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Controlling the International Investment Law Agency

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In recent years foreign investors have used a rapidly expanding network of bilateral and multilateral investment treaties to directly sue states before international tribunals for violations of international law. There have now been hundreds of such lawsuits, with tribunals occasionally granting investors massive damage awards. In the process of resolving these disputes, tribunals announce and apply new rules of law. This brave new world of international investment law ("IIL") has emerged as one of the most dynamic and controversial areas of international law today. In this Article I argue that the IIL system can be usefully analogized to a domestic-law administrative agency, where significant regulatory power is transferred to expert decision-makers acting on behalf of political principals. Viewing IIL as an agency highlights the IIL system's major weakness: the lack of sufficient mechanisms of political control by states. Drawing on domestic administrative practice, I suggest reforms designed to enhance control by adapting domestic-law systems of notice-and-comment and the legislative veto. Doing so promises to ensure states a more adequate degree of control over IIL outputs.

Introduction

In recent years international investment law ("IIL") has emerged as one of the most dynamic areas of international legal practice. Many states have now entered into bilateral and multilateral international investment agreements ("IIAs") that grant foreign investors important substantive and procedural rights, including, most importantly, the right to sue the state hosting their investment for violations of customary international law and treaty obligations. Today, there are over 2500 IIAs in existence, and investors are increasingly exercising their right to sue by bringing IIA-based claims before international arbitral tribunals. Many of those claims are decided under the auspices of the World Bank's International Centre for the Settlement of Investment Disputes, or ICSID.[1] In its first thirty years of existence, from 1967 through 1996, investors registered just thirty-eight investor-state dis-

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1. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

putes at ICSID.[2] Since 1997, ICSID's caseload has exploded. From 1997 through 2010, investors have registered 293 disputes.[3] ICSID tribunals often either partially or fully uphold investor claims, with investors prevailing on the merits approximately forty-five percent of the time.[4] While the typical pro-investor ICSID award grants the investor relatively modest monetary damages, on occasion the amounts awarded are impressively large.[5]

Given the increasing ubiquity of IIA-based investor-state arbitration, the historical novelty of a private international law right of action against states and the occasionally generous pro-investor award, the modern IIL system is proving to be highly controversial.[6] Proponents suggest that the system benefits states by promoting rule-of-law values that encourage potentially dramatic increases in economically beneficial foreign direct investment ("FDI").[7] Opponents argue, among other things, that the threat of IIA litigation chills legitimate and desirable domestic regulation and that investment tribunals are inherently biased against the justifiable exercise of state authority.[8] I make no claims about the objective accuracy of either position in this Article. Regardless of whether one is "for" or "against" the IIL system in its present form, it does seem clear that IIL actors are being asked to engage in complex and politically fraught value-balancing exercises.[9] Actual examples include, for instance, the circumstances under which sovereign debt may be coercively renegotiated,[10] or the compatibility of health-based anti-smoking regulations with the property rights of multinational cigarette

2. ICSID, *The ICSID Caseload - Statistics*, *Issue 2010-11*, ICSID, 7 (Dec. 31, 2010), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&CaseLoadStatistics=True&language=English11.

3. *Id.*

4. *Id.* at 13.

5. Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. Rev. 1, 58–59 (2007).

6. *See, e.g.*, Asha Kaushal, *Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime*, 50 Harv. Int'l L.J. 491, 493–94 (2009) (describing a "backlash" against the IIL system).

7. This is the so-called "grand bargain" of IIAs: that states agree to be bound by them in exchange for the possibility of increased foreign investment. Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 Harv. Int'l L.J. 67, 77 (2005).

8. *See, e.g.*, Olivia Chung, *The Lopsided International Investment Law Regime and Its Effect on the Future of Investor-State Arbitration*, 47 Va. J. Int'l L. 953, 963 (2007).

9. *See* Suzanne A. Spears, *The Quest for Policy Space in a New Generation of International Investment Agreements*, 13 J. Int'l Econ. L. 1037, 1071 (2010) (arguing that the IIL system is increasingly engaged in a "balancing process" in which ILL tribunals are "called upon to make value judgments").

10. Argentina provides an example of such a case. *See* Robert M. Ziff, *The Sovereign Debtor's Prison: Analysis of the Argentine Crisis Arbitrations and the Implications for Investment Treaty Law*, 10 Rich. J. Global L. & Bus. 345, 380–81 (2011); Michael Waibel, *Opening Pandora's Box: Sovereign Bonds in International Arbitration*, 101 Am. J. Int'l L. 711, 754 (2007).

corporations,[11] or the amount of scientific justification necessary to support bans on chemical products sold to consumers.[12]

In this Article, I argue that we can usefully analogize the emerging IIL system to a domestic-law administrative agency in which significant policymaking authority is transferred from political organs to expert decisionmakers who are charged to act in instrumental pursuit of a collective policy goal—the promotion and protection of foreign investment. Viewing the IIL system as a policymaking agency highlights the system's major weakness: the lack of sufficient mechanisms of state political control. Drawing on domestic administrative practice, I suggest reforms designed to enhance state control, such as adapting domestic-law systems of notice-and-comment and the legislative veto. Doing so promises to ensure states a more adequate degree of control over IIL rules. The IIL system, like the World Trade Organization ("WTO"), represents a "new generation" of international legal institutions that promise, or threaten, to arrogate significant regulatory authority and capability.[13] In a world in which someone must be the ultimate decider of how society's complex set of values and priorities should ultimately be balanced, I suggest that states, rather than the IIL agency itself, should sit at the top of the decisional hierarchy. In the absence of adequate state-centered control mechanisms, states are increasingly likely to abandon IIL either partially or wholesale, as Bolivia, Ecuador, and Venezuela have recently done.[14]

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11. For example, Philip Morris has initiated ICSID lawsuits against Australia and Uruguay, based on the claim, inter alia, that those countries' anti-smoking "plain packaging" laws violate the company's investment-treaty-based right to be free from uncompensated expropriation. *Philip Morris Sues Australia Over Cigarette Packaging,* N.Y. TIMES, June 27, 2011, at B8; Duff Wilson, *Companies Fight Back as Rules Tighten on Smoking: Tobacco Industry Focuses on Blocking Regulations in Developing Economies*, INT'L HERALD TRIB., Nov. 15, 2010, at 16.

12. Charlie Fidelman, *Maker of Herbicide Sues Quebec; Dow Agrosciences Says Province Has No Scientific Basis for Ban*, MONTREAL GAZETTE, April 14, 2009, at A10. The dispute, brought under Chapter 11 of NAFTA, has since been settled.

13. Gary Born, *A New Generation of International Adjudication*, 61 DUKE L.J. 775, 775–76 (2012) (arguing that international investment tribunals are part of a "second generation" of international tribunals that "have been frequently and successfully used in vitally important fields, in part because they issue effective and enforceable decisions," in contrast to an earlier generation of institutions, such as the International Court of Justice). On the WTO as an international regulatory authority, characterized by judicial lawmaking, *see generally* Judith Goldstein & Richard Steinberg, *Regulatory Shift: The Rise of Judicial Liberalization at the WTO*, *in* THE POLITICS OF GLOBAL REGULATION (Walter Mattli & Ngaire Woods, eds., 2009).

14. Ignacio A. Vincentelli, *The Uncertain Future of ICSID in Latin America*, 16 LAW & BUS. REV. AM. 409, 410 (2010) (discussing withdrawals from ICSID by Bolivia, Ecuador, and Venezuela). Other examples include India, which has cited the Philip Morris lawsuits as one of the reasons behind its rejection of investor-state arbitration in a proposed European Union-India Free Trade Agreement. Asit Ranjan Mishra, *India Rejects Clause on Litigation*, MINT, (July 4, 2011), http://www.livemint.com/2011/07/04002124/India-rejects-clause-on-litiga.html. Even developed countries are rethinking their commitment to IIL. Norway, for instance, has informally shelved its IIA program in the face of public polarization. Damon Vis Dunbar, *Norway Shelves Its Draft Model Bilateral Investment Treaty*, INVESTMENT TREATY NEWS, (June 8, 2009), *available at* http://www.iisd.org/itn/2009/06/08/norway-shelves-its-proposed-model-bilateral-investment-treaty. Much more significantly, the European Union is actively considering whether to eliminate intra-E.U. IIAs. Hanno Wehland, *Intra-EU Investment Agreements and Arbitration: Is*

The Article proceeds as follows. Part I discusses how the way in which scholars frame the IIL system has important consequences for how we view the relationship of IIL to states. Part II argues that the IIL system can be understood as an "epistemic community" of networked actors who function somewhat like a regulatory agency. Parts III and IV describe the IIL agency's control problem, focusing on both the justification for strong state control and the inadequacies of existing control mechanisms. Part V argues that existing calls for reforming the IIL system risk exacerbating control problems. Part VI draws on domestic administrative practice to suggest reforms designed to enhance state control without fully abandoning the IIL system. Part VII offers some concluding thoughts.

I. Framing International Investment Law

How scholars categorize or frame the IIL system can have important implications for how those scholars understand the system's essential nature, how they define the system's most important flaws, and which institutional reforms they suggest. Scholars have suggested a number of different theoretical frames. For example, Susan Franck has suggested a dispute-resolution framework that emphasizes the role of investment treaty arbitration in promoting the mutually acceptable resolution of discrete conflicts between individual investors and host states.[15] This understanding of IIL as primarily concerned with efficiently resolving self-contained disputes reflects the field's historical emergence from the world of contract-based international arbitration. This view also supports the "traditional conception of arbitration as an inherently private and confidential mode of dispute resolution."[16] It is also the framework typically emphasized by IIL insiders and by the most forceful proponents of the status quo.[17]

European Community Law an Obstacle?, 58 Int'l & Comp. L.Q. 297, 297–98 (2009). *See generally* Jacob Katz Cogan, *Competition and Control in International Adjudication*, 48 Va. J. Int'l L. 411, 419 (2008) (arguing that mechanisms of control "provide States the comfort they seek . . . that an international court will not venture beyond its assigned mandate," and suggesting that when control mechanisms become perceived as inadequate, states will abandon their consent to the jurisdiction of international institutions).

15. Susan D. Franck, *Integrating Investment Treaty Conflict and Dispute Systems Design*, 92 Minn. L. Rev. 161, 163 (2007). We see the same worldview applied to the world of international commercial arbitration (ICA), where ICA elites insist on defining the field as solely concerned with dispute-settlement. *See, e.g.*, W. Michael Reisman & Heidi Iravani, *Arbitration and National Courts: Conflict and Cooperation: The Changing Relation of National Courts and International Commercial Arbitration*, 21 Am. Rev. Int'l Arb. 5, 5 (2010) (quoting the American Law Institute's Tentative Draft Number 1 of the Restatement of the U.S. Law of International Commercial Arbitration as defining ICA as "a dispute-resolution method in which the disputing parties empower an arbitral tribunal to decide in a final and binding manner a dispute with respect to a defined subject matter.").

16. L. Yves Fortier, *Arbitrating in the Age of Investment Disputes*, 31 Univ. New S. Wales L.J. 282, 283 (2008).

17. *See, e.g.*, Ibrahim F.I. Shihata, *The Settlement of Disputes Regarding Foreign Investment: The Role of the World Bank, with Particular Reference to ICSID and MIGA*, 1 Am. U. J. Int'l L. & Pol'y 97, 98–99 (1986); Charles N. Brower & Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of*

Others, such as David Schneiderman, have emphasized a constitutional frame, under which IIAs are part of a system that uses international arbitration to "entrench . . . beyond the reach of majoritarian control . . . rules for the free movement of transnational capital."[18] The system is constitutional because it focuses on providing investors with vaguely worded substantive rights, like the right to "prompt, adequate, and effective compensation" in the event of expropriation.[19] Such rights are normatively higher than domestic legal rights. They are primarily interpreted and enforced by unelected judges (arbitrators), and the content of these new constitutional rights, like the content of the U.S. Constitution, is difficult to modify through normal democratic law-making processes. Unlike the dispute-resolution framework, the constitutional framework suggests that investor-state disputes are not merely private conflicts, but often reflect and impact important issues of public policy.

The notion of "Global Administrative Law" provides a third possible frame.[20] Drawing on pioneering work by Kingsbury and Stewart,[21] Van Harten and Loughlin argue that the IIL system is "best analogized to domestic administrative law rather than to international commercial arbitration" because investment treaty arbitration "engages disputes arising from the exercise of public authority by the state as opposed to private acts of the state."[22] Those disputes are resolved by "semi-autonomous international adjudicative bod[ies] that review . . . and control . . . state conduct in the public sphere,"[23] akin to the domestic courts that review the legality of government actions at the municipal level.

Each of these various frames illuminates important aspects of the IIL system.[24] But the frames are not as successful as they otherwise might be in clarifying either the fundamental reason for IIL's continuing controversy or in suggesting institutional reforms that have a realistic probability of alleviating otherwise legitimate concerns without denuding the system of its potential to encourage the peaceful and reasonable settlement of investment disputes.

International Investment Law?, 9 CHI. J. INT'L L. 471, 477 (2009) (providing a defense of IIL that emphasizes the system's role in providing dispute settlement services that "stabilize" investor expectations by providing a system of rules that are "enforced").

18. David Schneiderman, *Investment Rules and the New Constitutionalism*, 25 LAW & SOC. INQUIRY 757, 757 (2000).

19. *Id.* at 772–73.

20. Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT'L L. 121, 146 (2006).

21. *See, e.g.*, Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROB. 15 (2005).

22. Van Harten & Loughlin, *supra* note 20, at 121.

23. *Id.* at 149.

24. There are other possible frames. Jeswald Salacuse suggests we view the IIL system as an "emerging regime," where the concept of regime is drawn from international relations theory. Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 HARV. INT'L L.J. 427, 431 (2010).

In this Article, I suggest the utility of further pushing Van Harten and Loughlin's administrative law analogy, in the hope that doing so will both improve our descriptive understanding of the system that we actually have and generate useful suggestions for transforming the system in normatively desirable ways. In Van Harten and Loughlin's analysis, IIL appears to be "administrative" in the relatively narrow sense of providing an international adjudicatory regime that reviews "public" government actions for legality.[25] They focus on the role that international investment tribunals play in approving or disapproving state action. That focus suggests that the tribunals themselves are not inherently "administrative"—they are simply playing the role that normal courts play in domestic law systems in reviewing the legality of public acts. Like Schneiderman's constitutional frame, the global administrative framework is essentially about control, *by* international judges (arbitrators) and *of* national governments, where the former prevent the latter from running amok in ways that harm investor rights, and where those rights are often, at least implicitly, of a constitution-like or natural character.[26]

However, the Global Administrative Law framework risks obscuring the fact that these tribunals are part of a larger IIL system whose members (including the arbitrators who decide disputes) produce novel legal rules as much as or perhaps more than they merely apply them. In the paragraphs below I propose that we begin to think about international investment arbitrators as serving within a larger (if largely informal and still developing) IIL "agency" that legislates, administers, and adjudicates the rules of the international investment game, much in the same way that agencies in domestic legal systems are delegated authority to make important policy decisions. The reader should keep in mind that the agency I am describing is not *literally* an agency in the same way that, say, the U.S. Food and Drug Administration is an agency. But it is not entirely dissimilar either. As Francesca Bignami has recently argued, the domestic administrative state is increasingly organized as a relatively horizontal "network" of policymaking actors,[27] much like the IIL agency that I describe below, in which ensuring appropriate accountability is a major challenge.

So what do we gain by adopting an agency framework? I see at least two main benefits. First, the framework is descriptively helpful in that it underscores the fact that tribunals, and the larger system of which they are an integral part, are extensively engaged in policymaking and not just dispute settlement. By "policymaking" I mean that IIL actors are delegated the authority to engage in expert-based decisionmaking that leads to the articu-

25. Van Harten & Loughlin, *supra* note 20, at 149.

26. Carol Harlow, *Global Administrative Law: The Quest for Principles and Values*, 17 EUR. J. INT'L L. 187, 191-92 (2006) (discussing the "control" understanding of administrative law).

27. Francesca Bignami, *From Expert Administration to Accountability Network: A New Paradigm for Comparative Administrative Law*, 59 AM. J. COMP. L. 859, 877 (2011).

lation of generally and prospectively applicable rules or standards, in instrumental pursuit of some reasonably specific and externally selected and legitimated collective goal.[28] In its simplest form, the collective goal is the promotion of foreign investment through the articulation of rules that limit state authority to undertake actions that harm investors and that, because of this harm, might threaten future investment flows.[29] This definition of policymaking is Weberian, and accords with definitions typically offered in scholarship on the modern administrative state.[30] I sometimes refer to policymaking interchangeably as "lawmaking," and it should be clear that policymaking is much like "legislation" by Congress or by a national parliament. The principal difference is that we typically do not insist that legislative decisions be based on expertise (though we often hope that they are).

Second, an agency framework usefully suggests the desirability of locating an appropriate principal on behalf of whom the agency—the agent—is delegated the authority to act.[31] Understanding the IIL system as an expert administrative agent of someone else acts as a corrective to the main implication of Schneiderman's constitutional frame, which, by naming investment law tribunals as constitutional, thereby places them at the peak of

28. The fact that the goal is externally selected and legitimated by states distinguishes the IIL agency from constitutional courts and quasi-constitutional courts like the European Court for Human Rights, which can be viewed as enforcing "fundamental" or "natural" or "inalienable" rights because such rights should inherently be enforced, and not because a politically legitimate principal has instructed that they be enforced as a matter of public policy.

29. This functional goal is expressly articulated in the preambles of most IIAs. To offer just one example, the 2004 Model U.S. Bilateral Investment Treaty states in its preamble that the Parties "recogniz[e] that agreement on the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties." U.S. Model Bilateral Investment Treaty, Preamble, 2004, *available at* http://www.state.gov/documents/organization/117601.pdf. The language is strikingly similar to the preambles of Germany's earliest IIAs, which date to the 1960s. *See, e.g.*, 1960 Agreement Between the Federal Republic of Germany and the Federation of Malaya Concerning the Promotion and Reciprocal Protection of Investments, Fed. Republic of Ger. - Fed'n of Malaya, Preamble, Dec. 22 1960 ("Recognising that a contractual [treaty-based] protection of [foreign] investments is likely to promote private business initiative and to increase the prosperity of both nations.").

30. Policymaking is the "process by which a government agent, whether legislator, executive, administrator, or judge, uses some articulated method to establish general rules, or standards, for the implementation of governmental efforts." Edward L. Rubin, *Discretion and Its Discontents*, 72 CHI.-KENT L. REV. 1299, 1317 (1997). Agencies engaged in policymaking are tasked by their political superiors (e.g. the legislature) with advancing the "public good," which the superiors can define in "the most general terms" or in "mind-benumbing detail"; and with that goal in mind, the "agency is expected to gather information, review various options, and decide which option best implements the. . .goal." *Id.* at 1318. *See also* Charles H. Koch, Jr., *Policymaking by the Administrative Judiciary*, 56 ALA. L. REV. 693, 694 n.2 (2005) ("The term 'policy' encompasses a wide variety of decisions that advance or protect some collective goal of the community as a whole (as opposed to those decisions that respect or secure some individual or group right).").

31. *Cf.* Allison Marston Danner, *When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War*, 59 VAND. L. REV. 1, 41-43 (2006) (noting that "the dominant conceptual approach to international courts is to view their authority as stemming from a delegation of domestic sovereign authority . . . [S]tates, as principals, delegate to courts, as agents, tasks that states themselves cannot do efficiently. A principal-agent understanding of international courts, therefore, suggests that courts should act in accordance with the principals' wishes, in this case, the states that established the court.").

the international legal hierarchy, subject to little possibility of political correction or control. By thinking of IIL tribunals as constitutional, we risk, to paraphrase Hamlet, making them so.[32] In contrast, because agents (and agencies) exercise delegated authority on behalf of their principals in pursuit of goals that the principal has defined, an agency framework serves to highlight the point that IIL, and investment tribunals, should ultimately be structured so as to effectively serve the interests of their legitimate political masters. In other words, an agency framework encourages us to mentally relocate the agency in relation to other important institutions in the international politico-legal constellation, namely, states.

Once we understand the IIL system as an agency, we are better able to perceive, discuss, and address the fundamental source of the system's controversy: the concern that unaccountable, transnational elites-cum-bureaucrats might impose undesirable policies upon domestic polities.[33] While I thus focus on control or accountability as a key issue, as do Van Harten and Loughlin, my analysis presents a mirror image of its own: for me, the object to be controlled is the IIL agency, not the states on behalf of which the agency exercises its delegated authority.

