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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 hyphen (-) 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. The opinions expressed in it are those of the consultants and not necessary those of the secretariats.

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ABBREVIATIONS

APEC	Asia-Pacific Economic Cooperation
ASEAN	Association of Southeast Asian Nations
BIT	bilateral investment treaty
CARIFORUM	The Caribbean Forum
CCIA	COMESA Common Investment Area
COMESA	Common Market for Eastern and Southern Africa
CSR	corporate social responsibility
ECOWAS	Economic Community Of West African States
EPA	Economic Partnership Agreement
EPFI	Equator Principles Financial Institution
FDI	foreign direct investment
FET	fair and equitable treatment
FTA	free trade agreement
GATT	General Agreement on Tariffs and Trade
ICSID	International Centre for Settlement of Investment Disputes
IFAP	Investment Facilitation Action Plan
IIA	international investment agreement
ILO	International Labour Organization
IPA	investment promotion agency
ISDS	investor-State dispute settlement
NAFTA	North American Free Trade Agreement
NGO	non-governmental organisation
OECD	Organisation for Economic Co-operation and Development
SADC	Southern African Development Community
SRII	socially responsible institutional investment
UNCITRAL	United Nations Commission on Internatioanl Trade Law
UNPRI	United Nations Principles for Responsible Investment
WTO	World Trade Organization

EXECUTIVE SUMMARY

The aim of this study is to enhance Asia-Pacific Economic Cooperation (APEC) member economies' understanding of one selected Core element of international investment agreements (IIAs), namely Transparency. The issue of Transparency is an essential element of the APEC Non-Binding Investment Principles, the Bogor Goals and the Osaka Action Agenda. The study conceptually examines Transparency as a core principle and assesses its role and impact in enhancing the overall investment climate, as defined by APEC member economies. In order to achieve these objectives, the study examines the way in which transparency issues have been addressed in recent IIAs and discusses the recent emergence of transparency issues in the context of investor-State dispute settlement (ISDS).[1] In analysing these trends, this study assesses the development implications and policy options of the different transparency-related formulations used in IIAs and ISDS provisions.

In analysing Transparency in IIAs, a certain set of key issues have continuously been of importance regardless of more recent developments in treaty-making. For example, it is necessary to continue exploring the identification of potential addressees of transparency obligations in IIAs and the development implications of the various options. 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 of the host economy to meet those obligations. 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 economies to fulfil expansive transparency obligations, and the resulting cost to such economies.

In addition to these common issues, this study identifies significant areas of change in approaches to the issue of transparency by economies and the corporate sector. The most substantial shift has been the emergence of transparency issues within ISDS procedures. This study addresses the implications of this conceptual shift and its specific manifestation within the dispute resolution context. The second broad issue is the consideration of transparency concerns more generally and their impact on procedural matters in ISDS. Important in this context are the appearance of transparency and public participation-related provisions within recent IIAs and the development implications of particular formulations.

[1] Unless otherwise noted, all instruments and bilateral investment treaty (BIT) texts cited in this report may be found in UNCTAD's online collection of BITs and IIAs at: www.unctad.org/iia.

Section I contains an explanation of the concept of transparency as it is understood in the context of IIAs and ISDS and elaborates on the key issues identified above. Section II provides a review of current treaty and arbitral practice with respect to transparency issues, focusing on recent examples from APEC economies. Section III analyses the interaction of transparency obligations with other related issues in IIAs, which specifically includes ISDS. The final section of this study contains a series of policy options available to IIA negotiators and those involved in revising arbitral rules. In this final section, the study also briefly considers the potential implications of those options for host economy development. This will assist the negotiator in deciding whether or how to include transparency provisions in IIAs and in ISDS provisions, and, if so, which formulation to include into new agreements.

This study was prepared by Kate Miles and Andrea Bjorklund, working as independent consultants under the supervision of Anna Joubin-Bret, Senior Legal Advisor at UNCTAD's Division on Investment and Enterprise. Jan Knörich consolidated the final document.

INTRODUCTION

Transparency is a concept that has multiple understandings and applications. In the context of performing public functions, it is represented by openness of decision-making and opportunities for scrutiny by the general public or by peers. Transparency contributes to a perception of fairness and enhances confidence in the decision-making and implementation processes of the government. Within that characterisation, its particular manifestation in any given setting will be determined by the specific requirements of its application and this is no different for the field of international investment law.

It should be noted at the outset that transparency, together with accountability, is a means to ensure the broader aim of good governance and the rule of law. It is expected that governments, and more generally any social entity, act transparently with respect to international commitments and towards those that are affected by their decisions, acts, or measures. In this regard, transparency is a means to ensure that a decision, act or measure is not arbitrary, as it will require openness about the intent and, as a corollary, a justification. Furthermore, transparency also fosters a climate of good governance by shedding light on possible cases of corruption, malpractice and other wrongful behaviour on the part of a government or an investor.

Issues relating to transparency in public administration have long been regulated at the domestic level, with a view to ensuring that conditions, application, possible recourse and interpretation are available to all stakeholders.[2] This is particularly true for foreign operators, as they are generally at a disadvantage when it comes to access to information, regulatory decisions and their application beyond government authorities. In this regard, transparency is a means to facilitate access to courts and other administrative review mechanisms to ensure a proper application of the laws and regulations of the host economy.

Transparency in international investment law

At the international level, transparency is a means for parties to international agreements or other instruments of international cooperation to ensure that commitments and obligations are being respected and fulfilled by all signatories. Transparency enables the parties to monitor the implementation of commitments by other contracting parties, to monitor compliance, reservations, restrictions and other exceptions. This aspect is closely connected with a key function of transparency in the area of international investment — international cooperation among stakeholders. Numerous investment treaties, chapters and provisions focus on cooperation between contracting parties and on the exchange of information, be it for promotion or monitoring purposes, and are often accompanied by requirements to exchange best practices and engage in consultations to enhance transparency in decision-making and implementation processes. In this way, transparency is an important means through which the investment

[2] The APEC-UNCTAD Study on Core Elements of IIAs in Domestic Investment Frameworks discusses the issue of domestic legislation on investment in further detail. The study includes an in-depth discussion of transparency.

relationship between all stakeholders can be fostered. Extending transparency obligations to corporate disclosure is also meant to promote a better understanding between the expectations of investors and of the host economy's authorities, and stakeholders at large. Furthermore, such an approach aims to protect the interests of relevant communities in the host economy.

In the area of international economic law, transparency is found in particular to be a central pillar of the international trading system. Here, access to information of the other Contracting Parties on laws, regulations and procedure relating to duties, taxes, prohibitions, requirements or restrictions affecting trade in goods and services is essential to the overall objective of liberalization of international trade (see also Box 1). Access to information also ensures the proper functioning of the system and the global balance between all members of the World Trade Organization (WTO).

Box 1. Transparency and the international trading system

In international economic agreements, particularly those that form a central pillar of 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. A basic 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 that requires that:

"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."

The beneficiaries of this requirement for the publication of laws and regulations are identified as the governments of the other member economies and the economic actors, namely in this case, the traders.

In the field of international investment, transparency is closely related to the three main objectives of the international investment framework, namely promotion, protection and liberalization. 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 economies, with the objective of facilitating and supporting investment. Ensuring that information about the domestic investment climate is available to potential investors and the authorities in their home economy is the first step in any investment promotion strategy (UNCTAD, 2008a). A decision

to pursue investment promotion and facilitation pro-actively is greatly enhanced by the availability of information about laws, regulations, conditions for investing, incentives and requirements. Thus, transparency serves to disseminate information both on conditions within the economy and on investment opportunities that may be available.

