy to economic development disregards “the actual text of the ICSID Convention and . . . the ordinary meaning of the term ‘investment’ as employed in Article 25(1) of the ICSID Convention.”¹⁷¹ One would have thought that contribution to host state economic development would not be a problem in run-of-the-mill disputes. Nevertheless, it has proven to be sufficiently troublesome to the investment arbitration bar to require abandonment of *Salini*. Conveniently, the “emerging” consensus appears to be settling upon a narrow formula proffered by Zachary Douglas, requiring a “commitment of resources to the economy of the host state . . . entailing the assumption

166. Philip Morris Brands Sárl, Philip Morris Products S.A. & Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, ¶ 295 (July 8, 2016).

167. Ad Hoc NAFTA Arbitration Under UNCITRAL Rules (Chemtura Corporation v. Government of Canada), Award, ¶ 266 (Aug. 2010).

168. *Phillip Morris*, ARB/10/7 ¶ 295.

169. *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 52 (July 23, 2001) (interpreting The Convention on the Settlement of Investment Disputes Between States and Nationals of other States, Mar. 18, 1965, 4 I.L.M. 524 (1965) [ICSID Convention]). An ICSID Annulment Committee declared this to be a faulty reading of the ICSID Convention in *Malaysian Historical Salvors SDN BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, ¶¶ 56–82 (Apr. 16, 2009).

170. *E.g.*, *Pantehniki S.A. Contractors & Engineers v. The Republic of Albania*, ICSID Case No. ARB/07/21, Award, ¶ 36 (July 30, 2009) (abandoning the *Salini* criteria); CHRISTOPH H. SCHREUER ET AL., *THE ICSID CONVENTION: A COMMENTARY* 900–04 (2d ed. 2009).

171. Roberto Castro de Figueiredo, *The Notion of Investment and Economic Development under the ICSID Convention*, in *ICSID CONVENTION AFTER 50 YEARS: UNSETTLED ISSUES* 75, 130 (Crina Baltag ed., 2017).

of risk in expectation of a commercial return.”¹⁷² Similar legitimacy concerns also drove the presiding arbitrator in *Tokios*, Proper Weil, to issue an unusual dissenting opinion. Weil opposed jurisdiction on the grounds that setting up a shell company abroad in order to channel funds originating out of the host state back into it (“round tripping”) disqualified the investor from pursuing a claim under the ICSID Convention.¹⁷³ Adopting a realistic, rather than a formalistic, view of nationality, Weil was of the view that only genuinely cross-border investment qualified under ICSID. Deciding otherwise, he wrote, “put the extraordinary success met by ICSID at risk.”¹⁷⁴ Not surprisingly, subsequent tribunals have not endorsed Weil’s approach and, instead, have preferred to accept jurisdiction.¹⁷⁵

It looks like investment arbitrators have pretty much given up on having investment law play a meaningful role in host state economic development. After all, as a meta-analysis of existing empirical evidence on the correlation between signing BITs and attracting foreign direct investment (“FDI”) suggests, the effects appear to be “economically negligible.”¹⁷⁶ No better result emerges in a sample of twelve states: BITs do not attract “development-enhancing FDI,” the authors of the study conclude.¹⁷⁷ This is underscored by UNCTAD’s finding that an annual “investment gap” of \$2.5 trillion remains to be filled in order for developing countries to meet development goals set out in its 2030 Agenda for Sustainable Development.¹⁷⁸ As the promise of economic development via new inward investment appears not to have materialized, and so offers a weak foundation for the regime’s strictures,

172. ZACHARY DOUGLAS, *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS* 189 (2009) adopted approvingly by arbitrator Jan Paulsson in *Pantechniki*, ARB/07/21 ¶ 36.

173. *Tokios Tokelès v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, (Apr. 29, 2004); *Tokios Tokelès v. Ukraine*, ICSID Case No. ARB/02/18, Dissenting Opinion, ¶ 23 (Apr. 29, 2004).

174. *Tokelès*, ARB/02/18 Dissenting Opinion ¶ 30.

175. Matei Purice, *Natural Persons as Claimants Under the ICSID Convention*, in *ICSID CONVENTION AFTER 50 YEARS: UNSETTLED ISSUES* 131, 158 (Crina Baltag ed., 2017).

176. Christian Bellak, *Economic Impact of Investment Agreements* 19 (Vienna Univ. of Econ. and Bus., Working Paper No. 200, 2015), <https://epub.wu.ac.at/4625/1/wp200.pdf>.