Concern with the political control of agencies permeates both the political science and legal literatures on the U.S. federal bureaucracy.[34] To the extent that we find the agency analogy persuasively apt, those literatures can provide a potentially valuable set of institutional-design suggestions for promoting accountable IIL institutions. As the IIL agency continues to evolve, expand, and modernize, and as it is delegated or requisitions for itself an ever-more-complex value-balancing mission, the challenge of ensuring sufficient accountability will grow. It is essential to begin thinking about how to meet that challenge now, before pressure to abandon rather than reform a

32. As Hamlet says, "there is nothing either good or bad, but thinking makes it so." William Shakespeare, Hamlet act 2, sc. 2. In this case, thinking of IIL tribunals as "constitutional" rhetorically grants them a status and prestige that they might not actually enjoy or deserve. Landis made a similar point in describing the emergence of the U.S. administrative state: "Naming is significant. Not only does it permit one to point to a thing or a thought, but . . . [it] leads us thereby to invest a thing or a thought with properties attached to the object theretofore associated with the name." JAMES LANDIS, THE ADMINISTRATIVE PROCESS 3–4 (1938).

33. Judge Brower, a frequent ICSID arbitrator and a strong critic of IIL critics, has made a similar suggestion, though to my knowledge most IIL commentators ignore the point that states are, legitimately (in my view) or illegitimately (in Brower's view) concerned with political control of IIL outcomes. 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, 200 (2001) ("Canada's real source of unease is not with the substantive rule articulated in [NAFTA] Article 1110 [dealing with expropriation] but with how the system itself operates. Stated plainly, Canada is apprehensive that the arbitral tribunals constituted pursuant to Chapter 11 may not make the right decisions."). More generally, *see* Paul B. Stephan, *International Governance and American Democracy*, 1 CHI. J. INT'L L. 237, 238 (2000) (arguing that broad delegations of law-making authority to international institutions, as well as a robust system of customary international law that privileges the law-making role of academics, can pose threats to democratic control of policy outcomes).

34. *See, e.g.*, Matthew D. McCubbins et al., *Structure and Process, Policy and Politics: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 432 (1989).

probably useful system of international governance grows too strong to resist.

Before providing a more detailed discussion, I must note two points of caution. First, I am not claiming that an agency framework is either fully accurate as a descriptive matter or exclusively useful. The IIL system is in many respects sui generis,[35] and, at a fundamental level, it is what it is (and it can be many things at once), not uniquely what academics might wish it or their theories claim it to be. Here, the value of an agency analogy lies in underscoring some important and perhaps non-obvious (or at least sometimes ignored) truths about an increasingly contested state of affairs and in steering us toward the consideration of certain potentially desirable reforms.

Second, my discussion of the IIL system as one of delegated authority subject to legitimate and desirable state control may seem at odds with the influential "credible commitment" theory of IIAs.[36] To briefly summarize the theory, states intentionally give up decisional sovereignty to the IIL community. That sacrifice of sovereignty is rational in the sense that it is necessary for the states to remain competitive for foreign investment, which states more or less universally desire. State control of IIL is incompatible with the state's interest in attracting investment, because absent a transfer—and not simply a delegation—of decisionmaking authority to the IIL community, states will not be able to convince investors that their investments will not be expropriated or otherwise mistreated.

While this explanation of IIL has been influential, it suffers from several problems that mitigate its relevance for my own argument. First, the theory exaggerates the inherent incentives that states have to interfere with foreign investments absent a transfer of sovereignty to the IIL agency.[37] Second, it ignores the availability of other potentially effective means for investors to legally secure their investments against the relatively rare risk of host state malfeasance.[38] Third, it fails to address the lack of any consistent empirical evidence that the current IIL system actually succeeds in promoting significant new flows of investment.[39] And fourth, the credible commitment the-

35. *See* Andrea Bjorklund, *The Emerging Civilization of Investment Arbitration*, 113 PENN ST. L. REV. 1269, 1270 (2008) (describing IIL as an evolving "*sui generis* civilization that is combining elements of many pre-existing practices to create new norms suitable for the specialized mode of practice occasioned by the hybrid nature of investment arbitration.").

36. The seminal statement of the theory is provided by Andrew Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639, 658–59 (1998).

37. Nicholas DiMascio & Joost Pauwelyn, *Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?* 102 AM. J. INT'L L. 48, 58, 84 (2008) (noting the limited incentives that states have to mistreat foreign investors).

38. Jason Webb Yackee, *Conceptual Difficulties in the Empirical Study of Bilateral Investment Treaties*, 33 BROOK. J. INT'L L. 405, 444–53 (2008) (discussing alternative means of credible commitment); Jason Webb Yackee, *Pacta Sunt Servanda and State Promises to Foreign Investors Before Bilateral Investment Treaties: Myth and Reality*, 32 FORDHAM INT'L L. J. 1550, 1571–72 (2009) (arguing that investment contracts can provide an alternative to IIAs).

39. RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 8 (2008) (noting the lack of evidence that concluding an IIA leads to investment). I provide overviews of

ory fails to explain why developed countries, which have no trouble attracting massive amounts of foreign investment and which have highly effective domestic legal systems, should need to permanently attach themselves to rule by the IIL agency.[40] In short, the "credible commitment" case for a robustly independent IIL is weaker than typically recognized or acknowledged. There is little reason to think that constructing a more accountable IIL agency would adversely impact the agency's investment-promotion functions.

II. The IIL Epistemic Community as an Agency, and Vice Versa

In this Part, I argue that various actors engaged in the production and application of IIL rules can be understood as an epistemic or highly networked community that functions like a modern domestic agency, engaged in policymaking as defined in the previous Part. The agency's functions, like those of most domestic agencies, are tripartite but coordinated. Through a small, networked, and expert community it performs a suite of quasi-adjudicative, quasi-legislative, and quasi-executive tasks in purposive-rational pursuit of the agency's externally defined functional goal. This kind of purposive-rational, expert policymaking has long been understood as the theoretical hallmark of administrative agencies, or, in Weberian terms, bureaucracies.[41]

A. The IIL Epistemic Community

The IIL agency, like any domestic-level agency, consists of various interrelated and interconnected offices, each tasked with performing a portion of the agency's regulatory mission. The most visible branch is the administrative tribunal of the IIL agency: the various temporary arbitral courts periodically formed to resolve investor-state disputes arising under IIAs and organized most often under the ICSID Rules and less often under the rules of the International Chamber of Commerce or other providers of arbitration

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the empirical debate (and evidence that IIAs do not promote investment) in Jason Webb Yackee, *Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?*, 42 Law & Soc'y Rev. 805 (2008); Jason Webb Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence*, 51 Va. J. Int'l L. 397 (2011) [hereinafter *Do BITs Promote FDI?*].

40. Thus we are beginning to see arguments that investors in developed countries should have to exhaust local remedies before accessing IIL dispute settlement mechanisms. *See* William S. Dodge, *Investment Treaties between Developed States: The Dilemma of Dispute Resolution*, *in* The Future of Investment Arbitration (Catherine A. Rogers & Roger P. Alford, eds., 2009). *See also* Ann Capling & Kim Richard Nossal, *Blowback: Investor-State Dispute Settlement Mechanisms in International Trade Agreements*, 19 Governance 151 (2006) (describing Australia's successful resistance to including an investor-state arbitration provision in its recent FTA with the United States).

41. Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 Cornell L. Rev. 95, 148 (2004) ("According to Weber, instrumental rationality is the dominant principle of modern bureaucratic government.").

services, or on an *ad hoc* basis under the U.N. Commission on International Trade Law ("UNCITRAL") Arbitration Rules. But the IIL agency is not just a collection of temporary courts; it is a multifaceted organization made up of an elite group—what Haas calls an "epistemic community"[42] or what others might call a transnational regulatory "network"[43]—engaged in policymaking.

In Haas's terms, the IIL agency can be understood as "a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area."[44] The members of that network share certain normative and causal beliefs (for instance, about the benefits of increased foreign investment flows, and of the causal linkage between the "rule of law" and such flows), and they are engaged in a "common policy enterprise—that is, a set of common practices associated with a set of problems" (how to structure and apply IIL to promote investment) "to which their professional competence is directed, presumably out of the conviction that human welfare will be enhanced as a consequence."[45]

IIL actors are thus more than just a collection of people who happen to be doing similar things at roughly the same time. They comprise a highly networked "knowledge elite" who possess "professional training, prestige, and reputation for expertise in an area highly valued by society or elite decision makers" and upon whom national political leaders rely for advice and to whom those leaders delegate policymaking responsibility.[46] By highly networked, I mean that the various agency employees engage in regular,

42. *See, e.g.*, Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT'L ORG. 1, 3 (1992) (defining epistemic communities).

43. ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004). Slaughter focuses her analysis exclusively on transnational networks of government regulators, while Haas's epistemic communities can include both public and private actors. For Slaughter, transnational networks pose fewer problems of accountability than do epistemic communities because transnationally networked public actors remain accountable to their domestic political principals, while transnational private actors (such as Amnesty International, or Doctors Without Borders) do not. *See* Pierre-Hughes Verdier, *Transnational Regulatory Networks and Their Limits*, 34 YALE J. INT'L L. 113, 119–20 (2009) (describing this aspect of Slaughter's theory).

44. Haas, *supra* note 42, at 3.

45. *Id.* For Haas, the community's shared normative commitment distinguishes it from a "profession." *Id.* at 19. For examples of the IIL community's shared normative commitment, *see* Brower & Steven, *supra* note 33 (arguing that the IIL system promotes the "rule of law"); Salacuse, *supra* note 24, at 449–50 (describing the basic principles of the IIL "regime" as involving the promotion of economic well-being through the protection, and thus the promotion of FDI); José Alvarez, *The Return of the State*, 20 MINN. J. INT'L L. 223, 223–24 (2011) ("International lawyers largely define success by how much states are convinced by Wimbleton's rationale—by the victory of the multinational over the parochial national. We think of ourselves as greasing the wheels that drive global governance. This defines our professional outlook. Nearly all of our efforts involve getting states to delegate away some part of their "domestic jurisdiction.").

46. Haas, *supra* note 42, at 4, 7, 17. The IIL network may also be viewed as part of a broader "global disaggregation of authority," under which states find themselves competing less and less successfully with rapidly proliferating, alternative "spheres of authority" for the right to design and implement the rules and norms of global governance. James N. Rosenau, *Governing the Ungovernable: The Challenge of a Global Disaggregation of Authority*, 1 REGULATION & GOVERNANCE 88, 89 (2007).

substantive intra-agency dialogues via conferences, formal meetings, trade and academic publications, specialized listservs such as OGEMID or websites like TDM,[47] legal advocacy, or adjudicative award-writing. They also exhibit a fluid mobility between intra-agency roles, shifting relatively easily between public and private service, between advocacy and adjudication and scholarship,[48] and they self-police each other's commitment to the common cause.[49]

While a key aspect of the agency is the members' shared normative commitment to the notion that IIL as expertly determined and applied is a good thing, I do not mean to attribute to agency employees a Panglossian outlook. They do not necessarily accept their world as the best possible, and they are willing to examine it critically and to suggest reforms that may make it better. But those suggestions are generally supportive rather than subversive; they are institutional tweaks designed to make the IIL system more efficiently or successfully accomplish what it is already presumed to accomplish, without changing either the system's essential operational character or the normative values that the system is meant to effectuate. And as I discuss in Part V, those reforms often promise to worsen the agency's control problem.

In the paragraphs below, I provide a sketch of the main members and functions of the IIL agency, but my discussion is necessarily somewhat impressionistic and anecdotal. There have been few serious empirical attempts to document and analyze the community's size or the interactions of its various members,[50] and empirically studying epistemic communities poses certain difficulties.[51] I also do not mean to exaggerate the degree of normative uniformity among those involved in debates *about* the IIL agency. For example, there exists a robust academic dialogue about the desirability of the IIL regime, with Gus Van Harten,[52] David Schneiderman,[53] and M.

47. TDM, or Transnational Dispute Management, describes itself as "The Network for International Arbitration . . . and . . . International Investment Law." TRANSNATIONAL DISPUTE MANAGEMENT, www.transnational-dispute-management.com (last visited Mar. 26, 2012). It hosts one of the most important online IIL communities, the OGEMID listserv, in which leading practitioners and scholars of IIL exchange IIL gossip and news and debate IIL developments.

48. The prototypical example is Jan Paulsson, who has enjoyed a remarkably successful career as an IIL litigator, arbitrator, and scholar, heading the international arbitration practice of a prestigious law firm, serving as arbitrator in numerous ICSID disputes, and writing influential scholarly articles and monographs. He has recently accepted a chaired professorship at the University of Miami Law School.

49. *See* William W. Park, *Arbitrator Integrity: The Transient and the Permanent*, 46 SAN DIEGO L. REV. 629, 653 (2009) (observing that arbitrators face strong incentives "to safeguard professional status, particularly with peers. Individuals who serve as arbitrators care deeply about the respect of their colleagues, for reasons both personal and professional. Doing a good job builds a positive reputation.").

50. One important exception is YVEZ DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER (1998), which nonetheless focuses only incidentally on IIL as compared to ICA more generally.

51. Allison Christians, *Networks, Norms, and National Tax Policy*, 9 WASH. U. GLOB. STUD. L. REV. 1, 16 (2010) (discussing the difficulties of studying the OECD as an epistemic community).

52. GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW (2008).

53. Schneiderman, *supra* note 18.

Sornarajah,[54] among others, providing critiques of IIL (typically from a left-leaning perspective). At the same time, it is interesting to note that the more subversive analysts and commentators tend to be excluded from the actual workings of the IIL agency—they are not invited to the best conferences, they are not appointed to serve as arbitrators or as counsel, they are not hired by formal IIL agencies, such as ICSID, and their scholarship is ignored by those who are professionally or intellectually committed to maintaining the IIL agency in something close to its current form.[55]

Who are the members of the IIL agency? Most obviously, key agency employees include government representatives (typically, career bureaucrats in foreign ministries) who have been delegated by national governments the authority to draft and negotiate investment treaties. Investment treaties serve as the primary legislative rules of the investment game.

But the agency also includes other public-sector actors, particularly state delegates to intergovernmental organizations such as the Organisation for Economic Co-operation and Development ("OECD"). The OECD's work includes the task of drafting "soft" but nonetheless influential recommendations for creating favorable legal and policy climates for investments,[56] or conducting and disseminating legal research that seeks to define contested notions of custom- and treaty-based IIL.[57] Other public sector members include the employees of supporting international organizations, such as various offices within the World Bank that promote IIL and other "good governance" kinds of policies for the benefit of foreign investors.[58] Other examples include the United Nations Conference on Trade and Development ("UNCTAD"), the Secretariat of which has developed a robust investment treaty promotion practice as well as a first-quality research arm that compiles statistics about IIAs and drafts influential surveys of IIL practice and law.[59]

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54. *See, e.g.*, M. Sornarajah, *Power and Justice: Third World Resistance in International Law*, 10 SINGAPORE YB INT'L L. 19 (2006); M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT (2010).

55. Sornarajah describes the self-referential and exclusionary aspects of the IIL agency, in his typically provocative fashion, when he refers to the agency as an "arbitration fraternity" the members of which "elevate each other in status, cit[ing] each other's views" to create IIL while ignoring "assertion[s] of competing principles" emerging from "alternative sources." M. Sornarajah, *Power and Justice: Third World Resistance in International Law*, 10 SINGAPORE YB INT'L L. 19, 30–31 nn. 40–43 (2006).

56. Organisation for Economic Co-Operation and Development (OECD), *Policy Framework for Investment* (2006). On the OECD as a norm-generating epistemic community, *see* Gefion Schuler, *Effective Governance through Decentralized Soft Implementation: The OECD Guidelines for Multinational Enterprises*, 9 GERMAN L.J. 1753 (2008) (describing the OECD's use of "soft law" instruments to regulate multinational corporations); Christians, *supra* note 51 (discussing the OECD as an epistemic community producing international tax norms).

57. *See, e.g.*, OECD Directorate for Financial and Enterprise Affairs, *Fair and Equitable Treatment Standard in International Investment Law*, *Working Paper on International Investment No. 2004/3*, OECD (Sept. 2004), *available at* http://www.oecd.org/dataoecd/22/53/33776498.pdf.

58. For example, the World Bank's Foreign Investment Advisory Service (FIAS), or its Multilateral Investment Guarantee Agency (MIGA).

59. *See, e.g.*, UNCTAD, Most Favoured-Nation Treatment, Geneva, Switz., December 1998, *Issues in International Investment Agreements* (UNCTAD/ITE/IIT/10) (1999). The former Director of UNCTAD's

The IIL agency contains private-sector members as well, such as the lawyers at the most prestigious global law firms responsible for identifying and then deciding whether to pursue particular causes of action on behalf of foreign investors. These private lawyers act as the IIL agency's primary enforcement arm, serving as a sort of "private attorney general" that makes up for the inability of more formalized agency offices, such as ICSID, to initiate enforcement actions.[60] Elite private lawyers are also deeply involved in the generation of IIL rules not just by virtue of their role in authoring partisan briefs in discrete IIL disputes, but also through their regular involvement in the academic and professional conference circuit,[61] their service as arbitrators, and their production of IIL scholarship published in specialized journals. Furthermore, international lawyers, international law firms, and international professional organizations, such as the International Bar Association, are hard at work developing secondary rules and policies, such as codes of ethical conduct, that are designed to guide the behavior of participants in the IIL field.[62] Academics are also agency employees of sorts; they explicate and advocate for particular understandings of IIL through scholar-

Division on Investment, Technology and Enterprise Development (the main UNCTAD office dealing with IIL issues) is Karl Sauvant, one of the leading experts in IIL and the author and editor of numerous scholarly works on IIL. Sauvant is now affiliated with Columbia Law School's Program on International Investment, where he performs IIL research and organizes IIL conferences attended by IIL insiders.

60. In U.S. administrative practice, a "private attorney general" refers to private citizens who are authorized by statute to bring enforcement actions against other private actors violating a statutory or an administrative scheme. Citizen enforcement actions play an important role in enforcing U.S. antitrust and environmental laws. *See, e.g.*, Jeannette L. Austin, *Rise of Citizen-Suit Enforcement in Environmental Law: Reconciling Private and Public Attorneys General*, 81 NW. U. L. REV. 220 (1987).

61. For example, they participate in the annual "Investment Treaty Arbitration Conference" organized by Juris Conferences (the self-described "leading organization developed to promote a discourse between figures in International Arbitration and Dispute Resolution") and held each spring in Washington, D.C.

62. *See, e.g.*, IBA GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION (2004), *available at* http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#conflictsofinterest. The Guidelines have been cited to and by ICSID tribunals. Judith Gill, *The IBA Conflicts Guidelines—Who's Using Them and How?*, 1 DISPUTE RES. INT'L 58, 70 (2007).

ship[63] or the production of "restatements" of IIL,[64] and also through service as expert witnesses[65] or as arbitrators during IIL litigation.[66]

While I've described what might seem like a large number of agency "employees," and while it is certainly true that a large number of people are engaged in discussions about the IIL agency, or involved in its functioning at the periphery, it is important to appreciate that the size of the agency's elite core, responsible for driving most IIL policymaking, is probably quite small. While empirical studies of the size of the community are rare, an intriguing recent study of the community of ICSID arbitrators found that just twelve arbitrators have sat on a majority of ICSID tribunals.[67] The small size of the community's core, along with its highly networked and mobile characteristics, supports my claim that the ensemble of IIL actors is usefully

63. That scholarship is too vast to cite fully here, but there is no doubt that scholarship—particularly by those academics best integrated into the community's core—provides an important venue for critiquing or promoting particular understandings of IIL. Andrea Bjorklund, *Investment Treaty Arbitral Decisions as Jurisprudence Constante*, *in* INTERNATIONAL ECONOMIC LAW: THE STATE AND FUTURE OF THE DISCIPLINE 265, 279 (Douglas Arner, Isabella Bunn & Colin Picker, eds., 2008) ("the intense attention of the international community of scholars" will help shape IIL rules by separating "good" from "bad" awards through scholarly praise and criticism" (quoting Jan Paulsson)). Many of the most prominent ICSID arbitrators have written important scholarly works on IIL. *See, e.g.*, JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2011); JESWALD W. SALACUSE, THE LAW OF INVESTMENT TREATIES (2010); R. DOAK BISHOP, JAMES CRAWFORD & W. MICHAEL REISMAN, FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY (2005). And some of the most prominent IIL academics have served as ICSID arbitrators. Their works include, *inter alia*, RUDOLF DOLZER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2008); CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY (2009). Even somewhat less prominent IIL practitioners play an active role in academic commentary on IIL, typically through any of the numerous edited volumes in the field. *See, e.g.*, THE FUTURE OF INVESTMENT ARBITRATION (Catherine A. Rogers & Roger P. Alford, eds.) (2009) (containing contributions from many notable IIL practitioners).

