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## Conceptualizing the Shapeshifting Nature of Investment Law(yers)

Responding to Jason Yackee, *Controlling the International Investment Law Agency*,  
53 HARV. INT'L. L.J. 392 (2012).

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*Within international law, international investment law (IIL) has become one of the topics that is en vogue. This follows on the heels of two interrelated developments. First, the proliferation of international investment agreements (IIA), most in the form of bilateral investment treaties (BITs), others forming part of more encompassing trade and investment agreements.<sup>1</sup> Second, following*

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<sup>1</sup> U.N. Conference on Trade and Dev., World Investment Report 2011, at 100, U.N. Sales No. E.11.II.D.2 (2000).

*this increase in investment protection for investors, there has been a surge of cases that have been adjudicated before international investment tribunals.<sup>2</sup>*

*The increasing practical importance of IIL has been accompanied by a (still) growing number of academic contributions. Adding to this literature is Jason Yackee's *Controlling the International Investment Law Agency*, which makes an important contribution to this field—while steering clear of the controversy over whether the system is overly friendly towards investors.<sup>3</sup> This brief comment will first outline the main arguments of Yackee's article (I.) and then critique some of the arguments it makes, specifically around whether there is indeed a functional IIL agency and Yackee's comparative analysis with domestic administrative agencies (II.), before offering some concluding remarks (III.).*

## I. MAIN THRUST OF THE ARTICLE

Yackee's article tackles the question of how to adequately capture the growth of international investment arbitration while maintaining a functioning investment arbitration system. This question becomes even more relevant as "IIL actors are being asked to engage in complex and politically fraught value-balancing exercises."<sup>4</sup> His analytic framework—informed by his training as both a legal scholar and a political scientist—is that of the domestic administrative agency, made up by the participants of IIL, who form their own epistemic community. By using this framework, Yackee captures a particularly critical element of all multi-level governance structures, namely how and to what extent political authority is being delegated to expert decision-makers who may not be subject to "sufficient mechanisms of state political control."<sup>5</sup> This is not a new concern, but has been debated in diverse contexts such as the

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<sup>2</sup> *The ICSID Caseload—Statistics (Issue 2012-1)*, INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES (2012); *Latest Developments in Investor-State Dispute Settlement*, UNCTAD IIA ISSUES NOTE, No. 1, April 2012, available at

[http://unctad.org/en/PublicationsLibrary/webdiaeia2012d10\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaeia2012d10_en.pdf).

<sup>3</sup> For an overview of the debate see the contributions in MICHAEL WAIBEL, *THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY* (2010). See also Nicolas Hachez & Jan Wouters, *International Investment Dispute Settlement in the 21st Century: Does the Preservation of the Public Interest Require an Alternative to the Arbitral Model?* 8–15 (Leuven Ctr. for Global Governance Studies, Working Paper No. 81, 2012), available at <http://ssrn.com/abstract=2009327>.

<sup>4</sup> Jason Webb Yackee, *Controlling the International Investment Law Agency*, 53 HARV. INT'L L.J. 391, 393 (2012). For various approaches of how to deal with the extent of governments' policy space, see Markus Wagner, *Law Talk v. Science Talk: The Languages of Law and Science in WTO Proceedings*, 35 FORDHAM INT'L L.J. 151, 180–93 (2011).

<sup>5</sup> Yackee, *supra* note 4, at 394, 416–17.

increasing integration of the European Union<sup>6</sup> or the WTO,<sup>7</sup> but also in other less-obvious contexts such as the UN.<sup>8</sup> His concerns are based on the potential of states leaving the international investment law system—as has been the case with Bolivia, Ecuador and Venezuela<sup>9</sup>—rather than on “reform[ing] a probably useful system of international governance”.<sup>10</sup> This step—though rarely exercised—is on the far side of a spectrum of how to shape IIL governance which includes, in Yackee’s opinion, inadequate control mechanisms to prevent the IIL agency from acquiring too much power. This includes the lack of control over government personnel, as well as attempts to more precisely circumscribe the powers allocated to, or usurped by, the agency.

In addition, Yackee identifies precedent and custom as areas in which states no longer have a prerogative. This power shift is worrying—and according to the article even more so in the IIL field—because of its character as a highly networked field with high barriers to entry for outsiders. Whether the article’s proposed solutions—consisting of procedural requirements taken from US administrative law such as notice-and-comment opportunities for states (regardless of whether they are a party in the particular dispute or not) as well as forms of “legislative veto”—are adequate

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<sup>6</sup> Ingolf Pernice, *Constitutional Law Implications for a State Participating in a Process of Regional Integration: German Constitution and “Multilevel Constitutionalism”*, in GERMAN REPORTS ON PUBLIC LAW. PRESENTED TO THE XV. INTERNATIONAL CONGRESS ON COMPARATIVE LAW, BRISTOL, 26 JULY TO 1 AUGUST 1998 40 (Eibe Riedel ed., 1998); LIESBET HOOGHE & GARY MARKS, MULTI-LEVEL GOVERNANCE AND EUROPEAN INTEGRATION (Rowman & Littlefield Publishers 2001).

<sup>7</sup> Andrew Guzman, *Global Governance and the WTO*, 45 HARV. INT’L L.J. 303, 341 (2004); Ernst-Ulrich Petersmann, *International Economic Law, ‘Public Reason’ and Multilevel Governance of Interdependent Public Goods*, 14 J. INT’L ECON. L. 23, 41 (2011).

<sup>8</sup> Steven R. Ratner, *Foreign Occupation and International Territorial Administration: The Challenges of Convergence*, 16 EUR. J. INT’L LAW 695 (2005). See generally Armin von Bogdandy & Philipp Dann, *International Composite Administration: Conceptualizing Multi-Level and Network Aspects in the Exercise of International Public Authority*, 9 GER. L.J. 2013, 2020 (2008); Ramses A. Wessel & Jan Wouters, *The Phenomenon of Multilevel Regulation: Interactions between Global, EU and National Regulatory Spheres*, 4 INT’L ORGS. L. REV. 259, 263 (2007).