Transparency is also inherently part of the protection of the rights and interests of foreign investors. In order to establish the violation of international or domestic commitments to protect property rights of investors, to ensure fair and equitable treatment, or to assess whether any decision or conduct of the host economy government is discriminatory against the foreign investor, either vis-à-vis domestic investors (national treatment) or vis-à-vis investors of another home economy (most-favoured-nation treatment), it is essential to have a given set of rules and regulations as a benchmark criterion. Transparency and access to information is a central component in that process, providing a means to guarantee and enforce due process and access to justice.

Finally, as in the case of the international trading system, liberalization of conditions to entry and operation of investment behind the borders of member economies requires the availability of information about laws, regulations, and administrative procedures to all economic actors whose rights and interests are affected by them, as well as to the general public. Stakeholders require information not only on the removal of barriers and restrictions, but also regarding the prevailing investment conditions within economies, which allows for any changes to be duly assessed. In this way, transparency can be a means to assess the stability of the legal framework for investment and keep track of changes in the laws and regulations, whether such changes go towards further liberalization or restriction to the entry and operation of foreign investors.

Even though transparency issues remain a central concern for foreign investors throughout the investment relationship, they are of particular significance for prospective investors in the period during which they assess whether or not to enter into an investment. Extensive 'pre-establishment' transparency is a vital component in that decision-making process. Indeed, transparency in the investment decision-making process goes beyond investment promotion practices that are based on the availability of relevant and reliable information concerning the laws and regulations applicable to entry and operation of foreign investors. Rather, transparency in the decision-making process forms an integral part of the enabling framework that will allow investors to carry out their due diligence before making investment decisions. It avoids raising wrong expectations on the part of the investor that may result in possible problems and disputes. Reflecting that importance, IIAs tend to impose obligations on host economies to disclose an often vast array of information that could affect the investment.

Of course transparency obligations in IIAs also extend to the operation of the investment, manifesting themselves in due process and fair dealing requirements. Due process also includes access to prompt review of administrative decisions, rules or regulations, whether they are challenged as violating protection or liberalization obligations.

It should be noted however that transparency obligations have considerable development-related implications for both contracting parties to IIAs, including questions around the technical capacity of governments to comply with those requirements as well as the financial costs of compliance and monitoring. For these reasons, this study examines the nature of transparency obligations in recent IIAs, their degree of intrusiveness into the legal framework for investment, and the mechanisms through which disclosure requirements are to be met and enforced.

The traditional view of transparency obligations contained within IIAs is that they are solely directed at *host* economies. There is, however, a growing sense that transparency is also an important component in the investment relationship in view of the host economy and that, accordingly, disclosure requirements should also apply to prospective investors and the *home* economy. This issue was introduced by UNCTAD in 2004 through an examination of the emergence of such approaches in IIAs (UNCTAD, 2004). This study further explores the implications of transparency requirements for investors and home economies.

Transparency in ISDS procedures

What has been especially interesting in recent times, however, has been the changing nature of transparency issues within international investment law, spreading from traditional concerns focused on host economy activity to a variety of contexts. As a consequence of this shift in emphasis, current debates on transparency in international investment law are centred not only on host economy obligations under IIAs, but have also extended to the conduct of investor-State disputes. This has, perhaps, been the most radical development in the consideration of transparency issues in IIAs in recent years.

Several factors recently converged to bring about the application of transparency issues to ISDS, including, amongst other factors:

- the increasing emphasis on the public interest inherent to investor-State disputes as they involve a sovereign;
- the determination of large damages awarded against host economies;[3]
- the filing of investor claims against each of the contracting parties to the North American Free Trade Agreement (NAFTA, 1992);[4]
- and a more generalised appreciation of the potential impact of procedural matters in ISDS.

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[3] See, for example, the award of US$353 million in *CME Czech Republic BV v Czech Republic* (Damages) (2003) 15(4) *World Trade and Arbitration Materials* 83 and 245; see also the award of US$133 million in *CMS Gas Transmission Company v Argentine Republic* (2005) 44 *International Legal Materials* 1205; see also the award in excess of US$165million in *Azurix Corp. v Republic of Argentina* (Award) (2006) ICSID Case No. ARB/01/12.

[4] See, for example, *Methanex Corp. v United States*, Final Award (2005) 44 *International Legal Materials* 1345; *Glamis Gold Ltd v United States of America*, Award, 8 June 2009, <http://ita.law.uvic.ca/documents/Glamis_Award.pdf> at 10 February 2011; *Pope & Talbot Inc v Canada*, Award on Damages, (2002) 41 *International Legal Materials* 1347.

These circumstances have given rise to many issues concerning the operation of protections guaranteed under IIAs, including, as a key aspect, the procedural conditions under which ISDS is conducted. The recent focus on delineating public interest elements within investor-State disputes, in particular, has contributed to calls for greater transparency within ISDS. Such proposals have, in turn, met with resistance, dividing economies, investors and various interest groups. Debates on this issue continue.

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 intention to submit a claim to arbitration, pleadings, submissions, interim decisions, evidentiary material, and the final award. Within the context of ISDS, the issue of transparency has also become very much bound up with the related issue of non-party participation in the proceedings, specifically, the circumstances in which *amicus curiae* submissions can, should, or should not, be accepted by an arbitral tribunal in an investor-State dispute. Again, this is an issue over which there are divergent views amongst the key actors in the investment relationship. It is not a transparency issue per se, but is often linked to transparency in the debate.

With respect to these transparency and non-party participation issues in ISDS, and even in spite of the lack of consensus surrounding their desirability, there have been significant developments in recent treaty practice, procedural decisions in disputes and revisions to arbitral rules. In particular, transparency and public participation-related provisions have appeared in several more recent IIAs,[5] expressly stating that proceedings are permitted, or required, to be conducted on an open basis, pleadings are to be publically available, and tribunals are entitled to accept non-party submissions should they so wish. Several tribunals in recent investor-State disputes have permitted the submissions of *amicus curiae*, 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 also not known.[6] Responding to concerns of the lack of transparency in the conduct of ISDS, leading arbitral institutions and authorities have introduced, or are currently working on, revisions of the procedural rules predominantly used in investor-State disputes. This is the case of the International Centre for Settlement of Investment Disputes (ICSID)[7] and the arbitration rules of the United Nations Commission on International Trade Law (the UNCITRAL Arbitration Rules).[8] The central concern of the section on ISDS is

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[5] See, for example, Australia-Chile FTA (2008) art. 10.22.

[6] See, for example, *Methanex Corporation v United States of America*, (2005) 44 *International Legal Materials* 1345; *Biwater Gauff Limited v United Republic of Tanzania*, Procedural Order No. 5 (2 February 2007) <http://www.worldbank.org/icsid/cases/pdf/ARB0522_ProceduralOrdNo5.pdf> at 15 March 2011.

[7] *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, signed 18 March 1965, (1966) 575 UNTS 159 (entered into force 14 October 1966).

[8] *Arbitration Rules of the United Nations Commission on International Trade Law*, U.N. Doc. A/Res/31/98 (1976). UNCITRAL adopted a revised version of the UNCITRAL Rules on 29 June 2010.

to examine what these recent developments in transparency in ISDS mean for host economies, and, in particular, for developing host economies. The section considers the implications of these new trends from a development perspective and with a particular focus on delineating the policy options for treaty negotiators.