177. Liesbeth Colen & Andrea Guariso, *What Type of Foreign Direct Investment is Attracted by Bilateral Investment Treaties?*, in *FOREIGN DIRECT INVESTMENT AND HUMAN DEVELOPMENT: THE LAW AND ECONOMICS OF INTERNATIONAL INVESTMENT AGREEMENTS* 138, 156 (Olivier De Schutter, Johan Swinnen & Jan Wouters eds., 2013) (discussing a study of twelve Central and Eastern European states that challenge “the idea that BITs are a desirable policy tool to enhance development”).

178. Press Release, *Developing Countries Face \$2.5 Trillion Annual Investment Gap in Key Sustainable Development Sectors*, UNCTAD Report Estimates, U.N. Press Release (June 24, 2014), <http://unctad.org/en/pages/PressRelease.aspx?OriginalVersionID=194>.

other rationales to bolster legitimacy need to be sought out.

B. Third Parties

I turn now to an institutional response inaugurated by investment tribunals, at the prompting of NGOs, which has subsequently been taken up by states and selected arbitration facilities. The object is to augment the participation of third parties in arbitration proceedings and to, thereby, enhance the legitimacy of investment arbitration. As the *Biwater Gauff* tribunal acknowledged, third-party participation assists “in securing wider confidence in the arbitral process itself.”¹⁷⁹ Following upon innovations by the tribunals in *Methanex* and *UPS*,¹⁸⁰ the NAFTA states confirmed in 2003 that tribunals have full discretion to receive written submissions from third parties.¹⁸¹ ICSID Arbitration rules, amended in 2006, enable the filing of third-party submissions and attendance at hearings.¹⁸² The former are permitted after consultation with the parties; the latter only with consent of the parties.¹⁸³ No ICSID tribunal has yet acceded to a request to attend or make oral submissions at a hearing.¹⁸⁴ UNCITRAL Rules on Transparency in Investment Arbitration, in force as of 2014, expand transparency and also enable third-party submissions at the discretion of tribunals.¹⁸⁵

179. *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 5, ¶ 50 (Feb. 2, 2007). See *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. & Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae*, ¶ 22 (May 19, 2005) (“Through the participation of appropriate representatives of civil society in appropriate cases, the public will gain increased understanding of ICSID processes.”).

180. *United Parcel Service of America Inc. v. Gov’t of Can.*, ICSID Case No. UNCT/02/1, Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae* (Oct. 17, 2001); *In the Matter of an Arbitration Under Chapter 11 of the North American Free Trade Agreement and the UNCITRAL Arbitration Rules (Methanex Corp. v. United States of America)*, Decision of the Tribunal on Petitions from Third Persons to Intervene as “*Amici Curiae*” (Jan. 2001).

181. *Statement of the Free Trade Commission on non-disputing party participation* (Oct. 7, 2003), <https://www.state.gov/documents/organization/38791.pdf>.

182. ICSID Convention, Regulations and Rules, Rule 37(2) (Apr. 2006).

183. *Id.* at Rule 37(2), 32(2). The 2004 Dominican Republic-Central America-United States Free Trade Agreement (“CAFTA-DR”) mandates access to documents and open hearings. The Dominican Republic-Central America-United States Free Trade Agreement art. 10.21(1)–(2), Aug. 5, 2004.

184. See BENJAMIN MILLER ET AL., *GUIDE FOR POTENTIAL AMICI IN INTERNATIONAL INVESTMENT ARBITRATION* 15 (Renu Mandhane et al. eds., 2014), http://ciel.org/Publications/Guide_PotentialAmici_Jan2014.pdf.

185. UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, *UNCITRAL RULES ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION* 6 (2014), <http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on->

So, while there has been increasing openness among the NAFTA parties—even live online streaming of some hearings¹⁸⁶—there is still a chasm between aspiration and reality.¹⁸⁷ Pre-award transparency, for instance, is hardly available in ICSID and UNCITRAL tribunal practice.¹⁸⁸ Investors, it seems, typically oppose third-party interventions. Not only are interveners more likely to favor respondent states, they will also boost the already significant costs associated with investment arbitration.¹⁸⁹ There is also an ancillary fear that third-party interventions will contribute to the “repoliticization” of investment disputes. Investment arbitration, it is said, has already secured its “depoliticization.”¹⁹⁰ Enabling third parties, it is feared, will undo this achievement. There are two versions to this claim.¹⁹¹ The first, more modest, one is that investment arbitration has removed disputes from home state control.¹⁹² Now that disputes are in the hands of investors, home states no longer determine whether investment claims get launched.¹⁹³ The second, more extravagant, version is that disputes are now resolved without reference to politics.¹⁹⁴ As the political element has

Transparency-E.pdf.

186. *E.g.*, *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12, Award, ¶ 1.23, 1.35 (Oct. 14, 2016) (referring to live-stream in English and Spanish on ICSID’s website).