<sup>9</sup> See *Denunciation of the ICSID Convention and BITs: Impact on Investor-State Claims*, UNCTAD IIA ISSUES NOTE, No. 2, December 2010, available at [http://unctad.org/en/Docs/webdiaeia20106\\_en.pdf](http://unctad.org/en/Docs/webdiaeia20106_en.pdf). See also *Gobierno Bolivariano denuncia convenio con Ciadi*, MINISTERIO DEL PODER POPULAR PARA RELACIONES EXTERIORES (Jan. 26, 2012),

[http://www.mre.gov.ve/index.php?option=com\\_content&view=article&id=18939:mppre&catid=3:comunicados&Itemid=108](http://www.mre.gov.ve/index.php?option=com_content&view=article&id=18939:mppre&catid=3:comunicados&Itemid=108) (stating that Venezuela is the latest country to have withdrawn from ICSID in 2012). For an analysis of the Australian announcement to no longer include investor-state arbitration in future IIAs, see Jürgen Kurtz, *Australia’s Rejection of Investor-State Arbitration: Causation, Omission and Implication*, 27 ICSID REV. 65 (2012).

<sup>10</sup> Yackee, *supra* note 4, at 399–400.

mechanisms, or whether there are other mechanisms that may be more promising will be discussed below.<sup>11</sup>

The article's main arguments should be taken very seriously. This is all the more important at a time when IIL moves from resolving discrete disputes to situations where the regulatory fabric of states or supranational entities is the subject of investment arbitration.<sup>12</sup> What Yackee is concerned with is the lack of control by states in the IIL system. This is what makes his article so potentially compelling—and certainly worth reading: if Yackee's conception of the players forming part of an agency is correct and if the players in the system truly act—intentionally or not—in concert with one another for the promotion of the “international investment law agency”, then there would indeed be a troubling loss of control over those players. The question then turns to how accurate and useful the agency conception is.

## II. CRITIQUE OF MAIN ARGUMENTS

### A. *The utility of describing the IIL system as an “agency”*

By describing and analyzing the IIL system as an agency, Yackee implicitly rejects competing conceptions such as the constitutional framework advanced by Schneiderman<sup>13</sup> or the more traditional view of thinking about IIL as discrete disputes with little or no impact on those beyond the immediate parties.<sup>14</sup> Rather, he aligns himself with the school of thought that perceives public international law as an exercise of global administrative law (GAL).<sup>15</sup> In the IIL area this type of scholarship has been most prominently advanced by writers such as Van Harten and Loughlin.<sup>16</sup>

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<sup>11</sup> See Yackee, *supra* note 4, at 426–30, 434–45.

<sup>12</sup> Consider the attempts by tobacco companies to challenge Australia's regulation of cigarette packages. See Tania Voon & Andrew D. Mitchell, *Time to Quit? Assessing International Investment Claims Against Plain Tobacco Packaging in Australia*, J. INT'L ECON. L. 515 (2011).

<sup>13</sup> David Schneiderman, *Investment Rules and the New Constitutionalism*, 25 L. & SOC. INQUIRY 757 (2000).

<sup>14</sup> See, e.g., Andrea K. Bjorklund, *Investment Treaty Arbitral Decisions as Jurisprudence Constante*, in INTERNATIONAL ECONOMIC LAW: THE STATE AND FUTURE OF THE DISCIPLINE 265, 274 (Colin Picker et al. eds., 2008); Jeffery P. Commission, *Precedent in Investment Treaty Arbitration—A Citation Analysis of a Developing Jurisprudence Precedent in Investment Treaty Arbitration*, 24 J. INT'L ARB. 129, 141 (2007); Mark C. Weidemaier, *Toward a Theory of Precedent in Arbitration*, 51 WM. & MARY L. REV. 1895, 1905 (2010).

<sup>15</sup> Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15 (2005).

<sup>16</sup> Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT'L LAW 121 (2006).

But—and this is the great contribution of Yackee’s article—he goes beyond the traditional GAL paradigm that describes IIL as an exercise of public authority: rather than assigning to IIL tribunals the mere function of reviewing domestic acts as Van Harten and Loughlin do, he suggests that we 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.<sup>17</sup>

This setup allows Yackee to describe these functions in greater detail, using a (stylized) domestic administrative agency model as a blueprint. The utility of the model is apparent. It not only allows for a theoretical explanation of the rule-making element that international tribunals possess,<sup>18</sup> but also realigns the structure of the IIL universe—shifting power away from the tribunals, where the constitutionalization model would place it, and back to the states. This reveals one of Yackee’s underlying apprehensions: he is less concerned with the question of how to control states than with how to control the members of the agency. In particular this brings up the issue of states’ (in)ability to control the arbitrators and, more specifically, their quasi-legislative function. Most importantly, the framework allows a more poignant discussion about what could also be framed as a lack of legitimacy in that “unaccountable, transnational elites-cum-bureaucrats might impose undesirable policies upon domestic polities.”<sup>19</sup>

#### 1. Members of the agency

One of the first questions that have to be addressed is the question of who forms part of the “agency.” Traditional agencies have a particular role to play, a relatively clear structure, which often comes in the form of a diagram, with more or less direct lines of responsibility from one level to the next. Different individuals within an agency are given particular tasks and can rise within the ranks (or sometimes get stuck at a particular level). There are often particular requirements, the fulfillment of which is a prerequisite to be permitted to become part of an agency.

Very few such requirements exist for the IIL agency. Regarding the membership of the agency a number of questions arise. Given the nature of some of the participants as changelings, it is not always clear who—at any given moment—is a member of the

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<sup>17</sup> Yackee, *supra* note 4, at 397.

<sup>18</sup> This is true despite provisions such as Article 59 of the ICJ Statute or Article 3(2) DSU in the WTO context. The same is true for the domestic level, see only the debate surrounding the rule-making authority at the U.S. Supreme Court level, which is an almost uniquely American debate.

<sup>19</sup> Yackee, *supra* note 4, at 399. For a recent review of the scholarship on legitimacy, see Nienke Grossman, A New Approach to the Normative Legitimacy of International Courts (unpublished manuscript) (on file with author).

organization and what role they play. The article lists the members of this invisible college of international investment lawyers<sup>20</sup> as: officials from governments and from international organizations;<sup>21</sup> private sector individuals, such as “lawyers at the most prestigious law firms” who—as the enforcement mechanism—serve as “private attorney[s]-general”, but also as arbitrators and writers of scholarship or policy briefs; and scholars (who sometimes also act as arbitrators, witnesses or advocates) whose task—at least ideally, as non-interested parties—is to elicit the underlying structures of IIL (as is the case with this article, making Yackee a member of the “agency”). The latter two groups are more amorphous and it is less clear what role they play at any moment and to whom or what they are beholden. Even less clear is the status of those that the article describes as being “affiliated” with the IIL agency, such as the International Bar Association, which has a considerable impact regarding the rules on independence and impartiality, but operates outside of any potential control mechanism as it is a private organization.

