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Does international investment law need administrative law?

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

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I. INTRODUCTION

Jason Webb Yackee's thoughtful article, *Controlling the International Investment Law Agency*,¹ is an important contribution to a growing literature on the question of the legitimacy of the international investment law (IIL) system, and, in particular, investor-state arbitration, which is largely the focus of his article. Rather than taking a for-or-against position on the IIL system in its present form,² Professor Yackee proposes that we accept the system as it exists and analogize it "to a domestic-law administrative agency in which significant policymaking authority is transferred from political organs to expert decisionmakers who are charged" to effect "the promotion

¹ Jason Webb Yackee, *Controlling the International Investment Law Agency*, 53 HARV. INT'L L.J. 392 (2012).

² See *id.* at 393.

and protection of foreign investment.”³ In viewing the IIL system through this lens, Professor Yackee argues that the system’s major weakness—“the lack of sufficient mechanisms of state political control”—is laid bare, and that the state can, in his view, be reinserted to “sit at the top of the decisional hierarchy” through application of administrative-law principles.⁴ The state is “re-stated” (my word, not his) at the center of the IIL system by recognizing that the system is a political one that needs political checks, and those checks are provided by states.⁵ In Professor Yackee’s view, principles of administrative law point the way to a partial solution—“the adaptation of notice-and-comment and legislative veto concepts to the dispute resolution process.”⁶ The idea is that viewing the IIL system through the lens of administrative-law agency provides a potential solution to the question at the heart of the system itself: what role should the state play in IIL, especially in the investor-state context?²

In this response, I do three things. First, I examine whether there is a problem with the IIL system that needs an administrative-law solution. Second, I explore whether the analogy to administrative law helps solve the putative problem. Third, I offer some concluding thoughts to encourage the consideration of more than state interests in evaluating the IIL system.

II. IS THERE A PROBLEM WITH THE IIL SYSTEM?

Professor Yackee appears to adopt the view that the IIL system is anti-democratic and illegitimately regulates states by imposing supra-national law, developed by unelected international arbitrators, on states.⁷ As he explains it, there is a concern “that unaccountable, transnational elites-cum-bureaucrats might impose undesirable policies upon domestic polities.”⁸ In his view, there is something undemocratic about delegating state authority to unaccountable arbitral tribunals, especially where the action of those tribunals trumps the authority of national law-makers.⁹ And, in his view, the checks on this democratic deficiency—opt out, personnel controls, better drafting of agreements—do not solve the problem.¹⁰ This is so because states are

³ *Id.* at 394.

⁴ *Id.*

⁵ *See id.* at 448.

⁶ *Id.*

⁷ *See id.* at 399–400.

⁸ *Id.* at 399.

⁹ *See id.* at 400.

¹⁰ *See id.* at 422–26.

forced to confront, according to him, hostile arbitrators employing custom and precedent to vindicate their actions favoring investors over the actions of states.¹¹

In making this argument, Professor Yackee employs a public international law paradigm for viewing the IIL system. That paradigm “tends to privilege the role of states because it focuses on the system’s treaty basis. Instead of seeing states primarily or exclusively as actual or potential respondents in investor-state disputes, this approach focuses attention on their role as treaty parties that entered into the substantive treaty and delegated enforcement powers to investment tribunals.”¹² The outcome of adopting this paradigm is that “it places states at a position of relative superiority to both investors (who are not treaty parties) and investment tribunals (who are presented as agents of the treaty parties).”¹³

Professor Yackee’s critique rests on the argument that states have lost control of developing law in the IIL system—or, put more strongly, perhaps states have lost control of the IIL system itself. As such, non-state actors and institutions—international arbitrators and arbitral panels—have the potential to develop law in the process of interpreting investment treaties.¹⁴ This law may trump the domestic policies of states. For instance, a tribunal may require a state to annul a domestic court judgment that is in violation of international law¹⁵ and require a state to take action to conform with contractual and international legal obligations.¹⁶ Given that investment treaties tend to contain broadly worded obligations, arbitrators may exercise substantial discretion, with the outcome being a shift of legal power away from states to the international arbitrators and tribunals.¹⁷

¹¹ See *id.* at 426–30.

¹² Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT’L L. (forthcoming 2013) (manuscript at 34), available at <http://ssrn.com/abstract=2033167>.

¹³ *Id.*

¹⁴ See Anthea Roberts, *Power and Persuasion in Investment Treaty Arbitration: The Dual Role of States*, 104 AM. J. INT’L L. 179, 179 (2010) (“As investment treaties create broad standards rather than specific rules, they must be interpreted before they can be applied. Investor-state tribunals have accordingly played a critical role in interpreting, hence developing, investment treaty law.”).

