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Reciprocity and the Regulatory Function of International Investment Law

Responding to Jason Yackee, *Controlling the International Investment Law Agency*,
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In a timely article, Jason Yackee proposes a pair of important, attractive, and politically plausible reforms to the international investment law (IIL) system. Because his proposals offer real promise as a way to bolster the regime's credibility and efficacy, this response will engage both the particulars proposed and the theory that informs them. I hope to suggest that, even for those who may not share Yackee's theoretical framework or his normative reservations about the IIL regime, his proposals offer an attractive response to the slow-burn crisis of legitimacy that has dogged the regime for more than a decade.

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I. SEEKING A DOMESTIC ANALOGY FOR INTERNATIONAL INVESTMENT LAW

A. *III as a Regulatory Agency*

Yackee's central claim is that the investment law regime can profitably be analogized to a domestic administrative agency. On the domestic level, such agencies typically exercise each of the three modern functions of government—lawmaking, adjudication, and execution—within a specified area of subject matter jurisdiction. The classic justification for such entities runs something like this: because of the unpredictability of the world and the increasingly unmanageable complexity of the human activities requiring regulation, we can no longer rely on legislative and judicial bodies of general jurisdiction as the sole instruments of social policy. We therefore create executive agencies with the (legislatively delegated and judicially supervised) capacity to identify and investigate problems, draft forward-looking rules of general applicability, and adjudicate disputes within a limited sphere of jurisdiction.

It is Yackee's argument that we should, in effect, understand the IIL regime in just these terms: as a "relatively ideologically cohesive and . . . coordinate[d]"—although "largely informal and still developing"¹—"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."² His sketch has several elements. The central move is a radically inclusive reframing. Instead of variegated actors scattered across a fragmented playing field, Yackee sees a cohesive framework in which the players' trans-institutional identity as members of a joint IIL enterprise looms larger than their nationalities, formal affiliations, or institutional functions. This global "Investment Agency" (my title, not his) includes not only the individual tribunals that are constituted for particular cases, but also the global pool of arbitrators as individuals, the foreign ministry employees who negotiate and implement IIAs, the national legislatures that approve them, the law firm practice groups that specialize in investment treaty arbitration, the international organizations that deal with this area of the law, and the scholars and commentators who write in the field. This big tent allows Yackee to frame the Investment Agency as a unitary entity comprising each of the classic roles of a domestic regulatory agency: quasi-adjudicative (in resolving specific disputes), quasi-legislative (in drafting treaty text and the legal reasoning of arbitration awards) and quasi-executive (in managing the administrative apparatuses that facilitate the regime's operation).

Yackee's theoretical model yields some important insights. First, it nicely illustrates that the IIL regime bears no intrinsic value as such, and must be justified instead in

¹ Jason Webb Yackee, *Controlling the International Investment Law Agency*, 53 HARV. INT'L L. J. 391, 407.

² *Id.* at 397.

terms of its role in a principal-agent relationship.³ On this view, the principals are the state participants themselves: the international lawmaking entities that created the system in the first place.⁴ As with any agent entity meant to serve the purposes of its principal, the Investment Agency can only be justified on the grounds that it is actually doing so—and its institutional apparatus must be designed with this limitation in mind.⁵ Particularly given the tendency of international organizations to arrogate power and independence in ways that, at least from the outside, can look an awful lot like empire building, this is a thoroughly worthwhile reminder.⁶

Yackee's frame also highlights the difference between the traditional role of arbitration as a dispute resolution mechanism and its modern function as a regulatory enunciator of forward-looking legal norms.⁷ The classic purpose of international arbitration, in both its state-to-state and commercial guises, was to resolve disputes in a fair and comparatively cost-effective way: to end a particular fight between particular parties and thereby allow everyone involved to move forward from a clean slate. For a variety of reasons, that no longer characterizes the adjudication of international investment law. Instead of secret decisions aimed at ending particular, unique disputes, the IIL regime is now characterized by public decisionmaking, a de facto system of precedent, thousands of similar legal instruments that give rise to hundreds of similar disputes, and a continually evolving body of law that both thickens and stabilizes the legal expectations of the players in the system. This increasing emphasis on the law-enunciating function of adjudication is characteristic of modern international law more generally, and it is here as much as anywhere else that the strains on the IIL system have become most apparent.⁸

³ See *id.* at 397–98.