Furthermore, there is no strict hierarchy between the members, although an informal one does exist.<sup>22</sup> This has not only to do with the educational and professional background of the person and the number of cases in which he or she has acted as counsel or arbitrator, but also with less tangible factors such as his or her standing within the community. It is here that the agency metaphor becomes problematic in that there is, compared to the domestic agency, far more fluidity. Domestic public officials—at least by and large—do not “shift[] relatively easily between public and private service, between advocacy and adjudication and scholarship, [nor do] they self-police each other’s commitment to the common cause”.<sup>23</sup>

The delineation of who is and who is not a member of the “agency” is far from clear. Some commentators have described the core of the IIL community as an “arbitration fraternity”, as a type of citation cartel that operates at the expense of those that may bring different points of view to the table.<sup>24</sup> All of this leads to the conclusion that the agency conception appears to be an apt description for some of its “members,” but not for all. Particularly problematic is the changing nature of some of the “members” of this agency, which take on different roles at different times and are, at least not permanently, part of a hierarchical system that generally characterizes domestic agencies.

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<sup>20</sup> See Oscar Schachter, *The Invisible College of International Lawyers*, 72 NW. U. L. REV. 217 (1977).

<sup>21</sup> Yackee, *supra* note 4, at 404–06.

<sup>22</sup> *Id.* at 446.

<sup>23</sup> *Id.* at 403.

<sup>24</sup> M. Sornarajah, *Power and Justice: Third World Resistance in International Law*, 10 SING. Y.B. INT’L L. 19, 31 (2006).

The lack of clarity on these issues creates the very control problem that Yackee identifies in the article. Even if states desired to exert more control over the agency members, it is not clear that it would be possible to do so, given the private nature of many of the participants in the “agency” as well as the lack of clear lines of responsibility among the members of the investment law community.

## 2. Powers of the agency

Another important part of the article concerns the powers of the “agency.” The article’s framework of the administrative agency, serves the article’s purpose by describing the three classic functions of a state that this “agency” performs: the adjudicative, legislative, and executive functions. Yackee’s first critique concerns not only the functions that the members of this epistemic community perform, but also the fact that these members appear to have the final say over the design of the rules that they themselves follow and continue to influence.<sup>25</sup> This epistemic community consists of government representatives in a variety of forms on the domestic and international level, lawyers in various capacities, academics, and professional organizations.

The agency’s three functions are clearly, even elegantly, laid out. Yackee shows how the players are indeed changelings whose roles morph between at least two functions—the judicial and the legislative function. In this framework, the adjudicative function is at first blush the least controversial of the three functions, as it is after all the main task of adjudicative procedures. This is true at least in the narrow sense of how IIL was understood in the past, when it dealt with discrete disputes between an investor and a state regarding individual and concrete decisions. The executive function is relatively weak and concerns the internal rulemaking role of, e.g., the ICSID Secretariat or the externally-oriented shaming function for misbehaving states.<sup>26</sup> The section on the quasi-legislative role of IIL, by contrast, is arguably one of the best features of the article, laying out what is for some the most controversial element of the international investment law regime: its quasi-legislative function.<sup>27</sup> In addition to the government representatives who craft IIAs at the outset, the article focuses on the rule-making. It goes well beyond the orthodox view that any adjudicative decision concerns only a particular and discrete dispute, and instead notes that tribunals have rule-making functions by, for instance, eliciting meaning from

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<sup>25</sup> Yackee, *supra* note 4, at 427–28. For a general overview of the generations of investment arbitration, see Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT’L L. (forthcoming 2013).

<sup>26</sup> Yackee, *supra* note 4, at 414–16.

<sup>27</sup> Yackee, *supra* note 4, at 410–14.

vague language contained in IIAs.<sup>28</sup> The implications, both for precedent within the IIL system as well as for international customary law overall, are potentially far-reaching.

With regard to precedent, the article points to the concern that one set of agency members may usurp powers that were designed to rest with states. Yackee clearly fears that “[t]oday’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” investment agreements or “the law that they desire to be bound by today.”<sup>29</sup> Yackee points to the dynamic system of precedent, which—once set in motion—will almost invariably follow in the direction it was originally given.

A similar problem exists with respect to international customary law, for which the “agency” also was not given a mandate, but over which it wields significant power. The problem presents itself not only for the function of norm-creation, but also for changing norms. The implications of this concern may be even greater, given the potential for cross-fertilization among different fields of international law. With regard to both custom and cross-fertilization, it should be pointed out that IIL does not differ from other areas of international law. Despite attempts at reigning in international courts and tribunals,<sup>30</sup> (see e.g. Article 3.2 Dispute Settlement Understanding [DSU]) there may be an inherent tendency for any adjudicatory body both on the international and domestic level to create rules not because individual members of any system want to usurp power, but because there is a need to resolve a particular dispute on the basis of vague language. This dynamism is not only prevalent within the IIL field itself, but in the wider realm of international law. Cross-fertilization among different fields of international law is a common phenomenon.<sup>31</sup>

It is unclear at this point to what extent the different facets of IIL have had an impact on other fields of international law. General principles of law, e.g., various forms of

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<sup>28</sup> Andrea K. Bjorklund, *Investment Treaty Arbitral Decisions as Jurisprudence Constante*, in *INTERNATIONAL ECONOMIC LAW: THE STATE AND FUTURE OF THE DISCIPLINE* (Colin Picker et al. eds., 2008); Armin von Bogdandy & Ingo Venzke, *Beyond Dispute: International Judicial Institutions as Lawmakers*, 12 *GER. L.J.* 979 (2011); Charles N. Brower & Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 *CHI. J. INT’L L.* 471 (2009).

<sup>29</sup> Yackee, *supra* note 4, at 427 (emphasis in original).

<sup>30</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes art. 3.2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

<sup>31</sup> See generally Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, International Law Commission, UN Doc A/CN.4/L.682 (Apr. 13, 2006). For an analysis in IIL, see Jürgen Kurtz, *Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis*, 59 *INT’L & COMP. L.Q.* 325, 359–70 (2010).



the proportionality principle or procedural rights, have found entry into the IIL realm, thus ameliorating the concern that IIL is an isolated field of international law.<sup>32</sup> At this point, it does not appear that other areas of international law have been very receptive to the jurisprudence of international arbitral awards (notable exceptions include the Iran-U.S. Claims Tribunal, which has been cited widely by the International Court of Justice (ICJ), and more recently the general notion of procedural rights discussed in the ICJ's advisory opinion on the Administrative Tribunal of the International Labour Organization's (ILOAT) judgment number 2867).<sup>33</sup>

### 3. Adequacy of the agency *leitmotiv*

Having dealt with the membership of the agency and its powers, it is necessary to ask whether the article's central metaphor—likening the IIL system to an agency—is apt. As pointed out before, it is incredibly useful to enunciate certain features of the IIL system in a different light. Nevertheless, there are questions as to the appropriateness of the agency *leitmotiv*.