187. J. Anthony VanDuzer, *Enhancing the Procedural Legitimacy of Investor-State Arbitration through Transparency and Amicus Curiae Participation*, 52 MCGILL L.J. 681, 723 (2007). This contrasts with post-award transparency, which is better, as noted by Federico Ortino, *Transparency of Investment Awards*, in *TRANSPARENCY IN INTERNATIONAL TRADE AND INVESTMENT DISPUTE SETTLEMENT* 119, 135 (Junji Nakagawa ed., 2013).

188. Nigel Blackaby & Caroline Richard, *Amicus Curiae: A Panacea for Legitimacy in Investment Arbitration?*, in *THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY* 253, 267 (Michael Waibel et al. eds., 2010); Avidan Kent, *The Principle of Public Participation in ICSID Arbitrations*, in *SUSTAINABLE DEVELOPMENT PRINCIPLES IN THE DECISIONS OF INTERNATIONAL COURTS AND TRIBUNALS* 554, 575 (Marie-Claire Cordonier Segger with H.E. Judge C.G. Weeramantry eds., 2017).

189. In the *Matter of an Arbitration Under Chapter 11 of the North American Free Trade Agreement and the UNCITRAL Arbitration Rules (Methanex Corp. v. United States of America)*, Decision of the Tribunal on Petitions from Third Persons to Intervene as “Amici Curiae,” ¶ 50 (Jan. 15) (stating that submissions may “add significantly to the overall cost of the arbitration”); see Noah Rubins, *Opening the Investment Arbitration Process: At What Cost, for What Benefit?*, in *THE INTERNATIONAL CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES (ICSID): TAKING STOCK AFTER 40 YEARS* 213, 219–22 (Rainer Hofmann & Christian J. Tams eds., 2007) (going so far as to propose that intervenors pay for the privilege of making amicus submissions).

190. Tomoko Ishikawa, *Third Party Participation in Investment Treaty Arbitration*, 59 INT’L & COMP. L.Q. 373, 399–401 (2010).

191. Schneiderman, *supra* note 99, at 693–94.

192. *Id.* at 696.

193. *Id.* at 699.

194. *Id.* at 708.

been removed from economic disputes, writes Noah Rubins, investment arbitrators now have recourse only to “principle.”¹⁹⁵ It appears to be this second, extravagant, version that is in circulation when it comes to third parties. Those promoting it are in denial, however, about the close linkages between law and politics in investment arbitration.¹⁹⁶ It simply is not credible to claim that investment arbitration is emptied of politics or that an investment dispute has not already significantly heightened the political stakes involved.

Although investment tribunals have accepted amicus interventions, they appear to have done so with some reluctance. This is exemplified by the behavior of the *Biwater Gauff* tribunal. The dispute arose over a failed water concession in Tanzania. The tribunal accepted the investor’s claims that Tanzania had been leaking arbitration documents to NGOs which, in turn, conscripted them in their public campaign against the investor.¹⁹⁷ In an interim order, the tribunal ruled that the proceedings would remain closed to the public until release of the tribunal’s final award.¹⁹⁸ This had the effect of barring disclosure of discussions or documents to any third parties.¹⁹⁹ It is noteworthy that the investor itself had used ads and press releases to advance its own cause in the arena of public opinion.²⁰⁰ The tribunal accepted, nevertheless, that:

[P]rosecution of a dispute in the media or in other public fora . . . may aggravate or exacerbate the dispute and may impact upon the integrity of the procedure. This is all the more so in very public cases, such as this one, where issues of wider interest are raised, and where there is already substantial media coverage, some of which already being the subject of complaint by the parties [sic].²⁰¹

Publicity, in other words, gave rise to a “sufficient risk of harm or prejudice [to the integrity of the proceedings], as well as aggravation [of

195. Blackaby & Richard, *supra* note 188, at 273; Rubins, *supra* note 189, at 218.

196. See discussion *supra* Part III.A (explaining how investment arbitrators have given up on using investment law to play a substantial role in host state economic development); David Schneiderman, *The Global Regime of Investor Rights: Return to the Standards of Civilised Justice?*, in 5 *TRANSNAT’L LEGAL THEORY* 60, 76 (2014).

197. The campaign was launched under the banner “Dirty aid, dirty water. Hands off Tanzania: Stop UK company Biwater’s attempt to sue.” *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 3, ¶ 16 (Sept. 29, 2006) (describing the purpose to discontinue the present ICSID proceedings); SCHNEIDERMAN, *supra* note 95, at 62–70 (discussing the *Biwater Gauff* dispute).

198. *Biwater Gauff*, ICSID Case No. ARB/05/22, Procedural Order No. 3, at ¶ 142.