⁴ Yackee does not address, but presumably would not much quarrel with, the proposition that the ultimate principals are human populations rather than the metaphysical entities through which they are understood to express themselves. Cf. Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 YALE J. INT'L L. 331 (2009) (justifying *jus cogens* norms by reference to a similar principle).

⁵ See Yackee, *supra* note 1, at 431.

⁶ Joseph H. H. Weiler offers one classic exposition of this point. See Joseph H. H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991); see also Julian Arato, *Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations*, 38 YALE J. INT'L L. (forthcoming 2013) (describing a comparable dynamic at the International Court of Justice).

⁷ See Yackee, *supra* note 1, at 446–48.

⁸ For helpful background on this sort of tradeoff, see, e.g., Miles Kahler, *The Causes and Consequences of Legalization*, 54 INT'L ORG. 661, 662 (2000); Robert O. Keohane et al., *Legalized Dispute Resolution: Interstate and Transnational*, 54 INT'L ORG. 457, 479 (2000); James McCall Smith, *The Politics of Dispute Resolution Design: Explaining Legalism in Regional Trade Pacts*, 54 INT'L ORG. 137, 143 (2000); *id.* at 148 n.37.

B. Some Weaknesses of the Agency Analogy

While Yackee's theoretical framework thus offers real leverage for analyzing the IIL regime, there are reasons to be skeptical of it as an alternative to other, tighter analogies from domestic law. I will first suggest some problems with the agency analogy, and then briefly adumbrate an alternate frame that might better serve the purpose.

To begin with, the Investment Agency has too many differences from its putative domestic counterpart for administrative law to offer more than a thin basis for comparison or reform. First, the Investment Agency has no unitary identity, much less a formally hierarchical leadership structure. By contrast, leadership, organizational structure, ideological cohesion, and community identity are baked into domestic agencies in a way that is simply impractical to ascribe to a far-flung and informally connected group of subject matter experts, even those who subscribe to the same journals and read the same blogs. Second, the Investment Agency has no investigatory capacity—the sort of genuinely executive power that most domestic administrative agencies have, and which is indeed in some cases their defining characteristic. It cannot generate its own basis for regulatory action or inform itself beyond the information that participants choose to share with it. Third, there is no centralized apparatus by which the Investment Agency can be checked through the sort of organized oversight and appropriations process that constantly looms over domestic regulatory agencies. Fourth, any “expertise” in the system is far less technical or rarefied than the sort of wonky knowledge base typically associated with domestic administrative agencies. Players in the IIL regime instead deploy a fairly limited set of legal doctrines drawn from a fairly limited number of cases, as well as some understanding of the basic commercial and financial practices of transnational entities. Fifth, in contrast to administrative law's free use of injunctive relief, IIL focuses on monetary compensation, a remedy that functions more as a tax than as a mandatory intrusion into the precise particulars of regulatory policy.⁹

These difficulties manifest each time that Yackee's discussion engages with institutional particulars. For one thing, the framework requires states to function simultaneously as both principal and agent in the same scheme:¹⁰ the same state that is the Investment Agency's controlling principal is simultaneously that Agency's “quasi-legislative” arm, responsible for authorizing, drafting, and ratifying the treaties

⁹ See Anita Bernstein, *Fellow-Feeling and Gender in the Law of Personal Injury*, 18 J.L. & POLY 295, 357 (2009) (dominance of monetary relief in tort law); Ronald M. Levin, “Vacation” at Sea: Judicial Remedies and Equitable Discretion in Administrative Law, 53 DUKE L.J. 291, 318 (2003) (dominance of injunctive relief in administrative law).

