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UNCTAD Series on Issues in International Investment Agreements II

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TRANSPARENCY

UNCTAD Series on Issues in International Investment Agreements II

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NOTE

As the focal point in the United Nations system for investment and technology, and building on 30 years of experience in these areas, UNCTAD, through the Division on Investment and Enterprise (DIAE), promotes understanding of key issues, particularly matters related to foreign direct investment (FDI). DIAE assists developing countries in attracting and benefiting from FDI by building their productive capacities, enhancing their international competitiveness and raising awareness about the relationship between investment and sustainable development. The emphasis is on an integrated policy approach to investment and enterprise development.

The term "country" as used in this study refers, as appropriate, to territories or areas. The designations employed and the presentation of the material do not imply the expression of any opinion whatsoever on the part of the Secretariat of the United Nations concerning the legal status of any country, territory, city or area or of its authorities, or concerning the delimitation of its frontiers or boundaries. In addition, the designations of country groups are intended solely for statistical or analytical convenience and do not necessarily express a judgment about the stage of development reached by a particular country or area in the development process.

The following symbols have been used in the tables:

Two dots (..) indicate that data are not available or are not separately reported.

Rows in tables have been omitted in those cases where no data are available for any of the elements in the row.

A dash (–) indicates that the item is equal to zero or its value is negligible.

A blank ( ) in a table indicates that the item is not applicable.

A slash (/) between dates representing years, e.g. 1994/1995, indicates a financial year.

Use of a dash (–) between dates representing years, e.g. 1994–1995, signifies the full period involved, including the beginning and end years.

Reference to "dollars" ($) means United States dollars, unless otherwise indicated.

Annual rates of growth or change, unless otherwise stated, refer to annual compound rates.

Details and percentages in tables do not necessarily add to totals because of rounding.

The material contained in this study may be freely quoted with appropriate acknowledgement.

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PREFACE

This volume is part of a series of revised editions — sequels to UNCTAD's "Series on Issues in International Investment Agreements". The first generation of this series (also called the "Pink Series") was published between 1999 and 2005 as part of UNCTAD's work programme on international investment agreements (IIAs). It aimed at assisting developing countries to participate as effectively as possible in international investment rulemaking at the bilateral, regional, plurilateral and multilateral levels. The series sought to provide balanced analyses of issues that may arise in discussions about IIAs, and has since then become a standard reference tool for IIA negotiators, policymakers, the private sector, academia and other stakeholders.

Since the publication of the first generation of the Pink Series, the world of IIAs has changed tremendously. In terms of numbers, the IIAs' universe has grown, and continues to do so — albeit to a lesser degree. Also, the impact of IIAs has evolved. Many investor-State dispute settlement (ISDS) cases have brought to light unanticipated — and partially undesired – side effects of IIAs. With its expansive — and sometimes contradictory — interpretations, the arbitral interpretation process has created a new learning environment for countries and, in particular, for IIA negotiators. Issues of transparency, predictability and policy space have come to the forefront of the debate. So has the objective of ensuring coherence between IIAs and other areas of public policy, including policies to address global challenges such as the protection of the environment (climate change) or public health and safety. Finally, the underlying dynamics of IIA rulemaking have changed. A rise in South-South FDI flows and emerging economies' growing role as outward investors — also vis-à-vis the developed world — are beginning to alter the context and background against which IIAs are being negotiated.

It is the purpose of the *sequels* to consider how the issues described in the first-generation Pink Series have evolved, particularly focusing on treaty practice and the process of arbitral

interpretation. Each of the *sequels* will have similar key elements, including (a) an introduction explaining the issue in today's broader context; (b) a stocktaking of IIA practice and arbitral awards; and (c) a section on policy options for IIA negotiators, offering language for possible new clauses that better take into account the development needs of host countries and enhance the stability and predictability of the legal system.

The updates are conceptualized as *sequels*, i.e. they aim to complement rather than replace the first-generation Pink Series. Compared to the first generation, the *sequels* will offer a greater level of detail and move beyond a merely informative role. In line with UNCTAD's mandate, they will aim at analysing the development impact and strengthening the development dimension of IIAs. The *sequels* are complementary to UNCTAD's Investment Policy Framework for Sustainable Development (IPFSD), providing in-depth analysis of particular topics covered in the IPFSD. The *sequels* are finalized through a rigorous process of peer reviews, which benefits from collective learning and sharing of experiences. Attention is placed on ensuring involvement of a broad set of stakeholders, aiming to capture ideas and concerns from society at large.

The *sequels* were edited by Anna Joubin-Bret, and produced by a team under the direction of Jörg Weber and the overall guidance of James Zhan. The members of the team include Wolfgang Alschner, Bekele Amare, Dolores Bentolila, Anna Lisa Brahms, Natalia Guerra, Hamed El-Kady, Jan Knörich, Ventzislav Kotetzov, Sergey Ripinsky, Faraz Rojid, Diana Rosert, Claudia Salgado, Ileana Tejada and Elisabeth Tuerk.

This paper is based on a study prepared by Andrea Bjorklund and Kate Miles. Inputs were received from Anne van Aaken, Anna Joubin-Bret, Claudia Gross, Gus van Harten, Lise Johnson, Cree Jones, Riku Miyata, Corinne Montineri, Jai Motwane and Stephan Schill.

The paper was typeset and formatted by Teresita Ventura. Sophie Combette designed the cover.

The contribution of the Asia-Pacific Economic Cooperation (APEC) Secretariat to this study is gratefully acknowledged.

Supachai Panitchpakdi
December 2012 Secretary-General of UNCTAD

CONTENTS

BOXES

ABBREVIATIONS

APEC	Asia-Pacific Economic Cooperation
ASEAN	Association of Southeast Asian Nations
BIT	bilateral investment treaty
CAFTA–DR	United States–Dominican Republic–Central America Free Trade Agreement
CARIFORUM	Caribbean Forum
CCIA	COMESA Common Investment Area
COMESA	Common Market for Eastern and Southern Africa
CSR	corporate social responsibility
DIAE	Division on Investment and Enterprise
EPA	economic partnership agreement
FAO	Food and Agriculture Organization
FDI	foreign direct investment
FET	fair and equitable treatment
FTA	free trade agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
IIA	international investment agreement
ILO	International Labour Organization
IPFSD	Investment Policy Framework for Sustainable Development
ISDS	investor-State dispute settlement
NAFTA	North American Free Trade Agreement
NGO	non-governmental organization
OECD	Organisation for Economic Co-operation and Development
PRAI	Principles for Responsible Agricultural Investment
SADC	Southern African Development Community
UNCITRAL	United Nations Commission on International Trade Law
UNPRI	United Nations Principles for Responsible Investment
WTO	World Trade Organization

EXECUTIVE SUMMARY

The aim of this paper is to update the first edition of UNCTAD's Pink Series paper on transparency.[1] It seeks to examine (i) the way in which traditional transparency issues have been addressed in international investment agreements (IIAs) since 2004, (ii) the emergence of investor responsibilities as a consideration within transparency issues, and (iii) the introduction of a transparency dimension into investor-State dispute settlement (ISDS). In analysing these issues, this paper outlines possible sustainable development implications of the different transparency-related formulations used in IIAs and points to some of the most progressive provisions that are appearing more frequently in investment instruments.

It is clear that certain key elements identified in the first edition paper on transparency have remained "live" issues. For example, it is necessary to continue exploring formulations for clauses where States are addressees of transparency obligations in IIAs and the sustainable development implications of such formulations. Secondly, the substantive scope and content of transparency obligations remains a central issue. Of most concern from a development perspective is the scope and extent of the obligation and the kind of requirements placed on the host States in this regard. These aspects are interlinked with a third issue, namely the different mechanisms available to implement transparency obligations in IIAs and the development impacts of particular methods of disclosure. In a practical sense, the development issues surround the "intrusiveness" of the obligation, the technical capacity of developing countries to fulfil expansive transparency obligations, and the resulting cost to such countries.

In addition to these issues common to the 2004 volume and this Sequel, this study identifies significant areas of change in stakeholder approaches to the issue of transparency. The first is the emergence of investor responsibilities as a consideration within the

transparency context. The second is the emergence of transparency issues within ISDS. This study focuses particularly on transparency in ISDS and the implications of this conceptual shift manifested in the dispute resolution context. This study also considers transparency concerns as a component of a more generalised interest in the impact of procedural matters in ISDS. A key issue is the appearance of transparency and public participation-related provisions in recent IIAs and the sustainable development implications of such approaches.

This study is structured as follows: the Introduction provides an overview of the role of transparency in facilitating international investment. Section I presents a synopsis of (i) the developments within the traditional framework of transparency in international investment law, (ii) the emergence of investor responsibilities as a component of transparency in IIAs, and (iii) transparency considerations in the context of ISDS. Section II expounds on the topics introduced in Section I and provides a review of current treaty and arbitral practice with respect to transparency in each of these contexts. Section III contains a series of policy options available to. In this final section, the study also briefly considers the potential implications of those options for a host State's sustainable development. In particular, it identifies those provisions that have a greater capacity to strengthen the development dimension of IIAs. It is hoped that this will assist the negotiator in deciding whether to include transparency provisions in IIAs and in ISDS provisions, and, if so, which formulations to include.

Note

[1] "Pink Series" refers to *UNCTAD Series on Issues in International Investment Agreements*. The Pink Series papers, including the first edition of the Transparency paper, are available at: http://archive.unctad.org/templates/Page.asp?intItemID=5820&lang=1.

INTRODUCTION

The notion of transparency in international investment law is evolving within the legal framework of international investment agreements (IIAs). The traditional objective of transparency provisions in IIAs has been to eliminate information costs and institutional risks faced by potential and existing foreign investors. This was to be accomplished by increasing host State disclosure of its laws and regulations as well as increasing the transparency of its policy-making process.

A second consideration has emerged in international investment law as to whether the rights and obligations of States and foreign investors are balanced in a way that facilitates not only increased investment but also the sustainable development of the host State. Balance is being achieved by introducing provisions that include investor transparency responsibilities and transparency considerations in the context of investor-State dispute settlement (ISDS).

The importance of transparency in the context of sustainable development is illustrated by UNCTAD's Investment Policy Framework for Sustainable Development (IPFSD) (UNCTAD 2012b). Transparency is a recurring element within multiple core principles of the IPFSD. These include:

- Principle 3: Public governance and institutions;
- Principle 7: Openness to investment;
- Principle 8: Investment protection;
- Principle 9: Investment promotion and facilitation;
- Principle 10: Corporate governance and responsibility; and
- Principle 11: International cooperation

Public governance and institutions: Transparency contributes to a perception of fairness and enhances public confidence in the

governance and institutions of a State. This is done by disclosing information regarding investment regulations to investors and the general public.

Openness to investment: Liberalization of the entry and operation of investment requires the availability of information about State laws, regulations, and administrative procedures to all investment stakeholders. Stakeholders require information not only on the removal of barriers and restrictions, but also regarding the prevailing investment conditions within States. In this way, Host state transparency can function as a signal to foreign investors regarding the stability of the legal framework of the host country. It can also help potential investors determine whether changes to the framework go towards liberalization or towards increased restrictions.

Investment protection: Transparency is inherently part of the protection of the rights and interests of foreign investors. Access to information is necessary to monitor host State compliance with international or domestic commitments to protect property rights of investors, to ensure fair and equitable treatment (FET), or to assess whether any decision or conduct of the host State discriminates against the foreign investor.

Investment promotion and facilitation: Transparency is one of the basic tools of investment promotion. It is used to disseminate information not only about the general investment climate but also about investment opportunities, incentive packages and other measures by host and home States designed to facilitate and support investment. Ensuring that such information is available to potential investors and the authorities in their home State is the first step in any investment promotion strategy (UNCTAD 2008a).

Corporate governance and responsibility: As mentioned above, investor responsibility has recently emerged as a transparency consideration within IIAs. Referencing investor responsibilities in transparency provisions in IIAs is one way to

balance the protections extended to investors with disclosure obligations that are designed to support the sustainable development of the host State.

International cooperation: Transparency obligations in IIAs can also foster international cooperation among contracting States. Numerous IIA provisions focus on cooperation between contracting States and on the exchange of information for promotion or monitoring purposes. They are also often accompanied by requirements to exchange best practices and engage in consultations to enhance transparency in decision-making and implementation processes.

The transparency elements in most of these principles focus on the traditional objective of transparency provisions to eliminate information costs and institutional risks facing investors. Some of these principles have an additional focus on balancing State and investor rights and obligations to facilitate the sustainable development of the host State. The following pages outline recent developments in international investment law that are relevant to both of these considerations.

I. EXPLANATION OF THE ISSUE

A. State obligations in the traditional framework

Transparency obligations in IIAs have traditionally centred on the provision of adequate information to foreign investors to enable informed investment decisions and to enhance the predictability and stability of the on-going investment relationship between the host State and the investor. Foreign investment processes benefit from transparency on a wide range of matters, including existing laws, proposed regulatory frameworks, and government policies that may affect the investment. This includes not only those regulations that address financial matters of direct relevance to foreign investors, such as capital transfer restrictions, establishment fees, operating licences, and taxes, but also regulation of a more general nature, such as environmental, health, and social welfare law and policy. Transparency obligations incumbent on the host State also extend to due process issues. In particular, this aspect relates to governmental decision-making and the activities of administrative agencies, including the desire for transparent processes in their dealings with foreign investors. Statements by the Asia Pacific Economic Cooperation (APEC) (box 1) and the Working Group on the Relationship between Trade and Investment of the World Trade Organization (box 2) illustrate the traditional elements of transparency in the context of international trade and investment.