64. See, for example, the "preliminary" restatement of IIL produced by the International Law Association (ILA). The ILA's Committee on the International Law on Foreign Investment is chaired by eminent ICSID scholar Christoph Schreuer and enjoys a membership equivalent to a "who's who" of the IIL community. The committee produced a "final report" of IIL law (*available at* http://www.ila-hq.org/en/committees/index.cfm/cid/1015) and an Oxford "Handbook" on IIL (THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW (Peter Muchlinski, Federico Ortino & Christoph Schreuer, eds., 2008)).

65. For example, in an arbitration involving Argentina, Anne-Marie Slaughter, the former dean of Princeton's Woodrow Wilson School and a former high-level appointee in the U.S. Department of State, engaged in a "battle of the experts" with Jose Alvarez, a professor at NYU Law School and former president of the American Society for International Law. Frequent IIL arbitrators, like James Crawford, also often serve as IIL expert witnesses. Professor Andrew Newcombe's website contains a helpful list and database of IIL expert opinions. *Expert Legal Opinions, Statements, and Affidavits*, INVESTMENT TREATY ARBITRATION, http://www.italaw.com/expert_opinions.htm.

66. For example, Yale Law School professor Michael Reisman, or Jeswald Salacuse of Tufts University. Reisman has also served repeatedly as an IIL expert, and both Reisman and Salacuse have produced important IIL scholarship.

67. José Augusto Fontoura Costa, "Comparing WTO Panelists and ICSID Arbitrators: The Creation of a Legal Field," Oñati Socio-Legal Series vol. 1, no. 4, 11-12 (2011). *See also* David Schneiderman, *Judicial Politics and International Arbitration: Seeking an Explanation for Conflicting Outcomes*, 30 NW. J. INT'L L. & BUS. 383 (2010) (describing IIL arbitrators as a small, closed "club"); DEZALAY & GARTH, *supra* note 50 (making the same point as to the "field" of international commercial arbitration). Susan Franck, however, has suggested that the club-like nature of the IIL community is exaggerated. Franck, *supra* note 5, at 77–78 (providing empirical evidence as to the number of repeat appointments in ICSID arbitration, evidence which she says "begins to rebut the claim that arbitration is a "mafia").

thought of as agency-like. A small, relatively closed IIL community is more likely to be relatively ideologically cohesive and better able to coordinate its policymaking efforts. I want to be clear though that I am not saying that the IIL community is usefully described as a "mafia," as is sometimes suggested.[68] The term is inadvisably pejorative. I have no doubt that the members of the IIL agency believe quite sincerely that their efforts promote the common good. Nor do I doubt that they are, for the most part, highly capable, accomplished, and well-meaning people. But as I argue more fully below, their accomplishments, capabilities, and motivations do not necessarily mean that they should be given the final say in designing the rules of the IIL system.

While I have sketched above some of the basic tasks that IIL agency employees perform, it is also useful to analyze the agency as performing in semi-coordinated fashion a set of three core functions that might in combination be called "truly regulatory or administrative"[69]: they exercise a quasi-judicial function, interpreting and applying IIL rules to particular cases in order to authoritatively decide controversies arising under them; a quasi-legislative function, engaging in prospective policymaking, based on expertise; and a quasi-executive function, administering the resulting regime. In the following Sub-Parts, I discuss each function in turn.

B. The Quasi-Adjudicative Function

Historically, an investor's only international option to settle a dispute with a host state was the institution of diplomatic protection, typically in the form of negotiations between home state and host state governments.[70] From the investor's perspective diplomatic protection is less than ideal, in large part because of the difficulties of convincing the home state government to espouse vigorously, or even to espouse at all, the investor's case. Beginning roughly in the middle part of the last century, investors began to create their own international legal right of action through arbitration and international law choice of law clauses inserted into concession contracts.[71] Those arbitrations were typically ad hoc, meaning that the arbitral procedures were largely if not entirely bespoke, and unsupported by much in the way of formal international legal institutions. While these contract-based

68. Franck, *supra* note 5, at 75 (discussing the claim that the IIL arbitral community is a "pale, male, and stale" "mafia").

69. Warren H. Pillsbury, *Administrative Tribunals*, 36 HARV. L. REV. 405, 408–09 (1922). Pillsbury divides these elements into five categories; I have collapsed them into three.

70. RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 211–12 (2008) (discussing diplomatic protection as the "traditional" method of investor-state dispute settlement, and noting that method's disadvantages).

71. Park, *supra* note 49, at 655–56 (describing the "paradigm shift" from contract-based to treaty-based investor-state arbitration). The most important of those contract-based arbitrations are discussed in Jason Webb Yackee, *Pacta Sunt Servanda and State Promises to Foreign Investors before Bilateral Investment Treaties: Myth and Reality*, 32 FORDHAM INT'L L. J. 1550 (2009).

arbitrations were useful both for settling discrete disputes and for establishing support for a relatively strong international law principle of *pacta sunt servanda*,[72] many in the international business community saw a need to establish a permanent arbitral institution, authorized to exercise jurisdiction even in the absence of actual contractual privity between host state and investor.

The result, in part, was the ICSID Convention, which, along with the arbitral rules promulgated under it, provides a detailed set of dispute-settlement rules, freeing the disputing parties from having to negotiate particularized, ad hoc procedural arrangements. Critically, the Convention, as a binding treaty, allows state parties to the Convention to pre-commit, as a matter of international law to recognize the jurisdiction of ICSID tribunals and the enforceability of ICSID awards. It also enables investors to bring their own claims, resolving one of the central problems under the system of diplomatic protection. While investors and states still sometimes turn to ad hoc arbitration, ICSID has emerged as the main forum for settling such disputes.[73] Its rise to prominence was helped by the modern practice of states including standing pre-consents to ICSID arbitration in their investment treaties, a phenomenon that has led to a "dramatic extension of arbitral jurisdiction in the international realm."[74]

Under the ICSID Convention, ICSID tribunals typically consist of three arbitrators, one selected by each party to the dispute and the third, the "president," appointed by party agreement or by ICSID's chairman.[75] Arbitrators must be of "high moral character" and expert in "the field of law,"[76] though in practice arbitrators tend to be expert in international commercial arbitration ("ICA") and/or IIL. Arbitrators are charged with resolving disputes on the basis of international and domestic law.[77] Like the ICA system, the Convention and its associated rules might be said to privilege "finality" or "efficiency" over legal "correctness." Compared to municipal court proceedings, ICSID proceedings are relatively abbreviated and informal,[78] and in contrast to generous rights of appeal available in most domestic systems, ICSID awards are subject only to a restricted "annulment" procedure in the case of gross procedural error.[79] Arbitrators must provided "reasoned"

72. Yackee, *supra* note 71.

73. Dolzer & Schreuer, *supra* note 70, at 20 (noting that "ICSID has become the main forum for the settlement of investment disputes.").

74. Jan Paulsson, *Arbitration without Privity*, 10 ICSID Rev.: Foreign Investment L.J. 232, 233 (1995).

75. ICSID Convention, *supra* note 1, at arts. 37–38.

76. *Id.* at art. 14.

77. *Id.* at art. 42.

78. For example, the U.S. Federal Rules of Evidence contain over fifty distinct rules; under the ICSID Convention, evidentiary issues are governed by just four rules. International Bank for Reconstruction and Development (the World Bank), ICSID Rules of Procedure for Arbitration Proceedings, rules 33–36, Apr. 10, 2006, ICSID/15, *available at* http://ics*id*.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf.

79. ICSID Convention, *supra* note 1, at art. 52.

awards that explain their decisions,[80] and in practice those reasons are expressed as logical deductions from legal principles. ICSID awards are thus self-consciously *legal* decisions, with ICSID arbitrators exercising (and viewing themselves as exercising) judge-like authority through a judge-like method.[81]

ICSID arbitrators are not perfectly judge-like, though. They are typically appointed by the parties themselves and sit for a single case at a time. They do not enjoy the judicial perquisite of life tenure and, as such, may be more likely to be subject to strong informal pressure to adhere to community norms, or to have internalized those norms. Also unlike judges in the U.S. system, ICSID arbitrators tend to be specialists and not generalists. Core members of the arbitrator ranks are small in number, they receive multiple appointments and serve on the majority of ICSID tribunals, and they are thoroughly plugged in to the IIL network.[82] Unlike conventional judges, then, ICSID arbitrators are not usefully viewed as a "branch" of the IIL governance structure separate from, or above, the agency's non-adjudicative offices or functions.

In those respects, the IIL agency's adjudicative office resembles administrative law judges ("ALJs") in domestic U.S. agency practice.[83] ALJs adjudicate disputes between regulated parties and administrative agencies over the interpretation and application of agency policy. ALJs are subject-matter experts, not generalists; they lack the protections of life tenure; and they are professionally and structurally embedded within the executive branch agency whose policies are being challenged.[84] As a result, ALJs are typically viewed as being more "accountable" to the agency's political leadership.[85] That accountability is important because ALJs are usually granted "considerable policymaking responsibility," much more so than "their counterparts in the conventional judiciary."[86] They make policy in the context of resolving discrete disputes, and that policymaking role is a "critical part" of the modern administrative state.[87] Rather than being shameful, it is often con-

80. *Id.* at art. 48.

81. As one well-known IIL arbitrator has put it, IIL arbitrators are "[L]ike a judge. You're called upon to decide the matter. In good conscience you have to be able to look at yourself and say, 'It's my decision. I know the law and the facts exhaustively.'" Schneiderman, *supra* note 67, at 383 (quoting elite arbitrator Marc Lalonde).

82. *Id.* at 397 (describing the "club"); Costa, *supra* note 67, at 11–12.

83. *See* Alan Scott Rau & Edward F. Sherman, *Tradition and Innovation in International Arbitration Procedure*, 30 TEX. INT'L L.J. 89, 97 (1995) ("The role of arbitrators under the traditional international arbitration model bears no small resemblance to . . . an American administrative hearing office.").

84. Chris Guthrie, Jeffrey J. Rachlinski, & Andrew J. Wistrich, *The "Hidden Judiciary": An Empirical Examination of Executive Branch Justice*, 58 DUKE L.J. 1477, 1478–92 (2009) (describing these characteristics of ALJs).

85. *Id.*

86. Koch, *supra* note 30, at 694.

87. *Id.* at 695.

scious and relatively openly admitted, disguised only by decorum.[88] Because of the accountability of ALJs to an agency's political appointees (and eventually to the President), ALJ policymaking is less problematic from the point of view of democratic political philosophy. Indeed, that accountability may actually promote better policy decisions than would be made through more conventional, independent judicial processes.[89]

Unfortunately, and in contrast, the policymaking role of IIL tribunals has long been denied or ignored. But, as I argue in the next Sub-Part, IIL tribunals do exercise a quasi-legislative policymaking function. By recognizing that probably inevitable fact,[90] we can begin to speak more intelligently about the desirability of rendering IIL policymaking accountable, both to make it more legitimate and, perhaps, to make it better.

C. The Quasi-Legislative Function

In some respects, the policymaking (or quasi-legislative) functions of the IIL agency are obvious. For example, states prospectively draft IIL for incorporation into the investment treaties that give IIL tribunals jurisdiction in the first place. Employees of state foreign ministries play the predominant role in designing treaty text, but their choices are likely to be influenced by the norms of the IIL community, by the phrasings of important arbitral decisions, and by the writings of esteemed academics, as treaty drafters will undoubtedly be aware of the texts of other states' investment treaties. The community has particular notions of what good or appropriate treaty language looks like, and drafters will face social pressure, even if implicit, not to deviate too far from community expectations.[91] This is especially so where treaty drafters are already well-integrated into the epistemic community and/or have aspirations to take advantage of the high degree of mobility between offices and roles, because acceptance by the community and opportunities for advancement will depend on peer approval and a certain willingness to accept the community's notions of the proper rules of the game.[92]

88. *Id.* at 702 n. 42 (noting that the reality of ALJ policymaking is hidden behind "decorum" that "demands that administrative judges say that they take policy rather than make policy").

89. Guthrie et al., *supra* note 84 at 1487–88 ("The ubiquitous accountability that ALJs face might enhance the quality of their decision-making because research shows that accountability often leads to better decision-making.").

90. As the cliché goes, "we are all legal realists now," by which is meant that most academic observers recognize that judicial decisionmaking [sic] necessarily entails lawmaking. Gary Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151, 1152 (1985) (asserting that "we are all [legal] realists now").

91. For example, many "South-South" IIAs were apparently "negotiated" during what might be called "investment treaty signing parties," in which UNCTAD experts gave developing countries model text, developed by IIA insiders, with insiders urged to sign "often within as little as a few hours" and without much if any time to give serious consideration to the proposed texts. Lauge Skovgaard Poulsen, *The Significance of South-South BITs for the International Investment Regime: A Quantitative Analysis*, 30 NW. J. INT'L L. & BUS. 101, 128–29 (2010).

92. Park, *supra* note 49; *cf.* Schneiderman, *supra* note 67, at 410–11 (arguing that the IIL "club" privileges certain outlooks and decisional tendencies and preferences, such that the IIL system enjoys a

Perhaps less obviously, agency employees prospectively develop IIL rules informally, and independently of treaty drafting, through the agency's many outlets for learned discussion, debate, and commentary, and through scholarship and advocacy. Here we can think of the soft law efforts of organizations like the OECD or of the role of white-shoe law firms in deciding which IIL cases to bring, and which arguments to make. We can also think of the role of scholars and organizations like UNCTAD in articulating rules of customary IIL or in providing expert opinions (whether inside or outside of actual litigation) as to what contested treaty terms actually mean.[93] That scholarship can also serve to identify important issues for the IIL agency to address, or new problems for it to solve, and to offer proposed solutions.

But the IIL agency's quasi-legislative function extends beyond states-as-treaty-drafters, and even beyond the soft-law-generating functions of scholars and international organizations. It extends to IIL tribunals themselves. I do not intend it to be controversial to suggest that IIL tribunals "make" law as much as, if not more than, they merely decide disputes on the basis of existing rules.[94] An increasing number of scholars, among them both supporters and critics of the present IIL system, have suggested as much.[95] In that regard, they are not just so different from agencies, or from ALJs; they are also not so different from conventional courts, that are also (more controversially but also probably inevitably) regularly engaged in lawmaking.[96]

"structural tilt [that] ensures that arbitral choices will be more likely to favor investment promotion" than other values).

93. *See infra* Part V.E.

94. Paradoxically, the assertion that IIL tribunals make law, rather than just apply it, may be most controversial to those who are most closely associated or familiar with the IIL system. As the political science literature on domestic court legitimacy suggests, "It may be that ordinary people who know little about courts have few reasons to believe that judges make decisions differently from any other politicians. Those attentive to courts come to adopt a different view, but not the view of legal realists. Greater awareness is associated with the perception that judges are different, that they rely on law not values in making decisions, that they are 'objective.' Greater awareness of the institution thus creates a less realistic view of the nature of judging, a view that contributes mightily to the legitimacy of the courts." James L. Gibson, Gregory A. Caldeira, & Vanessa A. Baird, *On The Legitimacy of National High Courts*, 92 AM. POL. SCI. REV. 343, 345 (1998).

95. Armin von Bogandy & Ingo Venzke, *Beyond Dispute: International Judicial Institutions as Lawmakers*, 12 GERMAN L.J. 979 (2011) (arguing, with special reference to IIL tribunals, that it is "beyond dispute" that international courts engage in "judicial lawmaking"); Schill, *supra* note 17, at 79–80 (arguing that IIL tribunals have emerged as "important law-makers," whose law-making ability represents an important "power-shift from States" because of the "restricted possibilities that States have influencing the direction of investment jurisprudence"); Bjorklund, *supra* note 63, at 269 (noting that even though states may even expressly "disavow the ability of [IIL] tribunals to create" law, IIL tribunals can be viewed as having been implicitly, and perhaps even necessarily, granted the authority to do so by virtue of the fact that states have "set up this system of arbitral case law in which tribunals develop the details of investment policy and investment standards" in the context of only vague treaty guidance); Brower & Steven, *supra* note 33, at 195, 201 (arguing that states "are getting exactly what they bargained for" when IIL tribunals "expound," "clarif[y]," "refine," "sustain," and "develop" IIL rules).

96. *See*, *e.g.*, Martin Shapiro, *The European Court of Justice*, *in* JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL PERSPECTIVES FROM AROUND THE WORLD 273, 276 (Peter H. Russell & David M. O'Brien, eds., 2001) (arguing that courts "make law not as an independent activity but as an integral and inescapable aspect of their fundamental logic as conflict resolvers" and that establishing a system of judicial review of legislation unavoidably increases "the policy-making powers of courts"); Rubin, *supra*

Indeed, the American common law tradition depends on the sharing of law-making authority between courts and legislatures.[97]

The probable inevitability of policymaking by IIL tribunals stems in large part from the relatively formless and vague rules that IIL tribunals are asked to apply.[98] Staley noted the fact (and the problem) of the vagueness and "unsettled condition" of IIL many years ago.[99] Those tasked with deciding investment disputes on the basis of such law are expected to reach a logically deduced and legally correct (or, less ambitiously, a predictable) decision through the application of the "traditional legal process."[100] But international investment disputes often involve fundamental disagreements over the content of relevant legal rules (as vague and unsettled as they are) and also over the proper balancing of ethical, social, cultural, or other values.[101] The "traditional legal process" leads not to correct or "predictable" decisions *emerging from* law, but to decisions *rationalized by* law, and those rationalizations, because they are expected to be purely "legal" in form, preclude the decisionmaker from engaging in an open and honest consideration of the social consequences of crucial decisions.[102] The result, for Staley, is that ostensibly law-based IIL dispute settlement will often actually be driven by a "variety of unacknowledged factors," such as, for example, the desire of the decider to expand rather than reduce his, or his institution's, importance.[103] While Staley makes his observations as part of a critique of the institution of diplomatic protection, he insists that the same problems would afflict any other dispute settlement mechanism—including "international judicial settlement"—that sought to decide IIL disputes solely on the basis of IIL. Instead, he says, IIL disputes must be "adjusted" by resorting to "[c]onciliation, compromise, [and] consideration of social policy . . . as well as, or more than, the logical application of judicial maxims."[104]

In favorably quoting Staley's analysis, I am not arguing that IIL, or any other body of law, is inherently and radically indeterminate.[105] But it is difficult to maintain that the content of IIL today is significantly more de-

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note 41, at 104 n. 43 ("There is virtually universal agreement among political scientists who study the legal system that judges make new policy in essentially the same sense that legislators do," and providing citations).

97. Michel Rosenfeld, *Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts*, 2 INT'L J. CONST. L. 633, 643–46 (2004).

98. Jason Webb Yackee, *Conceptual Difficulties in the Empirical Study of Bilateral Investment Treaties*, 33 BROOK. J. INT'L L. 405, 418 (2008) (discussing the vague content of IIL, and providing citations to other scholars making similar observations).

99. EUGENE STALEY, WAR AND THE PRIVATE INVESTOR: A STUDY IN THE RELATIONS OF INTERNATIONAL POLITICS AND INTERNATIONAL PRIVATE INVESTMENT 449 (1935).

100. *Id.* at 449–51.

101. *Id.*

102. *Id.* at 450–51.

103. *Id. See also* Schneiderman, *supra* note 67 (arguing that unacknowledged political factors drive modern IIL tribunals).

104. Staley, *supra* note 99, at 452.

105. On the indeterminacy thesis, *see generally*, Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987).

terminate or constraining than it was in Staley's time. So-called "easy cases" remain rare, legal interstices are frequent and wide, and tribunals enjoy significant decisional flexibility.[106] This decisional flexibility is most evident in disputes involving the application of complex, fact-specific balancing tests of the sort contained in the 2004 U.S. Model Bilateral Investment Treaty's ("BIT") provisions on expropriation.[107] It is also evident in the so-called "inconsistent decisions" that have attracted much attention in IIL literature, and which I address in more detail infra. In those decisions, tribunals applying the same or similar legal tests to similar fact situations have arrived at very different outcomes.

IIL tribunals thus have little choice but to act like common law courts—or, indeed, like modern administrative agencies.[108] They are creating and announcing retroactively applicable rules in the context of resolving discrete disputes within a system in which a particular pronouncement is likely to influence later pronouncements, and thus to influence future conduct, in precedent-like fashion.[109] This rule-pronouncement is policy-like because it is expertise-based, and not purely law-based, and is intended to advance in instrumental fashion the state-defined goal of promoting investment.