As a further point to note in the course of this enquiry, it would be unwise to consider transparency issues in isolation from their wider context. Indeed, there are several cross-cutting issues with which the concept of transparency closely interacts, including corporate social responsibility, fair and equitable treatment, and global administrative law. This study considers the development implications of those interactions.

Overall, the main purpose of this study is to analyse and take stock of recent developments in transparency provisions within IIAs and examine the recent emergence of transparency and public participation as an issue in ISDS. In doing so, the study will focus on the APEC region and examine the particular situation of APEC economies as they endeavour to enhance transparency in international investment. Essentially, the study is seeking to understand the implications of the most recent trends pertaining to transparency issues so as to provide commentary for negotiators on the development significance of available options.

I. EXPLANATION OF THE ISSUE

In a general sense, the concept of transparency entails notions of openness, predictability, access to information, and public scrutiny. Recalling that transparency is only but a means to an end, several sources have identified the basic content or elements of transparency rather than the concept of transparency itself and have focussed the relevant obligations on providing information about legislation, regulations and other measures that pertain to the investment or in the case of investment treaty obligations, to the treaty or chapter itself.

Box 2. Definitions of transparency

According to the Concise Oxford English Dictionary: "*allowing light to pass through so that objects behind can be distinctly seen; and it is related to clarity: the state or quality of being clear and 'easily perceived or understood'*."

According to UNCTAD (2004):
"*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."*

According to the APEC Leaders General Transparency Standards (2002):

"[Transparency] is an important element in promoting economic growth and financial stability at the domestic and international levels;
- is conducive to fairer and more effective governance and improves public confidence in government;
- is a General Principle in the Osaka Action Agenda which requires its application to the entire APEC liberalization and facilitation process;
- 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;
- in monetary, financial and fiscal policies, and in the dissemination of macroeconomic policy data ensures the accountability and integrity of central banks and financial agencies, and provides the public with needed economic, financial and capital markets data; and the overall aspect
- will be enhanced through well-targeted, demand-driven capacity building to assist developing economies make progress toward greater openness."

According to the WTO paper to the Working Group on 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."

Transparency obligations in IIAs have centred on the provision of adequate information to foreign investors, to enable informed investment decisions to be made and to enhance the predictability and stability of the ongoing investment relationship between the host economy and the investor. Investment processes require transparency on a wide range of matters, including existing laws and proposed regulatory frameworks, or 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 increasingly also regulation of a more generalised nature, such as environmental, health, and social welfare law and policy. Transparency obligations incumbent on the host economy 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.

Transparency provisions in IIAs are usually formulated in general terms, to cover all measures of general application which pertain to or affect the operation of an investment agreement as far as liberalization, promotion and protection are concerned. In investment agreements or investment chapters, beneficiaries of the requirement will be the governments of the other contracting parties and the economic actors covered by the agreement, namely in this case, the investors.

Attempts have been made in various international fora to further define the concept of Transparency and its content. See Box 2.

The definition of transparency is particularly relevant in the context of investment protection agreements, as arbitral tribunals have sought to read an obligation of transparency as generating positive rights for the investor. Consequently, an investor faced with a non-transparent behaviour on the part of a government could challenge it and obtain reparation. This issue will be further dealt with in the stocktaking part of this study.

A previous study conducted by UNCTAD focussed its approach on the need to delineate the different potential addressees of transparency obligations. In addition to the host economy, this can include the home economy and foreign investors (UNCTAD, 2004). Although the overwhelming majority of IIAs do not contain transparency provisions that impose obligations on foreign investors, this paper considers the extent to which transparency issues do, and should, also now manifest in disclosure requirements for investors. Given the development goals of host economies in seeking to attract foreign direct investment (FDI), a key issue in this analysis is the extent to which transparency obligations enhance or detract from the investment process or affect national policies of the host economies. Of particular concern in this regard is the capacity of developing economies to meet the requirements contained within transparency provisions in IIAs and their impact on the development trajectories of developing economies.

Key issues for investors and economies are the nature and extent of transparency obligations contained in IIAs, as these will determine both the scope of available information for investors

and the degree of imposition on the domestic administrative systems of economies. Accordingly, this paper sets out various formulations that are prevalent in recent IIAs and then examines their implications. In particular, there is a significant difference in the effect of a transparency obligation if the items to which it applies include only laws and regulations, or whether it extends also to administrative procedures, administrative rulings, judicial decisions, policies, draft regulations, and proposed policies. An additional issue that arises in this context is the interpretation of such provisions by arbitral tribunals in investor-State disputes and their delineation of what is required of governments in practice to meet their transparency obligations. Likewise, the particular mechanism through which transparency requirements are directed is also of significance to the ultimate shape of the obligation. In this regard, the paper considers the implications of requirements to:

- cooperate;
- consult;
- exchange information and notify;
- respond to questions;
- establish contact points;
- and publish the designated material.

One of the most significant developments regarding transparency in IIAs has been its emergence as a particularly controversial issue within ISDS.[9] In this context, the central concern is that although matters of public interest are addressed within investment disputes, the procedures for their hearing and determination are based on confidentiality by essence – because arbitration lacks transparency and offers little or no opportunities for public participation.[10] In response to such concerns, however, some recent IIAs - both bilateral investment treaties (BITs) and free trade agreements (FTAs) - that consider a newer set of issues such as for example the environment, health, safety and a more restrictive investment definition, have included provisions to promote transparency and non-disputing party participation in ISDS, offering more access to the public.[11]

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[9] Christina Knahr and August Reinisch, 'Transparency versus Confidentiality in International Investment Arbitration — the *Biwater Gauff* Compromise' (2007) 6 *The law and Practice of International Courts and Tribunals* 97.

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

[11] Such agreements have recently been referred to as a "new generation" of IIAs, a term that has been given to IIAs that have included not only these new measures on transparency and public participation, but that have also narrowed the definition of 'investment', refined provisions on indirect expropriation, and referred to the protection of health, safety, the environment, and labour rights (UNCTAD, 2005). See the discussion of 'New Generation BITs' in Andrew Newcombe, 'Sustainable Development and Investment Treaty Law' (2007) 8 *The Journal of World Investment & Trade* 357.

Transparency and public participation have also become contentious issues in the context of specific sets of procedural rules for international arbitration that are often used in ISDS. In particular, revisions to the Arbitration Rules of the International Centre for the Settlement of Investment Disputes (ICSID Rules) were introduced in 2006 to address legitimacy concerns surrounding ISDS. Although these reforms attempted to strike a balance between the public interest in the disputes and the private needs of the parties in keeping costs as low as possible and in keeping sensitive business information confidential, for some, the reforms at ICSID could be more in favour of openness. In particular, restrictions remain over public access to the oral hearings of investor-State disputes held at ICSID, namely, that non-disputing party access will be blocked if either disputing party objects to their presence. Given this provision on *amici* participation, it can be seen that this could, perhaps, operate fairly regularly as a bar to adequate public access to the proceedings of investor-State arbitration at ICSID.

The UNCITRAL Arbitration Rules are also frequently used as the procedural framework governing the hearing of investor-State disputes, although, as they were originally designed to facilitate international commercial arbitration, they do not contain anything like the transparency measures of the revised ICSID Rules. Perhaps unsurprisingly, therefore, transparency and public participation have also become highly controversial issues within the UNCITRAL context. The merits of greater transparency and non-disputing party participation continue to be debated in the context of reform to the UNCITRAL Arbitration Rules. Revisions were conducted in 2010, although measures akin to those in the ICSID Rules were not introduced. The on-going work of the working group is now focused on the feasibility of further revisions to the UNCITRAL Arbitration Rules based on the specific needs of ISDS, including better accommodation of transparency and public participation needs. At time of publication of this study, the working group had developed a set of "draft rules on transparency in treaty-based investor-State arbitration"[12], for further consideration by the working group.