Box 1. APEC: Statement to Implement APEC Transparency Standards (2002)

[*Transparency*] *is a basic principle underlying trade liberalization and facilitation, where the removal of barriers to trade is in large part only meaningful to the extent that the members of the public know what laws, regulations, procedures and administrative rulings affect their interests, can participate in their development, can participate in administrative proceedings applying them and can request review of their application under domestic law.*[1]

Box 2. WTO Working Group on the Relationship Between Trade and Investment (2002)

Ensuring 'transparency' in international commercial treaties typically involves three core requirements:

(1) to make information on relevant laws, regulations, and other policies publicly available;

(2) to notify interested parties of relevant laws and regulations and changes to them; and

(3) to ensure that laws and regulations are administered in a uniform, impartial, and reasonable manner.[2]

In international economic agreements, particularly in the international trading system, a key aspect of transparency involves the publication of domestic laws, regulations and administrative practices that are relevant to the subject matter of the agreement in question. An example of a provision embodying such a requirement can be found in Article X (1) of the General Agreement on Tariffs and Trade (GATT) (1994) (presented in box 3). The beneficiaries of this requirement are the governments of the other member countries and the economic actors, namely, the traders. Access to this type of information is essential to the overall objective of liberalizing international trade. It also ensures the proper functioning of the system and the global balance of rights and obligations between all members of the WTO.

B. Expansion beyond the traditional framework

Transparency in IIAs is no longer restricted to the traditional context of State obligations. It is now emerging in the form of investor responsibility and in the context of ISDS. Such a broad

conception of transparency was alluded to in the 2004 version of the Transparency Pink Series Paper (UNCTAD, 2004) (box 4).

Box 3. General Agreement on Tariffs and Trade (1994)

Article X: Publication and Administration of Trade Regulations

1. *Laws, regulations, judicial decisions and administrative rules of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefore, or affecting their processing, mixing or other use, shall be published promptly in such a manner to enable governments and traders to become acquainted with them.*[3]

Box 4. Transparency defined in UNCTAD Publications

Transparency denotes a state of affairs in which the participants in the investment process are able to obtain sufficient information from each other in order to make informed decisions and meet obligations and commitments. As such, it may denote both an obligation and a requirement on the part of all participants in the investment process.

1. Transparency and the investor

The increasing exploration of transparency obligations directed at investors marks a significant shift in recent notions of transparency in IIAs. Such an approach not only rebalances the obligations within an IIA, but also enhances the development potential of IIAs. Such a mechanism could prove useful for the host State in assessing the likely contributions a potential investor may make to the sustainable development of the State. Extending

transparency obligations to corporate disclosure can also promote a better understanding between investors and host State authorities regarding their expectations about disclosure on the side of the investor. Such an approach may also protect the interests of relevant communities in the host State by providing information on the past practices of potential investors. Illustrations of such mechanisms already in operation can be found in the transparency requirements of anti-bribery instruments such as the United Nations Convention Against Corruption,[4] as well as in several of the most recent IIAs discussed below in Section II.

2. Transparency and ISDS

(i) An overview of transparency in ISDS procedures

Another significant development regarding transparency in IIAs is its emergence within ISDS.[5] Today, ISDS frequently touches on matters of public interest, such as the protection of public health, the environment or local communities. . However, the ISDS procedures tend to be conducted under conditions of confidentiality and offer little or no opportunities for public participation.[6] In response to such concerns, some recent IIAs – both bilateral investment treaties (BITs) and free trade agreements (FTAs) – have included provisions to promote transparency and non-disputing party participation in ISDS.

Several factors recently converged to bring about the emergence of transparency in ISDS, including:

- the increasing emphasis on the public interest inherent within investor-State disputes;
- the possible involvement of broader human rights concerns;[7]
- the determination of large damages awarded against host States;[8]

- the filing of investor claims against each of the contracting parties to the North American Free Trade Agreement (NAFTA) (1992);[9] and
- a growing general appreciation of the potential impact of procedural matters in ISDS.

These circumstances have given rise to many issues concerning the operation of protections guaranteed under IIAs, including the procedural conditions under which ISDS is conducted. Public interest elements in investor-State disputes, in particular, has contributed to calls for greater transparency within ISDS. Such proposals have met with resistance, dividing economies, investors and various interest groups.

The key arguments in the discourse surrounding transparency in ISDS involve whether the arbitral proceedings should be open to the public and whether there should be public access to certain forms of information, such as the notice of intent to submit a claim to arbitration, pleadings, submissions, interim decisions, evidentiary material, and the final award. Within the context of ISDS, transparency has also become bound up with the related issue of non-disputing party participation, specifically, the circumstances in which *amicus curiae* submissions can, should, or should not, be accepted by an arbitral tribunal in an investor-State dispute.

With respect to these transparency and non-party participation issues in ISDS, there have been significant developments in recent treaty practice, in procedural decisions in disputes and in revisions to arbitral rules. In particular, transparency and public participation-related provisions have appeared in recent IIAs or model treaties, expressly stating that proceedings are permitted, or required, to be conducted on an open basis, pleadings are to be publicly available, and tribunals are entitled to accept non-party submissions should they so choose. Several tribunals in recent investor-State disputes have permitted the submissions of *amicus curiae* briefs, although

the petitioners have not been granted access to the oral hearings. The extent to which the submissions were taken into account in the tribunals' decision-making process is unknown.[10]

(ii) Evolving procedural rules in arbitral institutions

Responding to concerns regarding the lack of transparency in ISDS, leading arbitral institutions and authorities have introduced revisions to the procedural rules predominantly used in investor-State disputes or are currently working on preparing a legal standard on transparency in treaty-based investor-State arbitration. This is the case for the International Centre for the Settlement of Investment Disputes (ICSID) [11] and the United Nations Commission on International Trade Law (UNCITRAL) (in the following referred to also as the "Commission").[12]

The reforms to the ICSID arbitration rules attempt to strike a balance between the public interest in the disputes and the private needs of the parties. These rules now permit the tribunal to accept *amicus* briefs from non-disputing parties. Non-disputing parties may also be given access to oral hearings. However, this public access is conditioned on the consent of the disputing parties.

The UNCITRAL Arbitration Rules are also frequently used as the procedural framework governing the hearing of investor-State disputes. As they were originally adopted in 1976, they do not address transparency measures for that regime. The 1976 UNCITRAL Arbitration Rules were revised from 2006 to 2010 and resulted in the UNCITRAL Arbitration Rules (as revised in 2010).[13] During the revision process, the Commission decided that it would not be desirable to include specific provisions on treaty-based arbitration in the UNCITRAL Arbitration Rules in order to keep their generic form. The Commission further decided that the topic of transparency in treaty-based investor-State arbitration was worthy of future consideration and should be dealt with as a matter of priority immediately after completion of the at that time ongoing revision of the UNCITRAL Arbitration Rules.[14] The Commission was of the

view that the issue of transparency was a desirable objective in investor-State arbitration and should be addressed by future work. As to the form that any future work product might take, the Commission noted that various possibilities had been envisaged by the Working Group in the field of treaty-based arbitration, including the preparation of instruments such as model clauses, specific rules or guidelines, an annex to the UNCITRAL Arbitration Rules in their generic form, separate arbitration rules or optional clauses for adoption in specific treaties.[15]

The Working Group II on Arbitration and Conciliation, which is composed of all member States of the Commission, has commenced its work on developing a legal standard on transparency in treaty-based investor-State arbitration in October 2010, balancing the public interest in transparency in treaty-based investor-State arbitration and the disputing parties' interest in a fair and efficient resolution of their dispute.[16] At the time of publication of this study, the Working Group had developed a set of "*draft rules on transparency in treaty-based investor-State arbitration*"[17] for further consideration by the Working Group.

The central ISDS concern is to examine what these recent developments in transparency in ISDS mean for developing countries. For this reason, this paper considers the implications of these new trends from a sustainable development perspective and with a particular focus on delineating the policy options for treaty negotiators.

(iii) IIAs, ISDS and interaction with other issues

What has also become increasingly apparent since the publication of the first edition of this paper is that transparency issues in IIAs and ISDS do not operate in isolation. They interact closely with a range of other legal principles, concepts, practices, and policies, which also impact the implementation of IIAs, the resolution of disputes under ISDS, and the sustainable development strategies of host States. In particular, this paper considers the

interaction of transparency with issues surrounding the FET standard, corporate social responsibility (CSR), and global administrative law.

Notes

[1] Asia-Pacific Economic Cooperation (APEC) (2002), *Statement to Implement APEC Transparency Standards* (Los Cabos, Mexico, 27 October); available at: http://www.apec.org/Meeting-Papers/Leaders-Declarations/2002/2002_aelm/statement_to_implement1.aspx.

[2] WTO Working Group on the Relationship Between Trade and Investment (2002), *Transparency*, Document WT/WGTI/W/109, p. 1; available at: http://www.wtocenter.org.tw/SmartKMS/fileviewer?id=14155.

[3] World Trade Organization (WTO) (1994a), *General Agreement on Tariffs and Trade (GATT)*; available at: http://www.wto.org/english/docs_e/legal_e/legal_e.htm#goods.

[4] United Nations Office on Drugs and Crime (2004), *United Nations Convention Against Corruption* (New York, 31 October 2003), Document A/58/422, articles 5, 7 and 9; available at: http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf.

[5] Knahr, C. and Reinisch, A. (2007), "Transparency Versus Confidentiality in International Investment Arbitration – The Biwater Gauff Compromise", *The Law and Practice of International Courts and Tribunals,* Vol. 6, No. 1, pp. 97–118.

[6] Choudhury, B. (2008), "Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?", *Vanderbilt Journal of Transnational Law,* Vol. 41, pp. 775–832; Tienhaara, K. (2007), "Third-Party Participation in Investment-Environment Disputes: Recent Developments", *Review of European Community and International Environmental Law*, Vol. 16(2), pp. 230–242.

[7] See for example, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, paras.

366, 379, 380 and 387. See also *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Order in Response for Participation as *Amicus Curiae*, 17 March 2006, para. 18.

[8] See, for example, *CME Czech Republic B. V. (The Netherlands) v. The Czech Republic*, UNCITRAL, Final Award, 14 March 2003 (award of $353 million). See also *Azurix Corp. v. The Argentine Republic* (Award) ICSID Case No. ARB/01/12, Award, 14 July 2006 (award of $165 million); *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005 (award of $133 million).

[9] See, for example, *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000; *Methanex Corporation v. United States of America*, NAFTA/UNCITRAL Arbitration Rules Proceeding, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005; *Pope & Talbot Inc. v. Canada*, NAFTA/UNCITRAL Arbitration Rules, Award in Respect of Costs, 26 November 2002.

[10] See, for example, *Methanex Corporation v. United States of America*, NAFTA/UNCITRAL Arbitration Rules Proceeding, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order N. 5, 2 February 2007.

[11] The amended ICSID arbitration rules are available at: http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf.

[12] United Nations Commission on International Trade Law (2012), *Settlement of Commercial Disputes: Preparation of a Legal Standard on Transparency in Treaty-based Investor-State Arbitration* (New York, 6–10 February), UN General Assembly Document No. A/CN.9/WG.II/WP.169; available at: www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html.

[13] The amended UNCITRAL Arbitration Rules (2010) are available at: http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf .

[14] United Nations Commission on International Trade Law (2008), *Report of the United Nations Commission on International Trade Law* (New York, 16 June – 3 July), UN General Assembly Document No. A/63/17 and corrigendum ; available at: www.uncitral.org/uncitral/en/commission/sessions/41st.html.

[15] United Nations Commission on International Trade Law (2008), *Report of the United Nations Commission on International Trade Law* (New York, 16 June – 3 July), UN General Assembly Document No. A/63/17 and corrigendum ; available at: www.uncitral.org/uncitral/en/commission/sessions/41st.html.

[16] All documents on the Working Group's sessions since 2000 are available at: www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html.

[17] United Nations Commission on International Trade Law (2012), *Settlement of Commercial Disputes: Preparation of a Legal Standard on Transparency in Treaty-based Investor-State Arbitration* (New York, 6–10 February and Vienna, 1-5 October 2012), UN General Assembly Documents No. A/CN.9/WG.II/WP.169 and Addendum and A/CN.9/WG.II/WP.172; available at: www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html.

II. STOCKTAKING AND ANALYSIS

The nature of transparency issues in the context of international investment law has been changing since the publication of the first edition of this paper in the UNCTAD series (UNCTAD 2004). Although only a relatively short period has passed since that publication, new dimensions of the concept have emerged within the investment context, indicating significant shifts in the framing, substance, and direction of transparency issues within IIAs. Given these changes, this section embodies a stocktaking exercise that identifies the various approaches to transparency provisions within recent IIAs and analyses the implications of different formulations. The aim is to build on the work carried out in the first edition of this paper, focusing on an examination of IIAs concluded since 2004, identifying trends emerging in these recent IIAs and considering their sustainable development implications.