199. *Id.* at ¶¶ 128–130.

200. *Id.* at ¶ 41.

201. *Id.* at ¶ 136.

the dispute], in this case to warrant some form of control.”²⁰² In order to stop the company’s reputational bleeding, the tribunal sought to stifle further public discussion about a claim concerning a critical public resource for which Tanzania was on the hook for USD \$20 million. The order of confidentiality had the pernicious effect of undermining participation in the dispute by third parties. The tribunal subsequently granted standing to a group of five environmental NGOs to file an amicus brief in the dispute pursuant to Rule 37(2) of the ICSID Rules of Procedure. They could not gain access, however, to any of the arguments either side would be making in the case.²⁰³ This severely hampered their ability to contribute to the tribunal’s resolution of the dispute.²⁰⁴ In the final award, the tribunal acknowledged that the amicus brief provided a “very useful initial context” for the tribunal’s inquiry and reiterated that the brief was “useful” and “informed” in its analysis.²⁰⁵ Even though the brief was declared to be “useful,” the tribunal declined to follow the amici on any of the points made in their brief. They appear, consequently, to have done little to influence the tribunal’s reasoning.²⁰⁶ Third parties have played a similarly marginal role in the few other instances where their submissions have been received.²⁰⁷ Even if one accepts that third-party participation is now “firmly entrenched” in investment arbitration, legitimacy hardly has been enhanced.²⁰⁸

202. *Id.* at ¶ 146.

203. *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 5, ¶ 68 (Feb. 2, 2007).

204. See Nathalie Bernasconi-Osterwalder, *Transparency and Amicus Curiae in ICSID Arbitrations*, in *SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW* 191, 205 (Marie-Claire Cordonier Segger et al. eds., 2011) (describing how amici could now determine the area of focus that would most benefit the tribunal); Fiona Marshall, *The Precarious State of Sunshine: Case Comment on Procedural Orders in the Biwater Gauff (Tanzania) Ltd. v. Tanzania Investor-State Arbitration*, 3 *MCGILL INT’L J. SUSTAINABLE DEV. L. & POL’Y* 181, 185 (2007) (discussing how petitioners may file a written submission, but it would be without seeing the pleadings or other documents first).

205. *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, ¶¶ 355, 392 (July 24, 2008).

206. For more encouraging accounts, see Bernasconi-Osterwalder, *supra* note 204, at 206; Nathalie Bernasconi et al., *Civil Society and International Investment Arbitration: Tracing the Evolution of Concern*, in *OXFORD HANDBOOK OF INTERNATIONAL ARBITRATION* 8 (Federico Ortino & Thomas Schultz eds., forthcoming); Christina Knahr, *The New Rules for Participation of Non-Disputing Parties in ICSID Arbitration: Blessing or Curse?*, in *EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION* 319, 327 (Chester Brown & Kate Miles eds., 2011).

207. Wei-Chung Lin, *Safeguarding the Environment? The Effectiveness of Amicus Curiae Submissions in Investor-State Arbitration*, 19 *INT’L COMMUNITY L. REV.* 270, 300 (2017).

208. Blackaby & Richard, *supra* note 188, at 270.

C. Proportionality

Yet another legitimization strategy that is being selectively adopted by tribunals, mostly at the urging of a number of academic commentators, is to have recourse to a ubiquitous methodology for resolving constitutional disputes, namely, proportionality.²⁰⁹ A focus on means-ends scrutiny is described as a “tailor-made solution”²¹⁰ for investment arbitrators as a means of enhancing the “legitimacy of rule-governed legal institutions that undertake it.”²¹¹ These scholars advocate the “rapid adoption of proportionality analysis as a standard technique.”²¹² What better means for resolving legitimacy problems than to appropriate techniques that apex courts around the world have found useful in resolving contentious constitutional controversies?

On those occasions where tribunals have sought to adopt proportionality’s methods, however, they have not performed so well.²¹³ As Erlend Leonhardsen observes, tribunals have exhibited some confusion about how proportionality analysis functions. They have collapsed the requisite steps associated with the inquiry (suitability, necessity, proportionate effect) and have exhibited confusion by applying its methods in determining whether a treaty breach has occurred rather than in the context of determining whether a deprivation of rights can be justified.²¹⁴ The *Tecmed* tribunal decision is often singled out as having exhibited good technique, but it stumbles precisely upon these points. Jansen Calamita, for this reason, describes the *Tecmed* tribunal’s discussion of proportionality as amounting to a “[r]hetorical flourish[] about deference” rather than its “actual *application*.”²¹⁵ Significant

209. Alec Stone Sweet & Jud Matthews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT’L L. 72, 75 (2008).

210. *Id.* at 89.