What has also become increasingly apparent 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, again, also impact on the implementation of IIAs, the resolution of disputes under ISDS, and the development strategies of host States. In particular, this paper considers the interaction of transparency with issues surrounding the fair and equitable treatment (FET) standard, corporate social responsibility (CSR), and global administrative law.

In the following sections, this study examines these developments in IIAs and ISDS, and their implications for host economies. It concludes with a section on policy options and their development implications and it is in this final section that the main task of this paper is conducted, namely drawing together all the issues discussed throughout the study and providing

[12] General Assembly Document No. A/CN.9/WG.II/WP.166, United Nations Commission on International Trade Law, Working Group II (Arbitration and Conciliation). Available at: http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html.

a discussion on the main policy options available to IIA negotiators and those involved in revising arbitral rules. It is in this context that the paper explores the implications of those options for host economy development considerations.

II. STOCKTAKING AND ANALYSIS

The nature of transparency issues in the context of international investment law has been changing, as 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 focus on an examination of IIAs concluded since 2004, identifying trends emerging in these recent IIAs and considering their development implications.

A. Transparency obligations in IIAs

The traditional concerns of foreign investors regarding the transparency of host economy activity, statements, policies, regulations, and decision-making very much remain as live issues within international investment law and foreign investment practices. 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.[13] In examining the continuation and significance of these trends, this section first concentrates on the question of to whom IIA transparency obligations are directed, before considering recent trends in the substance of transparency provisions within IIAs. The section concludes with an assessment of the mechanisms through which the implementation of transparency obligations is contemplated in IIAs.

1. Whose Transparency?

As noted above, the potential addressees of transparency provisions in IIAs are the host economy, the home economy, and the foreign investor. This section examines recent IIAs, discerning current practice with respect to the addressees of transparency obligations. It explores the implications of the various formulations of transparency provisions in IIAs concluded since 2004, being (a) those addressing all parties to an IIA; (b) those imposing obligations solely on the host economy; and (c) those referring to disclosure requirements on the part of the investor.

[13] Unless otherwise noted, all instruments and BITs texts cited in this report may be found in UNCTAD's online collection of BITs and IIAs at www.unctad.org/iia.

In particular, it considers the needs of the host economy in seeking information related to the potential investor and any investment-promotion policies of its home economy. It should be noted that there are also questions of a more elemental quality innately involved in the consideration of these issues, namely theoretical enquiries into the nature of responsibility –what does it mean to be responsible for the promotion of transparency? Whose responsibility is it to implement transparency? And who are the beneficiaries of the treaty-based transparency requirements contained in IIAs? In many respects, the roles in carrying responsibility for transparency and benefiting from its promotion shift amongst the various actors depending on the nature of the obligation and its context in the IIA. Accordingly, this study conducts the stocktaking analysis of recent treaty practice within the context of these more conceptual issues regarding responsibility and the role of the participants in the investment relationship.

(a)Transparency obligations imposed on all parties to the IIA

Traditionally, although the obligations contained in IIAs have tended to be framed as applying to both contracting parties, the often unstated assumption was that capital inflows would largely be in one direction into the developing economy partner, and that, accordingly, the obligations would primarily be borne by that contracting party as the host economy. This is no longer the case in practice, as most contracting parties to IIAs are, to some extent, both capital-exporting and capital-importing economies. For this reason, both contracting parties can now expect to sustain host economy transparency obligations pursuant to IIAs (UNCTAD, 2010).

In another sense as well, there are transparency obligations that apply to both contracting parties, but, in this form, it is in both capacities as host and home economies. UNCTAD 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, p. 16)

This type of provision has continued to appear in recent IIAs, with the beneficiaries being the investor and the other party to the treaty. An example of this is illustrated in Article 18.2 of the transparency chapter in the Panama–United States FTA (2007), as shown in Box 3.

Box 3. Panama-United States FTA (2007)

Chapter Eighteen 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. [emphasis added]

This type of formulation continues to be found in recent IIAs and is wide-ranging, as it reaches into home as well as host economy regulation. What this form of obligation means is that if home or host economy regulation is relevant in any way to investments covered by the IIA, then public disclosure of that regulation, and any proposed regulation, must be made. Under this particular interpretation of the obligation, the responsibility to ensure adequate disclosure of the requisite information falls squarely on the contracting parties, whether as home or host economy. The beneficiary is very clearly any potential foreign investor.

(b)Transparency obligations imposed solely on the host economy

A relatively common formulation of transparency obligation imposes the requirements on the host economy only. This approach is largely born out of the concern that host economy regulatory changes have the potential to pose a particularly significant threat to the operation or profitability of foreign-owned investments. It is interesting to note that such formulations have continued to appear regularly in recent IIAs. An example of this type of provision can be seen in the Association of Southeast Asian Nations (ASEAN) Comprehensive Investment Agreement (2009) set out in Box 4. The specific wording that denotes the application of the provision solely to the host economy is akin to the phrase: … *which may affect the investments of investors of the other Contracting Party in its territory ….*

Box 4. ASEAN Comprehensive Investment Agreement (2009)

Article 21

Transparency

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

[…]

(c) make publicly available, all relevant laws, regulations and administrative guidelines of general application that pertain to, or affect investments in the territory of the Member State.

It is understandable from the perspective of the foreign investors that they would wish to have as much information as possible on which to base their investment decisions. However, a provision such as Article 21 of the ASEAN Comprehensive Investment Agreement is broad in its scope as it encompasses not only laws and regulations, but extends also to administrative guidelines of general application. The implications of expansively-worded transparency provisions are discussed in more detail below. At this point, it is suffice to note that provisions of this nature, in which the obligation is effectively placed only on the host economy, have significant repercussions for host economies in terms of the cost of compliance – and from the perspective of a developing economy, such costs could well be prohibitive. This type of provision is further illustrated by Article 10 of the China–Latvia BIT (2004) set out in Box 5.

Box 5. China-Latvia BIT (2004)

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.***
2. Nothing in this Agreement shall require a Contracting Party to furnish or allow access to any confidential or proprietary information, including information concerning particular investors or investments, the disclosure of which would impede law enforcement or be contrary to its laws protecting confidentiality or prejudice legitimate commercial interests of particular investors.
[emphasis added]

It can be seen that very similar wording was adopted in Article 1(1) of the Finland–Guatemala BIT (2005) and Article 2 of the Azerbaijan–Estonia BIT (2010), in which the obligations are directed to both of the contracting parties, but only when acting as the host economy. However, if the requirements are not limited by the inclusion of the words "… *to the extent possible* …", as for example in the 2005 Finland–Guatemala BIT, the scope of the obligation is particularly broad and precludes developing countries from adopting a relative standard of compliance according to their capabilities.

(c)Investor-related transparency obligations

The primary focus of IIAs is directed towards investor protection, the rationale being that the reassurance generated by such instruments can promote greater capital inflows to the contracting parties. For this reason, unsurprisingly, the emphasis in IIAs regarding disclosure requirements has largely remained on the obligations of host economies, the beneficiaries of which are the investing nationals of the home economy, i.e. investors from the other contracting party.