A. State-centred transparency obligations in IIAs

The traditional concerns of foreign investors regarding the transparency of host State activity, statements, policies, regulations, and decision-making very much remain live issues within international investment law and foreign investment. This is reflected in the continued prevalence of provisions in recent IIAs containing transparency obligations and in the subject of recent disputes in which allegations have been made of denial of justice, a lack of due process, and breaches of express treaty-based transparency requirements. In examining the continuation and significance of these trends, this section first considers different formulations of States as addressees of transparency obligations, before considering recent trends in the substance of State-centred transparency provisions within IIAs. The section concludes with an assessment of the mechanisms used to implement these provisions.

1. States as addressees

There are two State-centred addressee formulations considered here: (a) those addressing all parties to an IIA, and (b) those imposing obligations solely on the host State.

(i) Transparency obligations imposed on all parties

Transparency obligations in IIAs typically apply to both State parties. However, the often unstated assumption historically has been that capital inflows would largely be in one direction into the developing State partner, and that, accordingly, the obligations would primarily be borne by that State party as the host State. This is no longer the case in practice, as frequently State parties to IIAs are, to some extent, both capital-exporting and capital-importing countries (UNCTAD 2010). For this reason, both State parties can now expect to sustain host State transparency obligations pursuant to IIAs.

There are also transparency obligations that apply to both State parties in their dual capacity as host and home States. The first edition of this paper (UNCTAD 2004) explained the rationale for this conclusion as follows:

> "…*the general reference to laws and regulations 'respecting any matter covered by this Agreement' or 'that pertain to or affect covered investments' suggests that the transparency obligations* […] *apply to both host and home countries. In other words, since it may be possible that foreign investment is affected by the regulatory framework of both the host and home countries, any transparency obligations, formulated in these terms, should thus cover laws and regulations of both countries involved.*" (UNCTAD 2004).

An example of this is illustrated in Article 18.2 of the transparency chapter in the Panama–United States FTA (2007) (box 5).[1]

Box 5. Panama–United States FTA (2007)

Chapter 18: Transparency

Article 18.2: Publication

1. ***Each Party*** *shall ensure that its laws, regulations, procedures, and administrative rulings of general application* ***respecting any matter covered by this Agreement*** *are promptly published or otherwise made available in such a manner as to enable interested persons and* ***the other Party*** *to become acquainted with them.*

2. *To the extent possible, each Party shall:*

   (a) publish in advance any such measure that it proposes to adopt; and

   (b) provide interested persons and the other Party a reasonable opportunity to comment on such proposed measures.[2]

[Emphasis added]

This obligation requires that if home or host State regulation, including proposed regulation or regulation in draft form, is relevant in any way to investments covered by the IIA, then public disclosure of that regulation must be made. Under this formulation of the obligation, the responsibility to ensure adequate disclosure of the requisite information falls squarely on the State parties, whether as home or host State. The beneficiaries are both potential and current foreign investors.

(ii) Transparency obligations imposed on both contracting parties in their role as host States

A second relatively common formulation is to impose transparency obligations on the host State only. This approach is largely born out of the concern that host State regulatory changes

may pose a significant threat to the operation or profitability of foreign-owned investments. This formulation has continued to appear regularly in recent IIAs. An example of this type of provision can be seen in the Finland–Guatemala BIT (2005) (box 6).

Box 6. Finland–Guatemala BIT (2005)

Article 15: **Transparency**

1. *Each Contracting Party shall promptly publish, or otherwise make publicly available, its laws, regulations, procedures and administrative rulings and judicial decisions of general application as well as international agreements which* ***may affect the investments of investors of the other Contracting Party in the territory of the former Contracting Party.*** [Emphasis added]

Note that Article 15 is broad in its scope, as it encompasses not only laws and regulations, but extends also to "*procedures and administrative rulings and judicial decisions*". Such expansive transparency obligations are discussed in more detail below. However, it is important to note here that expansive obligations imposed solely on the host State may place prohibitive compliance costs on developing countries.

This type of expansive obligation may be qualified with the phrase "*to the extent possible*". Such a formulation is included in Article 2 of the Azerbaijan–Estonia BIT (2010) (box 7).

Such a qualification allows developing countries to adopt a relative standard of compliance according to their capabilities.

Box 7. Azerbaijan–Estonia BIT (2010)

Article 2: Promotion and protection of investments

[…]

4. *Each Contracting Party shall ensure that,* ***to the extent possible****, its laws, regulations, procedures, administrative rulings and judicial decisions of general application, as well as international agreements after their entry into force, which* ***may affect the investments of investors of the other Contracting Party in its territory****, are according to its legislation promptly published, or otherwise made publicly available.*

[Emphasis added]

2. State-centred transparency obligations

This section takes stock of the various formulations of State-centred transparency obligations, their scope and their implications.[3] The scope and depth of transparency obligations in recent IIAs is determined by what is to be made public, e.g. laws, regulations, investment opportunities, or other matters. It is also determined by the voluntary or mandatory character of the transparency provisions. For example, some IIAs include "soft" provisions in the wider context of investment promotion provisions. Others include legally binding obligations that may require significant reforms or the implementation of pro-active policies by the parties involved. The more exacting the obligation, the more impact such requirements will have on host States in terms of the costs, resources, and technical capacity involved in compliance.

(i) Laws, regulations and administrative procedures and rulings

The standard transparency requirement of host States is to publish laws and regulations. It is possible to distinguish between two types of laws and regulations – those addressing the general legal framework and those addressing the legal framework for investment. The obligation to publish laws and regulations is one of the least intrusive for host States as it requires little more of governmental authorities than is already required under domestic law.

The moment a provision goes beyond this basic requirement of "laws and regulations", the obligation becomes more intrusive, demanding a higher and more detailed level of action from government officials. There are many information items other than laws and regulations that are of interest to foreign investors. As a result, a balance needs to be struck between the disclosure needs of the investor and the cost implications for the State when negotiating such a provision. The inclusion of items such as administrative procedures and administrative rulings could encompass a very wide range of material. This, coupled with an obligation to respond to specific questions on these matters as they pertain to a particular investment, could make the administrative burden of compliance extensive.

For an example of a treaty provision that includes several additional items and the obligation to respond to specific requests, see the transparency measures contained in the Japan–Peru BIT (2008) set out in box 8.[4]

Box 8. Japan–Peru BIT (2008)

Article 9: Transparency

1. *Each Contracting Party shall promptly publish, or otherwise make publicly available, its* ***laws, regulations, administrative procedures and administrative rulings and judicial decisions of general application as well as international agreements which pertain to or affect investment activities****.*

2. *Each Contracting Party shall, upon request by the other Contracting Party,* ***promptly respond to specific questions and provide that other Contracting Party with information on matters set out in paragraph 1, including that relating to contracts each Contracting Party enters into with regard to investment****.*

3. […]

4. *The Government of each Contracting Party shall, in accordance with the laws and regulations of the Contracting Party, endeavour to provide, except in cases of emergency or of purely minor nature, a reasonable opportunity for comments by the public before the adoption, amendment or repeal of regulations of general application that affect any matter covered by this Agreement.*

[Emphasis added]

Compliance with transparency obligations of this calibre is likely to pose greater difficulties for developing countries. Accordingly, it is perhaps in the areas of capacity-building and technical assistance that the expertise of development organizations can come into play in supporting the efforts of developing countries to comply with their transparency obligations under IIAs.

(ii) Draft or proposed measures

In addition to laws and regulations, a number of recent IIAs also require the disclosure of draft or proposed measures by the host State. As unexpected changes in the regulatory framework of host States remain a primary concern for investors, this type of requirement provides a greater level of transparency and, therefore, reassurance for foreign investors. When coupled with provisions that permit interested persons to comment on the proposed measures, this sort of obligation also promotes interaction amongst stakeholders and participation in the process by investors, contributing to a sense of enfranchisement for those affected by the draft laws. At the same time, there is also a concern that investor participation may open up domestic decision making processes to the influence of foreign companies. Article 9, section 4 of the Japan–Peru BIT (2008) (box 8) includes a provision for investor participation. Another example can be seen in Article 1802 of NAFTA (1992) (box 9).

Box 9. NAFTA (1992)

Article 1802: Publication

Each Party shall ensure that its laws, regulations, procedures and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made available in such a manner as to enable interested persons and Parties to become acquainted with them.

To the extent possible, each Party shall:

- *publish in advance any such measure that it proposes to adopt; and*
- *provide interested persons and Parties a reasonable opportunity to comment on such proposed measures.*[5]

This level of transparency may also significantly expand the nature of the obligation, and, in so doing, potentially increases the financial and administrative burden assumed by the State. Although the obligation may be tempered with the phrase "*to the extent possible*", the potential costs and benefits of this expansive formulation need to be taken into account when negotiating the transparency provisions of an IIA.

(iii) Using modifiers to expand or limit transparency obligations

IIAs may incorporate simple modifiers that expand or limit State-centred transparency obligations. Expansive modifiers include "*which pertain to or affect*", "*may affect*", and "*might affect*". Limiting modifiers include "*to the extent possible*", "*substantially affect*", and "*materially affect*". A formulation may use one or multiple modifiers, each of which will recalibrate the scope of the transparency obligation. For example, Article 7 of the Japan–Republic of Korea BIT (2002) (box 10) uses a single modifier "*which pertain to or affect*". This modifier expands the obligation to include many laws and regulations not directly related to investment that could (indirectly) affect investment activities. Under this formulation virtually any change in regulatory measures would need to be reviewed for its impact on investments within the host State.

Box 10. Japan–Republic of Korea BIT (2002)

Article 7

1. *Each Contracting Party shall promptly publish, or otherwise make publicly available, its laws, regulations, administrative rulings and judicial decisions of general application as well as international agreements* ***which pertain to or affect investment and business activities.***

[Emphasis added]

Article 3 of the Azerbaijan–Croatia BIT (2007) (box 11) uses two modifiers to adjust the scope of the obligation. The first modifier "*may affect*" in the phrase "*which may affect the investments of investors*" expands the obligation to include regulations that might potentially affect investments. However, the second modifier "*to the extent possible*" contracts the obligation by introducing a differential standard of compliance. Such a standard would likely assist developing countries in fulfilling an otherwise expansive transparency obligation.

Box 11. Azerbaijan–Croatia BIT (2007)

Article 3: Access to Investor Information and Transparency

[…]

2. *Each Contracting Party shall ensure that,* ***to the extent possible****, its laws, regulations, procedures, administrative rulings and judicial decisions of general application, as well as international agreements after their entry into force,* ***which may affect the investments of investors*** *of the other Contracting Party in its State territory, are promptly published, or otherwise made publicly available.*

[Emphasis added]

A second example of a formulation with more than one modifier is Article 20.03 of the Canada–Panama FTA (2010) (box 12). The first modifier, "*to the maximum extent possible*", is both limiting and expansive. It is similar to the previous limiting modifier "*to the extent possible*" but has been expanded by the term "*maximum*". The second modifier, "*might materially affect … or substantially affect*" is also a limiting and expansive hybrid. The phrasing "*materially affect … or substantially affect*" limits the scope of the obligation. However, this limiting modifier is expanded by the term "*might*".

Box 12. Canada–Panama FTA (2010)

Chapter 20: Transparency

Article 20.03: Notification and Provision of Information

To the maximum extent possible, a Party shall notify the other Party of an existing or proposed measure that the Party considers ***might materially affect*** *the operation of this Agreement or* ***substantially affect*** *the other Party's interests under this Agreement*.[6]

[Emphasis added]

3. Implementation and enforcement

This section outlines the mechanisms used in IIAs to enforce State-centred transparency obligations. These mechanisms include (i) a binding obligation to make certain information public, (ii) a soft obligation to cooperate and consult with the other contracting party, (iii) a binding obligation to pro-actively exchange information with the other contracting party, and (iv) a binding obligation to respond to information requests.

(i) Making information public

The most straightforward mechanism to implement State-centred transparency obligations is to require that the information be made publicly available. Examples of this mechanism have already appeared in each of the IIA examples cited in the previous discussion regarding State-centred transparency provisions.

(ii) Cooperation and consultation

A second mechanism is a soft obligation assumed by the contracting parties to cooperate and consult with one another on issues regarding transparency. An example of this mechanism can be seen in the Canada–Peru FTA (2008) (box 13).

Box 13. Canada–Peru FTA (2008)

Chapter 19: Transparency

Article 1905: Cooperation on Promoting Increased Transparency

The Parties agree to cooperate in bilateral, regional and multilateral fora on means to promote transparency in respect of international trade and investment.[7]

A variation of this mechanism is a simple obligation to consult. This formulation can be seen in the China–Colombia BIT (2008) (box 14).

Box 14. China–Colombia BIT (2008)

Article 15: Consultations

The Contracting Parties shall consult with each other concerning any matter related to the application or interpretation of this Agreement.