¹⁰ Yackee, *supra* note 1, at 410.

that constitute the regime's foundation.¹¹ In a similar vein, the search for quasi-executive and quasi-legislative functions stretches each concept so far as to drain them of analytical power. Identifying a quasi-executive function, for example, requires viewing the infrastructure of adjudication as executive in nature.¹² It may in some technical sense be plausible to describe a tribunal secretariat or the county clerk's office as exercising executive functions, but only at the cost of shedding analytical value that would make the comparison enlightening. And while Yackee mentions the role of foreign ministries in designing treaty text, his principal example of the Investment Agency's quasi-legislative power is once again held by its adjudicators—the investment tribunals and their elaboration of doctrine in the course of dispute resolution.¹³ There is no disputing the lawmaking role of adjudicators in a system structured along common law lines, but for an institutional analysis to sweep them up as part of a broader bundle of legislating officials eliminates the institutional purchase that comparative analysis ought rightly to offer.

In the end, that is the most important difficulty with the administrative law framework: it sacrifices both the conceptual coherence and the institutional complexity that would let the analogy do helpful work. To make the point, it is helpful to reverse-translate Yackee's analogy back to the domestic context. Imagine, for example, describing the domestic environmental law regime in these terms. The resulting entity would include not only the investigative, adjudicatory, and policymaking arms of the Environmental Protection Agency itself, but also all levels of the federal judiciary, Congress itself as an occasional participant in adjusting regulatory particulars, the whole complex of D.C. lobbying and policy shops, entire faculty departments at research universities around the country, and perhaps even environmental and industry reporters at major media outlets.

To be clear, the problem is not solely that reverse translation produces an "agency" which vastly outstrips the original basis for analogy. Much more important, it sweeps so broadly that it loses purchase on the actual mechanisms of action within the regime, sacrificing meaningful depth for superficial breadth. Yackee's basic concern, fairly enough, is a version of the principal-agent problem. But the essence of any principal-agent dynamic—whether in corporations, contract law, the administrative context, or otherwise—emerges from the precise institutional arrangements and the

¹¹ One way to avoid this difficulty would be to lean so hard on the concept of political disaggregation as to conclude that the bureaucrats whose portfolios include investment law must understand their loyalties as lying primarily with the transnational investment regime rather than with their own state. For this to be a plausible account of the psychology of foreign ministry employees requires a fuller account of their incentives than the suggestion that any individual employee might rely on the hopes of making a living years later as an investment arbitrator known to be sympathetic to corporate claimants.

¹² See Yackee, *supra* note 1, at 414–16.

¹³ See Yackee, *supra* note 1, at 410.

particular number and alignment of actors that are engaging in a repeat game over time. By aggregating the atomistic and diverse IIL participants into a single agent and a single principal, the regulatory agency analogy misses the swirling dynamics of the regime as it actually plays out in a complex profusion of interactions within a constellation of meaningfully independent players.

It is fair to ask, of course, whether any better analogy is available. I think the answer may be yes. My own instinct gravitates to common law tort systems as a particularly promising analogue, particularly in their approach to sovereign tortfeasors. As in the IIL regime, a comprehensive regulatory framework¹⁴ emerges from the cumulative judicial elaboration of simple legal concepts (think of “reasonable” precautions, “negligent” behavior, or “proximate” causation) in the context of an essentially precedential framework.¹⁵ As with the IIL regime, sovereign tort law sacrifices an otherwise absolute state immunity from liability in the interests of advancing larger policy objectives, as influenced by interest groups and the political process more generally.¹⁶ Most important, as with the IIL regime, the common law tort system’s decentralized structure, overlapping jurisdictions, and parallel lawmakers offer a better analogy precisely because of the institutional tensions to which they give rise. The multi-polar and regionalized distribution of power in domestic tort law—between multiple state judiciaries, multiple state legislatures, and potentially multiple adjudicatory proceedings—would seem to capture critical institutional features of the IIL regime much better than the monolithic Investment Agency analogy.¹⁷

¹⁴ One important school of thought views the regulatory face of tort law as its most important function. *E.g.*, GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970); *cf.* LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (1st ed. 1973); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860* (1977); JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC* (2004).