Newer IIAs, however, increasingly include provisions that both directly and indirectly require disclosures of various types from investors. This trend has continued and is manifesting in a range of different formulations. At its most basic level, and in an indirect form, investor-related transparency obligations can be encompassed within provisions requiring foreign investors to comply with all laws and regulations of the host economy. It follows that if host economy corporate regulation requires disclosure of certain information, foreign-owned corporations will also need to comply with those transparency-related requirements. The APEC Strategy on Investment makes reference to this issue, as shown in Box 6

Box 6. 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.

In terms of inclusion of such provisions in IIAs, the Investment Agreement for the COMESA Common Investment Area (2007) provides an illustrative example of this type of provision in Box 7.

Box 7. Investment Agreement for the COMESA Common Investment Area (CCIA) (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

A further illustrative example of this type of wording can be found in the Protocol on Finance and Investment of the Southern African Development Community in Box 8.

Box 8. Protocol on Finance and Investment of the Southern African Development Community (SADC)

Article 10
Corporate Responsibility

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

The draft of the ECOWAS Supplementary Act on "Adopting Community Rules on Investment and the modalities for its Implementation within ECOWAS" also contains provisions regarding

the obligations and duties of investors and investments. In this regard, Article 11 is set out in Box 9.

Box 9. ECOWAS Supplementary Act

Chapter III. Obligations and Duties of Investors and Investments
Article 11:
General Obligations
(1) Investors and Investments are subject to the laws and regulations of the host State.
(2) Investors and investments must comply with the host State measures prescribing the formalities of establishing an investment, and accept host State jurisdiction with respect to the investment.

Moving beyond the more general provisions broadly requiring investors to comply with all local laws, some IIAs also now include more exacting disclosure requirements in which authority is expressly granted to the host economy to collect information from the investor. This is illustrated with the example of Article 3 of the Azerbaijan–Croatia BIT (2007) as shown in Box 10.

Box 10. Azerbaijan–Croatia BIT (2007)

Article 3
Access to Investor Information and Transparency
1. 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.

This type of provision clearly furnishes the host economy with a mechanism to carry out extensive due diligence on a potential investor. It will be the responsibility of the investor to ensure that adequate disclosure is provided to the host economy once a request for information is made. However, it is the responsibility of the host economy to use the mechanism to assist it in making investment-related decisions that are supportive of its own development policies. Transparency requirements will be typically found in the laws of the host economy. In this sense, such provisions could undoubtedly benefit host economies and, ultimately, also the local communities in which investors are proposing to operate. For these reasons, including a provision of this nature within an IIA can provide the host economy with an important tool to obtain information, which can not only assist it in general policy-making, but also, more specifically, in assessing the extent of any likely contribution to be made by a proposed investment to the economy's development trajectory. In the course of carrying out such

assessments, it may well be valuable for a host economy to obtain information on the past practices of foreign investors – and a provision drafted in similar terms to that of Article 3 of the Azerbaijan–Croatia BIT (2007) could provide a particularly useful means through which to acquire that information.

Finally, a number of international instruments contain influential investment-related provisions regarding transparency, accountability, and corporate disclosure. These included instruments such as the OECD Guidelines on Multinational Enterprises (OECD Guidelines)[14] and the United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (the UN Norms).[15] There have also been further relevant initiatives such as the launch of three particularly high-profile voluntary codes of conduct, namely the Equator Principles,[16] the United Nations Principles for Responsible Investment,[17] 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.[18] These instruments are, of course, non-binding, but they do illustrate a trend towards exploration, or 'modelling',[19] of more directly applicable investor obligations, including transparency-related obligations.

In this regard, there are some indications in recent IIAs of more interest in scrutinising investor conduct. For an illustrative example, see the EU–CARIFORUM Economic Partnership Agreement (EPA) (2008) in Box 11, which contains a provision specifically directed at investors.

Box 11. EU-CARIFORUM Economic Partnership Agreement (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

[14] OECD, *OECD Guidelines for Multinational Enterprises* (revised May 2011), http://www.oecd.org/dataoecd/43/29/48004323.pdf.

[15] United Nations Economic and Social Council, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN ESCOR, 55th sess, Agenda item 4, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003).

[16] The Equator Principles (revised, June 2006) <http://www.equator-principles.com>.

[17] United Nations Principles for Responsible Investment (UNPRI), <http://www.unpri.org/principles/>.

[18] Guiding Principles on Business and Human Rights for Implementing the United Nations "Protect, Respect and Remedy" Framework (21 March 2011), <http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf>.

[19] Braithwaite and Drahos (2000), pp. 539–543.

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.
(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.

It is also interesting to note the more transparency-related provision included in the Australia–United States FTA (2005) (see Box 12), focusing on the host economy's ability to require information from the investor on what appears to be any matter "*concerning that investment*" for informational purposes. The provision reiterates that the host economy is entitled to obtain information from the investor in accordance with its domestic laws.

Box 12. 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****.* [emphasis added]

2. Nature of transparency provisions

This section examines the substantive nature of transparency provisions contained within recent IIAs. This analysis is, of course, closely interrelated to the examination of the addressees of the obligations conducted above, as well as to the next section on mechanisms to implement transparency obligations. Although it is somewhat artificial to separate the discussion out in this way, it is also, perhaps, the clearest way in which to make the necessary distinctions between

key issues. Accordingly, this component takes stock of the various formulations of transparency obligations, their scope and their implications,[20] focusing on the content of the obligation, while, at the same time, also placing this discussion in the context of the issues addressed in the other sections of the study.

From the outset, it is clear that the scope and depth of transparency obligations contained in recent IIAs will largely depend upon the selection of items of information to be made public, whether that encompasses, for example, laws, regulations, investment opportunities, or other matters. It will also be affected by the voluntary or mandatory character of the transparency provisions. For example, some IIAs include "soft" transparency provisions in the wider context of investment promotion provisions. Other transparency provisions are legally binding obligations that may require significant reforms or the implementation of pro-active policies by the parties involved. The more exacting the obligation, of course, the more impact such requirements will have on host economies in terms of the costs, resources, and technical capacity involved in compliance.

(a)Laws and regulations

The standard transparency requirement of host economies 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 economies as, on the whole, it requires little more of governmental authorities than is already required under domestic laws and, therefore, no further action is generally necessary to comply with this IIA obligation. The moment a provision goes beyond this basic requirement of "laws and regulations", however, the obligation becomes more intrusive, demanding a higher and more detailed level of action from government officials. There are, of course, many information items other than solely laws and regulations that will be of interest to foreign investors, so there is a balance that needs to be struck between the disclosure needs of the investor and the cost implications for the economy when negotiating such a provision. The inclusion of items such as "administrative procedures and administrative rulings" could potentially encompass a very wide range of material, and coupled with an obligation to respond to specific questions on these matters as they pertain to a particular investment, the administrative burden of compliance could be extensive. Again, the practicalities of ensuring compliance of this kind are likely to pose greater difficulties for developing economies. Accordingly, it is, perhaps, in the areas of knowledge exchange, capacity-building, and technical assistance that the expertise of development organisations can come into play in supporting the efforts of developing economies to comply with their transparency obligations under IIAs. For an example of a treaty provision

[20] See the discussion in Akira Kotera, 'Regulatory Transparency' in Peter Muchlinski, Federico Ortino, and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008).

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 13.

Box 13. 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 contract each Contracting Party enters into with regard to investment****.*

3. The provisions of paragraphs 1 and 2 shall not be construed so as to oblige either Contracting Party to disclose confidential information, the disclosure of which would impede law enforcement or otherwise be contrary to the public interest, or which would prejudice privacy or legitimate commercial interests.