Both the cooperation and the consultation mechanism seem fairly passive in their framing. They do not require State parties to be proactive in offering information, to provide substantive material, or to respond to specific requests of the other party. Such provisions do, however, indicate a willingness on the part of the contracting parties to engage with each other on transparency issues and to enhance transparency conditions within their domestic settings.

(iii) Proactive obligation to exchange information

In addition to provisions on publication and consultation, many IIAs also contain requirements to notify, exchange, or provide information in various forms. Such requirements can significantly enhance transparency conditions between the contracting parties.

However, the host State may also have to meet correspondingly greater administrative and financial demands in order to comply with these obligations. These obligations can be classified as either proactive or responsive. Proactive obligations require a State to provide information without solicitation. Provisions of this kind tend to limit their application to measures that "*materially affect*" or "*substantially affect*" the operation of the IIA or the other contracting party's interests. An example of this type of provision is Article 172 of the China–New Zealand FTA (2008) (box 15).

Box 15. China–New Zealand FTA (2008)

Chapter 13: Transparency

Article 172 Notification and Provision of Information

1. *Where a Party considers that any proposed or actual measure might materially affect the operation of this Agreement or otherwise substantially affect the other Party's interests under this Agreement,* ***that Party shall notify the other Party****, to the extent possible, of the proposed or actual measure.*[8]

[Emphasis added]

A similar variation of this provision can be seen in subsection 1 of Article 20.3 of the Australia–United States FTA (2005) (box 16). Both formulations qualify the obligation with the limiting modifiers "*to the extent possible*" and "[*t*]*o the maximum extent possible*", respectively. (Note that subsection 2 in box 16 is a responsive obligation and is discussed below).

Another formulation of a proactive obligation to notify can be found in Article 19 of the Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation between the People's Republic of China and the Association of Southeast Asian Nations (ASEAN–China Agreement on

Investment) (2009) (box 17). This formulation includes an annual disclosure requirement in subsection (b) as a minimum standard for compliance. (Note that subsection (c) is partly a responsive obligation and is discussed below).

Box 16. Australia–United States FTA (2005)

Chapter Twenty: Transparency

Article 20.3: Notification and Provision of Information

1. *To the maximum extent possible,* ***each Party shall notify the other Party*** *of any proposed or actual measure that the Party considers might materially affect the operation of this Agreement or otherwise substantially affect the other Party's interests under this Agreement.*

2. *On request of the other Party, a Party shall promptly provide information and respond to questions pertaining to any actual or proposed measure that the requesting Party considers might materially affect the operation of this Agreement or otherwise substantially affect its interests under this Agreement, regardless of whether the requesting Party has been previously notified of that measure.*[9]

[Emphasis added]

(iv) Responsive obligation to exchange information

Responsive obligations, unlike proactive obligations, are only triggered by a request for information. Such requests may be made by either the other contracting party or by an entity granted the right to make such requests. Examples of responsive obligations have already appeared in section 2 of article 20.3 of the Australia–United States FTA (2005) (box 16) and in subsection 1(c) of article 19 of the ASEAN–China Agreement on Investment (2009) (box 17).

Box 17. ASEAN–China Agreement on Investment (2009)

Article 19: Transparency

1. In order to achieve the objectives of this Agreement, each Party shall:

(a) make available through publication, all relevant laws, regulations, policies and administrative guidelines of general application that pertain to, or affect investments in its territory.

(b) promptly and at least annually notify the other Parties of the introduction of any new law or any changes to its existing laws, regulations, policies or administrative guidelines, which significantly affect investments in its territory, or its commitments under this Agreement.

(c) establish or designate an enquiry point where, upon request of any natural person, juridical person or any one of the other Parties, all information relating to the measures required to be published or made available under Subparagraphs (a) and (b) may be promptly obtained.

(d) notify the other Parties through the ASEAN Secretariat at least once annually of any future investment-related agreements or arrangements which grant(s) any preferential treatment and to which it is a party.

[Emphasis added]

Note that in subsection 1(c) of the ASEAN–China Agreement on Investment (2009) the contracting parties undertake to establish a contact point to which enquiries can be directed. A similar "*enquiry point*" requirement is also included in Article 3 of the General Agreement on Trade in Services (GATS).[10] A further example is

found in Article 11 of the Rwanda–United States BIT (2008) (box 18). The creation of such an office can assist with the management of investment-related issues between the parties and foster a more transparent investment environment. Institutional structures such as this, however, are a substantial additional cost and require administrative and technical capacity to meet this on-going commitment. Again, this is perhaps an area in which development organizations could assist developing countries with programmes directed at capacity-building and transferring technical knowledge.

Box 18. Rwanda–United States BIT (2008)

Article 11: Transparency

1. Contact Points

(a) Each Party shall designate a contact point or points to facilitate communications between the Parties on any matter covered by this Treaty.

(b) On the request of the other Party, the contact point(s) shall identify the office or official responsible for the matter and assist, as necessary, in facilitating communication with the requesting Party.

B. Investor responsibilities regarding transparency

The traditional focus of transparency in IIAs has been investor protections and State obligations. The rationale for this approach is that the reassurance generated by such instruments can promote greater capital inflows to the State parties. Newer IIAs, however, increasingly include provisions that introduce investor responsibilities as a component of transparency.

1. Complying with laws and regulations

A common indirect method of introducing investor transparency responsibilities is through provisions requiring foreign investors to comply with all laws and regulations of the host State. If host State regulations require certain disclosures, foreign-owned corporations must comply with those requirements. The APEC Strategy on Investment (box 19) – a non-binding instrument – makes reference to this issue.

Box 19. APEC Strategy for Investment (2010)

Investor Behaviour:

Acceptance of foreign investment is facilitated when foreign investors abide by the host economy's laws, regulations, administrative guidelines and policies, just as domestic investors should. [11]

Article 13 of the Investment Agreement for the Common Market for Eastern and Southern Africa (COMESA) Common Investment Area (CCIA Investment Agreement) (2007) provides an example of this type of provision (box 20).

Box 20. CCIA Investment Agreement (2007)

Article 13: Investor Obligation

COMESA investors and their investments ***shall comply with all applicable domestic measures*** *of the Member State in which their investment is made.* [12]

[Emphasis added]

A slightly different formulation can be found in Article 10 of the Protocol on Finance and Investment of the Southern African Development Community (SADC Protocol on Finance and

Investment) (2006) (box 21). This formulation lists the specific domestic measures that investors shall abide by.

Box 21. SADC Protocol on Finance and Investment (2006)

Article 10: Corporate Responsibility

Foreign investors ***shall abide by the laws, regulations, administrative guidelines and policies*** *of the Host State.*[13]

[Emphasis added]

2. State authority to collect information

Some IIAs incorporate investor transparency responsibilities by granting authority to the host State to collect information from the investor. This provision may assist host States when vetting potential investors. It may also insulate host States from liability by providing space for a State to argue that a challenged State action is a legitimate response to an investor's failure to disclose information.[14]

In Article 3 of the Azerbaijan–Croatia BIT (2007) (box 22), contracting States reserve the right as host States to collect information from "*potential investors*" regarding their "*corporate governance history and* [*their*] *practices as* [*investors*]".

Article 11.14 of the Australia–United States FTA (box 23) goes even further by reserving the right of the host States to collect information from any investor (including current investors) regarding the investment or "*in connection with the equitable and good faith application of the* [*host State's*] *law*".

Box 22. Azerbaijan–Croatia BIT (2007)

Article 3: Access to Investor Information and Transparency

Host Contracting Party has the right to seek information from a ***potential investor*** *or its home state* ***about its corporate governance history and its practices as an investor****, including in its home state. Host Contracting Party shall protect confidential business information they receive in this regard. Host Contracting Party may make the information provided available to the public in the community where the investment may be located, subject to the protection of confidential business information and to other applicable national legislation.*

[Emphasis added]

Box 23. Australia–United States FTA (2005)

Article 11.14: Special Formalities and Information

Requirements

[…]

2. *Notwithstanding Articles 11.3 and 11.4, a Party may require an investor of the other Party, or a covered investment,* ***to provide information concerning that investment solely for informational or statistical purposes****. The Party shall protect any confidential information from any disclosure that would prejudice the competitive position of the investor or the covered investment. Nothing in this paragraph shall be construed to prevent a Party* ***from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its law****.*[15]

[Emphasis added]

3. State cooperation

A third method to incorporate investor responsibilities into IIAs is for States to agree to cooperate to impose such responsibilities. For example, see Article 72 of the European Community–Caribbean Forum (CARIFORUM) Economic Partnership Agreement (EPA) (2008) (box 24). Although this provision does not refer to transparency, its method of incorporating investor responsibilities in IIAs could be extended to transparency.

Box 24. European Community–CARIFORUM EPA (2008)

Article 72: Behaviour of investors

The EC Party and the Signatory CARIFORUM States shall cooperate and take, within their own respective territories, such measures as may be necessary, inter alia, through domestic legislation, to ensure that:

(a) Investors be forbidden from, and held liable for, offering, promising or giving any undue pecuniary or other advantage, whether directly or through intermediaries, to any public official or member of his or her family or business associates or other person in close proximity to the official, for that person or for a third party, in order that the official or third party act or refrain from acting in relation to the performance of official duties, or in order to achieve any favour in relation to a proposed investment or any licences, permits, contracts or other rights in relation to an investment.

(b) Investors act in accordance with core labour standards as required by the International Labour Organization (ILO) Declaration on Fundamental Principles and Rights at Work, 1998, to which the EC Party and the Signatory CARIFORUM States are parties.

Box 25. (concluded)

(c) Investors do not manage or operate their investments in a manner that circumvents international environmental or labour obligations arising from agreements to which the EC Party and the Signatory CARIFORUM States are parties.

(d) Investors establish and maintain, where appropriate, local community liaison processes, especially in projects involving extensive natural resource-based activities, in so far that they do not nullify or impair the benefits accruing to the other Party under the terms of a specific commitment.[16]

4. Emerging international norms

Finally, a number of international instruments contain influential investment-related provisions regarding transparency, accountability, and corporate disclosure. These include: the Organisation for Economic Co-operation and Development (OECD) Guidelines on Multinational Enterprises,[17] the United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights,[18] the Principles for Responsible Agricultural Investment (PRAI),[19] and the International Chamber of Commerce (ICC) Guidelines for International Investment.[20] There have also been further relevant initiatives such as the launch of three particularly high-profile voluntary codes of conduct, namely the Equator Principles,[21] the United Nations Principles for Responsible Investment (UNPRI),[22] which are both directed at the finance sectors, and the Guiding Principles on Business and Human Rights for Implementing the United Nations "Protect, Respect and Remedy" Framework.[23] These instruments are non-binding but still illustrate a trend towards exploration, or "modelling",[24] of more directly applicable investor obligations, including transparency-related obligations.

C. Transparency in ISDS

Traditionally, IIAs have not contained transparency-related provisions regarding ISDS and arbitral proceedings have been held on a largely confidential basis. Concerns have recently emerged, however, that investment disputes can often involve matters of public interest and that the lack of transparency is, therefore, problematic.[25] In particular, attention has been drawn to the fact that:

(a) ISDS often involves public service sectors;

(b) Government regulation enacted for public welfare purposes may be the subject of the dispute;

(c) The presence of a State in the arbitration triggers good governance obligations;

(d) The costs of defending claims and financing compensation awards will draw on public funds; and

(e) The threat of arbitration from an investor can have a "chilling" effect on government policy and prevent the raising of environmental standards, health and safety standards, and labour conditions.

A central concern[26] raised by commentators has been that the matters in dispute in ISDS can implicate the ability of the host State to pursue sustainable development strategies. Public participation, a full consideration of relevant issues, and progress towards sustainable development can be impeded without sufficient access to information on the claims and proceedings of a dispute.

Recent IIAs include provisions that address these concerns regarding transparency and public participation in ISDS. These provisions are complemented by rule revisions at ICSID and UNCITRAL. Several recent arbitration decisions have also facilitated increased transparency and the participation of *amici*

petitioners in investor-State disputes. Each of these developments are outlined below.

1. ISDS transparency in recent IIAs

The traditional model for dispute resolution in investor-State arbitration has long followed that of international commercial arbitration which emphasises confidentiality, closed proceedings, and commercial considerations. [27] This model is largely uncontroversial when applied to international commercial disputes between private parties. However, it is becoming increasingly apparent that the international commercial arbitration model may not be appropriate for addressing the wider issues that occur in ISDS. In recognition of this, there have been explorations into developing a more suitable procedural framework that reflects the combined public-private dimensions of ISDS and its roots in both public international law and commercial arbitration.[28] Changes to the procedural framework include granting public access to hearings and documents and allowing non-party participation through the submission of *amicus* briefs.

(i) Public access to hearings and documents

The United States and Canadian model BITs were the first to introduce provisions granting the public access to investor-State dispute hearings and documents. See, for example, Article 29 of the United States' Model BIT (2004) (box 25).[29]

These provisions now form the bases for transparency provisions in numerous IIAs. They require extensive disclosure, permitting public access to a range of documents that were, traditionally, not in the public domain.[30] Note that the tribunal must take measures to protect confidential business information during an open hearing. In this way the negotiators have some leeway to balance the public interest in transparent proceedings and the disputing parties' need to keep certain business matters confidential.