Intriguingly, IIL tribunals may be better placed than conventional courts to make policy in the course of making law. This is because of their comparatively greater expertise and because of the relative clarity and narrowness of their functional mission. Arbitrators' deep involvement in other IIL offices (serving as counsel, as government employees, and as scholars) promises to give them a keen sense of the underlying normative issues, trade-offs, and practicalities. Because IIL arbitrators typically sit in panels of three (whereas conventional judges typically sit alone), their decisions may reflect the benefits of intra-panel debate and deliberation.[110] And finally, IIL arbitrators enjoy much greater procedural flexibility than do conventional judges; this

106. Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 415 (1985) ("Prototypically, a vague, ambiguous, or simply opaque linguistic formulation of the relevant rule generates a hard case [where] one cannot find the answer to a question . . . by a straightforward reading" of the rule).

107. Annex B of the Model instructs tribunals to determine whether an "indirect expropriation" has taken place by engaging in a "case-by-case, fact-based inquiry that considers, among other [non-specified] factors (i) the economic impact of the government action . . . (ii) the extent to which the . . . action interferes with distinct, reasonable investment-backed expectations; and (iii) the character of the government action." U.S. Model Bilateral Investment Treaty, *supra* note 29 at 38.

108. Ashutosh Bhagwati, *Modes of Regulatory Enforcement and the Problem of Administrative Discretion*, 50 HASTINGS L.J. 1275, 1304 (1999) ("Of course, agencies make law all the time—that is the nature of delegated rulemaking authority in the administrative state. Moreover, agencies make law through adjudications and informal decisions just as they make law through formal rules."); Rubin, *supra* note 30, at 1313–14 (noting the "essential similarities between judges and administrators," where the "judiciary's role is no different, in its essence, from that of any other [policy] implementation mechanism").

109. I discuss IIL tribunal decisions as precedent in Part IV, *infra*.

110. *But see* Mitu Gulati & C.M.A. McCauliff, *On Not Making Law*, 61 L. & CONTEMP. PROBS. 157, 188 (1998) ("District judges, however, tend to be specialists in trial management, not in opinion writing or lawmaking. Moreover, they sit alone and do not have the benefit of the intellectual debate among a panel. Therefore, the quality of lawmaking may decrease.").

procedural flexibility allows IIL arbitrators, in theory, to take an active role in developing the litigation facts necessary for a high-quality decision.

Whether it is wise for IIL tribunals to openly embrace and advertise their policymaking role is another question. For various reasons, discarding norms that require that judicial or arbitral discourse be primarily law-based in form is probably unappealing and perhaps even dangerous.[111] Instead, the challenge is to legitimize and improve this hidden policymaking by making it accountable to actors that are able to act more openly and perhaps more honestly.

D. The Quasi-Executive Function

The IIL agency, like domestic agencies, also has some ability to develop and implement subsidiary rules, procedures, practices, and routines that help the agency accomplish its policymaking tasks. These quasi-executive efforts are typically internally focused (for example, they are concerned with setting up the intra-agency machinery that enables the agency to function effectively). They may also be externally focused in the sense of enabling the agency to inform regulatory targets of its rules and to enforce its rules against targets. I discuss the internal and external aspects of the agency's quasi-executive function in turn.

As to internally oriented executive functions, the ICSID Secretariat plays an important role both in administering the ICSID arbitral process and in drafting study reports that explore potentially desirable institutional changes, such as the creation of an IIL appellate body. The larger ICSID apparatus is also able to articulate (and, within ICSID's own sphere, to apply) normatively desirable procedural principles. An example is ICSID's "rules" and "regulations," which govern ICSID proceedings and which were recently modified to increase system transparency and access for agency outsiders.[112]

Other organizations affiliated with the IIL agency, like the International Bar Association, draft internally oriented rules relating to ethical issues that arise in IIL arbitrations, particularly related to arbitrator independence and impartiality.[113] These ethical rules can have implications for the ability of disputing parties to select party-nominated arbitrators likely to be sympathetic to their arguments—a mechanism by which the parties might seek to exercise ex ante control over arbitral outcomes.[114] And organizations like

111. Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296, 299 (1990) (arguing that it is "imprudent" to encourage judges to be both introspective and fully transparent as to their decisionmaking).

112. Jarrod Wong & Jason Webb Yackee, *The 2006 Procedural and Transparency-Related Amendments to the ICSID Arbitration Rules: Model Intentions, Moderate Proposals, and Modest Returns*, *in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2009–2010, 233, 268–72 (Karl Sauvant ed., 2010) (discussing recent transparency reforms to the ICSID Rules, such as permitting tribunals to accept amicus submissions from non-parties and requiring the publication of award excerpts).

113. Park, *supra* note 49, at Part IV.D. (discussing the IBA and other arbitrator-ethics rules).

114. *Infra* note 154 and accompanying text.

UNCITRAL draft and revise their own arbitral rules, in the process debating key IIL issues, such as the role that confidentiality, an important and largely uncontroversial principle as applied to traditional international commercial arbitration, should play in investor-state arbitration.[115]

The articulation and management of the IIL system's internal rules can have important effects on the agency's other, non-executive functions. For example, the requirement in ICSID Rule 48 relating to the publication of award excerpts has the potential to render more efficacious the agency's quasi-legislative functions by encouraging the dissemination of legal reasoning that will serve as precedent in future cases.

The IIL agency's externally focused executive apparatus is largely informal. For example, intra-community dialogues can serve as an important means by which the reputational costs of ignoring IIL rules can be brought to bear upon states. A state that behaves badly in the eyes of the IIL community, or that refuses to honor an IIL award, will probably be heavily criticized by IIL scholars and practitioners, and that castigation may be communicated to investors, who may accordingly decline to invest in the offending state. In other instances, the IIL agency may be able to co-opt domestic institutions into helping the agency execute its rules and norms. For example, the World Bank Group's International Finance Corporation ("IFC") and Multilateral Investment Guarantee Agency ("MIGA") have established an "investment generation toolkit" which encourages developing countries to set up domestic "investment promotion agencies" that will implement World Bank advice on how best to promote foreign investment.[116]

These informal executive aspects aside, the IIL agency remains somewhat dependent upon the cooperation of domestic legal institutions, particularly domestic courts, to enforce IIL awards against recalcitrant states.[117] Domestic judges typically live and work outside of the IIL community, having been trained in, and operating within, a wholly different legal system, subject to its own community norms and institutions. For that reason, domestic courts may occasionally serve as a point of resistance to the effective applica-

115. *See, e.g.*, U.N. Commission on International Trade Law, Settlement of Commercial Disputes: Preparation of a Legal Standard on Transparency in Treaty-based Investor-State Arbitration, U.N. Doc. A/CN.9/WG.II.WP.169 (Dec. 13, 2011), *available at* http://www.uncitral.org/uncitral/commission/working_groups/2Arbitration.html.

116. The World Bank Group Investment Generation Toolkit, https://www.wbginvestmentclimate.org/toolkits/investment-generation-toolkit/ (last visited Apr. 14, 2012).

117. For example, the ICSID Convention leaves in place domestic rules governing sovereign immunity from execution of arbitral awards; those rules will be applied by domestic courts in the state—typically the host state—where the investor seeks to enforce a favorable IIL award that the host state has refused to honor voluntarily. Andrea K. Bjorklund, *Sovereign Immunity as a Barrier to the Enforcement of Investor-state Arbitral Awards: The Re-politicization of International Investment Disputes*, 21 AM. REV. INT'L ARB. 211, 215–17 (2010).

tion of IIL rules as articulated by the IIL community,[118] though when they do so they are subject to criticism by IIL actors.[119]

III. The IIL Agency's Control Problem

One of the central challenges of the modern administrative state, and by analogy of the IIL regime, is ensuring that the agencies to which policymaking authority has been delegated are sufficiently accountable to those who have delegated their decisional authority.[120] Through delegations both explicit (for example, treaty-based consents to arbitration) and implicit or even unwitting (for example, the acceptance of the quasi-legislative function of tribunals), states have granted significant policymaking authority to IIL actors.[121] Those actors are, for the most part, expected to exercise their authority on the basis of IIL expertise to achieve particular public purposes (such as the promotion and protection of foreign investment). Regardless of whether we view these grants of authority as establishing a principal-agent or a "trustee" relationship between states and the IIL agency, it is difficult to argue that states do not remain legitimately concerned with ensuring that the rules of the IIL game accord with state understandings of what the rules should be.[122] But unlike domestic agencies, the IIL agency is largely decoupled from the legitimating influence and control of domestic politics, and for that reason the agency's lawmaking functions are "structurally

118. We should not exaggerate the autonomy of domestic courts, however. As Born notes, the New York Convention and the ICSID Convention strictly limit the grounds upon which a domestic court might refuse to recognize an IIL award, and the spread of the so-called "restrictive theory of sovereign immunity" means that in many jurisdictions a state on the losing end of an award will have difficulty relying on sovereign immunity principles to avoid enforcement or execution. Born, *supra* note 13, at 826–31.

119. *See* United Mexican States v. Metalclad Corp. (2001), 89 B.C.L.R. 3d 359, 371–73 (Can. B.C. Sup. Ct. J.) (setting aside a NAFTA Chapter 11 award in favor of a U.S. investor in Mexico), *available at* http://italaw.com/documents/Metaclad-BCSCReview.pdf; Charles H. Brower II, *Beware the Jabberwock: A Reply to Mr. Thomas*, 40 Colum. J. Trans. L. 465, 476–88 (2002) (criticizing Judge Tysoe's opinion in *United Mexican States v. Metalclad Corp.*).

120. Andrea Hamann & Hélène Ruiz Fabri, *Transnational Networks and Constitutionalism*, 6 Int'l J. Const. L. 481, 484 (2008) ("[I]t is not the mere existence of networks that is a cause for concern but the transnational dimension in which their activities unfold and which enables them to remain beyond the reach of state control . . ."); Cogan, *supra* note 14 at 413 (emphasizing the practical importance of ensuring sufficient state control of international organizations); *see generally* Rubin, *supra* note 30 *and* Rubin, *supra* note 41 (describing the central challenge of the modern administrative state as ensuring sufficient opportunities for political supervision and control of the bureaucracy while accepting the reality and the benefits of bureaucratic modes of policymaking).

121. *Cf.* Kenneth Culp Davis, Police Discretion 22–23 (1975) (discussing unwitting delegations as to agencies generally).

122. *See* Karen J. Alter, *Agents or Trustees? International Courts in Their Political Context*, 14 Euro. J. Int'l Rel. 33, 38 (2008) (distinguishing between models of courts as agents or as trustees of states); Eric Posner & John Yoo, *Reply to Helfer and Slaughter*, 93 Calif. L. Rev. 957, 960 (2005) (critiquing the theoretical utility of Alter's distinction).

[much more] problematic" than the lawmaking functions of their domestic administrative counterparts.[123]

By accountability, I mean that states enjoy a demonstrable and regular relationship of "direction and control" over the rules developed by the IIL agency.[124] As a general matter, tools to ensure adequate control can exist in the form of the threat of ex post sanctioning or punishment, as emphasized by proponents of principal-agent models of international institutions, such as Grant and Keohane.[125] But accountability can also be promoted by recognizing the right of principals to seek to *influence* agency outputs: not just through threats of "punishment" but through the exercise of something like a veto, either purely negatively in the sense of undoing an undesirable agency outcome or more positively in the sense of replacing or preempting an undesirable agency outcome with a desirable one.[126] Sanctions are a means and not an end, and the threat of ex post punishment is one way of ensuring a sufficiently tight match between agency actions and principal desires, but it is not the only way.

It is important to recognize that states are not concerned only—or perhaps even primarily—with whether the IIL agency is operating within the bounds of the terms of the original delegations of authority. In the domestic setting, for example, the U.S. Congress routinely delegates to agencies broad authority to do x, where x is a largely undefined set of policy options that will address a particular policy problem. We can imagine an agency acting on that delegation and making a policy decision, y, which violates the original terms of Congress's delegation (which restricted agency authority to the implementation of x-type solutions).[127] Congress may or may not be upset

123. As forcefully argued by von Bogandy and Venzke, *supra* note 95, at 993–96.

124. Charles E. Gilbert, *The Framework of Administrative Responsibility*, 21 J. POL. 373, 374–78 (1959) (discussing the concept of administrative "accountability," defined as a demonstrable and regular relationship of "direction and control" over administrative agencies by political actors). The problem of insufficient accountability is similar in some respects to the famous "counter-majoritarian problem" of constitutional law theory, which is particularly acute where judges or other decisionmakers are delegated the authority to interpret and apply vague and difficult-to-amend statutory (or constitutional) commands. *See* Rosenfeld, *supra* note 97, at 653–54 (discussing the counter-majoritarian problem).

125. Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses in World Politics*, 99 AMER. J. POL. SCI. 29, 29 (2005) (defining "accountability" as the idea "that some actors have the right to hold other actors to a set of standards, to judge whether they have met those responsibilities in light of those standards, and to impose sanctions if they determine that these responsibilities have not been met").

126. For example, Grant and Keohane distinguish their notion of accountability, with its emphasis on ex post sanctioning, from what they call a "checks and balances" approach of ex ante influence, such as the authority of the U.S. President to veto legislation prior to its entry into force. *Id.* at 30. However, it is not clear why, analytically, such a distinction is necessary.

127. Indeed, international agencies may be particularly prone to "mission creep." *See* MICHAEL BARNETT & MARTHA FINNEMORE, RULES FOR THE WORLD: INTERNATIONAL ORGANIZATIONS IN GLOBAL POLITICS 2 (2004) (arguing that international organizations "exhibit mission creep. They wander far from their original mandate and into new terrains and territories. They develop new rules and routines in response to new problems that they identify.") For example, the World Bank has been accused of operating far outside the terms of its original delegation. *See* Jessica Einhorn, *The World Bank's Mission Creep*, FOREIGN AFFAIRS, Sept./Oct. 2001, at 22, *available at* http://www.foreignaffairs.com/articles/57235/jessica-einhorn/the-world-banks-mission-creep.

about the violation of the terms of the original delegation.[128] We can imagine that the terms of the delegation might have implicitly shifted (perhaps in response to changes in Congress's political make-up), so that Congress is actually pleased with the agency's bold solution.[129] On the other hand, we can imagine the agency acting upon the original delegation by enacting policy x_1. Here the regulatory output is within the terms of the original delegation, but Congress, perhaps never having specifically envisioned x_1 as a regulatory possibility, or having misestimated x_1's political or policy implications, may be quite upset with the regulatory choice. The agency's choice may be legally correct in the sense of being within the terms of the original delegation, but *politically* incorrect in the sense of being unacceptable to the agency's political masters in the here and now.[130] State interest in ensuring the acceptability of agency action is thus independent of the question of whether states at the time of the original delegation had any firm preferences as to the future content of IIL rules.[131] Indeed, it is entirely possible that at the time states delegated IIL policymaking authority to the IIL agency they had little idea of the kinds of issues the IIL agency might end up addressing, let alone any well-developed preferences as to how those issues should be addressed.[132]

While there is nothing inherently wrong with states delegating the right and authority to fill gaps in (or to adapt) their IIL agreements to tribunals or other actors, states retain the ability to exit the system in response to undesirable gap-filling or adaptation. As I argue in Sub-Part IV.A, exit is a blunt and probably undesirable option for dissatisfied states. If we accept the value

128. A reviewing court may choose to vacate and remand the agency's policy choice of y as a violation of the original delegation, even if Congress itself might currently be happy with y. But the court's decision to vacate will itself be theoretically subject to Congressional override via statute. In other words, in the domestic setting, Congress remains the ultimate master of agency policy choices, subject to Constitutional limits.

129. This is the problem of "legislative drift," under which the present Congress cannot be sure that a future Congress will share its preferences for bureaucratic outputs. *See* Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J. LAW, ECON., & ORG. 93, 95 (1992).

130. For example, in the 1970s the U.S. National Highway Transportation and Safety Administration (NHTSA) attempted to implement regulations that made it impossible to operate an automobile without attaching the seatbelt. This regulatory effort may well have been within the agency's original mandate to "force" technological change upon auto manufacturers, a mandate that has been described as "revolutionary." Jerry L. Mashaw & David L. Harfst, *Regulation and Legal Culture: the Case of Motor Vehicle Safety*, 4 YALE J. ON REG. 257, 257–58 (1987). But NHTSA's aggressive regulatory efforts attracted a consumer (and thus) political backlash, prompting the agency to back away from its proposals and, as Mashaw and Harfst argue, to "succeed by failing"—that is, to "legitimate . . . its existence by abandoning its statutory mandate," which embodied "politically naïve" elements. *Id.* at 262.

131. In that sense, Judge Brower's remark that states should not complain about undesirable IIL outcomes because they are "getting precisely what they bargained for" seems not quite right. Brower & Steven, *supra* note 33, at 195.

132. Spence makes a similar point in discussing delegations to domestic agencies. He notes that domestic agencies often must address new policy issues about which the political principal's views are not yet firmly established, and he questions the ability of Congress to accurately foresee the kinds of issues that agencies will face. David Spence, *Agency Policy Making and Political Control: Modeling Away the Delegation Problem*, 7 J. PUB. ADMIN. RESEARCH & THEORY 199, 210 (1997).

of keeping states involved in the IIL system over the long term, we should consider improving opportunities for states to play a greater role in directing the development of IIL.

Because delegations to IIL employees are typically broad or even formless, state complaints about IIL rules will generally be better understood as disputes about political rather than legal correctness, even if broad (and vague) delegations leave plenty of opportunity for rhetorically effective claims of, in essence, bureaucratic *excès de pouvoir*.[133] Granting an agency unmeaningfully circumscripted delegations of authority might be justified by theories of public administration that emphasize the agency's ability to self-regulate or to self-commit to making decisions on the basis of "disinterested and nonpolitical expertise." However, such models are normatively problematic because they proceed on the false assumption that "politics" will—or should—be irrelevant to bureaucratic decisionmaking.[134]

In fact, when the delegation is "incomplete, uncertain, or inchoate," as it is in the world of IIL, it is likely, if not inevitable, that the agency itself will become the locus of inherently political decisionmaking and conflict—what Jaffe calls a "transfer of function" or a "shift [of the] legislative process to a different level."[135] It is that concern with ensuring political control that has led some observers to argue in favor of granting citizens (and non-state groups claiming to represent citizens) significantly greater direct access to IIL decisionmaking. In the next Sub-Part, I argue in favor of maintaining states as the primary locus of control.

A. *The Primacy of States as the Locus of Control*

In this Article, I focus on the problem of ensuring adequate control over the IIL agency *by* states. A focus on states as the primary supervisors of the IIL agency is also justified because states are the primary enablers of the system (through their treaty-based consents and other delegations of author-

133. Louis L. Jaffe, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1183, 1184 (1973) (noting that "paradoxically, the more vague a delegation, the more likely the charge that an agency has failed to fulfill its congressional mandate").

134. *Id.* at 1183–84 (critiquing the "broad delegation theory" developed in KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE (1958) and KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969)). Brower and Steven are one of the few supporters of the IIL system to articulate the inherently political aspects of IIL decisionmaking, even if they reject such concerns as counter to the "rule of law," by which they mean rule by arbitrators. As they note, IIL tribunal decisions as to, say, what amounts to a compensable regulatory taking under international law is inherently political ("[I]t cannot be gainsaid that it is often an extremely difficult, politically sensitive task to distinguish between a compensable taking and a non-compensable regulation in a specific case."), and states are concerned—in their view—that tribunals may fail to make the "right" decisions. Brower & Steven, *supra* note 33, at 199–200.

135. Jaffe, *supra* note 133, at 1189–90. This model of the politically disinterested agency was predominant during the New Deal, advanced by such distinguished scholars of the administrative process as James Landis. As Jaffe summarizes Landis's model, it, like Davis's, "derive[s] its content and its authority, not from legislative or imperial dictates, but from an assumed comprehensive body of expertise available for the implementation of legislative grants of authority." *Id.* at 1187.

ity), and they are the primary targets of its regulations, which (except for the emerging soft law of corporate social responsibility) are aimed at constraining state rather than investor action.[136] In the absence of a world legislature, states are likely to remain the first and best aggregators of societal values and preferences. Even if some states that have joined the IIL system suffer from democratic deficits, those deficits are perhaps not as widespread as one might expect. In recent years we have seen a dramatic decrease in the number of autocratic regimes, and an increase in democratic and semi-democratic regimes, as documented by the Polity IV Project.[137] In most investment disputes, at least one directly interested state will be a full-fledged democracy, while the other state is likely to be at least partially democratic.[138]

Even if society's values and preferences might not map perfectly onto national borders, it is difficult to imagine any other globally capable actor that might both legitimately and effectively serve as the ultimate supervisor of IIL outputs. This is a point conceded even by those who seem to normatively favor a greater direct supervisory role by the globally organized interest groups in the name of "transparency."[139] Such groups themselves suffer from serious democratic deficiencies and also often lack the numbers, resources, and incentives sufficient to supervise the IIL agency in any systemically meaningful way.[140] Moreover, their involvement in the IIL policymaking system may be deeply self-interested, and should not reflexively be assumed to represent or promote the "common good" rather than to result in the lopsided and biased presentation of interests.[141]

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136. *See generally* Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 AM. J. INT'L L. 179 (2010) (arguing that states have a legitimate role in shaping IIL).