¹⁵ *Martini Case (Italy. v. Venezuela)*, 1930, published in 25 AM. J. INT’L L. 556, 584-85 (1931).

¹⁶ *Antoine Goetz v. Burundi*, 1999, ICSID Case No. ARB/95/3; *Texaco Overseas Petroleum Co. and California Asiatic Oil Co. v. The Government of the Libyan Arab Republic*, 1977, 53 ILR 389; *Siemens A.G. v. the Argentine Republic*, 2007, ICSID Case No. ARB/02/8 at para. 5.

¹⁷ See GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 123 (2007).

Professor Yackee's paradigm raises an important question: Should we really be concerned that states have lost all law-developing power in the IIL system?

To begin with, it is hard to see the purchase in an argument loosely grounded in democratic deficit, as many of the countries that have their domestic policies challenged in the IIL system are themselves not really democratic. Furthermore, to the extent states have lost control of interpretive power in the IIL system, they have lost this control by contracting some of that authority away from the state by agreeing to investment treaties that permit arbitrators to interpret, apply, and develop investment-treaty law.¹⁸ States have presumably entered into this arrangement to encourage the benefit of foreign investment in the host state. Without the protection of the IIL system, foreign investors would limit their investments in host states for fear that their investments would be subject to the abuse of national law.¹⁹

So, the legitimacy argument, to the extent it is based on democratic values, and the transfer of legal authority argument, to the extent it is correct, are really manifestations of a system that the states themselves have created. The system may be, to be sure, not the system that some states hoped for or even contemplated when they entered into the treaties. But, let us remember that no state is obliged to admit foreign investment within its borders or to enter into an investment treaty. All this means that the state has freely given over some of its lawmaking powers to a third-party in order to secure beneficial investment. Once it does that, each state must be subject to some minimum standards under international law to protect those investors. What kind of legal system would the IIL system be if arguably illegal actions on the part of host states could not be challenged in some forum? Obviously, the host state's courts will, in many circumstances, protect the host states. Should not a claimant be able to seek more just justice in another forum?

It is equally important to remember that the question whether the IIL system benefits a "host state remains a matter for each sovereign state to decide. In particular, each state will weigh, or at least have the power to weigh, the economic and financial benefits" of the system "against the consequences of being bound to the standards of protection laid down" by the system.²⁰ In light of this, there is a strong risk of gamesmanship on the part of host states. By inserting states at the top of the

¹⁸ See RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 22–23 (2008) (discussing the asymmetrical power structure of bilateral investment treaties, in which states are the focus of regulation).

¹⁹ See JOSÉ E. ALVAREZ, THE PUBLIC INTERNATIONAL LAW REGIME GOVERNING INTERNATIONAL INVESTMENT 118–19 (2011) (discussing the use of bilateral investment treaties to address the asymmetries of power between investors and host states). *But see* Jason Webb Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence*, 51 Va. J. Int'l L. 397 (2010) (questioning this assumption).

²⁰ DOLZER & SCHREUER, *supra* note 14, at 7.

decisional hierarchy in the IIL system, as Professor Yackee proposes, there is a risk that host states will induce foreign direct investment and then renege on their promises.²¹ Furthermore, by situating the state so completely at the top of the system, there is also a risk that investors will have no protection at all. Finally, there is a risk that there will be no IIL system at all, with all decisions so completely vested in the host state that investment law becomes a charade for the exercise of mere political power. I fear that the solution Professor Yackee proposes, and which I discuss in the next section, to resolve the proposed problem risks swallowing the whole IIL system on the basis of questionable assumptions of democratic legitimacy and transfer of law-making power.

I also wonder whether Professor Yackee focuses too much on critiquing the IIL system through a public international law paradigm and does not give sufficient consideration to other paradigms for viewing the system that seek to accommodate the interests of investors and other states in the system as a whole. For instance, his framework might be more appropriately viewed under a “public law paradigm [which] presents investment arbitration as a form of public law adjudication that is of interest to the public at large, not just to the treaty or disputing parties.”²² Unlike the public international law paradigm, which places states at the center of the system, the public law paradigm is not one-sided; it has elements that seek to carve out more regulatory authority for states while at the same time “giv[ing] meaning to the obligations to treat investors fairly and equitably and not indirectly expropriate their property.”²³ As explained by Anthea Roberts, “[v]iewing investment treaty arbitration solely through a public international law paradigm, state-to-state prism is unsatisfactory because investment treaties create reciprocal rights and duties for the treaty parties *and* rights for non-state actors (investors).”²⁴ Perhaps some consideration to the rights of investors in his framework would be beneficial.