What is the model of the agency that the article employs? The article explains early on that it uses a stylized version of an administrative agency as a model,<sup>34</sup> but it is a heavily stylized U.S. administrative agency model and one that differs very much from

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<sup>32</sup> See Stephan Schill, *Cross-Regime Harmonization through Proportionality Analysis: The Case of International Investment Law, the Law of State Immunity and Human Rights*, 27 ICSID REV. 87 (2012); see generally Caroline Henckels, *Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration*, 15 J. INT'L ECON. L. 223 (2012); Benedict Kingsbury & Stephan W. Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law* (N.Y.U. Law Sch. Pub. L. & Leg. Theory Res. Paper Series, Paper No. 09-46), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1466980](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1466980); William Burke-White & Andreas von Staden, *The Need for Public Law Standards of Review in Investor-State Arbitrations*, in INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 689 (Stephan W. Schill ed., 2010).

<sup>33</sup> The WTO has scarcely made reference to ICSID tribunals in its jurisprudence so far. See Roger Alford, *Does the WTO Rely on Investment Arbitration Awards as Persuasive Authority?*, KLUWER ARBITRATION BLOG (Sept. 27, 2012), <http://kluwarbitrationblog.com/blog/2012/09/27/does-the-wto-rely-on-investment-arbitration-awards-as-persuasive-authority-2/>. For the ILOAT advisory opinion, see International Court of Justice, advisory opinion regarding Judgment No. 2867 of the Admin. Trib. of the Int'l Labour Org. upon a Complaint Filed Against the Int'l Fund for Agric. Dev. (Feb 1, 2012), at 18 available at <http://www.icj-cij.org/docket/files/146/16871.pdf>.

<sup>34</sup> Yackee, *supra* note 4, at 397.

administrative agencies elsewhere in the world.<sup>35</sup> If it is an agency, then a necessary question is what its mission is. Without going into detail, the article uses a definition that comprises “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”.<sup>36</sup> Yet in another part of the article, it does not appear that there is a shared understanding as to the goals of the enterprise among states.<sup>37</sup> If there was a shared understanding, it could be an argument in favor of Yackee’s main argument in that the epistemic community that controls IIL has moved away from the original conception and has created rules that are no longer aligned with the interests of states. It is, however, not altogether clear whether those goals were truly agreed upon in the past, (as opposed to being heavily favored by capital-exporting countries) or whether there is any such agreement at this point. But a minimal accord would be crucial if—as Yackee states—states are to “remain legitimately concerned with ensuring that the rules of the IIL game accord with state understandings of what the rules should be.”<sup>38</sup>

One of the most important elements in the description is the rule-making authority of administrative agencies. While it is true that U.S. administrative agencies are tasked with rule-making,<sup>39</sup> the extent to which administrative agencies in other countries have such powers is more limited.<sup>40</sup> To give but one example: Article 80 of the German Constitution proscribes in great detail that any law that authorizes an agency to issue a statutory instrument (and therefore engage in what is referred to as administrative rule-making in American terminology) must specify the “content, purpose, and scope of the authority conferred” and furthermore that “[e]ach statutory instrument shall contain a statement of its legal basis.”<sup>41</sup> Already by this language, but even more so through the so-called *Wesentlichkeitstheorie*, the extent to which agencies are able to craft rules similar to those crafted by U.S. agencies is more curtailed.

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<sup>35</sup> Francesca Bignami, *From Expert Administration to Accountability Network: A New Paradigm for Comparative Administrative Law*, 59 AM. J. COMP. L. 859, 882 (2011). See also the contributions in SUSAN ROSE-ACKERMAN & PETER L. LINDSETH, *COMPARATIVE ADMINISTRATIVE LAW* 185–306 (2010).

<sup>36</sup> Yackee, *supra* note 4, at 398. See also *id.* at 416 (using a similar definition, i.e. the “promotion and protection of foreign investment”).

<sup>37</sup> *Id.* at 421.

<sup>38</sup> *Id.* at 416. An interesting question would be whether agency personnel use the disagreement or disinterest by some states for a long time in order to advance its own goals?

<sup>39</sup> See Fuchs, writing in 1938 that “[a]dministrative rule-making is one type of function performed by administrative agencies” as the introductory sentence to his article. Ralph F. Fuchs, *Procedure in Administrative Rule-Making*, 52 HARV. L. REV. 259, 259 (1938).

<sup>40</sup> Jens-Peter Schneider, *Regulation and Europeanisation as Key Patterns of Change in Administrative Law*, in *THE TRANSFORMATION OF ADMINISTRATIVE LAW IN EUROPE/LA MUTATION DU DROIT ADMINISTRATIF EN EUROPE*, 307, 309 (Matthias Ruffert ed., 2007).

<sup>41</sup> GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [Basic Law], May 23, 1949, BGBl. I (Ger.), Article 80.

Under this theory and based on the rule of law principle laid down in Articles 20(3) as well as the principle of democracy laid down in Article 20(2)(1) Basic Law, any significant intrusion into the guaranteed rights of individuals must be made by politically responsible parliaments rather than by administrative agencies.<sup>42</sup> In practice this means that politically charged decisions are routinely made by parliament and are rarely left to administrative agencies.<sup>43</sup> Translated into IIL, this means that more emphasis should be placed on the drafting stage of IIA, rather than finding solutions that have an impact prior to, during or after the adjudicatory process.

Furthermore, decisions by German administrative agencies are often—and to a much greater extent than is true for U.S. administrative agencies both with respect to depth and breadth—subject to review by administrative courts. German administrative agencies enjoy far less latitude in their decision-making than do their U.S. counterparts.<sup>44</sup> Additionally, the actions of administrative agencies are oftentimes subject to an internal complaint procedure, after which they can be reviewed, not by administrative law judges that form part of the agency bureaucracy,<sup>45</sup> but rather are part of a panel operating wholly independently from the agency bureaucracy. Yackee's description of US administrative law is somewhat similar. The structural connection of U.S. administrative law judges to the agency for which they are to settle disputes and their lack of protections (such as life tenure and full independence) distinguishes them from the independent judiciary. Thus, the more meaningful and more independent review of agency action in the U.S. typically (at least in the majority of cases) takes place in federal courts that review agency action. But this then begs the question—is the parallel between administrative law judges and arbitrators adequate when one regards arbitrators not only as adjudicators, but also as part of an agency the mandate of which they are beholden to fulfill, and where the contours of the agency's mission are not clearly delineated? It appears that properly functioning domestic agency models are predicated on control by an independent judiciary. Administrative review—whether through administrative law judges that form part of an agency or through other internal mechanisms—appears insufficient to genuinely control the actions of states who are accused by investors of running afoul of the rules contained in a particular IIA.