211. Benedict Kingsbury & Stephan Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law*, in EL NUEVO DERECHO ADMINISTRATIVO GLOBAL EN AMÉRICA LATINA: DESAFÍOS PARA LAS INVERSIONES EXTRANJERAS, LA REGULACIÓN NACIONAL Y EL FINANCIAMIENTO PARA EL DESARROLLO 221, 276 (Benedict Kingsbury et al. eds., 2009).

212. *Id.*

213. For more on proportionality as legitimation strategy in investment arbitration, see David Schneiderman, *Global Constitutionalism and its Legitimacy Problems: Human Rights, Proportionality, and International Investment Law*, in LAW AND ETHICS OF HUMAN RIGHTS (forthcoming 2018).

214. Erlend M. Leonhardsen, *Looking for Legitimacy: Exploring Proportionality Analysis in Investment Treaty Arbitration*, 3 J. INT’L DISP. SETTLEMENT 95, 124 (2012).

215. N. Jansen Calamita, *The Principle of Proportionality and the Problem of Indeterminacy in International Investment Treaties*, in YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2013–2014 157, 187 (Andrea K. Bjorklund ed., 2015) (emphasis in original).

learning will have to occur if tribunals are to begin adopting proportionality as a device both for determining the propriety of a state measure and for overcoming legitimization problems.

There is little reason to believe, however, that this strategy will take hold, despite the best advice of some scholars. This is because, as José Alvarez argues, a proportionality inquiry is hardly defensible in the face of obligations, like expropriation, that amount to something like strict liability.²¹⁶ The proposal, moreover, disregards already existing limitations “built-into” existing standards of protection. The weighing between ends and means is “an inescapable part” of the substance of treaty obligations, Alvarez and Kathryn Khamsi write.²¹⁷ There is little logic to supplementing such analyses with an additional layer of means-ends scrutiny. A complementary state strategy, the inclusion of “right to regulate” clauses as general exceptions in investment treaties,²¹⁸ give rise to similar objections. How might these clauses work to convince arbitrators to yield more policy space to states when arbitrators already take into account the right to regulate when interpreting substantive treaty obligations, it is asked.²¹⁹ Arbitrators, as argued above, are attentive to these audience effects and act strategically so as to yield this ground to states without, at the same time, diluting treaty standards of protection.²²⁰

Proportionality may still emerge as a constituent element of investment arbitration because of European agreements such as CETA and the EU-Vietnam FTA Annex on expropriation. Section Three of CETA, for instance, declares that indirect expropriations are unlikely to arise except when, among other factors, “an impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive.”²²¹

216. José E. Alvarez, *Beware Border Crossings*, in *BOUNDARIES OF STATE, BOUNDARIES OF RIGHTS: HUMAN RIGHTS, PRIVATE ACTORS AND POSITIVE OBLIGATIONS* 62–64 (Tsvi Kahana & Anat Scolnicov eds., 2016).

217. José E. Alvarez & Kathryn Khamsi, *The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime*, in *YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY* 2008–2009 449 (Karl P. Sauvant ed., 2009).

218. Suggested in UNCTAD’s roadmap for IIA Reform in United Nations Conference on Trade and Development, *World Investment Report 2017: Investment and the Digital Economy*, 126 (2017) [hereinafter UNCTAD].

219. This is the position taken by Andrew Newcombe, *General Exceptions in International Investment Agreements*, in *SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW* 355 (Marie-Claire Cordonier Segger, Markus W. Gehring, and Andrew Newcombe eds., 2011). Newcombe also argues that these clauses may have the unintended effect of “limiting the range of legitimate objectives available to the state.” *Id.* at 358.

220. The strategy, as declared by UNCTAD, is about “safeguarding the right to regulate, while providing protection.” UNCTAD, *supra* note 218, at 119.

221. EU-Vietnam Free Trade Agreement Annex: Expropriation ¶ 3, Jan. 2016:

For greater certainty, except in the rare circumstances where the impact of a measure or

Similar language is found in the EU-Vietnam agreement. Such textual directives might have the effect of leading arbitrators, exclusively in the context of determining whether an indirect expropriation has taken place, to apply a rigorous proportionality analysis. How well they perform this function remains an open question. Such explicit treaty language could also have the indirect effect of precluding arbitrators from applying a proportionality analysis when considering other standards of treatment.

While proportionality is held out as a magic bullet to secure legitimacy, it is unevenly available and clumsily applied. It also turns out to be a legitimization strategy directed almost exclusively at an expert audience of investment lawyers, arbitrators, and NGOs.