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.

[emphases added]

(b)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 economy. As unexpected changes in the regulatory framework of host economies 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. However, such wording also significantly extends the nature of the obligation, and, in so doing, potentially increases the financial and administrative burden of the requirement by a substantial amount. Although the obligation is tempered with the phrase "… to the extent possible …", the potential costs and benefits of this extended form of transparency provision would need to be

taken into account in negotiating the transparency components of an IIA. An example of this model can be seen in the (NAFTA) (1994) set out in Box 14.[21]

Box 14. NAFTA (1994)

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.

(c) "Materially affect"

Transparency provisions can have a particularly expansive reach when they are drafted in very broad terms, such as in the unqualified use of phrases similar to that seen in Article 7 of the Japan–Republic of Korea BIT (2002), in Box 15, namely, "… *which pertain to or affect investment and business activities* …".[22] As a large number of laws and regulations that are not directly related to the subject of investment could indirectly affect investment activities, virtually any change in regulatory measures would need to be reviewed for its impact on investments within the host economy.

Box 15. 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]

The Azerbaijan–Croatia BIT (2007) as in Box 16 appears to expand the application of the obligation even further with the use of the words "… which **may affect** the investments of

[21] The Panama–United States FTA (2007) contains a similar provision.

[22] The Japan-Peru BIT (2008) contains a similar provision.

investors …" [emphasis added]. This formulation thus includes regulations that might potentially affect investments. At the same time, its impact is seemingly limited with the inclusion of the phrase "… to the extent possible …". This particular phrase would seem to permit the use of a relative standard of compliance dependent on capacity to comply rather than a general standard applicable to all economies, which would certainly assist developing economies in fulfilling their treaty obligations.

Box 16. 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.* [emphases added]

Several IIAs have also utilised another approach to limit the reach of transparency obligations – employing the phrases "… materially affect …" or "… substantially affect …". In this way, those responsible for negotiating IIAs can seek to restrict the application of transparency requirements. An example of this type of provision can be seen in the Canada–Panama FTA (2010) in Box 17 and also the Panama-United States FTA.

Box 17. Canada-Panama FTA (2010)

Chapter Twenty 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. [emphases added]

(d)Arbitral interpretations of transparency obligations

It should be noted that transparency obligations have been given an expansive interpretation by tribunals in recent investor-State disputes. Such approaches can not only increase the financial and administrative burden on host economies, but a failure to meet the required standard can result in a finding of a breach of an IIA and raises the spectre of substantial awards being made against the host economy. For developing economies, in particular, costs and damages resulting from awards of this kind can be cause for concern.

One such award in the 2006 case of *Azurix Corp. v Republic of Argentina* (*Azurix*) referred to the legitimate expectations of the investor at the time of entering into the investment, the investor's right to know beforehand any rules and regulations that will govern the investment, and, given the conclusion of the IIA, the presupposition of the host economy's favourable disposition towards foreign investment.[23] In this way, transparency obligations were expressly considered in the context of their interaction with the substantive investor protection guarantee embodied in the FET standard. This relationship is discussed further in Part II of this paper. At this point, however, it is interesting to note that *Azurix* had endorsed the approach of a 2004 award, *Tecnicas Medioambientales Tecmed, SA v United Mexican States* (*Tecmed*),[24] which stated:

"*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.*"

This approach to the interrelationship between transparency obligations and the FET standard has also been adopted in a number of other subsequent awards, such as *MTD Equity Sdn Bhd & anor v Republic of Chile* and *CMS Gas Transmission Co v Argentine Republic*.[25] It may however be considered as overly investor-friendly, given the expectation of total transparency, and may be impractical, resulting in a high administrative burden on host economies, especially developing economies. The practicalities of implementing such an expansive interpretation of IIA transparency obligations have the potential to constrain host economies in their consideration of regulatory changes and policy development.

3. Mechanisms to implement transparency obligations

There are a range of possible mechanisms through which transparency obligations can be met. Each formulation has its own implications both generally and more specifically from a development perspective. This section examines the practical way in which IIAs contemplate disclosure occurring and the enforceability of those transparency obligations. It highlights the fact that the particular implementing mechanism selected can have a direct bearing upon the content of the transparency obligation itself, as each modality entails a different degree of commitment to the process of disclosure, thereby affecting the quality of the disclosure provided. Typical options found in recent IIAs include provisions requiring information to be made public, encouraging or requiring consultation, promoting cooperation on transparency,

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[23] *Azurix Corp. v Republic of Argentina* (Award) (2006) ICSID Case No. ARB/01/12, para. 371–373.

[24] *Tecnicas Medioambientales Tecmed, SA v United Mexican States* (2004) 43 *International Legal Materials* 133, 173.

[25] *MTD Equity Sdn Bhd & anor v Republic of Chile*(Award) (2005) 44 *International Legal Materials* 91, 105–106; *CMS Gas Transmission Co v Argentine Republic* (2005) 44 *International Legal Materials* 1205, 1235.

requiring the exchange of information, requiring notification, requiring prompt responses to requests for information and requiring the establishment of contact points within each contracting party. These provisions primarily benefit foreign investors. However, with the focus on transparency now also gradually extending to corporate conduct, several of these mechanisms are being utilised to obtain information from potential investors for the benefit of host economies, essentially to assist in their investment-related decision-making and development planning.

(a)Cooperation and consultation

One of the mildest transparency obligations in recent IIAs is the expressed agreement to cooperate on means to promote transparency matters, an example of which can be seen in the Canada–Peru FTA (2008) in Box 18. It appears to be more of a general expression of an intended approach to transparency rather than an enforceable obligation. It is also limited in its application to cooperation within "… bilateral, regional and multilateral fora …". Accordingly, such a provision is unlikely, *per se*, to have any direct practical requirements for governments in the design of their domestic administrative systems. However, if commitments on transparency are made during negotiations in such fora, then those will obviously have flow-on implications for domestic regulatory and administrative structures.

Box 18. Canada-Peru FTA (2008)

Chapter 19 Transparency
Section A - 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.

Another variation of transparency and provision of information clauses is a simple obligation to consult. This form of requirement continues to occur within BITs, an illustration of which can be seen in the China–Colombia BIT (2008) in Box 19. Both these types of commitment, namely the agreement to cooperate and the obligation to consult, are fairly passive in their framing. They do not require the contracting parties to be proactive in offering information, to provide substantive material, or, indeed, to be particularly responsive 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. This, in itself, can be an important part of maintaining open discussions between the contracting parties on their respective investment climates.

Box 19. 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.

(b)Exchange of information, requests for information, and notification

In addition to provisions on consultation, many IIAs also contain requirements to notify, exchange, or provide information in various forms. This type of provision can require an extensive level of engagement between the contracting parties on specified topics, either as a proactive obligation to offer information or as a responsive obligation following requests from the other party. For this reason, such provisions can contribute significantly to enhanced transparency conditions between the contracting parties. This greater level of transparency also means, of course, that the host economy has to meet correspondingly greater administrative and financial demands in order to comply with the treaty obligation. An example of a positive obligation to notify can be found in 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) (2009), shown in Box 20. The ASEAN Comprehensive Investment Agreement includes a similar provision (article 21).

Box 20. 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 (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 grants any preferential treatment and to which it is a party**. [emphases added]*

It can also be seen in the China–ASEAN Agreement (2009) in Box 20 that the contracting parties undertake to establish a contact point to which enquiries can be directed. A further

example is found in the Rwanda–United States BIT (2008) in Box 21. 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 the administrative and technical capacity to meet this on-going commitment. Again, this is, perhaps, an area in which development organisations could assist developing economies with programmes directed at capacity-building and transferring technical knowledge.