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<sup>42</sup> See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 33 BVerfGE 125 (160), 47 BVerfG 46 (55) and 49 BVerfGE 89 (126–27).

<sup>43</sup> This is true at least with respect to the relationship between the domestic legislator and administrative agencies. It is less true for legislation that originates on the European level, once it is being implemented on the domestic level. PETER L. LINDSETH, *POWER AND LEGITIMACY: RECONCILING EUROPE AND THE NATION-STATE* (2010).

<sup>44</sup> See Jan S. Oster, *The Scope of Judicial Review in the German and U.S. Administrative Legal System*, 9 GER. L.J. 1267 (2008).

<sup>45</sup> Yackee, *supra* note 4, at 413.

Building the agency on a different administrative law model from that used in the article may lead to very different outcomes. Therefore, it may be useful to conduct research on different administrative law systems that may be followed. One approach would be to engage in comparative law scholarship to elicit the extent to which domestic administrative agencies actually create rules in a way comparable to how Yackee describes it.<sup>46</sup> Important strands of scholarship are currently tackling exactly this issue.<sup>47</sup> This does not detract from the important insight that the IIL system works in the way that Yackee describes, but it may be useful to evaluate the parallel on a wider scale. Such an analysis may actually serve to strengthen Yackee's point. It may result in a finding that the current model is in use in only a handful of domestic systems, with their own particularities. In addition, by creating a more independent form of review, similar to that which exists in other administrative systems, the goals of the article could be more easily achieved. This could mean, for example, separating the roles of arbitrators and counsel.

Other questions can also be asked: one wonders at times what is so special about IIL that sets it apart from other international regimes. If there is indeed an agency in IIL, wouldn't there be a similar agency in other fields of international law? Is there a similar epistemic community in WTO law to which the agency metaphor could be applied? Does the lack of a centralized organizational structure and its small size in the case of IIL make it a special case that sets it apart from other areas of international law? The answer may be that IIL is—because of the strong influence of private actors in various roles that are generally reserved for public actors and because of the lack of a central institutional structure—indeed *sui generis*. If that is the case however, the larger question—and one that remains unanswered—is whether IIL should serve as a model for other areas of international law or whether IIL should be modeled after—though should not replicate—other international regimes.

#### B. *Adequacy of proposed solutions*

Finally, the article proposes the adoption of two mechanisms from US domestic law that are designed to correct some of the shortcomings of the current system as well as those of other potential responses that the article outlined before. Such “legal transplants”<sup>48</sup> include the aforementioned notice-and-comment for non-respondent and respondent states as a control mechanism prior to or at the initiation of proceedings. Secondly, as an ex post mechanism the article suggests the use of the so-

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<sup>46</sup> See Yackee, *supra* note 4, at 417 (providing an example, which is, as pointed out above, unusual in its breadth for most other jurisdictions).

<sup>47</sup> The foremost example of this strand is STEPHAN W. SCHILL, *INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW* (2010).

<sup>48</sup> ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (1974).

called “legislative veto”.<sup>49</sup> Both of these mechanisms fit into the US administrative law paradigm and are attractive, given the general tendency of the article to regard states as the more legitimate, maybe even more benevolent, source for investment law—at least compared to the “agency” of the current system. Yet they may also produce unintended results in the international realm, which is why alternative options for comparisons could also be explored. One area that may be fruitful for such a comparison is WTO law. This is especially true given the relative proximity of IIL and WTO law.<sup>50</sup>

### 1. Notice and comment

Yackee proposes a notice-and-comment procedure for states, including those that are not involved in the particular dispute.<sup>51</sup> Some of the features of this system appear wholly uncontroversial and a neutral observer may ask why measures such as the publication of the key arbitral documents—such as the notice of intent to submit a claim to arbitration, the actual submission of a claim, and potentially even the party memorials—are not already in place bearing in mind that certain facts may have to be protected for intellectual property reasons.<sup>52</sup> How this would be implemented in a setting that consists largely of bilateral treaties is not entirely clear. In a multilateral system this may not be a problem. If the membership is large and diverse enough, different policies may be brought before the tribunal (in the absence of extant reasons to not participate). This is different in the bilateral context however. One can easily imagine situations in which in addition to the investor’s home state or the respondent state (which is already a party to the dispute by default) other states may have a heightened interest to participate in the proceedings because their public policies are similar to those of the respondent state or those of the investor. A case in point is the current dispute over the plain packaging of cigarettes between Australia and a cigarette manufacturer in which a range of states have a vested interest.<sup>53</sup> Since a number of states have indicated an intent to institute measures that mimic or are at least similar to those proposed by Australia, these states maintain an interest in being able to participate. Yackee’s suggestion to extend participatory rights in such a

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<sup>49</sup> Yackee, *supra* note 4, at 440–45.

<sup>50</sup> Whether one conceives of them both as administrative law models or views them as two closely related fields on the international plane is immaterial in this context.

<sup>51</sup> See Yackee, *supra* note 4, at 435–37 (citing existing mechanisms).

<sup>52</sup> The meetings of the panels and the Appellate Body (AB) were only opened to the public in 2005 and 2008, respectively. See generally Lothar Ehring, *Public Access to Dispute Settlement Hearings in the World Trade Organization*, 11 J. INT’L ECON. L. 1021 (2008).

<sup>53</sup> See generally Voon & Mitchell, *supra* note 12. For the WTO implications of the dispute, see Tania S. Voon & Andrew D. Mitchell, *Implications of WTO Law for Plain Packaging of Tobacco Products*, in PUBLIC HEALTH AND PLAIN PACKAGING OF CIGARETTES: LEGAL ISSUES, 109 (T. Voon & J. Liberman eds., A. Mitchell ed., 2012).

situation would not address their concerns as these states are rarely the non-responding state in an IIL dispute.