¹⁵ It is true that the fundamentals of tort law arose organically from the common law rather than from an explicit legislative delegation at Time Zero. Rather than compromising it as an analogy for the investment law regime, however, this feature of the system arguably commends it, given IIL’s comparably overlapping mix of customary international law and positive codification.

¹⁶ While federal civil rights actions might also offer useful comparisons, I avoid relying on 42 U.S.C. § 1983, *Bivens* suits, and the like because they involve the federal imposition of liability on states, rather than the freely elected decision by a self-contained sovereign to open itself to such liability. I also bracket the Tucker Act (28 U.S.C. § 1491), which does not have the same broadly applicable ramifications for government actors in the world, since it allows them to limit their liability *ex ante* with some precision.

¹⁷ To be sure, we might identify differences: the state tort regime is plausibly seen as responding, not to an efficiency-oriented grand bargain, but to an innate sense of justice demanded by the citizen constituents. And even taken in efficiency terms, the grand bargain of sovereign tort law does not focus so single-mindedly on attracting entry by external players, but would appear to be at least equally concerned with players already within the system. But it

II. PROPOSALS FOR INSTITUTIONAL REFORM

Whatever difficulties the administrative law framework may have, it serves the indubitably useful function for Yackee of inspiring two proposals for reform that seem not only wise but politically feasible. My goal in this Part is to suggest that his excellent proposals stand on their own two feet, regardless of whether his audience agrees with his larger views of the investment law regime.

The first proposal is a formal procedure (which he analogizes to the “notice and comment” procedure in U.S. agency rulemaking) for state parties to intervene directly in the adjudication of pending investment disputes.¹⁸ In addition to mandating circulation to non-participating states of the briefing in each case, Yackee would require tribunals not only to consider amicus filings submitted by those states, but even to circulate draft copies of all awards for review by three parties: the investor, the respondent state, and the investor’s home state. This would allow at least two of the parties to any treaty, with their shared interest in prospective regulatory rulemaking, to criticize excessively extreme legal positions, explain the unanticipated impact of over-broad reasoning, and otherwise to point out potential error before it is committed.¹⁹

Yackee’s second proposal is a streamlined mechanism (which he analogizes to the legislative veto in U.S. administrative law) that would allow the signatories of an IIA, acting jointly, either effectively to annul the precedential value of the legal reasoning contained in an investment award, or to issue an interpretive statement that resolves a contested area of investment law *inter se*, so as to better align with their current shared legal and political preferences.

In my view, both of these changes ought seriously to be considered.²⁰ At least some of Yackee’s audience might be dissuaded from his proposals, however, either because

is not immediately clear that these potential differences ought to matter for the kind of political reform mechanisms proposed by Yackee.

¹⁸ See Yackee, *supra* note 1, at 434–40.

¹⁹ See Yackee, *supra* note 1, at 440–45. The notification of claims and distribution of draft awards would then serve as what Rebecca Ingber has called a “decision catalyst,” prompting action by states parties which might not otherwise have been galvanized to action. See Rebecca Ingber, *Interpretation Catalysts and Executive Branch Legal Decisionmaking*, 38 YALE J. INT’L L. (forthcoming 2013).

²⁰ As Yackee recognizes, both proposals have been part of the off-the-shelf U.S. Model Bilateral Investment Treaty (“U.S. Model BIT”) since 2004. See 2004 U.S. Model BIT, articles 28–29 (access by non-disputing state to proceedings, including a right to commentary on draft awards); 2012 U.S. Model BIT articles 28–29 (same); 2004 U.S. Model BIT, article 30(3) (establishing binding interpretation procedure); 2012 U.S. Model BIT, article 30(3) (same). It may be some cause for caution that, outside the North-American Free Trade Agreement (“NAFTA”) context, it is not clear whether states have exercised their rights in these respects.

of the disadvantages of his administrative law framework, or because the proposals appear to be bound up with Yackee's own normative skepticism about the IIL system. I write here to urge those elements of his audience not to be too dismissive on that score. I also want to highlight the developing political economy that renders his proposals not just attractive but politically plausible.