137. Monty G. Marshall & Benjamin R. Cole, *Global Report 2011: Conflict, Governance and State Fragility*, POLITY IV PROJECT (DEC. 1, 2011), 10, *available at* http://www.systemicpeace.org/polity/polity4.htm.

138. Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. Rev. 1, 28 (2007).

139. *See, e.g.*, Philippe Sands, *Turtles and Torturers: The Transformation of International Law*, 33 N.Y.U. J. INT'L L. & POL. 527, 530, 548 (2001) (supporting the role of an "emergent international civil society" in influencing international law, but accepting that states will "remain the principal actors on the international scene" for the foreseeable future); Bignami, *supra* note 27, at 879–80 ("[T]oday, accountability to elected officials constitutes one of the primary sources of administrative legitimacy and one of the principal constraints on administrative action. Indeed, in some accounts, elected officials represent not just one node of a complex accountability network, but rather the dominant node, responsible for designing the overall network and empowering or disenfranchising other network actors.").

140. Wong & Yackee, *supra* note 112, at 268–72 (discussing recent transparency reforms and suggesting that they are unlikely to meaningfully improve IIL decisionmaking).

141. Donald J. Kochan, *The Political Economy of the Production of Customary International Law: The Role of Non-governmental organizations in U.S. Courts*, 22 BERKELEY J. INT'L L. 240, 261 (2004) (arguing that NGO claims for the existence of particular customary rules is based on self-interest, and that NGOs face incentives to make expansionary claims about the content of CIL). *Cf.* Jason Webb Yackee & Susan Webb Yackee, *A Bias Toward Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 135–37 (2006) (providing empirical evidence that opening the regulatory process to public comments favors business interests).

B. The Primacy of Control as an Administrative Value

It might also be argued that accountability and control are not the only values that we should reasonably wish to advance within the context of an administrative arrangement generally, or as to IIL specifically. For example, in his analysis of administrative values, Gilbert identifies such alternative (and potentially conflicting) values as "prudence," "due process," "consistency," and "stability."[142] IIL is often justified as functionally necessary to promote those latter values—that is, to ensure investors access to stable, predictable, and favorable substantive legal rules and to fair dispute resolution procedures that, together, might be referred to in shorthand as the use of IIL by states to credibly commit to the "rule of law" for the purpose of promoting investment and, eventually, economic development.[143]

I have already discussed the major weaknesses of the credible commitment justification for a robustly independent IIL, mostly focusing on the lack of evidence that such a commitment is necessary to attract investment.[144] But there are also good reasons to doubt whether the IIL agency, as it currently exists, is even capable of providing much in terms of meaningfully stable or predictable law. As Rosenfeld argues, common law systems, which privilege the making of law through case-by-case adjudication, may exacerbate uncertainty and unpredictability.[145] And while fair procedures "can mitigate unpredictability by providing an assurance that justice will be done," Rosenfeld argues that fairness "can play this role only where there is a commonly shared sense of justice and equity in the polity."[146] The problem is that there is no such "sense" shared by the diverse polities that find themselves subject to the IIL agency's decisions.

To be clear, I am not arguing that states have no interest in giving up their right to control the operative outcomes of discrete dispute settlement events. For example, it may be useful for states to commit themselves in a binding way to neutral third-party dispute settlement as to particular in-

142. Gilbert, *supra* note 124, at 375–78. Gilbert suggests that conflicting evaluations of administrative performance may be explained by the fact that analysts typically differ in the weights or importance that they attach to particular values. *See id.* at 380. Gilbert's observation seems reflected in the debate over the IIL system. Supporters of the system will typically emphasize its role in promoting and applying Gilbert's values of consistent and stable rules based on specialized "competence" (expertise and specialization) by people and institutions exhibiting a high degree of "probity," while deemphasizing or ignoring the importance of ensuring "accountability" and the closely related value of "responsiveness." *See id.* at 376–82.

143. *Cf.* Armin von Bogandy & Ingo Venzke, *On The Democratic Legitimation of International Judicial Lawmaking*, 12 GERMAN L.J. 1341, 1341–42 (2011) (noting that the "most important" alternative justifications for international law generally, and for "arbitration in investment disputes" in particular, are functional in nature).

144. *See supra* notes 37–40 and accompanying text.

145. Rosenfeld, *supra* note 97, at 647.

146. *Id.*

vestment projects, or as to particular potential disputes.[147] In those cases, "control" recedes in importance as compared to other values. But there is little evidence that states either need to permanently give up control of the law-generating aspects of dispute settlement, or that the IIL system, as currently constructed, is especially likely to produce sufficiently predictable rules that states will be willing to live with.

IV. The Inadequacy of Existing Control Mechanisms

It is not accurate to say that states currently exercise *no* control over IIL agency outcomes. They certainly do. My point instead is that they may not have enough. In this Part, I discuss the weaknesses of current control mechanisms before moving on, in the next Part, to discuss potential reforms.

A. The Inadequacy of Opt-Out

First, and at the most elemental level, states maintain control over the decision to delegate authority to IIL actors in the first place. This ability to opt out of important aspects of the IIL system is most evident in the requirement that a state explicitly consent to IIL jurisdiction before a tribunal shall have adjudicatory (and thus law-making) authority over it. In the case of ICSID, that consent must be two-fold: the state must enter into the ICSID Convention, which permits but does not require use of its facilities, and then must additionally and separately consent to investor-initiated arbitration (typically through an IIA). States distrustful of the IIL system can avoid much of it by simply avoiding (or cancelling) state consents to arbitration, perhaps selectively rejoining the system through the judicious use of investment contracts, as I have argued elsewhere.[148] Indeed, some states have recently exercised, or are currently considering exercising, their exit options.[149]

However, exit is a blunt instrument, ill-suited to the exercise of what von Bogdandy and Venzke call the "dynamic" control of international judicial lawmaking that is important for ensuring the legitimacy of the IIL enterprise.[150] It is also unsuitable for those states that wish to continue to benefit from the IIL system's suitability for peacefully resolving serious investment disputes (as opposed to making law). Exit may even impose important polit-

147. *See generally*, Jason Webb Yackee, *Toward a Minimalist System of International Investment Law?*, 32 Suffolk Transnat'l L. Rev. 303 (2009) (suggesting the desirability of moving toward a "minimalist" system of IIL centered on contract-based dispute settlement).

148. *See generally*, Jason Webb Yackee, *Do We Really Need BITs? Toward a Return to Contract in International Investment Law*, 3 Asian J. WTO & Int'l Health L. & Pol'y 121 (2008).

149. *Supra* note 14 and accompanying text.

150. Von Bogdandy & Venzke, *supra* note 95, at 994–95. They argue that the possibility of exit "speaks in favor of democratic legitimacy in the same unsatisfactory way as the right of individuals to emigrate supports the legitimacy of public authority. It can hardly be a sufficient escape hatch and, in any event, it frequently does not constitute a realistic option." *Id.*

ical or even economic costs if it is taken as a "repudiation" of international norms.[151] Repudiating states may, for instance, be denied necessary International Monetary Fund or World Bank assistance.[152] And finally, exit may be subject to important legal constraints and delays. For example, some legal scholars argue that states that denounce ICSID may nonetheless be subject to ICSID jurisdiction as long as any underlying IIAs remain in force, and many IIAs contain continuation-of-coverage ("survival") clauses that maintain the IIA's authority over existing investments, potentially for many years.[153]

B. The Inadequacy of Personnel Controls

States can also exercise some degree of control over IIL agency personnel. For example, states select and assign foreign ministry employees who are responsible for negotiating IIL rules, defending the states in IIL litigation, and representing the states' interests in multilateral fora like the OECD or ICSID. States also typically select one of three members of IIL tribunals. State roles in employee selection may impact agency outcomes if states are able either to control or sanction the behavior of employees (firing the treaty negotiator who fails to negotiate favorable text; refusing to reappoint an arbitrator who has decided against the state in a previous case), or if states are able to successfully select employees whose ideas about proper agency outcomes largely mirror the states' own. For example, a state that has an interest in a narrow construction of IIL's regulatory takings doctrine may nominate an arbitrator who has a scholarly reputation for advancing just such a view.

But control over personnel is also an imperfect tool of state influence. Government employees may enjoy civil service protections that limit a state's ability to discipline them for undesirable IIL law-making activities. Government employees regularly engaged in IIL may also share or develop a natural affinity for the IIL community's pro-ILL outlook, or they may find themselves influenced by technocratic IIL insiders who themselves are relatively unamenable to state control, such as the staff members of the OECD who are responsible for initially developing much of that organization's IIL-related bureaucratic output.

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151. *See* Jose Alvarez, *Remarks by Jose Alvarez*, 86 AM. SOC'Y INT'L L. PROC., 550, 552 (1992) ("For many, [an IIA] relationship is hardly a voluntary, uncoerced transaction. They feel that they must enter into the arrangement, or that they would be foolish not to, since they have already made the internal adjustments required for [IIA] participation in order to comply with demands made by, for example, the IMF."); Paul B. Stephan, *International Governance and American Democracy*, 1 CHI. J. INT'L L. 237, 250 (2000) ("[I]n the context of multilateral agreements, the cost of withdrawal likely will exceed the harm caused by any particular decision reached at the international level. The power to repudiate an international commitment thus becomes an empty threat.").

152. *Cf.* Jason Webb Yackee, *Conceptual Difficulties in the Empirical Study of Bilateral Investment Treaties*, 33 BROOK. J. INT'L L. 405, 460–61 (2008) (discussing the World Bank's involvement in promoting adherence to IIL as a condition for access to investment insurance).

153. Vincentelli, *supra* note 14, at 425–45 (discussing this problem in regard to Bolivia and Ecuador).

The ability to nominate one of three arbitrators is also of somewhat limited utility as a control mechanism, as unanimity is not a requirement of IIL arbitration. Furthermore, a state's ability to nominate a partisan advocate rather than a neutral expert is increasingly constrained by institutional rules and system norms that impose upon IIL arbitrators stringent standards of impartiality and independence.[154] Even assuming that states were free to select partisan advocates as arbitrators (and investor-claimants were as well), median-voter theory suggests that the chair, not the party-appointed arbitrators, will control the dispute's outcome. A state's ability to select a favorable arbitrator may be further restricted if the IIL arbitrator community functions as a closed, self-promoting group that monopolizes the dispute-settlement process and whose members share an interest in advancing IIL rules that enhance their own power and prestige.[155]

C. The Inadequacy of Better Drafting

States looking to influence the development of IIL rules can draft rules to their liking in investment treaties. Existing treaties can be modified in response to undesirable adjudicative pronouncements of existing treaty language or to otherwise changing notions of what the rules should be.[156] But there are two important limitations to formal modification as the primary system of IIL control.

First, problems inherent in interpreting legal text (for example, the inherent ambiguity of words, or of the intent of a collective body like the state), combined with the inability of states to imagine at the time of drafting all of the legal issues or relevant facts that might arise in a later dispute, mean that states are unlikely to be able to draft, once and for all, a perfectly controlling treaty. U.S. IIA practice provides an important example of this problem. In response to concerns that North American Free Trade Agreement ("NAFTA") Chapter 11 tribunals were on the verge of creating a robust regulatory takings doctrine, the U.S. Congress ordered treaty drafters to "ensur[e] that foreign investors in the United States are not accorded greater substantive rights . . . than United States investors in the United States."[157] Officials inserted into the 2004 U.S. Model BIT's Annex a paragraph instructing arbitral tribunals to apply a version of U.S. regulatory takings law to IIL expropriation claims that do not involve a physical tak-

154. For example, ethical rules promoting impartiality might prevent a party from appointing as arbitrator a well-known academic critic of expansively pro-investor interpretations of IIL. This intriguing possibility is raised in the problem for the 2012 Foreign Direct Investment Moot Competition, *available at* http://fdimoot.org/2012/problem.pdf.

155. *See* Park, *supra* note 49. *Cf.* DEZALAY & GARTH, *supra* note 50; Costa, *supra* note 67.

156. *Cf.* Paul Michael Blyshak, *State Consent, Investor Interests and the Future of Investment Arbitration: Reanalyzing the Jurisdiction of Investor-State Tribunals in Hard Cases*, 9 ASPER REV. INT'L BUS. & TRADE L. 99, 125 (2009) (arguing that states should "more carefully craft . . . treaty provisions" in order to prevent undesirable tribunal interpretations).

157. 19 U.S.C. § 3802(b)(3) (2004).

ing—the *Penn Central* test.[158] Under *Penn Central*, courts (and now IIL arbitrators exercising jurisdiction under in-force versions of the 2004 Model) are supposed to balance three factors: "the economic impact of the government action," "the extent to which the government action interferes with distinct, reasonable investment-backed expectations," and "the character of the government action."[159] But as Sanders has suggested, the *Penn Central* test is "unclear, wavering, multi-faceted" and neither gives tribunals sufficient guidance as to the content of those factors, nor how they should be weighted, nor provides whether the tribunal should consult U.S. domestic law that applies the test, nor specifies its relationship to customary international law principles.[160] In short, IIL arbitrators operating under the 2004 U.S. Model BIT may paradoxically enjoy greater decisional wriggle room than they did under earlier and less loquacious drafts, especially as the 2004 U.S. Model BIT does not follow NAFTA's example of offering a means for state parties to provide interpretive corrections to undesirable tribunal constructions of open-ended rules. I discuss that mechanism of control infra.

More than just a one-off example of poor redrafting, the United States's unsatisfactory attempt to "fix" IIL's regulatory takings problem is indicative of the inherent difficulties that states have in clarifying contested IIL concepts via better treaty text. As Marc Poirier argues, "we do have an international legal standard for regulatory takings. We just do not know what it means. The problem cannot be escaped by giving up on current international law and setting out to draft a clearer treaty provision. 'Attempts to restate regulatory takings doctrine in clearer form—whether of the distillation or "start over" variety—sooner or later almost always rely on terms or procedures that reinsert vagueness into the formulation.'"[161] While Poirier is talking specifically about IIL's regulatory takings doctrine, his point surely applies to IIL's other vague rules, such as the requirement of "fair and equitable treatment" ("FET"), a standard whose open contours pose, according to Montt, one of the principle dangers of the IIL system. [162]

158. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978).

159. 2004 U.S. Model BIT, *supra* note 29, at art. 5.1. Note that this modification in U.S. treaty practice impacted only *future* U.S. IIAs, negotiated under the 2004 model. The U.S. was not taking on the much greater challenge of renegotiating all of its existing, pre-2004 BITs. *See id.*

160. Anthony B. Sanders, *Of All Things Made in America Why Are We Exporting the Penn Central Test*, 30 NW. J. INT'L L. & BUS. 339, 343 (2010).

161. Marc R. Poirier, *The NAFTA Chapter 11 Expropriation Debate Through the Eyes of a Property Theorist*, 33 ENVT'L L. 851, 904 (2003); *see also* U.N. Conference on Trade and Development (UNCTAD), *Investor-State Dispute Settlement and Impact on Investment Rulemaking* (2007) at 59, *available at http://www.unctad.org/en/docs/iteiia20073_en.pdf* (noting that despite the fact that "[n]umerous arbitral tribunals have addressed the issue of indirect expropriation over the last decade . . . the critical question of which elements establish a taking under international law remains unsettled. The complexity of the issue explains why a unified methodology has so far failed to emerge.").

162. SANTIGAO MONTT, STATE LIABILITY IN INVESTMENT TREATY ARBITRATION: GLOBAL CONSTITUTIONALISM AND ADMINISTRATIVE LAW IN THE BIT GENERATION 370 (2009) (noting the "real danger that an unrestrained international investment law jurisprudence [concerning FET] could crystallize conservative rules that overprotect the status quo").

Second, amending treaties is often costly and time-consuming, especially where the treaty, like the Energy Charter Treaty, is broadly multilateral. While the relevance of this Article's policy prescriptions, developed in Part VI, depend in part on the presumed willingness or ability of states to modify their existing treaty commitments, it is unrealistic to expect states to have any interest in or ability to *regularly* amend the substantive provisions of their IIAs. As I explain in Part VI, the key is to amend current treaties, or to modify existing drafting practices, to incorporate *procedural* mechanisms that allow states to correct or prevent undesirable IIL outcomes relatively easily on a rolling basis. This is because of the difficulties of making regular modifications to treaty text, mentioned above, and also because of the difficulty, or impossibility, of making once-and-for-all textual improvements to the treaties' *substantive* rights.

D. The Problem of Precedent

The development of a system of precedent in IIL arbitration also poses a control problem.[163] Precedent in early ICA was weak, in large part because of the relative lack of past cases available for argumentation and citation and because of strong norms against public disclosure of reasoned awards. If awards are not published, they remain largely invisible except to the parties and the arbitrators immediately involved. Third parties will thus be unable to refer to these past arguments in order to bolster their own claims, just as arbitrators will be unable to undergird their own decisions with references to past decisions of other arbitrators.

Given the historical lack of a system of precedent in international commercial arbitration, it is not surprising that the ICSID Convention fails to explicitly discuss the issue of whether ICSID awards might be said to restrict the discretion of later tribunals in a precedent-like fashion.[164] It is also probably not surprising that commentators and tribunals nonetheless read the Convention as implicitly disavowing precedent. Indeed, many investment treaties are themselves hostile to precedent.[165] Many commentators nonetheless suggest that the IIL system is rapidly developing into at least a quasi-precedential one, as awards are ever more frequently published and cited as support in later opinions.[166] ICSID arbitration is no longer primarily

163. *Cf.* W. Mark C. Weidemaier, *Toward a Theory of Precedent in Arbitration*, 51 WILLIAM & MARY L. REV. 1895, 1900–01 (2010) (arguing that an arbitral system may be viewed as enjoying a system of precedent if past arbitral decisions "shap[e] the arguments lawyers make, the explanations adjudicators provide, and serv[e] as a focal point around which parties can order their affairs.").

164. CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY 1096, 1101 (2009) (noting that Article 53(1) of the ICSID Convention "may . . . be read as excluding the applicability of the principle of binding precedent to successive ICSID cases" and citing supporting ICSID awards).

165. *See* Bjorklund, *supra* note 35, at 1295 ("Most investment treaties specifically preclude the use of awards as precedent.").

166. *See* Weidemaier, *supra* note 163, at 1907–08; Jeffrey P. Commission, *Precedent in Investment Treaty Arbitration - A Citation Analysis of a Developing Jurisprudence*, 24 J. INT'L ARB. 129, 148–54 (2007) (demonstrating empirically the development of a system of IIL precedent, as evidenced by citation patterns);

about "particularized, ad hoc decision-making,"[167] but about a cumulative stream of arbitral decisions—an inter-temporal arbitral dialogue—where the ripples of past decisions influence the direction in which current decisions flow. Given the vagueness of IIL's conventional and customary rules, the development of a system of quasi-precedent may have been inevitable.[168]

While precedent can be optimistically viewed as promoting legal stability (a typical rule-of-law value), precedent also carries with it the risk of locking in politically unfavorable decisions by judicial fiat.[169] Today's IIL law is becoming the IIL law that has been announced by *arbitrators* in the past, and not the law by which states may have intended to be bound when drafting an IIA, or, more importantly, the law that they desire to be bound by today. In other words, precedent empowers arbitrators by granting law-making power to their decisions, even if it constrains the ability of arbitrators to arbitrarily change the law by encouraging them to confront past awards. That custom empowers even as it constrains, explains (perhaps) elite IIL arbitrator Gabrielle Kaufmann-Kohler's insistence that she and her fellow arbitrators have an obligation to follow the precedent that they themselves create.[170]

The emerging system of arbitral precedent also empowers arbitrators because treaty-based guidance as to the desired content of substantive norms has so far been remarkably amorphous (for example, the command that states treat investors "fairly and equitably").[171] The vague substantive content of these original delegations of authority has given arbitrators a relatively clear field in which to move, with the result that modern understandings of treaty language and customary rules are largely arbitrator-derived rather than state-derived.[172] Furthermore, the difficulties that states have in continuously correcting undesirable jurisprudence through formal treaty modification means that arbitrators, even if constrained by a system of precedent, retain a significant degree of control over the direction of the

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Schill, *supra* note 95, at 82–84 (describing the development of a system of precedent in IIL jurisprudence); Stephan W. Schill, *System-Building in Investment Treaty Arbitration and Lawmaking*, 12 GERMAN L.J. 1083, 1086 (2011) (arguing that IIL tribunals "increasingly function as a mechanism of global governance," primarily through the development of a system of precedence).