A similar procedure exists in the WTO dispute settlement system, albeit a stronger version than that envisioned in the article.<sup>54</sup> In order to avoid overburdening the dispute settlement mechanism third party rights are expressly limited to other WTO members. This is a separate procedure from the often-analyzed *amicus curiae* brief, the problematic history of which has been described elsewhere.<sup>55</sup> According to Article 10 of the DSU,<sup>56</sup> WTO members who are not directly involved in a dispute can nevertheless participate in the proceedings as third parties provided that they have a “substantial interest” in the dispute which may consist of factual or legal interest.<sup>57</sup> Third party rights initially extend from simply participating in the proceedings to providing written submissions or oral statement.<sup>58</sup> Moreover, under Article 10.3 DSU third parties also have the right to receive the parties’ submissions to the first meeting of the panel.<sup>59</sup> Remarkably, despite wording that could easily be construed to the contrary, panel practice has even expanded these rights in certain cases to allow third parties participatory rights beyond the first meeting based on the “economic impact”

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<sup>54</sup> The system is described in Yackee, *supra* note 4, at 439.

<sup>55</sup> See generally Robert Howse, *Membership and its Privileges: the WTO, Civil Society, and the Amicus Brief Controversy*, 9 Eur. L.J. 496 (2003).

<sup>56</sup> DSU *supra* note 30, at art. 10. See also Appendix 3.6 which states that

“[a]ll third parties which have notified their interest in the dispute to the DSB shall be invited in writing to present their views during a session of the first substantive meeting of the panel set aside for that purpose. All such third parties may be present during the entirety of this session.”

See generally Antonis Antoniadis, *Enhanced Third Party Rights in the WTO Dispute Settlement Understanding*, 29 LEGAL ISSUES OF ECON. INTEGRATION 285 (2002); Ngangjoh H. Yenkong, *Third Party Rights and the Concept of Legal Interest in World Trade Organization Dispute Settlement: Extending Participatory Rights to Enforcement Rights*, 38 J. WORLD TRADE 757 (2004); Armin Steinbach, *The DSU Interim Review—Need for its Elimination or Extension to the Appellate Body Stage?*, 12 J. INT’L ECON. L. 417 (2009).

<sup>57</sup> Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, ¶ 132, WT/DS27/AB/R (Sept. 9, 1997).

<sup>58</sup> See DSU, *supra* note 30, at art. 10.2.

<sup>59</sup> For further details, see Panel Report, *Canada—Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, ¶ 2.34, WT/DS103/RW, WT/DS113/RW (July 11, 2001) (stating that “the object and purpose of Article 10.3 of the DSU is to allow third parties to participate in an informed and, hence, meaningful, manner in a session of the meeting with the parties specifically set aside for that purpose.”) This was later on expanded so that third parties receive all of the submissions of the parties. See Panel Report, *United States—Tax Treatments for “Foreign Sales Corporations.”* ¶¶ 243–49, WT/DS108/RW (Aug. 20, 2001).

and “significant trade-policy impact” of the case as well as general due process considerations.<sup>60</sup>

Another suggestion concerns the award writing stage, where the article suggests including the views of non-responding states. Article 15 of the DSU may again serve as a blueprint as it contains many of the suggestions contained in the article. At the so-called Interim Review Stage panels are not only required to “issue the descriptive (factual and argument) sections of its draft report to the parties”, but also must incorporate the comments of the parties to the dispute concerning the draft report prepared by the panel into its interim report. The parties may then request that “precise aspects of the interim report” be reviewed.<sup>61</sup> The final report must take the comments by the parties into consideration and reflect on them in the final report. However—and importantly in the present context—third parties are not privy to either the draft report or the interim report. The issue to extend third party rights also to the interim review stage was discussed in *EC – Bananas III* with the panel pointing out that “to give third parties all of the rights of parties would inappropriately blur the distinction drawn in the DSU between parties and third parties.”<sup>62</sup> Thus, without the consent of the parties to the dispute, this stage is not open to third parties—despite considerable debate concerning this issue since 1995.<sup>63</sup>

The WTO’s dispute settlement mechanism provides a potential blueprint that is in important ways similar to the suggestions that the article outlines with respect to IIL. Third party participation is—because of the institutional basis—widely developed in the WTO context. Prior notice is a built-in feature of the WTO system, displaying a realization in WTO law that matters in dispute arising from a bilateral relationship are also of concern to other WTO members. The DSU allows for participatory rights in a dispute’s initial stage even without the consent of the parties to the dispute. The same is not true for the review stage. The article points out here that such a stage may offer

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<sup>60</sup> See Panel Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, Annex A ¶ 7, WT/DS246/R (Dec. 1, 2003). See also *EC—Bananas III*, WT/DS27/R, para. 7.8. It should be noted however that panels have discretion in this matter, though this discretion is, according to the AB, not unlimited. See Appellate Body Report, *United States—Anti-Dumping Act of 1916*, ¶ 150, WT/DS136/AB/R, WTDS162/AB/R (Aug. 28, 2000).

<sup>61</sup> DSU, *supra* note 30, at art. 15.2.

<sup>62</sup> See, e.g., Panel Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, ¶ 7.9, WT/DS27/R/USA (May 22, 1997).

<sup>63</sup> This may not be as much a problem in the context of WTO law, as WTO members can appeal a case to the AB for review and may use arguments brought forth by third parties. In the case of IIL such a procedure does not exist, therefore making such a proposal all the more pertinent. For a review of proposal to include third parties at all stages see THOMAS A. ZIMMERMANN, *NEGOTIATING THE REVIEW OF THE WTO DISPUTE SETTLEMENT UNDERSTANDING* 176 (2006).

parties to the dispute another chance to settle their disputes.<sup>64</sup> The practice of the WTO's dispute settlement procedure—while designed for the same reason as evidenced by Article 3(7) DSU—does not lend support to this proposition.<sup>65</sup> This points towards an inherent problem. If the procedure were to allow—for many good reasons—more access by other states by way of notice and at least to a certain extent the general public, the party that is about to prevail may be less amenable to a settlement of a dispute that may have already garnered considerable public attention.

## 2. Legislative veto

A second suggestion consists of the use of a “legislative veto”, a procedure from US administrative law that would essentially override the legislative function of IIL adjudicatory bodies. The suggestion is fine-tuned in that it would move from the current – undesirable – system, where states have no possibility of providing input during the drafting stage of an award, to one that would allow states to jointly disapprove a particular award's legislative function, but would retain the “operative effect” of an award.<sup>66</sup> This would be akin to the situation in the WTO regarding its concept of “negative consensus”, albeit on a much smaller scale – in which consensus may be easier to achieve among states. However, it is not at all clear that the conclusions and the reasoning are as easy to distinguish as the article makes it sound. It is precisely in areas where tribunals are being given discretion that law-making occurs. It is also the very essence of dispute settlement. The solution presented in which states could thus “strike any of the award's factual discussion or legal reasoning” with the exception of “those portions of the award stating the tribunal's fundamental conclusion” is problematic. Providing reasons allows at least the possibility of debating basic rationales, while the proposal could entail the danger of any discourse being severely curtailed. The AB found that providing a “basic rationale” —as required by Article 12(7) of the DSU— “reflects and conforms with the principles of fundamental fairness and due process.”<sup>67</sup> It furthermore serves to clarify the obligations of the parties and allows for modification, in an informed and meaningful manner, of behavior that was found to be inconsistent.