At bottom, would Professor Yackee’s analysis change if different paradigms were offered to ground the IIL system? Before so completely “re-stating” the IIL system through a public international law paradigm, it would be helpful to see if other paradigms point to different solutions that balance the interests of all concerned parties.

²¹ See ALVAREZ, *supra* note 15, at 118–19 (2011) (noting the foreign investors only have leverage until they provide funds, at which point they are exposed to a foreign nation’s laws and politics).

²² Roberts, *supra* note 12 (manuscript at 35).

²³ *Id.* (manuscript at 36).

²⁴ Roberts, *supra* note 14, at 183.

III. IS ADMINISTRATIVE LAW THE SOLUTION?

All too often, legal academics are inclined to analyze and critique doctrine (or, indeed, an entire legal system) and not to offer positive solutions to the problems they see. Professor Yackee deserves praise for not only providing a sophisticated critique of the IIL system, but also for proposing a partial solution to the problem. In his modest proposal, adopting, in part, administrative law tools, I note that Professor Yackee does not wish to import whole cloth all of administrative law into this area. Rather, his incremental proposal is to support ex ante and ex post controls of the IIL system through notice and comment, legislative veto, and draft award procedures. I commend him for being constructive and incremental, but I wonder how incremental the proposal really is.

Before addressing Professor Yackee's proposal, let me note that it would be interesting to adopt a comparative approach to the question. It is not clear to me that the administrative law practices he describes encapsulate the myriad ways in which developed polities deal with administrative law and the relationship between executive, legislative, judicial, and administrative functions. Perhaps some additional work should be done to understand the way in which administrative law in different countries deals with these questions before his approach is adopted. Especially given that the IIL system is a system of international law, more consideration of the law of other countries might provide additional opportunities for development of his proposal.

As to the notice-and-comment proposal,²⁵ something can be gained by affording interested parties the opportunity to advise a tribunal of their views on the case. There is no doubt, as Professor Yackee notes, that the practice of the U.S. Supreme Court in soliciting the views of the United States in cases where the United States is not a party but has an interest in the proceeding is appropriate and generally well regarded.²⁶ Note, however, that the Supreme Court is not afraid to criticize the U.S. government's views when they change with the political winds.²⁷ Should tribunals be able to do the same? If so, how?

Likewise, it must be noted that the success of that practice arguably differs from the view of amicus practice in general before U.S. courts. To be clear, when flooded with

²⁵ In short, the proposal is that interested states would be provided advanced notice of IIL decisions before publication and an opportunity "to influence those decisions prior to promulgation." Yackee, *supra* note 1, at 434-440.

²⁶ See SUP. CT. R. 37.4 (allowing the Solicitor General to file an amicus curiae brief without leave from the court); Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 760 (2000) (tracking the increasing volume of and citation to amicus briefs by the Solicitor General).

²⁷ Tony Mauro, *Roberts Takes SG's Office to Task Over Shifting Positions*, The National Law Journal (Nov. 27, 2012).

amicus briefs, many U.S. judges confess that the briefs are not even read.²⁸ They are not read because of time constraints, but, perhaps more importantly, they are not read because they are viewed more as pieces of advocacy as opposed to friendly suggestions for the court to examine.²⁹ In the notice-and-comment procedures that Professor Yackee proposes, will interested states be friends (*amici*) of the tribunal or advocates for other states against the IIL system?

Furthermore, will it really help if the arbitrators come to an appropriate solution by lining up other states to advocate for one or another party? One can easily imagine a situation where amici line up only in favor of one side, and that side is on the wrong side of clearly established international law. Would it be an affront to the dignity of those states to reject their position? In other words, one can imagine a world where increased amicus practice before tribunals is unhelpful and might serve to undermine the system by providing opportunities—even in situations where there is clearly established international law—for states to engage in a public relations strategy to challenge the judgment. It seems to me that Professor Yackee's view also has implications for the New York Convention and other provisions for the enforcement of arbitral awards.³⁰ Yet, enforcement is not considered in his analysis. Do we really protect the state in this regime or just give it an opportunity to escape international law obligations?

I also note that a notice-and-comment process is one thing and an “us versus them” process—interested states versus claimants and other interested states—is another. Let us hypothesize that his proposal is adopted. Let us further assume that the host state lines up amici in support of its position and that the claimant lines up amici in support of its position. Assuming the tribunal acts in the way that Professor Yackee intimates—in favor in general of investors³¹—how is the system improved? I fear

²⁸ See, e.g., Ruben J. Garcia, *A Democratic Theory of Amicus Advocacy*, 35 FLA. ST. U. L. REV. 315, 356 (2008) (discussing methods used by judges to deal with increasing amicus filings, including skipping certain briefs).