167. Weidemaier, *supra* note 163, at 1903 (describing the "traditional view" of arbitration).

168. Bjorklund, *supra* note 35, at 1294.

169. *Cf.* Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 631 (2001) (describing the inefficiencies caused by precedential "lock-in").

170. Bjorklund, *supra* note 35, at 1297–98 (quoting Kaufmann-Kohler's views on precedent). Kaufmann-Kohler is among the most prolific ICSID arbitrators. The ICSID website lists her as participating in 26 cases. Search ICSID Cases, ICSID, http://ics*id.*worldbank.org, (enter "Gabrielle Kaufmann-Kohler" into the search box, select "Cases" and click "Go" button)

171. Barnali Choudhury, *Evolution or Devolution? Defining Fair and Equitable Treatment in International Investment Arbitration*, 6 J. WORLD INVEST. & TRADE 297, 320 (2005) (discussing the "amorphous" FET standard).

172. *See id.* (concluding that "as much as governments try to constrain the meaning of fair and equitable treatment . . . it is the international tribunals who will ultimately determine the meaning of the standard. Their decisions will determine the rate of evolution.").

system. Once the system is set in a particular direction by arbitral decision, precedent helps ensure that it will continue to evolve in the direction that arbitrators have set it to go. While a strong system of precedent might help promote incremental rather than radical change, it nonetheless embodies within its logic a grant of judicial authority to change and develop the law within the proper increments. In that sense, the developing IIL system of precedent is not incompatible with the belief that arbitral tribunals have the power, and perhaps the duty, to continuously evolve IIL rules.[173]

E. The Problem of Custom

If precedent empowers the IIL agency, so too does IIL's embeddedness in the conceptual framework of customary international law. Custom is widely considered to be one of the primary sources of international law (along with treaties), and a customary rule is said to exist where there is consistent state practice informed by a sense of legal obligation. The difficulty of persuasively demonstrating either consistent state practice or, more especially, a sense of legal obligation, means that universally acknowledged customary rules are few and far between; where such a rule exists without controversy, the words in which it is articulated will often nonetheless be of uncertain and disputed content. For example, today it is plausibly claimed that custom requires foreign investors to be treated "fairly and equitably," but what those two terms might actually mean remains uncertain and contested.[174]

Custom empowers the IIL agency because the concept privileges the articulation of its content by IIL academics and arbitrators. Traditionally, the writings of academics have been the primary source of claims that a customary rule exists, and a law-recognizing (or law-making) function for academics remains embedded within most conceptions of the "sources" of international law.[175] In the IIL system, prominent IIL academics, who them-

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173. *Cf.* Thomas E. Carbonneau, *Arbitral Law-Making*, 25 MICH. J. INT'L L. 1183, 1204–05 (2004) (discussing how the development of a tradition of precedent in ICA will inevitably lead to "system-wide discussion of applicable decisional predicates" that results in "arbitrators mak[ing] law both inside and outside national legal systems").

174. Christoph Schreuer, *Fair And Equitable Treatment in Practice*, 6 J. WORLD INVEST. & TRADE 357, 364 (2005) (noting that the interpretation of the FET standard is "relatively imprecise" and that its "meaning will often depend on the specific circumstances of the case at issue").

175. For example, Article 38 of the Statute of the International Court of Justice recognizes the "teachings of the most highly qualified publicists" as a "subsidiary means for the determination of rules of [international] law." I.L.J. Statute Art. 38. But as Stephan argues, in practice such "teachings" function as the primary, and not merely a "subsidiary" source of custom:

> To know what constitutes customary law, we need to know what states believe their obligations to be. But because states tend to speak in open-ended, if not vacuous, terms, someone has to explain what those statements really mean. We look to scholars to perform this task. So even though, as a formal matter, authorities such as the Statute of the Permanent Court of Justice rate academic opinion last in a list of sources of international law, in reality international jurists play the primary role in determining the content of customary international law.

Paul B. Stephan, *International Governance and American Democracy*, 1 CHI. J. INT'L L. 237, 246 (2000). U.S. court practice also recognizes the primary role of academics in espousing custom. *See The Paquete Habana*,

selves often serve as counsel or as arbitrators in IIL disputes, are among the most important articulators of IIL custom; their scholarly writings are taken as persuasive evidence that a customary rule of *x*, *y*, or *z*, exists, or exists in such-and-such form; Article 38 of the Statute of the International Court of Justice also recognizes "judicial decisions" as another "subsidiary" source of international law, and the proliferation of IIL arbitrations has meant that IIL tribunals are increasingly called upon to announce customary rules of law.[176]

The custom-finding (or custom-creating) powers of tribunals serve, much like precedent, to create prospectively binding rules of law that extend beyond the mere resolution of a discrete dispute. Furthermore, because custom is often thought of as inherently dynamic,[177] and because it is impossible to objectively determine custom's existence, granting the IIL agency a mandate to pronounce custom amounts to a mandate for the agency to change it as well. The lack of objectively verifiable custom and custom's allegedly dynamic nature interferes with state control of IIL, especially where investment treaties are drafted with implicit or explicit reference to undefined customary principles. Because notions of customary international law are woven throughout IIAs, and because non-state actors (academics and tribunals) are privileged over states in their ability to declaim customary principles—somewhat ironically, given that the conception of custom emphasizes the centrality of state practice to its formation—states are less able to control IIL than they otherwise might wish to be.

Indeed, to the extent that IIAs *themselves* might be said to now constitute custom—binding even on non-signatories—exit, and not just control, may be impeded.[178] Formally speaking, simply refusing to sign IIAs, or withdrawing from them, may no longer be enough. The customary rules, as they

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175 U.S. 677, 700 (1900) (noting that the content of customary international law must be determined by consulting "the works of jurists and commentators, who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat"). *But see Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 827 (D.C. Cir. 1984) (Robb, J., concurring) (arguing that it was " 'needless to review the speculations and repetitions of writers on [customary] international law. . . . Their lucubrations may be persuasive, but are not authoritative.' . . . Courts ought not to serve as debating clubs for professors willing to argue over what is or what is not an accepted violation of the law of nations.").

176. *See supra* note 175.

177. *See generally*, Carl-Sebastian Zoellner, *Student Note: Transparency: An Analysis of an Evolving Principle in International Economic Law*, 27 MICH. J. INT'L L. 579 (2006) (describing the customary international law of FET as "evolving").

178. On IIAs as forming custom, *see* Patrick Dumberry, *Are BITs Representing the "New" Customary International Law in International Investment Law?*, 29 PENN ST. INT'L L. REV. 675, 698 (2010) ("Custom . . . applies to *all States*, including those which have not entered into any IIAs. Customary rules can therefore be invoked by *any foreign investor* irrespective of whether its State of origin has entered an IIA with the country where it makes its investment. This is the first reason why the determination of the content of custom remains so fundamental."). An early examination had concluded that IIAs had not created any "definite principle of customary international law" due to insufficient consistency of treaty language. Bernard Kishoiyian, *The Utility of Bilateral Investment Treaties in the Formation of Customary International Law*, 14 NW. J. INT'L L. & BUS. 327, 372 (1994). However, today prominent IIL observers, including Judge Schwebel and Professor Lowenfeld, argue that the content of IIAs has become custom. *See* Dumberry, *supra*, at 681–82 (discussing the views of Schwebel and Lowenfeld); Stephen M. Schwebel,

have been crystallized by existing IIA practice and jurisprudence, and as they continue to evolve (perhaps in the direction of a one-way ratchet) will, at least in theory, bind states whether states want to be bound or not.[179]

V. The Problematic Nature of Extant Calls for Reform

Members of the IIL community recognize that the IIL world may not be the best possible, and much of the IIL academic literature concerns itself with various reform proposals. In broad form, that literature identifies two major problems—bias and inconsistent decisions—and suggests institutional changes that promise to address them. Unfortunately, those reforms are also likely to exacerbate problems of control in the name of addressing problems of questionable importance.

A. Bias

Take bias first. One of the common critiques of IIL is that its outcomes are "biased" in favor of investors.[180] But this concern with bias is misplaced. As Jaffe noted long ago, bureaucratic "action which 'favors' an industry or some defined portion of it can usually be explained as expressing a 'correct' application of the statute or a theory of regulation which is administratively rather than industry determined."[181] The underlying "statutes" of IIL, or the system's supporting theory, may indeed purposefully (or by reasonable application) favor the production of outcomes that systematically favor particular actors, such as investors, or developed countries. Even if we were to find evidence of bias (which is itself quite difficult, as Susan Franck has shown),[182] that bias may not be undesirable but rather natural and by design.[183] Whether such bias is *currently* desirable is a separate question, and the degree and direction of desired bias may, quite properly, shift over time as the system develops, as new information is revealed, or as new facts on the

The Influence of Bilateral Investment Treaties on Customary International Law, 98 Am. Soc'y Int'l L. Proc. 27 (2004).

179. Absent an explicit grant of jurisdiction to an IIL tribunal, it is unlikely that a customary rule, even if derived from IIA jurisprudence, could be effectively enforced against an objecting state, though a state may still face reputation costs for failing to live up to a customary rule. *See generally*, Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom,* 120 Yale L. J., 202 (2010). States may also enjoy the ability to opt out of customary IIL, though the ease with which they may do so is hotly debated. *Id.*

180. Brower & Schill, *supra* note 17, at 474–75, 489–95 (2009) (discussing arguments that the IIL system is biased against states); *See* Park, *supra* note 49, at 658 (noting but arguing against the "common argument" of pro-investor bias in ICSID arbitration).

181. Louis L. Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation*, 67 Harv. L. Rev. 1105, 1107 (1954).

182. Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 Harv. Int'l L.J. 435 (2009).

183. For example, Alvarez, suggests that the IIA system was constructed (or "premise[d]") to act as a "one-way ratchet designed to benefit multinationals." Alvarez, *supra* note 151, at 555.

ground emerge.[184] The key policy question is not "how do we remove the possibility of bias in IIL regulation?" (as if the point of regulation were to randomize outcomes), but rather "how do we ensure that regulatory outputs generally accord with the interests of IIL's principals?"

The problem of bias, whether real or perceived, has led some observers to suggest the desirability of structurally guaranteeing the independence of IIL decision-makers, particularly arbitrators. For example, Paulsson has suggested that the tradition of party-appointed arbitrators be abandoned in order to strengthen the independence of arbitrators whose role, in his view, is appropriately viewed as judge-like.[185] Paulsson's proposal, which is professionally courageous, is consistent with the broader academic literature on international courts, which tends to emphasize the importance of improving the independence of international adjudicators.[186] Insulating the arbitrator appointment process from party influence may, Paulsson suggests, improve IIL system legitimacy by eliminating actual bias or by making public perceptions of bias less easy to hold.[187] Others have suggested addressing bias by establishing a permanent panel of IIL judges[188] or more robust standards of arbitrator ethics.[189] But these proposals, by eliminating or impeding the ability of states to judge decisionmakers likely to be sympathetic to their preferred views of IIL, will also, in obvious ways, eliminate one of the few existing mechanisms through which states currently attempt to control IIL tribunal outputs. It is not incompatible with that observation to also note the party-appointment tradition is an *imperfect* control mechanism, as already discussed above in Sub-Part IV.B. Despite its imperfections, however, it is

184. *Cf.* Abba Kolo & Thomas W. Wälde, *Renegotiation and Contract Adaptation in International Investment Projects: Applicable Legal Principles and Industry Practices*, 1 J. WORLD INVESTMENT 5, 29–32 (2000) (noting that in the realm of investor-state contracts, for example, bargains are often, and often by necessity, periodically renegotiated).

185. Professor Jan Paulsson, Moral Hazard in International Dispute Resolution, Inaugural Lecture as holder of Michael R. Klein Distinguished Scholar Chair, University of Miami School of Law (Apr. 29, 2010), *available at* http://www.arbitration-icca.org/media/0/12773749999020/paulsson_moral_hazard.pdf. Paulsson's proposal is professionally courageous in the sense that it would, if implemented, almost certainly harm his ability to maximize the market for his arbitral services, a point that Paulsson makes in his lecture.

186. *See, e.g.*, Dinah Shelton, *Legal Norms to Promote the Independence and Accountability of International Tribunals*, 2 LAW & PRAC. INT'L CTS. & TRIBUNALS 27, 55–57 (2003). Shelton suggests a curiously narrow understanding of "accountability," whereby courts should be held "accountable" for behavior that violates strong norms of decisional "independence." *Id.* at 53 ("Accountability of international tribunals requires rules and procedures to determine judicial conflicts of interest, discipline, disqualification or removal from office.").

187. *See* Paulsson, *supra* note 185.

188. Brower & Schill, *supra* note 17, at 475 (noting that one response to the problem of bias is to create a "permanent international investment court with tenured judges"); Van Harten, *supra* note 52, at 180–84 (advocating the same).

189. Catherine A. Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration*, 23 MICH. J. INT'L L. 341, 422 (2002) (calling for the development of "articulated, enforceable ethical norms" in international arbitration, including ICSID arbitration).

unlikely that states would ever consent to a new system in which they gave up their right to (relatively) freely appoint "their" arbitrator.[190]

B. Inconsistent Decisions

It is often suggested that inconsistent IIL decisions (e.g. tribunals interpreting or applying the same or similar IIA language or customary international law concepts in different ways) have created a crisis of legitimacy for the IIL system, as parties on whose support the system depends are likely to view inconsistency or lack of predictability as being antithetical to the rule-of-law principles that the IIL system is supposed to promote.[191] But the evidence that inconsistent decisions are either especially frequent or especially problematic actually appears quite weak.[192] The literature cites only a handful of allegedly inconsistent decisions among the many awards that have been issued to date, and furthermore it is not entirely clear that the cited examples are actually unexplainably inconsistent.[193] And in any event, inconsistent decisions are common in domestic legal systems, and those systems, at least in the developed world, seem to enjoy relatively high levels of legitimacy and effectiveness.

The argument that inconsistent decisions are problematic relies on the likely unwarranted privileging of legal predictability or legal certainty. This is so in two ways. First is the notion that investors, faced with inconsistent decisions, will be unable to accurately price their investment options, and will be less likely to invest because of this price uncertainty. For example, imagine a treaty containing both a most favored nation ("MFN") clause and another clause requiring that the investor wait eighteen months before filing a claim. The MFN clause might be read to incorporate by reference a more favorable provision in another treaty that has only a three-month waiting

190. The suggestion that IIL arbitrators might legitimately be "partisan" will strike some readers as inherently problematic. It is only if we insist on viewing IIL arbitrators as the international equivalent of domestic-court judges that "partisanship" becomes an inherent problem. In fact, partisan arbitrators are routinely tolerated in domestic commercial and transnational practice. *See* Thomas E. Carbonneau, *At the Crossroads of Legitimacy and Arbitral Autonomy*, 16 AM. REV. INT'L ARB. 213, 232 (2005) (noting that "partisan arbitrators are hardly unknown in international arbitral practice"). *See also* Adam M. Smith, *"Judicial Nationalism" in International Law: National Identity and Judicial Autonomy at the ICJ*, 40 TEXAS INT'L L.J. 197, 200–04, 206 (2005) (describing the historical roots of non-neutral adjudicators in arbitration and arguing that the International Court of Justice was designed with the expectation of partisan judges).

191. *See generally* Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions,* 73 FORDHAM L. REV. 1521 (2005). Franck does not specify which particular actors are concerned about IIL's inconsistent decisions, but it seems clear that she means foreign investors and members of the IIL agency, and not the public at large.

192. *See* Jan Paulsson, *Avoiding Unintended Consequences*, APPEALS MECHANISMS IN INTERNATIONAL INVESTMENT DISPUTES 241, 258–59 (Karl Sauvant, ed. 2008) (arguing that concerns about inconsistency are overdrawn).

193. *See* Barton Legum, *Options to Establish an Appellate Mechanism for Investment Disputes*, *in* APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES 231, 237 (Karl Sauvant, ed. 2008) (arguing that the "poster child for lack of consistency in investment arbitration" is actually explainable once it is realized that the two tribunals held different appreciations of the underlying facts).

period, or it might not.[194] According to the theory, an investor would be much less likely to invest in the face of uncertainty over how long an investor would have to wait to file a claim in the event that it should ever find itself in a treaty-based dispute with the host state. But such fine-grained legal analysis is probably never a determinative part of the investment decisionmaking process, and there is no evidence that uncertainty over the meaning of IIL that might arise from inconsistent interpretations has any impact on investor behavior.[195]

Second, scholars suggest that observers of the IIL system will lose confidence in its ability to provide rule-of-law-based decisions, as the existence of inconsistencies lays bare the fact that there is no single legally correct solution to a given problem. But this assumption treats the system's observers as unrealistically naïve. The only people aware of inconsistent decisions are highly sophisticated international lawyers who can appreciate that inconsistent decisions are an inevitable byproduct of any multi-court legal system, whether international or domestic.

The concern with inconsistent decisions has prompted much discussion of the merits of an IIL appellate mechanism, or a World Investment Court, most likely consisting of a standing body of IIL judges who would exercise the power to review IIL awards for errors of law and to consolidate divergent legal trends.[196] But this reform, if implemented, would significantly worsen control problems.[197] The judges on a World Investment Court would almost certainly operate under ethical rules designed to ensure significant independence from state parties.[198] They would likely be drawn from the world of IIL experts, sharing the community's normative commitment to a certain vision of IIL. And by virtue of being labeled an appellate court (or a World Investment Court), their decisions would enjoy a rhetorically much stronger

194. This is, in fact, a live debate in IIL jurisprudence and scholarship. *See generally* August Reinisch, *How Narrow Are Narrow Dispute Settlement Clauses in Investment Treaties*, 2 J. INT'L DISP. SETTLEMENT 115 (2011).

195. Yackee, *Do BITs Promote FDI?*, *supra* note 39, at 400 (providing evidence that investors do not know much about BITs, or pay much attention to them, when deciding whether to invest). Inconsistent decisions, or, more generally, uncertainty over the content of IIL rules, will have consequences during any eventual litigation process, where ambiguities will give rise to opportunities for lawyers to argue over what the law "is."

196. *See, e.g.*, Michael D. Goldhaber, *Wanted: A World Investment Court*, THE AMERICAN LAWYER, June 2004, at 115; Karsten Nowrot, *International Investment Law and the Republic of Ecuador: From Arbitral Bilateralism to Judicial Regionalism*, *in* ESSAYS ON TRANSNATIONAL ECONOMIC LAW No. 96, at 42–51 (May 2010), Institute of Economic Law Transnational Economic Law Research Center, School of Law, Martin Luther University Halle-Wittenberg, *available at* http://www.wirtschaftsrecht.uni-halle.de/sites/default/files/altbestand/Heft_96.pdf (arguing for the creation of a "Latin American Court of Investment Law"). *See generally* KARL P. SAUVANT, APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES (2008). Others have suggested the creation of regional appellate IIL courts.

197. A point also recognized by Brower & Schill, *supra* note 17, at 495 (suggesting that the establishment of a "permanent court with tenured judges that are not removable might result in the creation of an institution that potentially restricts state sovereignty more significantly than arbitrators allegedly do today").

198. *See, e.g.*, Nowrot, *supra* note 196, at 46 (suggesting that judges on her "Latin American Investment Court" should enjoy various guarantees of independence from the Court's Contracting Parties).

claim to being generally applicable "law" than do the decisions of temporary tribunals resolving, at least officially, discrete disputes. A World Investment Court, unless carefully designed as more of a political than a judicial organ, would risk further consolidating the law-making functions of IIL experts while diminishing the ability of states to control system outcomes.

VI. Lessons from Domestic Administrative Practice

What then is the best path forward? We can look to domestic agency practice for inspiration. The agency analogy encourages us to consider both ex ante and ex post mechanisms of control. I discuss each of these categories in turn.

A. Ex ante Control: Notice-and-Comment for Non-Respondent & Respondent States

By ex ante control, I mean that the principal has the opportunity to attempt to influence an agency outcome before the agency acts in a legally binding way. In U.S. agency practice, one important ex ante control mechanism of agency outputs is the institution of notice-and-comment under Section 553 of the Administrative Procedures Act.[199] U.S. agencies are required to provide the public with notice of many of their regulatory initiatives by publishing the text of the initiative as a proposed rule. The notice of the proposed rule must solicit public feedback (comments), and the agency must consider those comments when deciding whether to promulgate the proposal as is, or as modified, or to withdraw the proposal entirely.