It would also be interesting to find out more about how the idea of only publishing the tribunal's fundamental conclusion relates to the previous proposal that would make public the initial stages of any dispute. If notice-and-comment, and thus

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<sup>64</sup> Yackee, *supra* note 4, at 439.

<sup>65</sup> There is little evidence to support that states settle their disputes at this late stage of the dispute settlement process. Steinbach, *supra* note 56, at 422.

<sup>66</sup> Yackee, *supra* note 4, at 443.

<sup>67</sup> Appellate Body Report, *Mexico—Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, ¶ 107, WT/DS132/AB/RW (Oct. 22, 2001).



“publicness,” is a desideratum at one point of the proceedings, it is not clear why the same would not be true at other stages. Moreover, it may tip the scales of power too much in favor of states and leave other interested parties (constituencies very different from states) without the reasoning of how the decision-makers arrived at the conclusion.<sup>68</sup>

In the end, this may be a matter of finding the right balance between the rights and obligations of states towards each other and their constituencies on one hand and the agency members on the other that appear to have become comfortable in a narrative through which they do not decide matters of public policy. There appears to be one feature of the IIL system that sets it apart from other legal systems on the international plane, namely the strong influence of the – rather closed – epistemic community that Yackee describes as the “international investment law agency”. What may be required is a closer supervision of not only the adjudicatory function that the arbitration panels have been tasked to carry out, but also—crucially—of the indisputable quasi-legislative function that the article describes.<sup>69</sup>

### 3. Alternative options for comparison

There is a tendency in the article to view states, at least, as the more benevolent actor compared to the members of the “agency”. There are—as this article and others before it have pointed out—a number of challenges to the existing system of IIL. It should however also be kept in mind that IIL was borne out of distrust of governments, who exhibited rent-seeking behavior to the detriment of investors. Given that capital streams are no longer a one-way phenomenon, the system is undergoing considerable changes. This in turn poses conceptual challenges. Yackee’s article is built on an assumption that states should have the final say and would be in a position to reject what under this vision are mere legislative “proposals”, but which

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<sup>68</sup> Most administrative law systems are premised on the idea that agencies should give reasons for their decision-making. The proposal could be seen as a departure from this premise. For an overview of the U.S. administrative law, see Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 DUKE L.J. 1811 (2012). For a global perspective, see Carol Harlow, *Global Administrative Law: The Quest for Principles and Values*, 17 EUR. J. INT’L LAW 187 (2006).

<sup>69</sup> I am not as skeptical as Yackee about the possibility better drafting. Compare Yackee, *supra* note 4, at 424. It is also not clear to what extent personnel control really is as inadequate as described in the article, as there is little evidence at this point that the government representatives act in concert with other members of the epistemic community of IIL to advance the interest of the “agency” as opposed to the interests of the governments they serve. Ultra vires acts by government officials are rare and although it is possible to argue that the “common bond” among government representatives in the IIL agency to advance its goals, it is questionable whether this supersedes the bond to the government representative’s home country. It should also be borne in mind that in a number of countries, government representatives are rotated to avoid exactly the situation described.

also fulfill another role as an adjudicative tool.<sup>70</sup> As pointed out above, it is difficult if not impossible to separate those two functions as clearly as would be necessary for the author's vision to become reality. Whether that balance can be struck by giving power to the states and, at the same time, potentially sacrificing the debate about the reasons and the rulings of investment tribunals, remains an open question.

There will be further debate over whether more state-centric solutions are the appropriate way forward and the article is an important contribution to this debate. There are good arguments that may point in the opposite direction, towards a stronger multilateral solution with a solid institutional structure. Taking cues from other international regimes, such as the WTO, may be useful. The merit of such proposals is that they are more encompassing, but they come at the cost of shifting power to an international institution, something which the article attempts to circumvent. But would it be possible to decouple the procedural features in the DSU (e.g., third party participation) from its multilateral and institutional backdrop as well as its self-understanding as an institution that deals extensively with public policy? Such a system would run into problems at the very least in selecting those entities that would be allowed in any particular dispute, given that IIL is a dispute settlement process that was designed to function between a private party and a state. The problem is that states that are not directly implicated in the dispute (such as the non-respondent state in a bilateral relationship) yet may be affected would not be addressed by these measures—one would essentially view one state as a stand-in for others that are similarly situated. Moreover, if states have to agree to the legislative veto, this may not be fruitful as powerful interests in the non-responding state may actively engage against such an agreement. In the end, what would thus be needed is a debate about whether to create a more meaningful multilateral system of investment treaty law, combined with a permanent institution.<sup>71</sup>

There are other areas of law upon which investment law can be reformed. The agency analogy may narrow the field of vision for other viable alternatives on the international plane. Conceiving of IIL as analogous to the domestic arena risks conflating areas with very different dynamics and self-understandings. This is especially problematic in an area, as the article points out,<sup>72</sup> where there appears to be a high degree of insularity between some of the members of the IIL community and

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<sup>70</sup> This appears to imply democratic feedback, which is not the case for all states involved in international investment disputes. In this sense, the administrative law model used in the article does not map well with the extent of democratic governance in countries that are subject to investment law disputes.

<sup>71</sup> The likelihood for reforming the current system and building an international institution is marginal at best at this point though bidirectional investment flows may ameliorate some of the concerns that were previously raised in the context of the negotiations leading up to the attempt to create a multilateral investment treaty.

<sup>72</sup> Yackee, *supra* note 4, at 407, 424.

other parts of the international law community.<sup>73</sup> Looking towards adjacent fields is another potentially more fruitful alternative in searching for solutions to the problems the article describes. The domestic analogy presumes that solutions for IIL can be developed from domestic parallels. This certainly has its merit, although it may be necessary to investigate a larger sample of domestic administrative systems to yield appropriate results. Transplants from either area should be examined very carefully, as all fields rest on their own respective assumptions.