A. Yackee's proposals do not require hostility to the IIL regime

Yackee is much more skeptical of the IIL regime than at least some of his audience will be. In particular, he holds to his longstanding belief, based on his own prior empirical work, that the regime does not in fact promote investment. That conclusion is in significant tension with the work of other empiricists,²¹ and it also sits uneasily with Yackee's own belief that exit from the regime is not an attractive option.²² But it represents a serious and considered view of the data, and I will not directly address it here. At the same time, he has little regard for the internal processes of regime checking, because of what appears to be his distrust of the participants' internal ethic of lawyerly integrity as professionally legitimating.²³ He suggests in particular that the appointment process, which typically guarantees that each side names one member of a three-person panel, is actually stacked against defendant states because of the Investment Agency's overarching ideological commitment to protecting investors from harm.²⁴ As he recognizes, others have noted that such suggestions of pro-investor bias may not quite match the data,²⁵ and some may see his skeptical view of the regime as overdrawn in other respects as well.²⁶

²¹ The literature on this question has swelled beyond the space this footnote can accommodate. Some studies lend support to Yackee's skepticism. *E.g.*, Axel Berger et al., *More Stringent BITs, Less Ambiguous Effects on FDI? Not a Bit!*, at 1 (Kiel Institute for the World Economy, Working Paper No. 1621, 2010) ("Stricter dispute settlement provisions do not necessarily result in higher FDI inflows so that the effectiveness of BITs as a credible commitment device remains elusive"). Other studies reach the opposite conclusion. *E.g.*, Andrew Kerner, *Why Should I Believe You? The Costs and Consequences of Bilateral Investment Treaties*, 53 INT'L STUD. Q. 73, 73 (2009) (concluding, after correcting for endogeneity, that "BITs attract significant amounts of investment . . . from [both] protected and unprotected investors").

²² See Yackee, *supra* note 1, at 418.

²³ See Yackee, *supra* note 1, at 410, 421, 423-424, 427.

²⁴ Yackee, *supra* note 1, at 402-403.

²⁵ See Yackee, *supra* note 1, at 393; *id.* at 431 (citing Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 HARV. INT'L L. J. 435 (2009); Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. Rev. 1 (2007)); see also Jan Paulsson, *Is an Investment Dispute Appellate Mechanism Desirable*, in APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES 241, 244 (Karl P. Sauvant & Michael Chiswick-Patterson eds., 2008); Steven R. Ratner, *Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law*, 102 AM. J. INT'L L. 475 (2008). Indeed, my own earlier work has

It is to those skeptics that I address this first set of comments, since Yackee's normative reservations about the IIL regime sit cheek by jowl with his expectation that his proposals would seriously limit the system's "credible commitment" function.²⁷ Yackee's own doubts about the regime mean that this sacrifice is not much of a loss for him. But there may be those inclined to disregard a suggestion defended in these terms by such a forthright skeptic. For this reason, it seems important to highlight that Yackee's proposal is in fact quite consistent with the IIL architecture as currently constituted. In particular, there is no reason to believe that adding two mechanisms for adjusting the terms of any particular IIA bargain would abandon the signatory states' credible commitment to require their officials to respect basic international norms.

In this vein, it must be remembered that the IIL regime is grounded in assumptions that are very different from those of, say, the human rights regime. In particular, investment law protections are rarely if ever defended as necessary emanations of some deontic view of intrinsic human dignity. (Since IIL protections extend only to a tiny minority of the individuals affected by regulatory decisions, it would be hard to make such a case.) Instead, the IIL regime forthrightly grants rights solely in the service of larger ends, whether—on a cynical account—helping powerful corporate interests to extract rents, or—more sympathetically—creating an investment environment that will tend to promote economic development for all concerned. Think again here of torts: we don't presume that ongoing adjustments to the tort system transform it from the domain of law to the realm of caprice. We set laws and rules up front, but we don't prevent the political system from adjusting the result of the delegated lawmaking where it seems unsatisfactory, whether through legislative revision or amicus interventions by the executive branch.