We can adapt the notice-and-comment concept to serve as a potentially effective ex ante, pre-rule control mechanism for IIL outputs. Some states currently use notice-and-comment at the treaty-drafting stage, soliciting input from the public at large, and this may be a useful means of counteracting the epistemic biases of treaty drafters.[200] But here my focus is on adapting notice-and-comment to the IIL adjudication process by providing interested *states* advanced notice of impending IIL decisions and improved opportunities to influence those decisions prior to promulgation. It might seem odd to talk about notice-and-comment in the context of adjudicatory proceedings. However, we can identify at least one relatively analogous ex-

199. *See* McCubbins et al., *supra* note 34, at 464.

200. Norway, for example, used notice-and-comment when deciding whether to restart its investment treaty program. *Negotiation Watch: Norway Proposes Significant Reforms to its Investment Treaty Practices*, Investment Treaty News (ITN) (Int'l Inst. For Sustainable Dev.), Mar. 27, 2008, *available at* http://www.iisd.org/itn/wp-content/uploads/2010/10/itn_mar27_2008.pdf. Current U.S. practice is also to solicit public comments on proposed changes to its model investment treaty. Notice of Bilateral Inv. Treaty Program Review, Office of the U.S. Trade Representative (July 14, 2009), *available at* http://www.ustr.gov/about-us/press-office/blog/notice-bilateral-investment-treaty-program-review.

ample in U.S. Supreme Court practice. There, the Court regularly gives a favored non-disputing party, the U.S. Executive Branch (represented by the Solicitor General) notice of a particular dispute along with an invitation to file a brief representing the government's views of how the case should be determined.[201]

While it is certainly possible to imagine opening up the IIL adjudicative process to mass participation through a notice-and-comment-like regime, granting individuals and organizations generous direct participation rights along with states, facilitating mass participation poses potentially severe risks, including, for instance, weakening the quality of IIL decisionmaking.[202] It may also further sever the accountability link between states and the IIL agency by moving the value-balancing task from the state to the agency level.[203]

We should focus, then, on improving notice-and-comment opportunities for the states most directly interested in a particular dispute—the respondent state and the investor's home state (in the bilateral treaty or ad hoc arbitral context) and all treaty parties in the multilateral treaty context. Non-respondent state treaty partners have an especially obvious and strong interest in the acceptable construction of IIL, and IIL instruments could require the investor-claimant or the respondent state (or the arbitral institution) to automatically and promptly submit key arbitral documents—the notice of intent to submit a claim to arbitration, the actual submission of a claim, and any post-claim documents and submissions, such as memorials and the like—to the non-respondent state (and preferably to a designated office within the state whose portfolio specifically includes IIL issues). This kind of automatic reporting requirement, akin to notice-and-comment's requirement of publication, serves to put the non-respondent state, as a directly interested party, on formal notice as to both the existence and the details of a particular dispute. This model of notice has been incorporated

201. *See* David C. Thompson & Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16 GEO. MASON L. REV. 237, 288 (2009).

202. *Cf.* Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decision-making*, 92 NW. U. L. REV. 173, 215 (1997) (arguing that direct participation in the domestic administrative process may harm decisional quality). Ironically, mass participation may be unlikely to lead to substantive IIL outcomes that would systematically favor "the public" as opposed to well-heeled business interests. *Cf.* Jason Webb Yackee & Susan Webb Yackee, *A Bias Toward Business? Assessing Participant Influence in Notice and Comment Rulemaking*, 68 J. POLITICS 128, 129 (2006) (providing empirical evidence that the domestic U.S. notice-and-comment process is biased toward business interests).

203. That is why the decision of WTO tribunals to allow amicus submissions—despite no clear authority in the WTO texts to do so—has proven so controversial. The WTO member states fear losing influence over how their disputes are argued and decided. *See* Ruth Mackenzie & Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 HARV. INT'L L.J. 271, 283–84 (2003) (describing the controversy over allowing amicus briefs in the WTO context).

into U.S. and Canadian model treaty practice since 2004,[204] and it should probably be extended to other investment treaties as well.

But notice by itself is not sufficient to ensure the interested non-respondent state an adequate opportunity to participate in the tribunal's policymaking process. To facilitate meaningful opportunities to participate, the non-respondent state must be granted an opportunity to submit "comments" on the dispute, as they are under the U.S. and Canadian model treaties. Both countries' models grant non-respondent treaty partners the right to make submissions to the tribunal as to the interpretation of the treaty.[205] Such provisions have occasionally been used by non-respondent states to comment on disputes.[206] And because those states will have access to the details of the dispute (by virtue of their "notice" of or access to the post-claim submissions), their own submissions can be more knowledgeably and effectively drafted. Rather than having to guess at the issues under dispute or at the disputing parties' approaches to those issues, non-disputing states can tailor their responses so as to respond to the issues and arguments actually being made.

In contrast, under existing amicus practice (in which amicus rules fail to discriminate between interested parties generally and interested *state* parties) tribunals are typically reluctant to violate principles of confidentiality by sharing disputing-party submissions, especially with NGOs or other non-state parties.[207] That practice makes it difficult for amici to avoid submitting redundant or irrelevant arguments and observations. I am not, however, suggesting that tribunals should necessarily relax confidentiality principles as to non-state amici.[208] Rather, I am suggesting that confidentiality princi-

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204. *See, e.g.*, Model Canadian FIPA, art. 34 & 35, 2004. U.S. Model BIT, art. 29(1), 2004. Similar provisions exist in the investment chapters of U.S. free trade agreements. *See, e.g.*, North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 605 [hereinafter NAFTA]; Dominican Republic-Central America Free Trade Agreement, U.S.-Costa Rica-Dom. Rep.-El Sal.-Guat.-Hond.-Nicar., Aug. 5, 2004, *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text [hereinafter DR-CAFTA].

205. Model Canadian FIPA, art. 35, 2004. U.S. Model BIT, art. 28(2), 2004. For examples in U.S. free trade agreement practice, *see* DR-CAFTA Article 10.20(2); NAFTA Article 1128. The 2009 ASEAN Comprehensive Investment Agreement contains a weak form of these kinds of provisions. Under Article 39, an ASEAN respondent-state is required to notify all other ASEAN member-states that it has received a notice of arbitration, though it is not required to share the notice with the other states; on the other hand, the investor's state *is* given the right "to receive from the disputing Member State a copy of the notice of arbitration." The ASEAN agreement does not provide non-disputing member states the right to participate in arbitrations, however, or to receive arbitration filings or other documents. ASEAN Comprehensive Investment Agreement, art. 39, July 24, 1998.

206. *See, e.g.*, Commerce Group Corp. & San Salvador Gold Mines, Inc. v. The Republic of El Salvador, ICSID Case No. ARB/09/17, ¶ 40 (noting that Costa Rica and Nicaragua had filed submissions under DR-CAFTA Article 10.20(2)). The tribunal cited these submissions favorably as according with its own views on the relevant legal issue. *Id.* at ¶¶ 81–82.

207. *See, e.g.*, Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, 102–03 (Award) (rejecting amici request for an exception to the tribunal's confidentiality order).

208. *Cf.* Wong & Yackee, *supra* note 112 (suggesting that amici submissions are unlikely to provide much benefit to IIL tribunals). *See also* Yackee, *supra* note 148 (describing state hostility to expanding amici participation in WTO dispute settlement).

ples usually be relaxed as to non-respondent states, especially in the bilateral context where the non-respondent state is necessarily the investor's home state, with appropriate exceptions made to protect the disputing parties' trade or state secrets.

Outside of post-2004 U.S. and Canadian model treaty practice, these kinds of notice-and-comment provisions are rare.[209] Most investment treaties do not contain comparable provisions. Perhaps the easiest way to extend notice-and-comment beyond current U.S. practice would be to modify the rules of the main arbitral institutions that administer investor-state disputes. Unfortunately, ICSID missed an opportunity to follow the United States' lead in its recent "transparency"-related revisions to its arbitral rules.[210] ICSID handles the bulk of investor-state disputes arising under IIAs, and in 2006 ICSID amended its arbitral rules in response to demands from civil society groups for greater transparency. The key changes were made to make it easier for ICSID tribunals to open hearings to public attendance, to mandate the publication of "excerpts" of awards, and to permit, but not to require, tribunals to accept submissions from third parties, whether state parties or private parties, such as NGOs.[211] The missed opportunity is two-fold.

First, the new rules could have *required* ICSID tribunals to accept written or oral submissions from non-disputing state parties. Second, and perhaps more importantly, the rules could have been modified to require greater notice to non-disputing state parties. Currently, the ICSID rules contain no provisions requiring that non-disputing state parties to an investment treaty receive notice, either of the existence of a particular dispute or, more importantly of any of disputing party submissions. It is difficult to imagine an ICSID tribunal refusing to allow an interested non-disputing state to make a submission, but the need to first request permission from the tribunal raises the costs of such participation. Furthermore, the failure of the ICSID rules to mandate the sharing of dispute documents with the non-disputing state makes informed and effective participation less likely.

A simple notice-and-comment regime as to non-disputing state parties would not necessarily specify that the tribunal give any special weight to the comments (just as, under U.S. administrative practice, an agency is formally required only to "consider" comments received, not necessarily to act upon them). But we can imagine a more robust regime, in which tribunals are directed to give special consideration to state views, especially where the respondent state and the non-disputing state are in agreement on a particu-

209. See, for example, the Chinese (1997), French (2006), German (2005), Dutch (1997), Turkish (2000) and United Kingdom (2005/2006) Model BITs, published in ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS (2009), none of which contain notice-and-comment-type provisions.

210. These reforms are discussed in Wong & Yackee, *supra* note 140.

211. *See generally* Wong & Yackee, *supra* note 112 (providing an overview of the transparency amendments to the ICSID rules).

lar issue. That is, in fact, the model embodied in the 2009 Association of Southeast Asian Nations ("ASEAN") Comprehensive Investment Agreement, which provides that:

> Where a disputing investor claims that the disputing Member State has breached Article 14 (Expropriation and Compensation) by the adoption of a taxation measure, the disputing Member State and the non-disputing Member State shall, upon request from the disputing Member State, hold consultations with a view to determining whether the taxation measure in question has an effect equivalent to expropriation or nationalization.[212]

In the event that any joint determination is made, Article 36(8) requires a subsequently established investor-state arbitral tribunal to "accord serious consideration" to the states' determination of the issue.[213] To my knowledge Article 36(8) has never been invoked, and it is unclear how an ASEAN investment tribunal might interpret and apply its requirement to give "serious consideration" to a joint determination. However, it is worth considering whether this basic notion should be extended to other investment treaties, and beyond the relatively narrow issue of taxation-as-expropriation.

From a control perspective, even the state directly involved in the dispute as a respondent lacks full notice-and-comment rights as to the formulation of adjudicatory statements of IIL law. This is because the tribunal presents to the respondent state its policymaking instrument—the award—as a final draft, and not as a proposal. The state-respondent is on notice of the outcome only to the extent the state can read the tribunal's tea leaves during hearings (much in the way that Supreme Court watchers attempt to predict the outcomes of cases based on the disposition of justices during oral argument). The state-respondent lacks full notice of how the tribunal is likely to "rule" (in a policymaking sense), and it lacks an opportunity to engage in a dialectical exchange with the tribunal akin to the exchange between commenters and agency officials in the domestic notice-and-comment process over the final shape of a reasonably well-developed proposal.

To fix that problem, we can further enhance opportunities for meaningful state influence by extending notice-and-comment principles from the pleading to the award-writing stage. We might, for example, require tribunals to submit to the disputing parties (and to non-disputing states) a draft copy of the tribunal's award. The idea of permitting or requiring the circulation of draft awards is not unheard of, either in international or domestic practice. For example, the 2004 U.S. Model BIT contains such a provision (though, to my knowledge, no other country's investment treaties do).[214] English

212. ASEAN Comprehensive Investment Agreement, art. 36(7).

213. *Id.* at art. 36(8).

214. 2004 U.S. Model BIT, *supra* note 29, art. 28(9)(a) provides that "at the request of a disputing party, a tribunal shall, before issuing a decision or award on liability, transmit its proposed decision or

courts also recognize the practice.[215] While the U.S. version of the rule provides only limited draft-award notice-and-comment rights to the non-disputing state, a more control-centric version would require that the draft award be circulated to the non-disputing state (and to the disputing parties) automatically, and permit the non-disputing state to submit comments on the draft.[216]

Under this form of notice-and-comment, the draft award functions, in essence, as a proposed rule, and the notified actors would be invited to provide the tribunal with comments on the proposal, which the tribunal would consider incorporating into the binding, final award.[217] Tribunals would be permitted not just to "interpret" but to modify their awards in response to concerns raised by the "commenters." State potential to influence tribunal outputs would be enhanced in two ways. First, states would have the opportunity to respond directly to the tribunal's actual arguments as to the proper outcome, and to convince the tribunal that its proposal suffers from errors of policy, logic, or law. Second, exposure to a draft award may encourage parties to settle their dispute.[218] Settlement facilitates state control over the law-making aspects of tribunal activities by pre-empting the publishing of a final award.[219] Without a published final award, a tribunal's decision is much less likely to make law through the formation of precedent or custom.[220] Increasing the number of disputes that are settled without a binding

award to the disputing parties and to the non-disputing Party. Within sixty days after the tribunal transmits its proposed decision or award, the disputing parties may submit written comments to the tribunal concerning any aspect of its proposed decision or award. The tribunal shall consider any such comments and issue its decision or award not later than forty-five days after the expiration of the sixty-day comment period." This provision is analyzed in Jack J. Coe, Jr., *An Examination of the Draft Award Circulation Provision of the U.S. Model BIT Of 2004*, *in* THE FUTURE OF INVESTMENT ARBITRATION 107, 107–23 (Catherine A. Rogers & Roger P. Alford, eds. 2009). *See also* Jan Paulsson, *Avoiding Unintended Consequences, in* APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES 241, 259 (Karl Sauvant, ed. 2008) (mentioning this reform favorably).

215. *See* Kirsty Hughes, *The Use, Abuse and Implications of the Draft Judgment Procedure*, 127 LAW Q. REV. 565 (2011).

216. Coe, *supra* note 7, at 214 (discussing the limited extension of notice-and-comment rights to non-disputing states under Article 28).

217. A move toward such a practice would admittedly represent an important shift from current practice. But it is worth noting that the ICSID Convention already does provide at least some limited opportunity for back-and-forth dialogue between the parties over the content of an award, even if that opportunity has rarely, if ever, been used: Article 50 allows the parties to request that the tribunal "interpret" its final award, and allows the tribunal to stay enforcement pending any interpretation. Schreuer's commentary on the ICSID Convention asserts, however, that Article 50's scope is limited to interpretive disputes focused on the award's implementation. He declares "complaints about the award's lack of clarity" or disputes about "new points which go beyond the limits of the award" to be inadmissible. CHRISTOPH H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY 866, 867–68 (2009).

218. Coe, *supra* note 214, at 118–19 (discussing the settlement effects of the rule).

219. Under ICISD Arbitration Rule 43, parties may choose to have any pre-award settlement embodied in an award, but they need not do so. In practice, most ICSID settlements do not result in a published award.

220. Aside from issues of control, a dialectical approach to award-writing may also make the ICSID arbitration process more efficient by preventing abuses of the annulment process. Under ICSID Convention Article 52, either party may request that an award be annulled for failing "to state the reasons on which it is based." Allowing comments on proposed awards would allow the parties a pre-annulment

award would certainly slow down the articulation and evolution of IIL, but that is not necessarily a bad thing. As Reisman has argued,

> [J]udicial romantics see third-party settlement [via binding international arbitration] as the highest form of dispute resolution. They are wrong. Adjudication is a sign of failure, for it signals that the parties have been unable to settle their differences amicably. Negotiated solutions, that are not leonine, are always better than third-party solutions; even with prior consent, judgments and awards are by their nature imposed solutions in a political system not notable for its enforcement mechanisms. If there is a credible possibility of success, it should never be too late to negotiate.[221]

I suggest that we become a bit less "romantic" about the inherent value of IIL awards. While it is easy for academics and IIL practitioners to view the explosion of published, binding awards as an immensely exciting development—for one, it gives academics something to write about—it may be worthwhile to more seriously consider reforms that facilitate, even at a very late stage, negotiated and private rather than imposed and public solutions.

B. Ex Post Control Mechanisms: the "Legislative Veto"

In domestic practice, the legislature can always overrule an undesirable agency output by passing a correcting statute through the normal legislative process. At the international level, states can do the same by formally amending their treaties. But in both circumstances, the transaction costs of formal modification are often high. In the United States, Congress has long attempted to implement an abbreviated legislative process that would make it easier to reject otherwise final agency actions, typically by allowing a single house of Congress to prevent an agency action from entering into force. Some attempts to implement this "legislative veto" have been rejected by the U.S. Supreme Court as violating U.S. constitutional principles,[222] but the basic idea has been recognized as having significant

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opportunity to request a fuller set of reasons for a particular decision; where a party has not raised an "insufficient reasons" complaint at the proposed award stage, an annulment committee could consider any subsequent claim of insufficient reasons to be waived.

221. W. Michael Reisman, *The Supervisory Jurisdiction of the International Court of Justice: International Arbitration and International Adjudication*, 258 RECUEIL DES COURS 358, 358 (1996).

222. *INS v. Chadha*, 462 U.S. 919 (1983). The Court held that the legislative veto, as structured in the particular statute, violated Constitutional provisions requiring that all legislation be passed by both legislative houses and signed by the President. Typically, legislative veto procedures allowed one house of Congress to overturn an agency action by a resolution, with no requirement of passage by the other house or presidential signature. Other countries, particularly those that possess a parliamentary form of government, do not suffer from the separation-of-powers complexities that provoked the *Chadha* decision. Ronald J. Krotoszynski, *The Shot (Not) Heard 'Round The World: Reconsidering the Perplexing U.S. Preoccupation with the Separation of Legislative and Executive Powers*, 51 B.C. L. REV. 1, 20 (2010) (noting the "utter

theoretical utility,[223] and it continues to be included in statutes despite its unconstitutionality[224] and to be re-proposed in constitutionally compliant forms.[225]

In the IIL context, the closest existing equivalent to the legislative veto is the Free Trade Commission ("FTC") mechanism. The FTC consists of cabinet-level representatives from each NAFTA party, and its "interpretations" are binding upon NAFTA Chapter 11 tribunals.[226] The FTC model has been followed in subsequent U.S. free trade agreements,[227] and is reflected in the 2004 U.S. Model BIT.[228]

While some scholars argue that the FTC process is illegitimate because it allows the NAFTA parties to "amend" the NAFTA text without going through the formal treaty amendment process,[229] in fact tribunals have generally respected the FTC's interpretive authority.[230] Moreover, critics of the FTC process fail to recognize that the "FTC is not restricted to interpreting the NAFTA text in the same way as a court or tribunal. The FTC is a political institution. When issuing interpretive statements, the FTC can, and should, give policy considerations greater weight than concern for conceptual accuracy."[231]

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absence of concern in most other countries about placing legislative and executive functions in the same hands").

223. *See, e.g.*, Peter L. Strauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 DUKE L. J. 789, 789; Elizabeth M. Martin, *An Informational Theory of the Legislative Veto*, 13 J. LAW, ECON., & ORG. 319, 335 (1997).

224. Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 LAW & CONTEMP. PROBS. 273, 288 (1973).

225. *See, e.g.*, Regulations from the Executive in Need of Scrutiny Act (REINS Act), 5 U.S.C. §§ 801–07 (2011), *available at* http://geoffdavis.house.gov/UploadedFiles/REINS_Act_Bill_Text_112th_Final.pdf.

226. NAFTA, *supra* note 204, at art. 2001, 1131.

227. For example, Article 19.1 of DR-CAFTA establishes an FTC with the authority to interpret the treaty, and Article 10.22 establishes FTC interpretations as "binding" upon DR-CAFTA investor-state tribunals, whose decisions and awards "must be consistent with that [interpretive] decision." DR-CAFTA, *supra* note 204, at art. 19.1, 10.22.

228. 2004 U.S. Model BIT, *supra* note 29, at art. 30 ("Governing Law") ("A joint decision of the Parties, each acting through its representative designated for purposes of this Article, declaring their interpretation of a provision of this Treaty shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision.").

229. *See, e.g.*, Charles H. Brower, II, *Why the FTC Notes of Interpretation Constitute a Partial Amendment of NAFTA Article 1105*, 46 VA. J. INT'L L. 347, nn. 4, 23 (2006) (providing citations). On the other hand, the Vienna Convention on the Law of Treaties (VCLT) provides few requirements for treaty amendments. The main requirement is simply an "agreement between the parties." VCLT, *entered into force* Jan. 27, 1980, 1155 U.N.T.S. 331 art. 39. Professor Brower, however, suggests that the FTC is bound by the Vienna Convention's Article 31, Browers, *supra*, at 356–58 (applying a reasonableness of interpretation standard based VCLT art. 31), which provides "general rules of interpretation" of treaties, the most important of which is that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." *See* VCLT, *supra*, at 356–58.