### III. CONCLUSION

Yackee's article is striking in that it forces the reader to look at international investment law through a different prism: that of a stylized US administrative agency. It correctly points out that investment treaties and investment tribunals do not exist in a vacuum, but are embedded in sometimes formal, sometimes informal, institutions which create their own norms and rules. There is indeed a high utility to conceiving the international investment law universe through this prism as it lays open the actors and their interrelationships. The metaphor is epically apt regarding the law-making function in IIL. But that very law-making function is long-standing and pervasive in international practice, despite concerns regarding the lack of a functioning system of checks and balances. As stated by von Bogdandy and Venzke, "[j]udicial lawmaking is an integral element of almost any adjudicatory practice".<sup>74</sup>

In the quest for finding a balance for this problem the article's turn to a domestic administrative system shows some significant parallels between the domestic and the international realm. Here, the article also appears to stop short of its potential. The agency metaphor invites thinking about whether there has been some kind of agency capture—not in the traditional sense in that outside forces shape administrative agencies for their own benefit, but rather as internal agency capture. There appear to be hints of this in the paper at various points,<sup>75</sup> although it would be useful to have a more thorough discussion of this topic and whether there are other changes that could be useful in addition to the two changes the article proposes. Care should also be taken not to equate one system of administrative law with administrative law systems that exist on a wider scale. The law-making function for administrative agencies in the sense described in the article is a feature that exists only in a relatively small number of jurisdictions, which have other mechanism to determine how the balancing between the competing interests of efficiency in adjudication and political control should be drawn. Here it may be useful to think about this article as a

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<sup>73</sup> Roberts, *supra* note 25, at 52–56.

<sup>74</sup> Bogdandy & Venzke, *supra* note 28, at 979, 983, 993.

<sup>75</sup> Yackee, *supra* note 4, at 426–30.

contribution to an important larger trend of scholarship that uses comparative law to analyze features in domestic law that may ameliorate the concerns that the article raises.<sup>76</sup>

One of those proposals—creating a higher degree of awareness for such disputes through notice-and-comment—does not seem controversial. The second suggestion—a form of legislative veto—appears to be at odds with current practices in the domestic realm as well as – increasingly so – on the international plane. This leads to the issue of whether the article’s underlying concerns are addressed by the proposals made, or whether more encompassing changes are needed. Various commentators have called for stronger institutions or the creation of more permanent structures akin to those of other international dispute settlement mechanisms, which could in turn have an impact on many of the issues that the article identifies as problematic.<sup>77</sup>

The great virtue of the article is that it contributes to a growing trend of scholarship that forms a new wave of discourse over IIL, one that equally preceded by and is commensurate with what has been called the “re-calibration” in IIL.<sup>78</sup> These authors are no longer confining themselves to approaching the field through descriptive contributions of the existing treaty law and jurisprudence (the utility of which is not in question)<sup>79</sup> or systematizing the existing jurisprudence.<sup>80</sup> Rather they engage this field

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<sup>76</sup> See here only the contributions in Part III. in SCHILL, *supra* note 47, 377–624 for such comparative law scholarship.

<sup>77</sup> These questions are oftentimes debated vividly—including by individuals that the article would identify as members of the “agency”. On the impact of the change in self-understanding from the quasi-institutionalized GATT to the WTO, see J.H.H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats—Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, 35 J. WORLD TRADE 191 (2001).

<sup>78</sup> José Alvarez, *Why are We ‘Re-calibrating’ our Investment Treaties?*, 4 WORLD ARB. & MEDIATION REV. 143 (2010). For a review of the literature, see Jürgen Kurtz, *The Shifting Landscape of International Investment Law and Its Commentary*, 106 AM. J. INT’L L. 686 (2012); Stephan W. Schill, *W(b)ither Fragmentation? On the Literature and Sociology of International Investment Law*, 22 EUR J. INT’L L. 875 (2011). Notable examples that predate the current phase are Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV. 232 (1995); Andrew T. Guzman, *Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT’L L. 639 (1998).

<sup>79</sup> To name but a few examples, all of which have a different emphasis see RUDOLF DOLZER & MARGRETE STEVENS, *BILATERAL INVESTMENT TREATIES* (M. Nijhoff, 1995); KENNETH J. VANDELDELDE, *BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION* (2010); RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* (2008); ZACHARY DOUGLAS, *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS* (2009). A detailed historical and structural analysis is ANDREW NEWCOMBE & LLUÍS PARADELL, *LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS AND TREATMENT* (2009).

in an interdisciplinary fashion,<sup>81</sup> examining the development aspects of investment law,<sup>82</sup> linking it to other fields in international law<sup>83</sup> or elucidating general principles from both domestic and international law.<sup>84</sup> This type of scholarship asks important questions regarding the legitimacy of IIL, the extent to which decisions in individual investment claim cases have an important impact on the regulatory fabric of states or supranational entities, or how and to what extent IIL is embedded in the general international law. Moreover, these authors provide much-needed critical analysis without denying the utility of the IIL enterprise. What unites these works is that they attempt—and in Yackee’s case, succeed—to resituate IIL in the larger legal and policy framework of today’s less insular world.

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<sup>80</sup> See with respect to the jurisprudence of the Iran-U.S. Claims Tribunal CHARLES N. BROWER & JASON D. BRUESCHKE, *THE IRAN-UNITED STATES CLAIMS TRIBUNAL* (Nijhoff, 1998). See also CAMPBELL MCLACHLAN ET AL., *INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES* (2007); CHRISTOPH SCHREUER, *THE ICSID CONVENTION: A COMMENTARY ON THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES* (2d ed., reprt. ed. 2010).

<sup>81</sup> JESWALD W. SALACUSE, *THE LAW OF INVESTMENT TREATIES* (2010). See also Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. Rev. 1 (2007).

<sup>82</sup> M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* (1994).

<sup>83</sup> ROBERTS, *supra* note 25; STEPHEN WOOLCOCK, *TRADE AND INVESTMENT RULE-MAKING: THE ROLE OF REGIONAL AND BILATERAL AGREEMENTS* (2006); Markus Wagner, *Stretching and Squeezing Like an Accordion: Comparing the Requirement of Providing Policy Rationales in International Trade Law and International Investment Law* (unpublished manuscript) (on file with author).

<sup>84</sup> José E. Alvarez, *The Once and Future Foreign Investment Regime*, in *LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN* 607 (Mahnoush H. Arsanjani et al. eds., 2011); STEPHAN SCHILL, *THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW* (2009); SANTIAGO MONTT, *STATE LIABILITY IN INVESTMENT TREATY ARBITRATION: GLOBAL CONSTITUTIONAL AND ADMINISTRATIVE LAW IN THE BIT GENERATION* (2009). For an approach combining both domestic and international law, see STEPHAN W. SCHILL, *INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW* (2010).