Box 25. United States Model BIT (2004)

Article 29: Transparency of Arbitral Proceedings

1. […] *the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Party and* ***make them available to the public****:*

(a) the notice of intent […]*;*

(b) the notice of arbitration […]*;*

*(c) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Article 28(2) (Non-Disputing Party submissions) and (3) (*Amicus *Submissions) and Article 33 (Consolidation);*

(d) minutes or transcripts of hearings of the tribunal, where available; and

(e) orders, awards, and decisions of the tribunal.

2. ***The tribunal shall conduct hearings open to the public*** *and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. However, any disputing party that intends to use information designated as protected information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure.*[31]

[Emphasis added]

Some recently negotiated IIAs include even more exacting transparency requirements regarding procedural steps in ISDS. For example, Chapter 10 of the Australia–Chile FTA (2005) (box 26) not only requires open hearings and the public disclosure of documents such as the notice of intent and of arbitration, but it also

requires the disclosure of detailed substantive documents such as the pleadings, briefs, transcripts, orders, and the final award.

Box 26. Australia–Chile FTA (2008)

Chapter 10: Investment

Article 10.22: Transparency of Arbitral Proceedings

1. […] *the respondent shall, after receiving the following documents, make them available to the public at their cost:*

(a) the notice of intent […]*;*

(b) the notice of arbitration […]*;*

(c) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to paragraphs 2 and 3 of Article 10.20, Article 10.21.2 and Article 10.26;

(d) minutes or transcripts of hearings of the tribunal, where available; *and*

(e) orders, awards, and decisions of the tribunal.

2. The tribunal shall conduct hearings open to the public […][32]

[Emphasis added]

A particularly interesting development in seeking greater transparency has been the novel use of technology. The power to determine the "logistical arrangements" for the conduct of open hearings has been used to initiate the broadcasting on the internet of public hearings in investor-State disputes. In this regard, the Dominican Republic–Central America FTA (1998) and the United States–Dominican Republic–Central America FTA (CAFTA–DR) (2004) have pioneered provisions on transparency which to date count as the most innovative and sophisticated. They not only

impose high standards on the regulatory processes in Signatory countries, but require transparency in ISDS. The provisions aim to achieve openness through the prompt publication of dispute claims and other relevant documents as well as the conduct of public hearings.

On the basis of Article 10.21.2 of the CAFTA–DR (box 27) the first ICSID live internet broadcast of a public hearing was made on May 31 and July 1, 2010 in *Pac Rim Cayman LLC v. Republic of El Salvador.* [33] Two subsequent cases, *Railroad Development Corporation v. Republic of Guatemala* [34] and *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador,* [35] have also been broadcast live on the web.

Box 27. CAFTA–DR (2004)

Article 10.21: Transparency of Arbitral Proceedings

[…]

1. ***The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements.*** *However, any disputing party that intends to use information designated as protected information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure.* [36]

[Emphasis added]

Prior to the *Pac Rim Cayman* broadcast, public hearings had taken place at ICSID as early as 2002.[37] In these cases, public access was conditioned on the consent of the parties and access to the broadcast was limited to a specified room at the World Bank Building. Live internet broadcasting is a significant development in ISDS transparency as it is open to a larger audience and allows the public to revisit the hearing at a later point in time.

(ii) Submission of amicus briefs

The second change to the procedural framework of transparency in ISDS introduced through specific language in IIAs that expressly allows the submission of *amicus* briefs (briefs written by entities that are not a party to the dispute). Non-party participation is closely linked to transparency in ISDS, but it is not the same thing. In the context of ISDS, achieving transparency requires open hearings and public access to information. Although non-party participation is not a necessary component of transparency, it is an important procedural mechanism that can be an indicator of the level of transparency within the system.

The rationale for non-party participation in ISDS is that, in certain circumstances, non-parties can provide relevant information to the tribunal not presented by the disputing parties. They can also represent perspectives from sectors of the community affected by the dispute that are distinct from the interests of the host State.[38] Non-parties also provide a layer of public scrutiny, thereby enhancing transparency in ISDS.

Similar to public access to ISDS proceedings, the United States and Canadian Model BITs were the first to introduce provisions allowing the submission of *amicus* briefs.[39] The text of Article 28 of the United States Model BIT is presented in box 28.[40]

Like the public access provisions discussed above, these *amicus* brief provisions have been included in the Canada–Peru BIT (2006) and the United States–Uruguay BIT (2005).

What is also increasingly seen in provisions that permit the acceptance of *amici* submissions is a set of criteria to guide tribunals in determining whether or not to accept a particular submission. These criteria tend to include the consideration of factors such as whether the non-disputing party can contribute a perspective that is distinct from that of the disputing parties, whether they can address a matter within the scope of the dispute, and whether they have an

identifiable interest in the matters in dispute. Tribunals are also charged with ensuring that any intervention on the part of *amicus curiae* would not disrupt the proceedings or unfairly burden or prejudice the disputing parties. An example of this provision is in Article 39 of the Canada–Jordan BIT (2009) (box 29).

Box 28. United States Model BIT (2004)

Article 28: Conduct of the Arbitration

[...]

2. *The non-disputing Party may make oral and written submissions to the tribunal regarding the interpretation of this Treaty.*
3. *The tribunal shall have the authority to accept and consider* ***amicus curiae*** *submissions from a person or entity that is not a disputing party.*[41]

[Emphasis added]

Box 29. Canada–Jordan BIT (2009)

Article 39: Submissions by a Non-disputing Party

1. *Any non-disputing party that is a person of a Party, or has a significant presence in the territory of a Party, that wishes to file a written submission with a Tribunal ("the applicant") shall apply for leave from the Tribunal to file such a submission* […]
2. […]
3. […]
4. *In determining whether to grant leave to file a non-disputing party submission, the Tribunal shall consider, among other things, the extent to which:*

/…

Box 29. (concluded)

(a) *the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;*

(b) *the non-disputing party submission would address a matter within the scope of the dispute;*

(c) *the non-disputing party has a significant interest in the arbitration; and*

(d) *there is a public interest in the subject-matter of the arbitration.*

5. *The Tribunal shall ensure that:*

(a) *any non-disputing party submission does not disrupt the proceedings; and*

(b) *no disputing party is unduly burdened or unfairly prejudiced by such submissions.*

2. Arbitral rules

In response to concerns surrounding the legitimacy of ISDS, there have been a number of recent initiatives to improve transparency and public participation conditions through changes to the procedural framework. This section takes stock of revisions to the transparency-related provisions in the ICSID and UNCITRAL Arbitration Rules.

(i) Revisions to ICSID Arbitration Rules

ICSID implemented a series of reforms in 2006, which included new rules relating to non-disputing party access to the proceedings and the acceptance of *amicus curiae* briefs.[42] ICSID Rule 37(2) (box 30) creates space for the consideration of public interest issues

within investment arbitration as it expressly allows the tribunal to receive *amicus* briefs, even without the consent of the parties.

Box 30. ICSID Arbitration Rules (2006)

Rule 37: Visits and Inquiries; Submissions of Non-disputing Parties

[…]

(2) After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the "non-disputing party") to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:

(a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;

(b) the non-disputing party submission would address a matter within the scope of the dispute;

(c) the non-disputing party has a significant interest in the proceeding.

The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.

As can be seen from the phrasing of Rule 37(2), the tribunal is still required to consult with the parties, but it can override their wishes. There are, however, three factors the arbitrators must consider before they can accept the written submissions of a non-

disputing party. These include whether the submission will assist the tribunal, whether the matter addressed is within the scope of the dispute, and whether the interest of the non-disputing party in the proceeding is significant.[43] This reform marks a significant shift in ISDS procedure.

ICSID Rule 37(2) on non-party submissions can be contrasted with ICSID Rule 32(2) (box 31) on non-party access to hearings. This access is conditioned on party consent: if one party objects, the non-disputing party will be excluded from the oral hearings.[44] These two formulations attempt to strike a balance between the public interest in transparent proceedings and the private interests of the parties in a fair and efficient resolution of the dispute. However, it should be noted that the progress made on transparency through allowing non-party submissions could be furthered by unconditional non-party inclusion in oral hearings.

Box 31. ICSID Arbitration Rules (2006)

Rule 32: The Oral Procedure

[…]

(2) ***Unless either party objects****, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information.*

[Emphasis added]

(ii) UNCITRAL Arbitration Rules and transparency

The UNCITRAL Arbitration Rules were originally designed for commercial arbitration.[45] The application of these rules to ISDS, in which the State is a party, has introduced a public interest component regarding transparency that previously did not exist. However, the UNCITRAL Arbitration Rules have not been modified to address this issue (see above, [page 28]). The deliberations regarding the revision of the 1976 UNCITRAL Arbitration Rules were concluded in 2010, during which the Commission decided not to include specific provisions on ISDS in the UNCITRAL Arbitration Rules in order to keep their generic form.[46] At its forty-first session in Vienna in 2008, the Commission agreed by consensus on the importance of transparency in treaty-based investor-State arbitration and that the topic should be dealt with as a matter of priority after completion of its at that time ongoing revision of the 1976 UNCITRAL Arbitration Rules.[47] At its forty-fourth and fifth sessions in 2011 and 2012, the Commission reaffirmed the importance of ensuring transparency in treaty-based investor-State arbitration.[48]

Discussions on the form of a legal standard on transparency were still continuing at the fifty-sixth session of the Working Group II on Arbitration and Conciliation in February 2012, involving proposals for a stand-alone text that parties could opt into or out as well as an appendix to the Rules.[49] These discussions are on-going and have so far resulted in the preparation of a set of draft rules.[50] These draft rules contain a set of drafting options for further consideration by the Working Group. Intended to be clear rules rather than just guidelines, the draft rules cover issues such as publicity of the initiation of arbitral proceedings, documents to be published, non-disputing party submissions, open hearings, and publication of awards. Like the ICSID rules, these draft rules seek to balance the public interest in transparency in treaty-based investor-State arbitration specifically and arbitral proceedings generally and

the disputing parties' own interest in a fair and efficient resolution of their dispute.[51]

3. Recent awards

Recent decisions in investor-State disputes with respect to transparency and public participation indicate a trend toward increased openness in ISDS. This section begins with an analysis of *Methanex Corp. v. United States of America*[52], an important decision that preceded the revisions of arbitral rules discussed in the previous section.

(i) *Methanex Corp. v. United States of America*

Methanex involved a challenge by a Canadian investor to health and environmental regulation enacted in the United States. Non-governmental organizations (NGOs) petitioned the tribunal, requesting permission to file *amici* submissions, to attend the hearings, and to make oral submissions to the tribunal.[53] The tribunal relied on an innovative interpretation of Article 15(1) of the UNCITRAL Arbitration Rules to accept *amicus* briefs for consideration (box 32).

Box 32. UNCITRAL Arbitration Rules (1976)

Article 15

1. […] ***The arbitral tribunal may conduct the arbitration in such a manner as it considers appropriate****, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.*[54]

[Emphasis added]

The tribunal determined that the authority in Article 15(1) to decide the way in which the arbitration was to be conducted included authority to accept *amicus* briefs should it wish to do so. The tribunal's decision was motivated in part by the desire to address general concerns about the lack of transparency within ISDS and the resulting questions surrounding the legitimacy of the system as a whole:

> "[*the*] *arbitral process could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive. In this regard, the Tribunal's willingness to receive* amicus *submissions might support the process in general and this arbitration in particular; whereas a blanket refusal could do positive harm.*"[55]

(ii) *Glamis Gold v. United States of America*

Glamis Gold v. United States of America[56] was a NAFTA dispute conducted under the UNCITRAL Rules. It involved mining on lands of indigenous cultural significance and several entities sought to file *amicus* briefs. In addition to environmental NGOs and the National Mining Association, an *amicus* brief was also filed by the Quechan Indian Nation.

Glamis Gold raises issues concerning the identity of possible *amicus curiae* and the implications of their involvement. Andrea Bjorklund has analysed the Quechan tribe submission in *Glamis Gold*[57] and the argument that the federal government could not fully represent the tribe's perspective.[58] In her article she contemplates the extension of such arguments to other sub-national entities, such as a provincial State. She also considers both the advantages and difficulties this could pose for the host economy in either reinforcing or undermining its defence depending on the position taken by the sub-national body.[59]

(iii) *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*

The differing approach between the two ICSID Rules (Rule 37(2) and Rule 32(2)) discussed above in subsection 2 is reflected in the procedural decision in *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania.*[60] *Amicus* submissions were permitted, but access to documents and the hearings was denied (UNCTAD 2008b).