So, for example, some might see a cigarette company's IIL challenge to health regulations as a startling abuse of the system. But we can all agree that, whatever the right balance, this tradeoff between facially neutral public policy concerns and harm

suggested that at least one major doctrinal development may actually support a contrary thesis: that under at least some circumstances, the regime may in fact have responded to a perceived crisis of legitimacy by retracting its reach. See Julian Davis Mortenson, *The Meaning of "Investment": ICSID's Travaux and the Domain of International Investment Law*, 51 HARV. INT'L L. J. 257 (2010).

²⁶ In particular, the suggestion that criticism of the regime is excluded from academic and professional discourse does not match my own anecdotal experience. To take but one example, a primary address at the largest investment law conference I have attended was delivered forcefully by M Sornarajah, who is one of the most prominent critics of investment law. See Yackee, *supra* note 1, at 404. And the idea that members of the various foreign ministries are hoping to serve as arbitrators and therefore insert investor friendly language so as to curry favor with the investor community may not account for the formidable difficulties of breaking into the world of arbitration. See *id.*, at 410.

²⁷ See Yackee, *supra* note 1, at 400.

to individual investors may be the most vexing problem facing the IIL regime. The question, however, is not whether requiring the sale of cigarettes in plain packages inflicts a grievous *moral* wrong on the cigarette manufacturer. Rather, and less grandly, the question is how to calibrate that balance between regulatory interests and private economic rights, on a spectrum from inviolable protection of all investment expectations to unfettered government prerogative to regulate.²⁸ It is thus more useful—and, incidentally, a more natural defense of Yackee’s own proposals—to think about his reforms as a thermostat adjuster that allows for a different and perhaps more politically sustainable form of investment commitments.

B. *Yackee’s proposals do not depend on the agency analogy*

Another source of skepticism about Yackee’s proposals for reform might stem from resistance to his framing them as logical extensions of the administrative law analogy—an analogy, as discussed above, that has significant flaws. I therefore want to emphasize that you can buy his proposals chapter and verse without accepting the administrative law language in which they are framed.

Yackee’s first proposal, the pre-award review of draft tribunal decisions, need not look to administrative law for a justifying analogy.²⁹ Indeed, it need not even leave the arbitral framework, since this sort of pre-award review is hardly unknown among arbitrators.³⁰ Even if we were inclined to look outside the arbitral realm for precedent, ordinary civil litigation offers more direct institutional precedent for such innovations.³¹ True, these sorts of procedures are typically restricted to the parties to the dispute, but viewing the investor’s home state as a party to the dispute is hardly a

²⁸ Cf. *Lochner v. New York*, 198 U.S. 45, 53 (1905) (“Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the state in the exercise of [its police] powers”).

²⁹ A significant problem with the administrative analogy as a basis for this proceeding is that notice and comment proceedings are typically directed at the rulemaking process within administrative agencies (i.e., at rules promulgated in the agency’s “quasi-legislative” guise), not at the results of an adjudicative process within the agency.

³⁰ See e.g., John Hinchley & Troy Harris, *Draft Awards—Overview*, INT’L CONSTR. ARB. HANDBOOK § 11:22 (2012). For some specific examples of this procedure in actual cases, see, e.g., *Hoelt v. MVL Group, Inc.*, 343 F.3d 57, 61 (2d Cir. 2003); *Local P-9, United Food & Commercial Workers Int’l Union, ALF-CIO v. George A. Hormel & Co.*, 776 F.2d 1393, 1394 (8th Cir. 1985); *Thomas v. Republic Airways Holdings, Inc.*, No. 11-CV-01313-RPM, 2012 WL 683525 (D. Colo. Mar. 2, 2012).