230. Jack J. Coe, Jr., *Taking Stock of NAFTA Chapter 11 in Its Tenth Year: An Interim Sketch of Selected Themes, Issues, and Methods*, 36 VAND. J. TRANSNAT'L L. 1381, 1429 (2003).

231. Joshua Elcombe, Note, *Regulatory Powers vs. Investment Protection under NAFTA's Chapter 1110:* Metalclad*,* Methanex*, and* Glamis Gold, 68 UNIV. TORONTO FAC. L. REV. 71, 98 (2010).

As a mechanism of ex post control, the FTC model is most effective in the bilateral context. This is because FTC interpretations depend on unanimity among treaty partners, and unanimity will generally be more difficult to achieve as treaty membership grows.[232] As a mechanism of ex post control, the FTC model is most effective in the bilateral context. This is because FTC interpretations depend on unanimity among treaty partners, and unanimity will generally be more difficult to achieve as treaty membership grows.[233] To implement a legislative veto akin to the FTC process without requiring unanimity would require the negotiation of majority voting rules, something likely to be politically difficult to achieve because it would, in effect, amount to establishing a multilateral legislature authorized to impose binding amendments-as-interpretations upon dissenting parties. Multilateral treaties pose more serious control problems than do bilateral treaties, and for that reason, calls for the multilateralization of IIL through something like the failed Multilateral Agreement on Investment,[234] or its actual multilateralization through such instruments as the Dominican Republic-Central America Free Trade Agreement, seem especially unwise.

The FTC mechanism is not a perfect method of control. For example, the NAFTA FTC is not authorized to annul or overturn an award once the award has been rendered. An FTC interpretation is binding on Chapter 11 proceedings that have not yet been initiated; an interpretation would most likely also bind a proceeding that has been initiated but not completed.[235] But it could not retroactively "undo" an award that has already been issued in final, binding form. In something of a contrast, legislative vetoes in the U.S. system typically allowed the legislature to veto regulations prior to their entry into effect. The contrast lies in the fact that the legislative veto allowed Congress to undo a regulation without having to wait for the regulation to impact any particular person or entity. Under the FTC mechanism, the FTC will generally have to wait until an undesirable rule is announced and applied as to at least one party before closing off that jurisprudential approach as to future cases.

Moreover, just as it is impossible to draft "perfect" treaty provisions, so too is it impossible to draft "perfect" FTC interpretations. FTC interpreta-

232. For example, under DR-CAFTA art. 19.1, "[a]ll decisions of the Commission shall be taken by consensus," including the decision to issue a binding interpretation, "unless the Commission otherwise decides" to follow a non-consensus decision rule. DR-CAFTA, *supra* note 204, at art. 19.1.

233. For example, under DR-CAFTA art. 19.1, "[a]ll decisions of the Commission shall be taken by consensus," including the decision to issue a binding interpretation, "unless the Commission otherwise decides" to follow a non-consensus decision rule. DR-CAFTA, *supra* note 204, at art. 19.1.

234. *See* Rainer Geiger, *Toward a Multilateral Agreement on Investment*, 31 CORNELL INT'L L. J. 467, 467 (1998).

235. It may seem inherently unfair that the FTC could issue an interpretation binding upon tribunals in ongoing litigation. In some cases an international court might indeed find that legislative interference in litigation violates fundamental principles of due process. *See, e.g.*, *Case of Stran Greek Refineries and Stratis Andreadis v. Greece*, EUR. CT. H.R. 301-B (ser. A) (1994). However, generally domestic law finds little fault with the application of legislative changes to pending litigation, even where the legislative change extinguishes the cause of action. *See, e.g.*, *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429 (1992).

tions will suffer from their own gaps and ambiguities; IIL tribunals may refuse to grant the interpretations proper deference; or they may justify departures from the interpretation on the basis of changing customary norms; or state understandings of their preferred interpretations may change over time.[236] It would be unrealistic to imagine that an FTC-like interpretation could once and for all resolve a particular debate about the "best" IIL rule. Rather, the FTC process, like the process of notice-and-comment described in the previous Sub-Part, must be viewed as part of a robust, dialectic process—a dynamic conversation—between principal and agent.

Going beyond the FTC model, we can imagine a fuller version of IIL legislative veto, in which the state parties to a particular IIA might have an opportunity to jointly disapprove an award prior to its entry into force. Where the state parties disapprove an award, the award would have no legal effect as to the disputing parties. That is a rough description of the WTO dispute settlement system. WTO panel reports must be "adopted" by the WTO membership prior to having legal effect, and reports are deemed adopted unless the WTO membership unanimously refuses to adopt them.[237] Given the WTO's large membership, unanimity is difficult or impossible to achieve, and unsurprisingly no panel report has failed to achieve adoption. But in the IIL context, it is quite likely that awards would occasionally fail to be adopted, given that most IIL treaty relationships are either bilateral or, if multilateral, include only a relatively small handful of states, with unanimity correspondingly easier to achieve.

Establishing a WTO-like adoption process for IIL disputes would be controversial because it would allow states to extinguish both the lawmaking *and* the operative effects of an award in an investor's favor. A less radical proposal might allow state parties to an IIA to veto, by agreement, only the law-making aspects of an award. For example, a tribunal might be required to present the state parties with their final draft, with the states allowed to

236. The NAFTA FTC's 2001 interpretation of NAFTA Article 1105(1) provides an example of some of these limitations. There, the FTC interpreted Article 1105(1) (which provides a right to FET) as being equivalent to "the customary international law minimum standard of treatment of aliens." NAFTA FTC, Notes of Interpretation of Certain Chapter 11 Provisions, ¶ 2 (July 31, 2001). The FTC was presumably reacting to decisions by the tribunals in *Metalclad* and *Pope & Talbot* that interpreted Article 1105 as including a robust "transparency" requirement for domestic regulatory processes. *See, e.g.*, Zoellner, *supra* note 177, at 605–12 (discussing the *Metalclad* and *Pope & Talbot* cases in relation to the transparency element of FET). By expressly tying Article 1105(1)'s concept of FET to customary international law, the NAFTA Parties were ostensibly trying to limit FET to the minimum (and minimal) standard pronounced in the famous *Neer* case. *Neer v. United Mexican States*, 4 R.I.A.A. 60–62 (Oct. 15, 1926). Yet by tying Article 1105 FET to customary principles generally, the NAFTA Parties left open the possibility that tribunals would continue to interpret Article 1105 as incorporating a stronger-than-*Neer* standard, precisely because custom continues to evolve, and largely so at the direction of tribunals. This possibility was expressly addressed in the recent *Glamis Gold* NAFTA Chapter 11 arbitration, though the tribunal there placed the burden of proving such an evolution on the claimant investor, a burden which the claimant, in that case, could not meet. *See Glamis Gold Ltd. v. United States*, Award, at 345 (NAFTA Arb. Trib. 2009), *available at* http://www.state.gov/documents/organization/125798.pdf.

237. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 16, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.

strike any of the award's factual discussion or legal reasoning, except for those portions of the award stating the tribunal's fundamental conclusion (whether the state is liable to the investor or not—and, if liable, perhaps the specific treaty clauses under which it is liable) and the amount of damages and costs awarded.

Alternatively, we could re-conceptualize the state-parties' power as less one of actual "veto" than of preventing the publication of undesirable awards. For example, rather than giving states the power to strike award text prior to entry into force and publication, we could allow them to unanimously prevent an award from being published at all, either formally by the arbitral institution, or informally by the state-parties or the investor. By facilitating meaningful award confidentiality as to institutions *and* to the parties involved in the litigation, states would regain control over the law-making aspects of the IIL dispute settlement system without impinging on the investor's right to receive an operative, expert evaluation of his international legal rights. In contrast, current ICSID practice is to give non-disputing states to the relevant IIA no say in the decision of whether to publish an award.[238] Furthermore, even when the respondent state and the investor refuse to consent to publication, the ICSID Secretariat will nonetheless publish extensive excerpts of awards, a practice that arguably violates the ICSID Convention.[239]

It should be clear that this last proposal cuts against the grain of recent developments, in which key institutions like ICSID, as well as developed states like the United States, have argued for greater transparency of the IIL process. Indeed, the need for greater transparency is treated as a matter of basic common sense.[240] But transparency comes at a cost that is hardly ever acknowledged in the IIL literature, either by critics or supporters of current arrangements. By making IIL decisions more visible, we make them more law-like and less subject to state control. Less visibility of the system's workings is thus not necessarily a bad thing, though it does entail trusting the states involved to make "good" decisions away from prying eyes. But as Mark Fenster has recently argued, both the achievability and the value of full governmental transparency are more questionable than commonly sug-

238. ICSID Convention, *supra* note 1, art. 48(5) ("The Centre shall not publish the award without the consent of the parties [to the dispute].").

239. ICSID Arbitration Rule 48(4) ("The Centre shall not publish the award without the consent of the parties. The Centre shall, however, promptly include in its publications excerpts of the legal reasoning of the Tribunal."); Wong & Yackee, *supra* note 112 (describing how ICSID has implemented Rule 48).

240. Meg Kinnear, Sec'y-Gen. of ICSID, Paper presented at the ICSID, OECD and UNCTAD's co-organized "Making the Most of International Investment Agreements: A Common Agenda" Symposium: Transparency and Third Party Participation in Investor-State Dispute Settlement (December 12, 2005), *available at* http://www.oecd.org/dataoecd/6/25/36979626.pdf ("One of the biggest challenges in investor-State dispute settlement in the last decade has been the demand for greater transparency and the implementation of government initiatives responding to the demand. The need for transparency is so obvious to many contemporary observers that the only mystery is why it has taken so long to address this issue.").

gested.[241] Full transparency in IIL simply transfers the "trust" issue from the government to IIL policymakers, who are entrusted with making wise law-like decisions. Supporters of international arbitration are comfortable with this transfer. Carbonneau argues for instance that international arbitration necessarily requires us to "trust the arbitrator to reach the 'right' or a plausible conclusion—or, at least, not to settle on a profoundly repugnant determination."[242] If the goal of the IIL system is to avoid only "profoundly repugnant" rules, then perhaps the existing system of control is sufficient. But given the importance of the issues involved, it seems worth considering whether states might be justified in wanting to establish mechanisms that allow them to ensure not just a lack of "repugnance," but a closer fit between their own conceptions of proper IIL rules and those announced by IIL actors who are currently only imperfectly subject to state control.

VII. Concluding Thoughts

Judge Brower, an eminent international jurist and scholar, and a frequent IIL arbitrator, has responded to critics of the IIL system by asking, "who then shall decide?"[243] Who shall have ultimate decisionmaking authority over the contested rules of the IIL game? From Judge Brower's perspective, we should trust Judge Brower to decide the rules, whether he is acting in the role of counsel, arbitrator, or scholar, because he is Judge Brower—a man with a hard-earned and deserved reputation for expertise, experience, intelligence, fairness, and common sense; a dealer in virtue, as Dezalay and Garth might say.[244] But what we expect from Judge Brower, as virtuous as he may be, is changing. It is becoming more complicated, and the implications of any single decision are more far-reaching than they once were. Judge Brower is not simply deciding disputes; he is making policy. While I have no reason to doubt Judge Brower's exceptional capabilities in either role, it is increasingly difficult to support the position that Judge Brower and his colleagues in the IIL agency should have the *final* word on what IIL policy should be. States do and should have an important role to play. The key question is one of institutional design: how might we amend the IIL system in order to ensure that states retain or enhance their role as the ultimate deciders of IIL rules, without completely abandoning the benefits that binding dispute settlement by experts probably provides?

I have argued that there is some utility in thinking about IIL as an agency-like system of actors, engaged in exercising delegated, expertise-

241. Mark Fenster, *The Opacity of Transparency*, 91 Iowa L. Rev. 885, 914-35 (2006) (questioning the practical value of transparency in government policymaking); Mark Fenster, *Seeing the State: Transparency as Metaphor*, 62 Admin. L. Rev. 617 (2010) (discussing practical difficulties in realizing full governmental transparency).

242. Thomas E. Carbonneau, *Arbitral Law-Making*, 25 Mich. J. Int'l L. 1183, 1206 (2003).

243. Brower & Steven, *supra* note 33.

244. Dezalay & Garth, *supra* note 50.

based policymaking authority. An agency analogy encourages us to broaden our institutional focus beyond investment treaties and investment tribunals, recognizing that those institutions exist and operate within a larger network of IIL actors that are working together in semi-coordinated fashion to create, apply, and administer the IIL rules of the game. The agency analogy also underscores the agency's quasi-legislative function, and it suggests that the key dilemma posed by the system centers on the problem of supervision and control, not of the *legal* correctness of the agency's outputs, but on their *political* correctness.

The agency analogy is not perfect. In particular, it seems clear that the IIL agency, in its current form, remains less "modern" (in Edward Rubin's terms) than the domestic administrative state that I have claimed it resembles, in that it is one in which judges are given primary responsibility for elaborating and implementing the relevant rules, developing them in a relatively piecemeal and incremental fashion while officially disclaiming any creative license or authority or ability to elaborate a coordinated and comprehensive regulatory system. A reliance on judges as the primary source of regulation is, according to Rubin, the key characteristic of the pre-modern state.[245] The IIL agency is also less internally hierarchical than is a modern agency,[246] even if internal hierarchies do exist.[247] It is also not well equipped to engage in the construction of elaborate, comprehensive, and prospective regulatory regimes, even if it is increasingly being asked to judge whether such regimes, created by others, are permissible.[248] The IIL agency is not the Surface Transportation Board or the Food and Drug Administration. At the same time, the IIL system is in the process of modernizing. IIL rules are becoming thicker and harder, and while they are developing incrementally, they are also developing much more quickly than they have in the past.

Furthermore, IIL rules are increasingly developed not in relative isolation (as were the rules announced in an earlier generation of contract-based arbitrations) but rather are informed by a series of vigorous and lively dialogues taking place within a dense network of IIL experts. Those experts—IIL arbitrators included—have not been told to develop a comprehensive system of investment regulation in so many words, but it seems clear that they are, in fact, increasingly being asked to balance a much more complex set of values,

245. Rubin, *supra* note 41, at 96–97 (describing the pre-administrative state). Unlike domestic judges, however, IIL arbitrators are not legal generalists, but are experts in their field. This expertise makes them more like adjudicators in modern agencies, and less like judges in pre-modern times.

246. Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2119–34 (2005) (describing the hierarchical nature of the modern administrative state); Edward L. Rubin, BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN STATE, 96–109 (2005) (also describing the hierarchical nature of the modern administrative state).

247. Those internal hierarchies are both formal (e.g. the ICSID annulment process) and informal (e.g. the special influence exercised by the IIL community' most esteemed members, the people that Dezalay and Garth, *supra* note 50, refer to as "grand old men" but which increasingly these days include formidable women as well).

248. *See* cases cited *supra* note 11.

in an increasingly complex, sophisticated, and comprehensive way.[249] We see this trend toward regulatory comprehensiveness and complexity in proposals to incorporate investor obligations into investment treaties, as suggested most prominently by the International Institute for Sustainable Development's Model BIT.[250] We see it in modern IIA preambles, which tend to emphasize a much broader and more inherently conflicting set of treaty goals, such as the importance of maintaining labor, environmental, or human rights standards.[251] And we see it in aggressive investor challenges to state regulations, such as Philip Morris's, that ask tribunals to become deeply involved in sensitive questions of public health policy.

Perhaps the problem is that the IIL system is becoming unevenly modern. It is semi-formal, semi-comprehensive, and semi-rational in a Weberian sense, but it lacks the full set of attributes of the modern administrative state that ensures an adequate measure of accountability. In resolving the inherent tension between the need for executive (or legislative) control and rule by expertise,[252] the IIL system currently errs on the side of the latter, where experts are trusted (and content) to control themselves.

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249. As Burke-White and von Staden have observed,

> The growth in investor-state arbitration has gone hand in hand with a diversification of the issues at stake in the underlying disputes. Far from being limited to merely technical questions, contemporary investment arbitrations frequently implicate the scope of the regulatory powers of the respondent states and reach well beyond the traditional concerns with simple expropriations and nationalizations. Instead, a much broader variety of regulatory and public goods disputes has come to be addressed through investment arbitration, ranging from the provision of basic public services, such as water and sanitation, to the maintenance of public order.

William W. Burke-White & Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitration*, 35 YALE J. INT'L L. 282, 284 (2010). *See also* UNCTAD/ITE/IIA/2007/3, *supra* note 161, at 5 (noting that "international investment rules are becoming increasingly sophisticated and complex"); *id.* at 71 (noting that investment treaties have evolved to address "a broader range of issues"). The IIL systems' comprehensive aspirations are especially evident in the literature supporting the development of a large-membership multilateral investment treaty. *See, e.g.*, Geiger, *supra* note 234, at 469 (calling for a "comprehensive" and "evolutionary" Multilateral Agreement on Investment [MAI]). Even though the MAI negotiations failed, Schill argues that the spread of bilateral IIAs has resulted in the de facto, if not de jure, multilateralization of IIL. Stephan W. Schill, *The Multilateralization of International Investment Law: Emergence of a Multilateral System of Investment Protection*, 2 TRADE, L. & DEVEL'T 59, 80–83 (2010).

250. Howard Mann et al., *IISD Model International Agreement on Investment for Sustainable Development*, Int'l Inst. For Sustainable Development (2006), *available at* http://www.iisd.org/pdf/2005/investment_model_int_handbook.pdf.

251. For example, the preamble to the U.S.-Uruguay BIT, emphasizes that the treaty's objectives should be realized "in a manner consistent with the protection of health, safety, and the environment, and the promotion of consumer protection and internationally recognized labor rights." Treaty between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment preamble, U.S.-Uru., Nov. 4, 2005, [U.S. treaty source not found], *available at* http://www.ustraderep.gov/World_Regions/Americas/South_America/Uruguay_BIT/Section_Index.html. *See also* Luke Eric Peterson, *Selected Recent Developments in IIA Arbitration and Human Rights*, IIA Monitor No. 2 (2009); UNCTAD/WEB/DIAE/IA/2009/7 at 2 (discussing the "increasing . . . interest in questions of whether, to which extent, and how State's human rights obligations may come into play in [investor-state] arbitrations").

252. Rubin, *supra* note 41, at 155–56 (noting this inherent tension).

We can imagine solutions that make the IIL system either more modern or less. We can recognize and affirm the desirability of rationality, of the independent exercise of expert judgment, in the development and application of IIL policy, but also to recognize the need to ensure that independent, rational, expert decisionmaking actually achieves the values that societies chooses to pursue. One way of doing that is to institutionalize a clearer appreciation of hierarchy. As Judge Brower suggests, the fundamental question is "who decides," but he errs in implying that the system can have only one decider. Judge Brower can decide, but he should decide under the supervision of his superiors. His superiors are those who have authorized him to decide in the first place, and who are best placed to make the kinds of value judgments that, as Rubin suggests, help us to avoid Weber's famous "iron cage" of rule by experts.[253]

Alternatively, we can attempt to move the IIL system back to something more closely resembling its earlier incarnation, where the domestic legal order played a larger role, where IIL rules were announced and applied in little-publicized awards or through diplomatic settlement, and where disputes that escaped domestic or diplomatic resolution were settled internationally less on the basis of "law" than on basic equitable principles, with arbitrators acting, essentially, as *amiables compositeurs*.

One of the main goals of my Article has been to suggest that there is nothing inherently wrong with states correcting the course of the IIL ship. Such corrections are perfectly normal in a principal-agent relationship in which the agent is exercising delegated policymaking authority. Using an agency analogy, I have suggested a number of mechanisms to facilitate state correction. Those suggestions primarily entail the adaptation of notice-and-comment and legislative veto concepts to the dispute resolution process. My suggestions can be criticized for re-politicizing an allegedly "depoliticized" process,[254] but the notion that IIL policymaking can or should be divorced from politics is a doubtful one.[255] The mission of the IIL agency is inherently political, and inherently and legitimately subject to political control.

253. Rubin, *supra* note 41, at 158–60.

254. Shihata, *supra* note 17, at 102–03 (describing the purpose of the ICSID system the depoliticization of investment disputes); Bjorklund, *supra* note 117, at 241 (warning that the "re-politicization of investment arbitration would be an unfortunate and reversionary step back to the era of power politics and gunboat diplomacy").

255. Rachel E. Barkow, *Insulating Agencies: Avoiding Capture through Institutional Design*, 89 TEX. L. REV. 15, 58 (2010) (noting that "Agencies are political creatures. . .. That is the nature of our governmental structure" and that it would be "impossible" to take "the politics out of agency design or operation").