The dispute in *Biwater* arose out of the cancellation of a concession contract for the provision of water services to the city of Dar es Salaam. In 2006, several NGOs sought to submit *amicus* briefs to the arbitral tribunal, to gain access to documents, and to obtain permission to attend the hearings pursuant to the ICSID Rules. Central bases for their requests were identified by the petitioners as follows:

> "*This arbitration raises a number of issues of vital concern to the local community in Tanzania, and a wide range of potential issues of concern to developing countries (and indeed all countries) that have privatized, or are contemplating a possible privatization of water or other infrastructure services. The arbitration also raises issues from a broader sustainable development perspective and is potentially of relevance for the entire international community.*" [61]

The tribunal determined that the petitioners met the requirements of Rule 37(2) and accepted their written submissions. However, as Biwater Gauff had objected to the presence of any persons other than the disputing parties and their representatives, the operation of Rule 32(2) meant that the proceedings would remain closed and the petitioning NGOs would not be able to observe the hearing. Access to the documents filed in the proceedings was also not granted.

(iv) *AES Summit v. Hungary and Electrabel v. Hungary*

The revisions to the ICSID Rules and developments within the operation of the UNCITRAL Rules raise questions about the impact that non-disputing party submissions may, or may not, have on the outcome of a proceeding.[62] With this in mind, this section discusses two additional ICSID cases in which the European Commission successfully petitioned to file *amicus* briefs: *AES Summit Generation Limited and AES-Tisza Erőmű Kft v. Republic of Hungary* (*AES*)[63] and *Electrabel S.A. v. Republic of Hungary* (*Electrabel*).[64]

Both disputes involved power purchase agreements, changes of agreed-upon prices for electricity, and alleged violations of protections guaranteed under the Energy Charter Treaty. The European Commission petitioned to submit an *amicus* brief in each case on the basis that such power purchase agreements are incompatible with European Community Law. The European Commission was permitted by each of the tribunals to make its submission, although those submissions have not been made publicly available.

Non-disputing parties are traditionally environmental or human rights NGOs or grassroots activist groups presenting perspectives from local affected communities. The European Commission is a different type of entity that may carry more political weight and, as a result, might affect the dynamics of the arbitral process.[65] In making its substantive decision, the *AES* tribunal did refer to the European Commission's submission but did little more than note that it took the submission into consideration. Consequently, it is difficult to analyze the extent of any influence the submissions may have had on the outcome of the proceeding.

These cases indicate that some tribunals are moving towards greater openness in the conduct of hearings and acceptance of *amicus* briefs in investor-State arbitration.[66] However, if a culture of transparency is to become embedded within ISDS, widespread

adoption of participatory mechanisms and more transparent measures in investment disputes is likely necessary.

D. Interaction between transparency and other IIA-related issues

Transparency obligations within IIAs and ISDS have important interactions with particular issues in international investment law as well as general principles of international law. These issues include FET, corporate social responsibility (CSR) and the evolving notion of global administrative law. These interactions can affect States seeking to attract sustainable development friendly investment. They can also recalibrate the administrative and financial burdens associated with meeting transparency obligations in IIAs.

1. Fair and equitable treatment

The first interaction is between transparency obligations and the FET standard. Part of the discourse on this interaction is illustrated in *Tecmed v. Mexico*. The excerpt is an example of how the FET standard has recently been interpreted as including host State transparency obligations under an IIA:

> *"The Arbitral Tribunal considers that this provision* [*embodying the FET standard*] *of the Agreement, in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the* ***basic expectations*** *that were taken into account by the foreign investor to make the investment.* ***The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the***

> ***relevant policies and administrative practices or directives****, to be able to plan its investment and comply with such regulations.*" [67]

The concept of legitimate expectations is seen by many as part of the FET standard. The *Tecmed* tribunal adopted a broad reading of this concept by including extensive transparency elements in its scope. However, the concept of legitimate expectation is more commonly understood in a narrower sense – as protecting investors against sudden and unjustified changes in the business and legal environment of the host State, especially where an investor has received official assurances that such changes would not occur (UNCTAD 2012a). The *Tecmed* tribunal's interpretation, by contrast, adds to this a general obligation to act transparently in all dealings with foreign investors, to provide beforehand all rules and regulations that will govern the investment as well as to communicate to investors the *goals* of relevant policies, administrative practices, and directives. Such an approach has been criticized as overly demanding. Douglas has noted that "[*t*]*he Tecmed 'standard' is actually not a standard at all; it is rather a description of perfect public regulation in a perfect world, to which all states should aspire but very few (if any) will ever attain*".[68] This standard imposes significant administrative and financial demands on the host State and requires a certain amount of technical knowledge and initiative by the host State to be able to anticipate the likely impact of future policies on an investment.

Other tribunals have also linked the issue of transparency with the legitimate expectations of the investor. The tribunal in Frontier Petroleum v. Czech Republic described the interaction in the following way:

> *"**The protection of the investor's legitimate expectations is closely related to the concepts of transparency and stability. Transparency means that the legal framework for the investor's operations is readily apparent and that any decisions of the host state affecting the investor can***

> ***be traced to that legal framework****. Stability means that the investor's legitimate expectations based on this legal framework and on any undertakings and representations made explicitly or implicitly by the host state will be protected. The investor may rely on that legal framework as well as on representations and undertakings made by the host state including those in legislation, treaties, decrees, licenses, and contracts."* [69]

In deciding whether FET incorporates transparency elements, the wording of the applicable FET provision can play a significant role. An unqualified FET obligation (a simple statement that investors must be afforded fair and equitable treatment) is often construed by tribunals as giving them more interpretative freedom than an FET obligation linked to the minimum standard of treatment of aliens under customary international law. Customary international law is a term of art that requires an almost universal international consensus regarding a particular rule before that rule qualifies as part of customary international law.

The interpretive effect of this distinction is illustrated by the dispute in *Metalclad v. Mexico*, a case brought under NAFTA.[70] The arbitral tribunal found an FET violation by the respondent State due to its lack of transparency concerning rules for issuing construction permits for waste landfills.[71] However, the tribunal's decision was set aside on domestic judicial review. In its decision, the Supreme Court of British Columbia emphasized that "[*n*]*o authority was cited or evidence introduced to establish that transparency has become part of customary international law*." [72] (See further UNCTAD 2012a.) The NAFTA Free Trade Commission also issued a special interpretative note that explicitly limited the meaning of the NAFTA's FET standard to the minimum standard of treatment under customary international law (box 33).[73]

Box 33. NAFTA Free Trade Commission (2001)

2. Minimum Standard of Treatment in Accordance with International Law

1. *Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.*

2. ***The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.***

3. *A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).*

[Emphasis added]

It is evident that consideration of these issues is already beginning to influence the decisions of treaty negotiators. Many recent IIAs have sought to limit the potentially overly broad FET clauses by linking them to customary international law. It should be noted that these new clauses remain subject to the interpretation by arbitral tribunals. A primary determination will be what the customary international standard of FET requires. This has, at times, been found to correlate with the evolving contemporary understanding of the concept, i.e. that the standard has been becoming stricter towards States over time. Given the difficulty of ascribing specific meaning to the customary international standard of FET, this evolution tends to leave uncertainty for States in assessing precisely what their obligations are, and in particular whether and how far the customary law standard embraces the duty

of transparency. In light of this, some agreements, such as the ASEAN–China Investment Agreement (2009), have gone further by restricting the meaning of FET to denial of justice issues. (For treaty practice and policy options on FET, see further UNCTAD 2012a.)

2. Corporate social responsibility

The second interaction is between transparency obligations and CSR-related provisions. While the majority of IIAs are silent on the subject, CSR-related provisions have been included in a number of recent IIAs.[74] This development has evolved in tandem with a large increase in the number of instruments promoting greater CSR reporting among transnational corporations. These instruments include a broad range of multi-stakeholder sustainability standards affecting trade and investment in global value chains, along with prominent international initiatives in finance (Equator Principles), portfolio investment (Principles for Responsible Investment), stock exchange listing rules (Sustainable Stock Exchanges), and corporate practices (Global Compact).[75]

In recent IIAs, CSR has appeared chiefly in the preamble. Although preambles do not create substantive obligations of reporting on the part of corporations, arbitral tribunals have turned to preambles as an interpretative tool.[76] Consequently, the contents of preambles have assumed a greater significance than was, perhaps, previously appreciated by IIA stakeholders.

"Best practice" in CSR involves more transparency on sustainability issues. The inclusion of references to CSR best practices within the preambles and core substantive provisions of IIAs points to the expectation of States that foreign investors should be willing to engage in more sustainability reporting. Such reporting could ultimately assist host States in vetting potential investors and in maintaining on-going investor transparency throughout project implementation.

3. Global administrative law

The third interaction is between transparency obligations and the inclusion of ISDS in the evolving notion of global administrative law.[77] Global administrative law is concerned with principles of transparency, public participation, and due process, among others. In the context of international investment law these principles are said to be embodied in the review of host State conduct through ISDS. However, these principles are not uniformly applied within the procedural framework of ISDS. This application of the "global administrative law" label could potentially impede transparency reforms in ISDS as it is arguably harder to criticize a system once it has been framed as the embodiment of the rule of law.[78]

Notes

1 Unless otherwise noted, all IIA texts cited in this report may be found in UNCTAD's online collection of BITs and other IIAs available at: www.unctad.org/iia.

2 The text of the Panama–United States FTA (2007) is available at: http://www.ustr.gov/trade-agreements/free-trade-agreements/panama-tpa/final-text.

3 See the discussion in Kotera, A. (2008), "Regulatory Transparency", in Peter Muchlinski, Federico Ortino, and Christoph Schreuer (eds.), *The Oxford Handbook of International Investment Law* (Oxford: Oxford University Press), pp. 617–636.

4 Similar obligations are included in Article 3 of the World Trade Organization (1994b), *General Agreement on Trade in Services (GATS)*; available at: http://www.wto.org/english/docs_e/legal_e/26-gats.pdf.

5 The text of NAFTA (1992) is available at: http://www.nafta-sec-alena.org/en/view.aspx?x=343.

6 The text of the Canada–Panama FTA (2010) is available at: http://www.international.gc.ca/trade-agreements-accords commerciaux/agr-acc/panama/panama-toc-panama-tdm.aspx?lang=eng&view=d.

[7] The text of the Canada–Peru FTA (2008) is available at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/peru-perou/peru-toc-perou-tdm.aspx?lang=eng&view=d.

[8] The text of the China–New Zealand FTA (2008) is available at: http://www.chinafta.govt.nz/1-The-agreement/2-Text-of-the-agreement/index.php.

[9] The text of the Australia–United States FTA (2005) is available at: http://www.ustr.gov/trade-agreements/free-trade-agreements/australian-fta/final-text.

[10] World Trade Organization (1994b), *General Agreement on Trade in Services (GATS)*; available at: http://www.wto.org/english/docs_e/legal_e/26-gats.pdf.

[11] APEC Committee on Trade and Investment (2010), *Annual Report to Ministers* (Singapore), Document No. 210-CT-01.6, p. 108; available at: http://www.apec.org/Press/News-Releases/2010/~/media/Files/Press/NewsRelease/2010/210_cti_annual_rpt.ashx.

[12] The text of the CCIA Investment Agreement (2007) is available at: http://www.tralac.org/wp-content/blogs.dir/12/files/2011/uploads/Investment_agreement_for_the_CCIA.pdf.

[13] The text of the SADC Protocol on Finance and Investment (2006) is available at: http://www.sadc.int/files/2913/2634/9829/PROTOCOL_ON_FINANCE_AND_INVESTMENT_-_18_AUGUST_2006-FINAL.pdf.

[14] See, for example, *Alex Genin and others v. Republic of Estonia,* ICSID Case No. ARB/99/2, Award, 25 June 2001.

[15] The text of the Australia–United States FTA (2005) is available at: http://www.ustr.gov/trade-agreements/free-trade-agreements/australian-fta/final-text.

[16] The text of the European Community–CARIFORUM EPA (2008) is available at: http://ec.europa.eu/world/agreements/downloadFile.do?fullText=yes&treatyTransId=12969.

[17] Organisation for Economic Co-operation and Development (OECD) (2011). *OECD Guidelines for Multinational Enterprises*; available at: http://www.oecd.org/dataoecd/43/29/48004323.pdf.

[18] United Nations Commission on Human Rights (UNCHR) (2003), *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 55th Session, Agenda Item 4, UN Document E/CN.4/Sub.2/2003/12/Rev.2; available at: http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.12.Rev.2.En.

[19] Food and Agricultural Organization of the United Nations (FAO), et. all (2010), *Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources*; available at: http://siteresources.worldbank.org/INTARD/214574-1111138388661/22453321/Principles_Extended.pdf.

[20] International Chamber of Commerce (ICC) (2012), *Guidelines for International Investment*; available at: http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2012/2012-ICC-Guidelines-for-International-Investment/.

[21] The Equator Principles (2003), Washington, D.C. (revised June 2006); available at: http://www.equator-principles.com.

[22] United Nations Principles for Responsible Investment (UNPRI) (2006); available at: http://www.unpri.org/principles/.

[23] United Nations Human Rights Council (2011), *Guiding Principles on Business and Human Rights for Implementing the United Nations "Protect, Respect and Remedy" Framework*, 17th Session, Agenda Item 3, Document A/HRC/17/31; available at: http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf.

[24] Braithwaite, J. and Drahos, P. (2000), *Global Business Regulation*, (New York: Cambridge University Press) pp. 539–543.