³¹ See, e.g., California Courts, *Court Programs*, available at <http://www.courts.ca.gov/2519.htm#tab7902> (last visited Jan. 26, 2013); Arizona Court of Appeals, *Court Policies*, available at <http://www.appeals2.az.gov/courtPolicies.cfm> (last visited Jan. 26, 2013); The Court of Appeals for the State of New Mexico, *In the Matter of the Court of Appeals Caseload*, Misc. Order No. 1-46 (N.M. Ct. App. June 23, 2010), available at <https://coa.nmcourts.gov/Forms/ExpeditedBenchDecisionProgram.pdf>.

stretch, since the state is equally a rights-bearing party under a typical IIA.³² And nonparty sovereign stakeholders are often afforded precisely such procedural consideration in the domestic context, including the U.S. Supreme Court's occasional practice of "Calling for the Views of the Solicitor General,"³³ or the statutory requirement that courts notify the U.S. Attorney General when litigants call the constitutionality of a statute into question.³⁴

Yackee's second proposal, for a broad adoption of NAFTA-style interpretation procedure, seems no more dependent on the administrative law framing than his first. Look again, instead, to common law adjudication, where law enunciated by gap-filling adjudicators is always subject to legislative override. Examples abound, with legislatures capping categories and amounts of damages,³⁵ resolving persistent doctrinal disputes on wide-ranging questions of substantive law,³⁶ and revising procedural rules to better match the current preferences of the system's political principals.³⁷ What Yackee describes as a form of legislative veto is thus more naturally analogized to a form of statutory fix: the legislative principals are simply reserving a streamlined procedure for themselves to correct their gap-filling delegates when they go wrong.³⁸ One particular benefit of this analogy is that, unlike the legislative veto's

³² Domestic tort law again provides a nice procedural analogy. Think of procedures for intervention or comment by interested parties in proposed class action settlements or in civil disputes as to which an initially uninvolved party is later viewed as a necessary party. *See, e.g.*, David L. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 721 (1968); Kenneth W. Taber & Charles Stephen Ralston, *Intervention by Affected Non-Class Members*, 13 N.Y. Prac., Employment Litigation in New York § 6:39 (2012). In both cases, attention is more properly focused on describing the procedure in the quintessentially judicial context in which it arises.

³³ *See* Eugene GRESSMAN ET AL., SUPREME COURT PRACTICE 516–17 (9th ed. 2007).

³⁴ *See* 28 U.S.C. § 2403(a); *see also id.* at 2403(b) (requiring similar notification to state attorneys general when the constitutionality of a state statute is challenged during litigation).

³⁵ *See, e.g.*, DAN B. DOBBS ET AL., THE LAW OF TORTS § 486 (2d ed. 2011) (citing examples).

³⁶ *See, e.g.*, Eli K. Best & John J. Donohue, *Jury Nullification in Modified Comparative Negligence Regimes*, 79 U. CHI. L. REV. 945, 951 (2012) (citing legislative replacement of contributory negligence by comparative negligence); Nora Freeman Engstrom, *An Alternative Explanation for No-Fault's "Demise"*, 61 DEPAUL L. REV. 303, 314 (2012) (discussing legislative incorporation of no-fault auto insurance).

³⁷ *See, e.g.*, Philip Michael Thompson, *Sanctioning Hard Bargaining: A Critique of State Offer-of-Settlement Rules*, 44 GA. L. REV. 1133 (2010) (discussing state rules attaching financial penalties to certain refusals to settle); *see also* Robert G. Bone, "To Encourage Settlement": Rule 68, Offers of Judgment, and the History of the Federal Rules of Civil Procedure, 102 NW. U. L. REV. 1561, 1562 (2008) (discussing analogous federal rules, which are promulgated by the Supreme Court subject to congressional revision).