D. Global Administrative Law

This last strategy is not one that tribunals have referred to expressly; rather, it emerges implicitly out of arbitral practice. I am referring to the “embryonic” field of global administrative law (“GAL”)—a scholarly movement originating out of New York University Law School that has taken on global dimensions. The object is to lay down standards worldwide regarding “transparency, participation, reasoned decision, and legality” and, in addition, “provid[e] effective review of . . . rules and decisions.”²²² Its ambition is to establish global norms and institutions that will “fulfill functions at least somewhat comparable to those administrative law fulfills domestically.”²²³ In its various guises, GAL is expected to “capture the nucleus of what inexorably will become a sophisticated, robust, and well-established field of law.”²²⁴ Investment arbitration, it is said, is a good example of global administrative law at work: a “functionally integrated system of norms that regulates national administrative decision-making.”²²⁵

Investment arbitrators have most evidently adopted a strategy of

series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures or series of measures by a Party that are designed to protect legitimate public policy objectives do not constitute indirect expropriation.

222. Benedict Kingsbury, Nico Krisch, and Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 *LAW & CONTEMPORARY PROBLEMS* 15, 17 (2005).

223. *Id.* at 28.

224. EYAL BENVENISTI, HAGUE ACAD. OF INT’L LAW, *THE LAW OF GLOBAL GOVERNANCE* 287 (2014). See also Lorenzo Casini, *Global Administrative Law Scholarship*, in *RESEARCH HANDBOOK ON GLOBAL ADMINISTRATIVE LAW* 548, 567 (Sabino Cassese ed., 2016) (discussing how GAL and its scholarship will flourish if it frames problems and raises questions).

225. Richard B. Stewart, *Global Standards for National Societies*, in *RESEARCH HANDBOOK ON GLOBAL ADMINISTRATIVE LAW* 175, 189 (Sabino Cassese ed., 2016); see also Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 *EUR. J. INT’L L.* 121, 149 (2006) (discussing how investment arbitration is a carrier of GAL values).

promoting the rules and institutions associated with domestic administrative law when considering fair and equitable treatment (“FET”), a treaty standard of protection increasingly central to the business of investment arbitration. The *Tecmed* tribunal, for instance, enumerated behavior expected of states under FET: transparency, consistency, uniformity, and predictability.²²⁶ Similarly, the *Waste Management* tribunal described the minimum standard of treatment as encompassing “manifest failure of natural justice.”²²⁷ This is what Thomas Wälde and Stephen Dow refer to when they speak of “good governance”²²⁸ and what arbitrator Pedro Nikken refers to in *Suez* as the “canons of a modern and well-organized State.”²²⁹ Though Nikken parts company with his fellow tribunal members on the issue of whether “legitimate expectations” doctrine falls within FET, he appears to have in mind the behavior enumerated by *Tecmed*, and the standards associated with GAL.

Some have singled out the *Clayton* tribunal as an example of the direction in which investment arbitration might be heading.²³⁰ Bilcon of Delaware, owned and controlled by the Clayton family, succeeded in its claim against Canada for having followed the advice of an independent environmental review panel. Under review was a proposal by Bilcon to build a rock quarry, together with a processing and ship-loading facility, on sensitive Nova Scotia shoreline for export to the state of New Jersey. A joint environmental review panel recommended to the Canadian and Nova Scotia governments that they reject Bilcon’s proposal because of its adverse environmental effects on land, marine, and human environments.²³¹ The tribunal found Canada liable, however, for having

226. Técnicas Medioambientales Tecmed, S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award, ¶ 154 (May 29, 2003).

227. Waste Mgmt., Inc. v. United Mexican States (No. 2) ICSID Case No. ARB(AF)/00/3, Award, ¶ 94 (Apr. 30, 2004); see also Clayton v. Canada, PCA Case No. 2009-04, Award on Jurisdiction and Liability, ¶ 442 (Mar. 17, 2015), <http://www.pccases.com/web/sendAttach/1287> (discussing the influence of the *Waste Management* international minimum standard).

228. Thomas Wälde & Stephen Dow, *Treaties and Regulatory Risk in Infrastructure Investment*, 34 J. WORLD TRADE 1, 4, 13, 57 (2000).

229. *Suez v. Argentina*, ICSID Case No. ARB/03/17, Separate Opinion of Arbitrator Pedro Nikken, ¶ 36 (July 30, 2010).

230. See Rob Howse, *The Bilcon Decision: The Environment, Local Politics and the Rule of Law*, INT’L ECON. L. & POL’Y BLOG (Mar. 20, 2015, 10:11 PM), <http://worldtradelaw.typepad.com/ielpblog/2015/03/the-bilcon-decision-the-environment-local-politics-and-the-rule-of-law.html> (arguing that investors are entitled to decisions based on “the law in force as written,” and not on the basis of political machinations).