²⁹ See Linda Sandstrom Simard, *An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism*, 27 REV. LITIG. 669, 701 (2008) (“The historical and empirical evidence indicates that over the last 100 years, amici curiae have played an increasingly significant role in federal litigation. They have inconspicuously morphed from neutral advisor to open advocate.”).

³⁰ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 3.

³¹ As an empirical matter, this is contested. Compare, e.g., Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 HARV. INT'L L.J. 435 (2009), with Gus Van Harten, *Fairness and Independence in Investment Arbitration: A Critique of “Development and Outcomes of Investment Treaty Arbitration,”* INVESTMENT TREATY NEWS, Dec. 16, 2010, <http://www.iisd.org/itn/2010/12/16/fairness-and-independence-in-investment-arbitration-a-critique-of-development-and-outcomes-of-investment-treaty-arbitration/>.

that such an approach politicizes the process too much and risks dividing the IIL system even further, rather than improving its outcomes.

I also wonder whether a draft award really helps the IIL system.³² States will already have had ample opportunity, through briefing, to advise the tribunal on the relevant law. Should the tribunal reject that view through a draft award, the state is left either to repeat its losing arguments or to make new arguments, which would pose the risk of a never ending cycle of point and counterpoint before a tribunal when time is already of the essence in reaching a decision.

For this reason, the legislative veto proposal³³ similarly strikes me as a tool for gamesmanship that would undermine the IIL system. Why should the views of states be seen as binding when in many circumstances such arguments could be seen as tactics to avoid liability? One can easily imagine such an approach tearing asunder the whole system, by creating voting blocs that strategically veto some awards and respect others. At some point, someone has to render a final decision. With so much back and forth, how can the system ever reach finality? If states can agree to arbitration, lose on the merits before a tribunal, and then veto the final award (in hopes of preventing its enforceability), then what point is there to the system? How is this system more legitimate or better than the one we have, except for the fact that it consolidates all power in states?

In these ways, I wonder if Professor Yackee equates too completely good-faith transparency in the IIL system with raw political power. To be sure, any system of law benefits from open debate. Yet, to the extent that debate itself risks undermining the rule of law, it must be asked whether there is a system of law that is supported in his analysis. If the whole system starts and ends with the state, why have tribunals? Why not just move back to a system where states protect their own investors? In other words, why have the IIL system at all if, as Professor Yackee proposes, states are left to use political pressure in these ways?

IV. CONCLUDING THOUGHTS

Professor Yackee has provided us all with some novel proposals to think about in hopes of correcting perceived flaws in the IIL system. It seems to me, however, that some attention should be paid to the other significant actors in this system: foreign

³² Professor Yackee proposes that tribunals might be required “to submit to the disputing parties (and to non-disputing states) a draft copy of the tribunal’s award.” Yackee, *supra* note 1, at 438. In so doing, “the notified actors would be invited to provide the tribunal with comments on the proposal, which the tribunal would consider incorporating into the binding, final award.” *Id.* at 439.

³³ Professor Yackee offers a series of proposals. At bottom, they are joined by the ability of state parties to disapprove of awards prior to their entry into force. *Id.* at 443-445.

investors. I worry that by focusing so much effort on the conceptual and practical problems with the IIL system as it relates to states and state action that we lose focus on the fact that foreign investors also have a role in the system.³⁴ As noted earlier, an important goal of the system itself is to encourage foreign investment and thereby develop the economies of host countries. Why would any foreign investor continue to move forward to invest in a host country when the persuasion of protections offered by the IIL system could be so easily short-circuited by states in the proposed administrative-law model?

What is needed to control the international investment law agency, assuming some further controls are warranted, is a lens, be it administrative law or otherwise, that does not reify one party, be it the state or the investor. Rather, what is needed is a more systemic and practical view of the system: a view where states, investors, and dare I say the lawyers and arbitrators that litigate these cases are consulted as to the appropriate ways to resolve the troubling tensions of the modern IIL system.

If the problem to be solved is the risk that defection from the system will undermined foreign investment, I wonder whether softer tools, as those proposed by Professor Yackee, which allow for the same undermining, albeit through oblique and ostensible legal measures, really save the system.

If Professor Yackee is right, we have to ask, then, is the system worth saving? And, if it is, what should the system look like? If we place the system so completely in the hands of states and raw politics, do we gain intellectual clarity and yet lose the war for a system of law to bring minimum standards of international law—both in investment law and otherwise—to fruition?

³⁴ See Jeswald W. Salacuse, *The Treatification of International Investment Law*, 13 L. & BUS. REV. AM. 155, 156 (2007) (noting that investment treaties are used to provide rules for the host country *and* to give foreign investors a right of action in international arbitration).