Box 21. 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.

In some instances, the provisions addressing consultations and requests for information are combined. An example of this approach is set out in Article 9 of the Thailand–Jordan BIT (2005), in which the provision also mandates that the parties "… give sympathetic consideration of the request …" for consultations (see Box 22). The inclusion of this phrase ensures that the nature of the obligation extends considerably beyond that contained in the China–Colombia BIT (2008) set out above in Box 19.

Box 22. Thailand–Jordan BIT (2005)

Article 9

Consultations and Exchange of Information

*Either Contracting Party **may request consultations** on the interpretation or application of this Agreement. The other Contracting Party shall give sympathetic consideration of the request. **Upon request by either Contracting Party, information shall be exchanged** on the foreign investment policies, laws and regulations of the other Contracting Party that may have an impact on new investments, investments or returns covered by this Agreement.* [emphases added]

Required action pursuant to more proactive obligations is not triggered solely by a request for information, but demands positive notification from the contracting parties. In other words, economies are not permitted to wait for a request for information from the other contracting party, but, in certain circumstances, are required to offer information unprompted. Provisions of this kind tend to limit their application to measures that "… might 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), as set out in Box 23.

Box 23. 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.* [emphases added]

A slight variation of this provision can be seen in the inclusion of the phrase "[t]o the **maximum** extent possible, …" in Article 20.3 of the Australia–United States FTA (2005) (Box 24), which, for developing economies in particular, provides a useful qualifier on compliance and takes into account the economy's capacity to comply.

Box 24. 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.[emphasis added]

B. Transparency in APEC

International organizations and institutions, especially in the economic field, have recognized the importance of transparency in economic relations and are increasingly including relevant aspects and issues into their policy agendas and work programmes. In what follows, the example of APEC and its handling of transparency issues in general and with respect to IIAs shall be further examined.

The Bogor Declaration of 1994 that identified the main goals for APEC to be accomplished within a period of 20 years (usually referred to as the "Bogor Goals") emphasized the importance of facilitating trade and investment amongst its member economies and aiming

towards open trade and investment in the APEC region.[26] The Osaka Action Agenda put these goals into action a year later, concretely identifying general principles and specific actions to be undertaken by the member economies. Transparency already featured strongly as a general principle in the Agenda as it was considered to be essential in the process of facilitating trade and investment. The Osaka Action Agenda requires that

> *"each APEC economy will ensure transparency of its respective laws, regulations and administrative procedures which affect the flow of goods, services and capital among APEC economies in order to create and maintain an open and predictable trade and investment environment in the Asia-Pacific region."*[27]

The Osaka Action Agenda promotes improvements of transparency of tariffs regimes, non-tariff measures, transport policies, regulations, procedures and standards, customs, maritime and port policies, investment regimes, policies on small-and medium-sized enterprises, government procurement regimes, other regulatory regimes and frameworks (laws, regulations and administrative procedures), dispute mediation and more.[28] This illustrates that starting from APEC's first enactment, the issue of transparency of laws, regulations and legal regimes was enshrined in many areas of the APEC process and constituted a core issue to be addressed and enhanced in order to successfully facilitate trade and investment.

APEC further defined its goals and actions on enhancing transparency in the particular field of investment. The APEC Non-Binding Investment Principles, developed and published as early as the Bogor Goals themselves, refer to transparency in stating that

> *"Member economies will make all laws, regulations, administrative guidelines and policies pertaining to investment in their economies publicly available in a prompt, transparent and readily accessible manner."* (UNCTAD 2008b).

In 1997, the Menu of Options for Investment Liberalisation and Business Facilitation to Strengthen APEC Economies further suggested concrete steps on how economies could facilitate business and investment. The recommendations on transparency made in the Menu of Options are shown in Box 25.

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[26] Leader's Declaration, Bogor. *APEC Economic Leaders' Declaration of Common Resolve.* Bogor, Indonesia, November 15, 1994. See APEC Website at http://www.apec.org/apec/ leaders__declarations/1994.html.

[27] The Osaka Action Agenda. Implementation of the Bogor Declaration. See http://www.apec.org/Groups/~/media/Files/Groups/CTI/ 02_esc_oaaupdate.ashx.

[28] Ibid.

Box 25. Menu of Options

"2.01 Make available to investors timely updates of changes to investment regimes, including via the APEC Secretariat (who will use it for the APEC investment guidebook).
2.02 Publish and/or make widely available through other means, on a timely basis, information on an economy's investment code, investment laws and regulations, and procurement procedures, with an eye to ensuring transparency in the administration of investment laws, regulations and procedures at federal/central, provincial/state and local authority levels.
2.03 If screening is used, publish and/or make widely available through other means the guidelines for evaluating and scoring projects for their approval.
2.04 Conduct briefings (in appropriate fora) on the current investment policies and future directions to be undertaken by the government.
2.05 Give advance notice of proposed regulations and laws, and provide an opportunity for public comment.
2.06 Clarify procedures and practices regarding application, registration, government licensing and procurement by:
-- Publishing (and widely disseminating) clear and simple instructions, and an explanation of the process (the steps) involved in applying/bidding/registering;
-- Publishing (and widely disseminating) definitions of criteria for assessment of investment proposals;
-- Publishing (and widely disseminating) contact points for inquiries on standards, technical regulations, and conformity requirements;
-- Conduct periodic reviews of prior authorization requirement procedures to ensure they are simplified and transparent;
-- Make available to investors all rules and information relating to investment promotion schemes."

Source: UNCTAD (2008b)

Following the meeting in Los Cabos, Mexico, in October 2002, the APEC Transparency Standards were announced and their implementation initiated. It was understood that transparency was important to foster economic growth and financial stability at domestic and international levels, and to improve governance. The standards cover a set of general standards as well as specific aspects relevant to individual areas of APEC's work.[29] The latter included the

[29] Leaders' Statement to Implement APEC Transparency Standards. Los Cabos, Mexico, 27 October 2002. See http://www.apec.org/en/Meeting-Papers/Leaders-Declarations/2002/2002_aelm/statement_to_implement1.aspx.

Transparency Standards on Investment, which are listed in Box 26. An assessment of the implementation of the Transparency Standards, made in 2007, was generally positive.[30]

Box 26. Transparency Standards on Investment

1. *Each Economy will, in the manner provided for in paragraph 1 of the Leaders' Statement, ensure that its investment laws, regulations, and progressively procedures and administrative rulings of general application ("investment measures") are promptly published or otherwise made available in such a manner as to enable interested persons and other economies to become acquainted with them.*
2. *In accordance with paragraph 2 of the Leaders' Statement, each Economy will, to the extent possible, publish in advance any investment measures proposed for adoption and provide a reasonable opportunity for public comment.*
3. *In accordance with paragraph 3 of the Leaders' Statement, upon request from an interested person or another Economy, each Economy will:*
   (a) endeavor to promptly provide information and respond to questions pertaining to any actual or proposed investment measures referred to in paragraph 1 above; and
   (b) provide contact points for the office or official responsible for the subject matter of the questions and assist, as necessary, in facilitating communications with the requesting economy.
4. *Where warranted, each Economy will ensure that appropriate domestic procedures are in place to enable prompt review and correction of final administrative actions, other than those taken for sensitive prudential reasons, regarding investment matters covered by these standards, that:*
   (a) provide for tribunals or panels that are impartial and independent of any office or authority entrusted with administrative enforcement and have no substantial interest in the outcome of the investment matter;
   (b) provide parties to any proceeding with a reasonable opportunity to present their respective positions;
   (c) provide parties to any proceeding with a decision based on the evidence and submissions of record or, where required by domestic law, the record complied by the administrative authority; and
   (d) ensure subject to appeal or further review under domestic law, that such decisions will be implemented by, and govern the practice of, the offices or authorities regarding the administrative action at issue.
5. *If screening of investments is used based on guidelines for evaluating projects for approval and for scoring such projects if scoring is used, in accordance with paragraph 1 of the*

[30] Report on the Implementation of APEC Transparency Standard. Appendix 6 to CTI 2007 Annual Report. See http://www.apec.org/en/Groups/Committee-on-Trade-and-Investment/~/media/Files/Groups/Transparency/07_cti_ctirpt_Appdx6.ashx.