231. See JOINT REVIEW PANEL, REPORT ON THE PROPOSED WHITE POINTS QUARRY AND MARINE TERMINAL PROJECT 4 (2007),

relied upon the environmental panel's allegedly faulty legal process.²³² The joint review panel engaged in arbitrary behavior because it failed to properly apply Canadian law, resulting in a violation of NAFTA's minimum standard of treatment, of which FET is an element.²³³

The panel was alleged to have been at fault for incorporating something called "community core values" into its report. Doing so was "inimical to the proponents having any real chance of success,"²³⁴ two tribunal members concluded, resulting in "a serious breach of the law on procedural fairness."²³⁵ As the dissenting opinion of Donald McRae emphasized, community core values served only as a label for "human environmental effects." It is as if, McRae complained, his fellow arbitrators had not even bothered to read the panel's report.²³⁶ Instead, the tribunal majority appears to have accepted, without qualification, the claimant's arguments that community core values were the essential basis of the panel's decision.²³⁷ The tribunal coupled this finding with a seemingly redundant discussion of legitimate expectations doctrine.²³⁸ The investor, after all, believed that local law would be properly applied. It was this legitimate expectation—present in most every investment dispute—that was upended.

Reminiscent of the GAL approach, the *Clayton* tribunal purported not to predetermine policy outcomes. It instead was focused on the question of whether decisions, having the effect of diminishing investment returns, were the product of fair processes. Numerous problems, however, arise even when applying this more modest standard of review. First, it is not beyond question that the joint review panel misapplied Canadian law.²³⁹

www.novascotia.ca/nse/ea/whitespointquarry/WhitesPointQuarryFinalReport.pdf [hereinafter JRP Report] (summarizing the panel's recommendations to the Government of Canada).

232. See *Clayton v. Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, ¶ 742 (Mar. 17, 2015), <http://www.pcacases.com/web/sendAttach/1287> (finding by a majority vote that Canada was liable for the breach of its obligations under NAFTA Articles 1105 and 1102).

233. *Id.* at ¶ 548.

234. *Id.* at ¶ 450.

235. *Id.* at ¶ 534.

236. *Clayton v. Canada*, PCA Case No. 2009-04, Dissenting Opinion of Professor Donald McRae, ¶ 14 (Mar. 10, 2015). Apart from the report summary, the first reference to human environmental effects appears only after the section headed "Human Environment Effects Assessment," which is 66 pages into a 107-page-long report. See JRP Report, *supra* note 231, at 66. Further, "core values" received a three-page discussion immediately prior to the panel's "conclusions and recommendations" at the end of the report. See *id.* at 96.

237. *Clayton*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, ¶ 452.

238. See Matthew Levine, *The Bilcon Case: Do Their Expectations Freeze Our (Environmental Assessment) Frameworks?* 14 (Apr. 19, 2017) (unpublished L.L.M. paper, University of Toronto) (discussing the legitimate expectations doctrine in relation to Article 1105).

239. *Clayton*, PCA Case No. 2009-04, Dissenting Opinion of Professor Donald McRae, ¶ 36.

The Federal Court of Canada might only have “potentially” been interested in the claim, observed McRae. Second, it is extraordinary, though not unprecedented, that a tribunal would find international liability for what is arguably a breach of host state law.²⁴⁰ Third, and as a consequence, the tribunal will have awarded damages in circumstances where Canadian courts would not have done so. As dissenting arbitrator McRae pointedly remarked, the ruling produced a “disturbing result,” leading to a “remarkable step backwards in environmental protection.”²⁴¹ If offered up as a good example of procedural review, the *Clayton* award renders global administrative law a perilous strategy for securing investment law’s legitimacy.

CONCLUSION

This Article has canvassed a number of strategies adopted by states and arbitral tribunals to generate or boost the legitimacy of ISDS. Not one of them turns out to be adequate. Some are even resisted by the system’s principal agents, which only thwarts their efficacy. There are other strategies, too, that might have been mentioned; for instance, conscription of WTO appellate body jurisprudence²⁴² or avoiding excessive damage awards for fear that it would “imperil the legitimacy” of ISDS.²⁴³ However wide-ranging this discussion could have been, it is fair to conclude that few strategies are being pursued vigorously or consistently, and so success on any of these fronts is unlikely. No “technical fix” is likely to solve this crisis.²⁴⁴ Nor is it likely that the system will imminently collapse as a consequence. Rather, it is more likely that, without much diffuse support, ISDS will recede from the headlines and

See generally Meinhard Doelle, *The Bilcon NAFTA Tribunal: A Clash of Investor Protection and Sustainability-based Environmental Assessment*, KEY DEVS. IN ENVTL. L. (forthcoming 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3002626 (explaining how the joint review panel ruling raised numerous concerns).