[25] See Tienhaara, K. (2007), "Third-Party Participation in Investment-Environment Disputes: Recent Developments", *Review of European Community and International Environmental Law*, Vol. 16(2), pp 230–242; See also the discussion in Center for International Environmental Law (CIEL) and International Institute for Sustainable Development (IISD) (2007), *Revising the UNCITRAL Arbitration Rules to Address Investor-State Arbitrations*; available at:

http://www.iisd.org/pdf/2007/investment_revising_uncitral_arbitration_september.pdf.

[26] For a summary of concerns and suggestions for solutions to issues raised by Investor-State dispute settlement procedures please consult the *World Investment Report 2012: Towards a New Generation of Investment Policies* (WIR 2012), (New York and Geneva: United Nations), Chapter IV, pp. 152-153.

[27] Van Harten, G. (2007), *Investment Treaty Arbitration and Public Law* (New York: Oxford University Press) p. 159; Sornarajah, M. (2003), "The Clash of Globalizations and the International Law on Foreign Investment: The Simon Reisman Lecture in International Trade Policy", *Canadian Foreign Policy*, Vol. 10(2), pp. 1–20 (13–17); Tienhaara, K. (2007), "Third-Party Participation in Investment-Environment Disputes: Recent Developments", *Review of European Community and International Environmental Law*, Vol. 16(2), pp 230–242 (230–231).

[28] See the discussion in Bjorklund, A. (2009), "The Emerging Civilization of Investment Arbitration", *Penn State Law Review*, Vol. 113, pp. 1269–1300.

[29] The same text appears in the 2012 United States Model BIT in Article 29 sections 1 and 2.

[30] For example, articles 34, 35, 38 and 39 of the Canada–Peru BIT (2006) and articles 28 and 29 of the United States–Uruguay BIT (2005) provide for public access to hearings and non-disputing party access to the pleadings and evidence.
See also the discussion on transparency in NAFTA and the United States' Model BIT in Coe, J. (2006), "Transparency in the Resolution of Investor-State Disputes – Adoption, Adaptation, and NAFTA Leadership", *University of Kansas Law Review*, Vol. 54, pp. 1339–1385.

[31] The text of the United States' Model BIT (2004) is available at: http://www.state.gov/documents/organization/117601.pdf.
See also the Canadian Model BIT (2004) (Canadian Model BIT) articles 34, 35, 38 and 39 available at: http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf.

[32] The text of the Australia–Chile FTA (2008) is available at:

https://www.dfat.gov.au/fta/aclfta/Australia-Chile-Free-Trade-Agreement.pdf.

[33] *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Preliminary Objections Under CAFTA Articles 10.20.4 and 10.20.5, 2 August 2010; ICSID Press Release June 2 2010, available at: http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement60.

[34] *Railroad Development Corporation (RDC) v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, 29 June 2012; ICSID News Release 18 November 2011, available at: http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement97.

[35] *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. The Republic of El Salvador*, ICSID Case No. ARB/09/17, Award, 14 March 2011; ICSID News Release 17 November 2010, available at: http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement71.

[36] The text of the CAFTA–DR (2004) is available at: http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text.

[37] Such cases include: *United Parcel Service of America, Inc. v. Government of Canada* NAFTA/UNCITRAL Arbitration Rules Proceeding, Award on Jurisdiction, 22 November 2002; ICSID News Release 28 May 2001, available at: http://icsid.worldbank.org/ICSID/StaticFiles/Announcement4.html; *Methanex Corporation v. United States of America*, NAFTA/UNCITRAL Arbitration Rules Proceeding, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005; ICSID News Release 8 June 2004, available at: http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Archive_%20Announcement10.

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Note: a similar practice is also established in the WTO, where both Panel and Appellate Body hearings are open to the public. Such open hearings are conditioned on the consent of the parties and are accessible through a live broadcast in a separate viewing room at the WTO Headquarters in Geneva.

[38] See Levine, E. (2011), "*Amicus Curiae* in International Investment Arbitration: The Implications of an Increase in Third-Party Participation", *Berkeley Journal of International Law*, Vol. 29 pp. 200–224; see also the discussion in Bjorklund, A. (2009), "The Emerging Civilization of Investment Arbitration", *Penn State Law Review*, Vol. 113 No. 4, pp. 1269–1300.

[39] See United States' Model BIT (2004), articles 28 and 29; see also Canadian Model BIT (2004), articles 34, 35, 38 and 39.

[40] The same text appears in the 2012 United States Model BIT in article 28, sections 2 and 3.

[41] The text of the United States' Model BIT (2004) is available at: http://www.state.gov/documents/organization/117601.pdf.

[42] The amended ICSID Rules are available at

http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf.
See also the discussion in McLachlan, C., Shore, L. and Weiniger, M. (2007), *International Investment Arbitration: Substantive Principles* (New York: Oxford University Press) pp. 57–60.

[43] See the discussion in Tienhaara, K. (2007), "Third-Party Participation in Investment-Environment Disputes: Recent Developments", *Review of European Community and International Environmental Law*, Vol. 16(2), pp. 230–242. See also Newcombe, A. (2007), "Sustainable Development and Investment Treaty Law", *The Journal of World Investment & Trade*, Vol. 8, pp. 357–407; McLachlan, C., Shore, L. and Weiniger, M. (2007), *International Investment Arbitration: Substantive Principles* (New York: Oxford University Press) pp. 57–60.

[44] ICSID Rule 32(2); Newcombe, A. (2007), "Sustainable Development and Investment Treaty Law", *The Journal of World Investment & Trade*, Vol. 8, pp. 357–407. See also Tienhaara, K. (2007), "Third-Party Participation in Investment-Environment Disputes: Recent Developments", *Review of European Community and International Environmental Law*, Vol. 16(2), pp. 230–242.

[45] The amended UNCITRAL Arbitration Rules (2010) are available at: http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf .

[46] United Nations Commission on International Trade Law (2008), *Report of the United Nations Commission on International Trade Law* (New York, 16 June – 3 July), UN General Assembly Document No. A/63/17 and corrigendum ; available at: www.uncitral.org/uncitral/en/commission/sessions/41st.html.

[47] United Nations Commission on International Trade Law (2008), *Report of the United Nations Commission on International Trade Law* (New York, 16 June – 3 July), UN General Assembly Document No. A/63/17 and corrigendum; available at: www.uncitral.org/uncitral/en/commission/sessions/41st.html.

[48] United Nations Commission on International Trade Law (2008), *Report of the United Nations Commission on International Trade Law* (Vienna, 27 June – 8 July 2011), UN General Assembly Document No. A/66/17; available at: www.uncitral.org/uncitral/en/commission/sessions/44th.html

[49] United Nations Commission on International Trade Law (2012), *Report of Working Group II (Arbitration and Conciliation) on the Work of its Fifty-sixth Session* (New York, 6–10 February), UN General Assembly Document No. A/CN.9/741; available at www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html.

[50] United Nations Commission on International Trade Law (2012), *Settlement of Commercial Disputes: Preparation of a Legal Standard on Transparency in Treaty-based Investor-State Arbitration* (New York, 6–10 February and Vienna, 1-5 October 2012), UN General Assembly Documents No. A/CN.9/WG.II/WP.169 and Addendum and A/CN.9/WG.II/WP.172; available at: www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html.

[51] See, for example, current draft article 1, paragraph (5) of the draft rules on transparency as contained in document A/CN.9/WG.II/WP.172, available at: www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html.

[52] *Methanex Corporation v. United States of America,* NAFTA/UNCITRAL Arbitration Rules Proceeding, Decision of the Tribunal on Petitions from Third Parties to Intervene as "Amici Curiae", 15 January 2001.

[53] See the discussion in Viñuales, J. (2006/2007), "Amicus Intervention in Investment Arbitration", *Dispute Resolution Journal*, Vol. 61(4) pp. 72–81; see also Tienhaara, K. (2007), "Third-Party Participation in Investment-Environment Disputes: Recent Developments", *Review of European Community and International Environmental Law*, Vol. 16(2), pp. 230–242; Coe, J. (2006), "Transparency in the Resolution of Investor-State Disputes – Adoption, Adaptation, and NAFTA Leadership", *University of Kansas Law Review*, Vol. 54(5), pp. 1339–1385.

[54] The text of the UNCITRAL Arbitration Rules (1976) is available at: http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf.

[55] *Methanex Corporation v. United States of America,* NAFTA/UNCITRAL Arbitration Rules Proceeding, Decision of the

Tribunal on Petitions from Third Parties to Intervene as "Amici Curiae", 15 January 2001.

[56] *Glamis Gold Ltd. v. United States of America*, NAFTA/UNCITRAL Arbitration Rules Proceeding, Award, 8 June 2009.

[57] *Glamis Gold Ltd. v. United States of America*, NAFTA/UNCITRAL Arbitration Rules Proceeding, Application for Leave to File a Non-Party Submission, 19 August 2005.

[58] Bjorklund, A. (2011), "The Participation of Sub-National Government Units as *Amici Curiae* in International Investment Disputes", in Chester Brown and Kate Miles (eds.), *Evolution in Investment Treaty Law and Arbitration* (New York: Cambridge University Press), pp. 298–316.

[59] Bjorklund, A. (2011), "The Participation of Sub-National Government Units as *Amici Curiae* in International Investment Disputes", in Chester Brown and Kate Miles (eds.), *Evolution in Investment Treaty Law and Arbitration* (New York: Cambridge University Press), pp. 298–316.

[60] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order N. 5, 2 February 2007. See also the discussion in Tienhaara, K. (2007), "Third-Party Participation in Investment-Environment Disputes: Recent Developments", *Review of European Community and International Environmental Law*, Vol. 16(2), pp. 230–242.

[61] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Petition for Amicus Curiae Status, 27 November 2006.

[62] Knahr, C. (2011) "The New Rules on Participation of Non-Disputing Parties in ICSID Arbitration – Blessing or Curse?" in Chester Brown and Kate Miles (eds.), *Evolution in Investment Treaty Law and Arbitration* (New York: Cambridge University Press), pp. 319–338.

[63] *AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010.

[64] *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, No decisions available (case is still pending).

[65] This point has recently been made by Christina Knahr; see the discussion in Knahr, C. (2011) "The New Rules on Participation of Non-Disputing Parties in ICSID Arbitration – Blessing or Curse?" in Chester Brown and Kate Miles (eds.), *Evolution in Investment Treaty*

Law and Arbitration (New York: Cambridge University Press), pp. 319–338.

66 See, for example, the discussion in VanDuzer, J. A. (2007), "Enhancing the Procedural Legitimacy of Investor-State Arbitration through Transparency and Amicus Curiae Participation", *McGill Law Journal*, Vol. 52(4), pp. 681–723; Coe, J. (2006), "Transparency in the Resolution of Investor-State Disputes – Adoption, Adaptation, and NAFTA Leadership", *University of Kansas Law Review*, Vol. 54(5), pp. 1339–1385. Hachez, N. and Wouters, J. (2012) *International Investment Dispute Settlement in the 21st Century: Does the Preservation of the Public Interest Require an Alternative to the Arbitration Model?* Leuven Centre for Global Governance Studies, Working Paper No. 81; available at: https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp81-90/wp81.pdf;

67 *Tecnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, para. 154 (emphasis added). This approach has been adopted in a number of subsequent awards, such as *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, paras. 114–115; *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, paras. 279–281; *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, paras. 360–361, 372, 392, 408.

68 Douglas, Z. (2006), "Nothing if Not Critical for Investment Treaty Arbitration: *Occidental*, *Eureko* and *Methanex*", *Arbitration International*, Vol. 22(1) pp. 27–51 (p. 28).

69 *Frontier Petroleum Services Ltd. v. Czech Republic*, PCA-UNCITRAL Arbitration Rules, Final Award, 12 November 2010, para. 285 (emphasis added).

70 *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000.

71 *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, paras. 74–101.

72 *The United Mexican States v. Metalclad Corporation*, Supreme Court of British Columbia, 2 May 2001, para. 68.

[73] NAFTA Free Trade Commission (2001), *Notes of Interpretation of Certain Chapter 11 Provisions* (31 July 2001); available at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/NAFTA-Interpr.aspx?lang=en&view=d.

[74] See, for example Article 816 of the Canada–Columbia FTA (2008) and the preamble of both the Albania–European Free Trade Association FTA (2009) and the European Free Trade Association–Peru FTA (2010).

See the discussion in UNCTAD 2011 (pp. 111–120) and in Interagency Working Group on the Private Investment and Job Creation Pillar of the G20 Multi-Year Action Plan on Development (2011), *Promoting Standards for Responsible Investment in Value Chains – Report to the High-level Development Working Group*; available at: http://archive.unctad.org/sections/dite_dir/docs//diae_G20_CSR_Standards_Report_en.pdf.

[76] See, for example, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, paras. 307, 324, 360 and 381.

[77] See, for example, the discussion in Schill, S. (2006), "Fair and Equitable Treatment Under Investment Treaties as an Embodiment of the Rule of Law", IILJ Working Paper 2006/6, *Global Administrative Law Series*, available at: www.iilj.org/publications/documents/2006-6-GAL-Schill-web.pdf.