³⁸ The tort analogy itself has some problems as a basis for comparison in this respect, particularly since there is a live debate about whether NAFTA's provisions for binding party interpretations are themselves problematic domestically for dualist states like the United States. *See* Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*,

override of the policy preferences of an agency body that is itself engaging in explicit lawmaking, the statutory override model need cast no aspersions on the political or policy judgments of the adjudicators. It is, instead, an expressly political readjustment of a facially neutral system that has produced an undesirable rule of decision.

C. Yackee's proposals depend primarily on the political economy of reciprocity

That point brings us to a final advantage of Yackee's proposals: they serve as highly attractive tools for supporters of the IIL regime to accommodate reasonable political pushback while preserving the regime's core benefits for cases where it concededly serves a legitimate function.

Understanding this feature of Yackee's proposals, somewhat counterintuitively, requires that we start off with what is potentially their most significant weakness. If the problem with the investment law regime is—as critics have charged since the earliest days—that it both derives from and reinforces existing disparities in state power, then politics will present a potentially insuperable obstacle to any procedural reform. Yackee fairly identifies this weakness in some of the basic checks on the regime now, in particular the pressure that client states can bring to bear on appointing authorities and other arbitral institutions. But if he is right that the appointment mechanism simply reproduces the power dynamics underlying the regime,³⁹ it is not immediately clear why his own proposals should turn out any different: the legislative veto would require agreement by both parties to the treaty, and the notice and comment proposal likewise contemplates broad party participation.

For entirely exogenous reasons, however, an ongoing re-alignment of state interests may be creating political space for adjustments like these actually to make a difference. This flows from the political economy of reciprocity. The point is simply this: states that have traditionally viewed themselves as the outbound sponsors of foreign investment rather than its recipients are themselves increasingly facing real liability under the IIL regime. This means that nowadays in a proceeding involving, say, a U.S. investor, the U.S. government's position will not necessarily be dictated by the accident that its national stands to benefit from a favorable ruling. Instead, careful attention will increasingly be paid to the potential rebound effect of any principle enunciated, such that structural pressures on the State Department may well diverge from the particular U.S. national's narrow adjudicatory objectives. So too with the legislative veto, and in some ways even more importantly so. The NAFTA-style interpretive agreement mechanism offers a focused moment of decision for the

104 AM. J. INT'L L. 179 (2010). The main point here, however, is that such provisions involve the intervention of non-adjudicating political entities, with some effect on the resulting adjudicative outcomes.

³⁹ See Yackee, *supra* note 1, at 423–24.

political principals to intervene as forward-looking policymakers on an issue about which they are increasingly likely to share interests: how much policy flexibility they want to build into an investment framework that binds each of them.

Yackee's reforms thus offer calibration mechanisms that may function to preserve the benefits of an investment regime that can indeed be pushed too far.⁴⁰ His proposals offer the significant procedural advantage of circumventing the formal treaty-making process, which may allow responses that are more carefully tailored than the blunt weapons of exit or across-the-board renegotiation. And they do tremendous good work in emphasizing some practical, powerful, and attractive ways to modulate the regime and soften the too-frequent posture of the problem as a binary choice between preserving the regime in its precise current form or abandoning it entirely.

⁴⁰ Other such reform measures might include more carefully enunciated deference doctrines. See, e.g., William W. Burke-White & Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35 YALE J. INT'L L. 283 (2010); Mortenson, *supra* note 25 at 314–15; *id.* at 314, n.281. Another option is to clarify or narrow particularly troublesome BIT terms by revising them. See, e.g., Paola Di Rosa, *The New 2012 U.S. Model BIT: Staying the Course*, KLUWER ARBITRATION BLOG (June 1, 2012), <http://kluwarbitrationblog.com/blog/2012/06/01/the-new-2012-u-s-model-bit-staying-the-course/>; Luke Eric Peterson, *US Releases Draft-Text of Revised Bilateral Investment Treaty Template*, INV. L. & POLY WEEKLY NEWS BULLETIN (Feb. 23, 2004), available at http://www.iisd.org/pdf/2004/investment_investsd_feb23_2004.pdf (discussing revisions in 2004 US Model BIT).