240. See M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 359 (3d ed. 2010) (discussing how tribunals are arguing that “all administrative irregularity should be regarded as unfairness” under FET).

241. *Clayton*, PCA Case No. 2009-04, Dissenting Opinion of Professor Donald McRae, ¶ 51.

242. See, e.g., Giorgio Sacerdoti, *BIT Protections and Economic Crises: Limits to Their Coverage, the Impact of Multilateral Financial Regulation and the Defence of Necessity*, 28 ICSID REV. 351 (2013) (discussing how the WTO jurisprudence was considered by the tribunal as an alternative to the requirement of necessity under ordinary international law); see also JÜRGEN KURTZ, *THE WTO AND INTERNATIONAL INVESTMENT LAW: CONVERGING SYSTEMS* 28 (2016) (explaining the role of the WTO in investment arbitration).

243. Thomas W. Wälde, *Remedies and Compensation in International Investment Law*, 2 TRANSNAT’L DISP. MGMT. 5, 7 (2005).

244. Lorenzo Cotula, *Democracy and International Investment Law*, 30 LEIDEN J. INT’L L. 351, 380 (2017).

investment lawyers will go about doing their work until such time as the next crisis erupts.

Even Guizot's democracy-deprived account of legitimacy-by-justification that relies upon elite management is discordant with investment arbitration. I have been describing a system, after all, that has some difficulty generating transparency and promoting conditions for contestability. It looks, in Beetham's memorable phrasing, more "like an extortion racket than a public service."²⁴⁵ Even though institutional efforts have been made—at ICSID, for instance—to enhance openness, the regime continues to operate at unacceptable levels of secrecy: with enigmatic initial claims, privileged memorials, confidential proceedings,²⁴⁶ and certain undisclosed awards. These problems are compounded by the field's arcane discourse,²⁴⁷ lengthy opinions, confidentiality of settlements, difficult-to-access scholarship and pricey subscriptions to specialized news outlets. Access to information, in other words, remains a problem.

Having disputes resolved within national legal systems would help to alleviate some of these problems, but that is a goal that investment law's agents fiercely resist.²⁴⁸ Instead, investment lawyers and scholars have a different end game in sight: having states everywhere internalize investment law standards of treatment so that all economic actors within host states benefit from investor protections, not just foreigners.²⁴⁹ This is an unrealistic, if dystopic, scenario. Even if such a consensus was secured and an empire of homogeneity installed, it would never result in stable outcomes. Disagreement about the proper relationship between politics and markets is endemic—it will always engender disagreement, particularly in an age of heightened economic inequality.²⁵⁰ The search

245. BEETHAM, *supra* note 53, at 83.

246. Even states have on occasion preferred that proceedings remain confidential. Int'l Council for Commercial Arbitration, *Survey: Arbitral Institutions Can do More to Foster legitimacy: True or False*, in LEGITIMACY: MYTHS, REALITIES, CHALLENGES 667, 733 (Albert Jan Van den Berg ed., 2015).

247. Investment arbitrators have not taken direction from more experienced communicators such as Gowers, who writes that "even if your understanding and use of Latin is 'faultless[,] your reader may be less learned than you and must not be made to feel inferior.'" SIR ERNEST GOWERS, THE COMPLETE PLAIN WORDS 73 (Sir Bruce Fraser rev'd., 1973).

248. The rationale for such a proposal, prompted by thoughts about the Latin maxim *audi alteram partem*, is developed in Schneiderman, *supra* note 94.

249. Thomas W. Wälde, *The Umbrella Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases*, 6 J. WORLD INV. & TRADE 183, 188 (2005).

250. Sean Ennis et al., *Inequality: A Hidden Cost of Market Power* (OECD, Working Paper No. DAF/COMP(2015)10 Feb. 16, 2017), [https://one.oecd.org/document/DAF/COMP\(2015\)10/en/pdf](https://one.oecd.org/document/DAF/COMP(2015)10/en/pdf).

for a common good as a means of justifying relations of power will always attract contestation and resistance. To believe otherwise is to be unrealistic about the legal profession's charismatic authority.

All of which speaks to the need to think creatively about routes to legitimacy. It requires imagination and some experimentation, both of which seem to be in short supply among the investment law set, including those inhabiting government positions. New legitimation strategies need to be devised in a Guizotian spirit. As Guizot's modern interpreter puts it, the task needs to be undertaken with the expectation that legitimacy will never be definitively acquired, remains precarious, and will always be open to challenge.²⁵¹

251. ROSANVALLON, *supra* note 23, at 7.