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[78] Marks, S. (2005), "Naming Global Administrative Law", *New York University Journal of International Law and Politics*, Vol. 37, pp. 995–1001.

III. ASSESSMENT AND POLICY OPTIONS

State-centred transparency obligations and investor transparency responsibilities introduced through IIAs can contribute to a more open investment environment by facilitating communication between investors and the host State. Transparency provisions that specifically target ISDS can contribute to enhanced accountability for all actors and help address legitimacy concerns raised with respect to ISDS. Enhanced accountability can also be facilitated through increased public participation in the resolution of investor-State disputes.

This final section presents policy options regarding transparency aspects in clauses addressing each of these contexts. Its purpose is to assist policymakers when determining whether, and if yes, which transparency provisions, to include in new IIAs. This section builds on UNCTAD's Investment Policy Framework for Sustainable Development (IPFSD), launched in July 2012, notably sections 4.8, 6.3.0 and 7 (UNCTAD 2012b).[1]

A. State-centred transparency obligations

Almost all IIAs contain some reference to transparency obligations assumed by the parties in their capacity as host States. It has been suggested that the absence of such a reference could be regarded by foreign investors as an adverse indication of the investment climate within a State. To avoid such an implication, negotiating States may choose to assume some form of transparency obligation. States must then select a formulation for the content of the provision, and whether to use modifiers to qualify the obligation.

1. Determining which States are the addressees of transparency obligations

As discussed in section II, there are two formulations for States as addressees in IIAs. The first is to impose transparency obligations

solely on the host State. The second is to impose transparency obligations on both States.

(i) Option 1: Obligations imposed on the contracting parties in their role as host State

Uncertainty regarding host State regulatory changes may be viewed by potential foreign investors as a threat to the operation or profitability of investment. Imposing transparency obligations on the host State can send a strong message to potential investors that the investment climate within that jurisdiction is a favourable one.

Possible formulation

Each Contracting Party shall …

promptly publish, or otherwise make publicly available, its laws and regulations

…which may affect the investments of investors of the other Contracting Party in the territory of the former Contracting Party.

(ii) Option 2: Obligations imposed on both contracting States

This formulation frames transparency obligations in an expansive way and imposes on all contracting parties the responsibility to ensure adequate disclosure of requisite information, whether as home or host State. This approach means that the home State can be expected to disclose information regarding its own regulatory framework or to provide information that could assist host States with their policies on, for example, corrupt practices (UNCTAD 2004). Of the two options for State addressees, this option provides prospective investors, contracting States, and other development stakeholders with the greatest access to relevant information.

Possible formulation

Each Contracting Party shall …

promptly publish, or otherwise make publicly available, its laws and regulations

…which may affect any matter covered by this agreement.

2. Determining the content of State-centred transparency obligations

A key issue in negotiating transparency provisions in new IIAs is the extent to which they cover regulatory and administrative issues and the associated financial burdens of compliance with and monitoring of the assumed transparency obligations. The scope and depth of such transparency obligations depend on the types of information to be made public. In this regard, there several options can be considered.

(i) Option 1: laws and regulations

2. The first option is to limit the transparency obligation to the disclosure of "*laws and regulations*". This formulation is one of the least intrusive for host States (UNCTAD 2004) because it requires little more of governmental authorities than is already required under domestic laws. For this reason, no further action is usually required of State parties to comply with provisions of this nature.

Possible formulation

Each Contracting Party shall…

promptly publish, or otherwise make publicly available, **its laws and regulations**

…which may affect the investments of investors of the other Contracting Party in the territory of the former Contracting Party.

(ii) Option 2: beyond laws and regulations

Including items other than "*laws and regulations*" will result in a more intrusive form of obligation, requiring a greater level of action from government officials. In making their investment decisions, however, foreign investors will be interested in many types of information beyond the laws and regulations. For this reason, negotiating States may wish to consider the appropriate balance that should be struck between the disclosure needs of the investor and the cost implications for the State. For example, the inclusion of items such as "*administrative procedures and administrative rulings*" is relatively common even though these items could potentially encompass a wide range of material.

As an additional layer of material, States may also wish to consider including "*draft"* or "*proposed"* laws and regulations. Such a formulation would significantly increase the administrative burden on the host State, but would provide a much greater level of transparency as well as address key investor perceptions of risk, namely, the impact of future regulatory changes on investment profitability. Regarding the requirement that the State party also invites and/or considers comments raised by affected stakeholders, from a public policy perspective the concern has been voiced that this may expose domestic decision-making processes to private sector influence (foreign or domestic).

Possible formulation

Each Contracting Party shall…

promptly publish, or otherwise make publicly available, its laws, regulations, procedures and administrative rulings and judicial decisions of general application as well as international agreements

…which may affect the investments of investors of the other Contracting Party in the territory of the former Contracting Party.

(iii) Option 3: agreement to cooperate and exchange information

In addition to an obligation to disclose administrative and regulatory information, States may also include a provision to cooperate and exchange other types of information that affect foreign investment. Such a provision may help build a greater culture of transparency and cooperation between the contracting States. States may also choose to establish contact points in each respective State to facilitate such cooperation.

Possible formulation

Consultation and cooperation

1. The representatives of the Contracting Parties shall each establish a point of contact to cooperate and hold meetings from time to time for the purpose of:
   (a) reviewing the implementation of this Agreement;
   (b) exchanging legal information and investment opportunities;
   (c) resolving disputes arising out of investments;
   (d) forwarding proposals on promotion of investment;
   (e) studying other issues in connection with investment.

3. Using "modifiers" to calibrate State obligations

States may choose to use modifiers to expand or limit State-centred transparency obligations. "Limiting" modifiers could insulate States from excessive administrative costs that could result from an otherwise expansive transparency obligation. On the other hand, "expansive" modifiers could help strengthen investor protections and providing investors with greater access to regulatory information.

(i) Option 1: modifying the obligations of both States

As discussed in Section II, expansive modifiers include "*which pertain to or affect*", "*may affect*" and "*might affect*". Limiting modifiers include "*to the extent possible*", "*substantially affect*" and "*materially affect*". Multiple modifiers may be combined within a single provision.

Possible formulations

Expansive modifiers:

Each Contracting Party shall (**no modifier**) promptly publish, or otherwise make publicly available, its laws, regulations, procedures and administrative rulings and judicial decisions of general application as well as international agreements which **may affect** the investments of investors of the other Contracting Party in the territory of the former Contracting Party.

Limiting modifiers:

Each Contracting Party shall, **to the extent possible**, promptly publish, or otherwise make publicly available, its laws, regulations, procedures and administrative rulings and judicial decisions of general application as well as international agreements which **materially affect** the investments of investors of the other Contracting Party in the territory of the former Contracting Party.

(ii) Option 2: explicit differential treatment for the less-developed State

In addition to the use of "limiting modifiers", there is the option to explicitly refer to the concept of special and differential treatment. As discussed in UNCTAD's IPFSD, such special and differential treatment regarding transparency requirements may help ensure that a less-developed party to a treaty does not assume obligations beyond its capacity to comply (UNCTAD 2012b).[2]

However, a relaxation of the standard by way of including a special and differential treatment may also be interpreted by potential investors as an indication that transparency requirements will not be satisfied by the less-developed party.

Possible formulation

Party A (the less-developed contracting party) **strives to** promptly publish, or otherwise make publicly available, its laws, regulations, procedures and administrative rulings and judicial decisions of general application as well as international agreements.

B. Transparency regarding investor conduct

States may also consider whether to refer in their IIAs to transparency obligations for investors. As discussed in Section II, an investor obligation or responsibility for transparency can be introduced through either a direct or indirect formulation.

1. Indirect formulation

The simplest investor-related transparency obligations can be encompassed in an indirect form within provisions requiring foreign investors to comply with the laws and regulations of the host State. In this way, if host State corporate regulations require disclosure of certain information, foreign-owned corporations will need to comply with those requirements. This is perhaps the least controversial approach to investor-related transparency obligations.[3]

Possible formulation

Foreign investors shall abide by the laws, regulations, administrative guidelines and policies of the host State.

2. Direct formulation

Some recent IIAs also include more exacting disclosure requirements in which authority is expressly granted to the host State to collect information from the investor. This option provides the host State with a mechanism to carry out extensive due diligence on a potential investor and could, therefore, be particularly useful in vetting sources of capital investment for development programmes. However, this formulation could also deter prospective investors that do not want to risk being subjected to this type of disclosure requirement.

Possible formulation

The Host Contracting Party has the right to seek information from a potential investor or its home State about its corporate governance history and its practices as an investor, including in its home State.

The Host Contracting Party shall protect confidential business information it receives in this regard. The Host Contracting Party may make the information provided available to the public in the community where the investment may be located, subject to the protection of confidential business information and to other applicable national legislation.

3. Non-binding formulations

There are other possible ways to incorporate investor conduct in transparency provisions. Two examples are mentioned here. The first is to condition particular IIA investment protections on satisfying corresponding transparency obligations, i.e. condition the right to free transfer of funds on compliance with reporting requirements for currency transfers. The second is to impose an obligation on the contracting parties to promote the uptake of CSR-related reporting through domestic legislation.

C. Transparency in ISDS

It is increasingly common in IIAs to address transparency issues relating to the conduct of arbitral proceedings. Among others, this is response to the general public's demand for information on ISDS proceedings and issues addressed therein. Hence, the question of whether or not to include transparency provisions in ISDS is likely to arise for States during the process of negotiating new IIAs. Options for such provisions are set out below.

1. Availability of documents and information

States can foster and facilitate transparency by including provisions in IIAs that are designed to facilitate access to information or documents regarding ISDS. Possible formulations range from no public access to full public access to a large number of documents issued in the context of ISDS procedures.

Arguments against fostering access to information/documents include the possibility of increased cost to the disputing parties, the greater administrative burden and the potential for confidential information to be compromised. In this context, it is possible to include a provision stipulating that the tribunal shall not require a party to furnish or allow access to information the disclosure of which would impede law enforcement, confidential business information or the financial affairs of individual customers of financial institutions.

The formulation below is a fairly comprehensive example of the types of documents States may require to be disclosed in ISDS proceedings.

Possible formulation

The respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Party and make them available to the public:

(a) the notice of intent;

(b) the notice of arbitration;

(c) pleadings, memorials, and briefs submitted to the tribunal by a disputing Party and any written submissions by non-disputing parties;

(d) minutes or transcripts of hearings of the tribunal, where available; and

(e) orders, awards, and decisions of the tribunal.

2. Access to oral hearings

Another key element related to increased transparency in ISDS procedures is whether or not to open the oral hearings to the public. Again, the relevant considerations for policymakers are the public's interest in the issues in dispute and the parties' need for confidentiality. In this regard, some recent IIAs have included a provision for open hearings, but with the qualifying statement that the presiding tribunal is empowered to determine the logistical arrangements to ensure that confidential information is protected.

Possible formulation

The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. However, any disputing Party that intends to use information designated as protected information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure.

3. Amicus submissions

A final, related issue, is that of *amicus curiae* submissions. *Amicus* submissions are often seen as an indicator of transparency in ISDS. If States choose to include a provision allowing for *amicus* curiae briefs to be submitted, the typical approach is to grant tribunals the discretion to accept and consider *amicus* submissions. States may also choose to enumerate the criteria tribunals should consider when exercising this discretion. Although such a provision my be redundant with ICSID rule revisions[4], including the provision would ensure that *amicus* submissions may more easily be considered regardless of the arbitral forum selected by the parties.

Possible formulation

After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:

1. the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceedings by bringing a perspective, particular knowledge or insight that is different from that of the disputing Parties;
2. the non-disputing party submission would address a matter within the scope of the dispute;
3. the non-disputing party has a significant interest in the proceeding.

The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either Party, and that both Parties are given an opportunity to present their observations on the non-disputing party submission.

* * *

There are a range of options available to States when considering which transparency provisions to include in their new (or re-negotiated) IIAs. These encompass traditional elements of State transparency as well as investor responsibilities and transparency within ISDS. When negotiating IIAs with these provisions, States should consider the sustainable development ramifications of each formulation. States should also ultimately consider the balance within IIAs of measures included to promote and protect investment, to enhance inter-State relations, and to preserve the public interest of each State in their capacity as host economy.

Notes

[1] For a complete list of policy options and related online discussions please visit the Investment Policy Hub under http://investmentpolicyhub.unctad.org.

[2] Although largely absent from existing IIAs, this principle is expressed in numerous provisions of the WTO agreements and has found its way into other aspects of international law such as the international climate change framework.

[3] See IPFSD, section 7, for a discussion of different issues regarding the requirement to comply with domestic laws and regulations.

[4] The possible formulation presented here is identical to Rule 37 of the ICSID Rules of Procedure for Arbitration Proceedings presented above in Box 30.

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   _____

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2. Which of the following best describes your area of work?

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3. In which country do you work? _____

4. What is your assessment of the contents of this publication?

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6. Please indicate the three things you liked best about this publication:

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8. If you have read other publications of the UNCTAD Division on Investment, Enterprise Development and Technology, what is your overall assessment of them?

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