Leaders' Statement each Economy will publish and/or make publicly available through other means those guidelines.

6. *Each Economy will maintain clear procedures regarding application, registration, and government licensing of investments by:*
   (a) publishing and/or making available clear and simple instructions, and an explanation of the process (the steps) involved in applying/government licensing/registering; and
   (b) publishing and/or making available definitions of criteria for assessment of investment proposals.
7. *Where prior authorization requirement procedures exist, each Economy will conduct reviews at the appropriate time to ensure that such procedures are simple and transparent.*
8. *Each Economy will make available to investors all rules and other appropriate information relating to investment promotion programs.*
9. *When negotiating regional trade agreements and free trade agreements that contain provisions with an investor/state dispute settlement mechanism, each Economy should consider whether or not to include transparency provisions.*
10. *Each Economy will participate fully in APEC-wide efforts to update the APEC Investment Guidebook.*

Source:
Leaders' Statement to Implement APEC Transparency Standards. Bangkok, Thailand, 21 October 2003. See http://www.apec.org/en/Meeting-Papers/Leaders-Declarations/2003/2003_aelm/leadersstmtimplapectranspstd.aspx.

APEC's efforts to promote transparency in the area of investment did not end here. The Investment Facilitation Action Plan (IFAP) of 2008 considers transparency as one of the most important principles of investment facilitation. Its working framework, as shown in Table 1, illustrates what should be done to enhance transparency under the action plan, and what business impact such actions are likely to have.

The IFAP included a concrete Menu of Actions and Measures specifying how accessibility and transparency in the formulation and administration of investment-related policies should be promoted. These are listed in Box 27.

Finally, transparency was also given emphasis in the APEC Strategy for Investment of 2010, which is considered as the successor to the IFAP. The APEC Strategy for Investment upholds the importance of transparency as an endorsed principle of APEC. The strategy gave added value to all the previous declarations and documents mentioned above, for the first time also emphasizing their particular relevance to IIA core elements.[31]

[31] APEC Strategy for Investment. 2010 CTI Report to Ministers.

Table 1. Transparency in the IFAP

Principles	*Government role*	*Business impact*
Promote accessibility and transparency in the formulation and administration of investment-related policies	Provide full, clear and up-to-date picture of investment regime, including advance notice of proposed changes Ensure readily available information, including through "one-stop" or special enquiry points and on-line services where appropriate Promote legislative simplification including plain language drafting Publicise outcomes of periodic reviews of investment regime	Encourages business interest and enables business decisions Allows business to include prospective changes in its planning decisions Gives business confidence that laws, regulations and policies are consistent across different areas and levels of government Promotes a perception in business that the government aims to maintain a good investment climate

Source: APEC Investment Facilitation Action Plan (IFAP). See http://www.ncapec.org/docs/IFAP%20Final%20Version.pdf.

Box 27. IFAP recommendations to promote accessibility and transparency in the formulation and administration of investment-related policies

- Publish laws, regulations, judicial decisions and administrative rulings of general application, including revisions and up-dates.
- Adopt centralised registry of laws and regulations and make this available electronically.
- Establish a single window or special enquiry point for all enquiries concerning investment policies and applications to invest
- Make available all investment-related regulations in clear simple language, preferably in languages commonly used by business
- Establish an Investment Promotion Agency (IPA), or similar body, and make its existence widely known
- Make available to investors all rules and other information relating to investment promotion and incentive schemes
- Allow investors to choose their form of establishment within legislative and legal frameworks.
- Ensure transparency and clarity in investment-related laws
- Establish an APEC-wide website or e-portal to replace the hard copy publication the APEC Investment Guidebook […]
- Encourage on-line enquiries and on-line information on all foreign investment issues

- Publish and/or make widely available screening guidelines for assessing investment proposals
- Maintain a mechanism to provide timely and relevant advice of changes in procedures, applicable standards, technical regulations and conformance requirements
- To the extent possible, provide advance notice of proposed changes to laws and regulations and provide an opportunity for public comment
- Explore the possibility of using the international benchmarks on a voluntary basis as a reference point for peer dialogue and measuring progress

The APEC transparency standard focuses to a large extent on transparency obligations to host and home economies in the formulation and implementation of clauses, regulations, judicial decisions and administrative rulings of general application. So far, transparency on the part of investors is not contemplated. This could however be given more thought.

C. Transparency manifesting in ISDS

In addition to its more traditional manifestation in IIAs focusing on host economy conduct, which was discussed in Section A, the notion of transparency has also recently acquired form in the investment relationship beyond that traditional context. In particular, it has emerged in the context of ISDS, and the focus on this issue has greatly intensified in recent years, becoming a particularly controversial subject within the field. In observing recent trends within transparency issues, the emergence of an entirely new context in this way is a shift of quite some magnitude and noteworthy in itself. For this reason, this section commences with a more thematic framing of the issues before moving to the stocktaking exercise, which will then focus on identifying the various approaches to transparency within ISDS and analysing their implications with respect to development and public interest issues.

1. Transparency and non-party participation: Linked but distinct

The first issue for consideration in this section is the relationship between transparency and non-party participation. Although the concepts are closely interlinked, they are not strictly speaking the same thing. Transparency, at its most fundamental level, is embodied within notions of openness and public scrutiny; in essence, it is the idea of 'shining a light' on the activities of public officials or those in positions of authority to reassure the public that all conduct and decision-making is as it should be. In the context of ISDS, achieving a state of openness and availability for public scrutiny requires open hearings, public access to information, and public access to the documents such as the pleadings and final award. Non-party participation is not a necessary component in achieving that state of transparency. However, it is an important procedural mechanism relevant to transparency and, indeed, can be considered as an indicator of the level of transparency within the system. Furthermore, there are also degrees of non-party participation, namely, permission only to submit a written *amicus curiae* brief to the tribunal or permission also to attend the oral hearings.

The rationale for the role of a non-disputing party or a non-party participant in ISDS is that, in certain circumstances, such an entity can provide relevant information to the tribunal not proffered by the disputing parties, can represent the public interest, or can present perspectives from sectors of the community affected by the dispute that are separate from the interests of the host economy. The value of this role in ISDS, however, is not universally accepted and the participation of *amici* in this context remains a highly contentious issue. Indeed, scepticism comes from many quarters, including developing economies arguing that permitting participation by non-governmental organisations (NGOs) favours developed economy perspectives and that such participation can increase the costs for the disputing parties; investor representatives argue that NGO participants do not, in fact, often contribute substantive material that is additional to that already presented by the disputing parties.

It is important to note, nevertheless, that in addition to the rationale for *amici* as purveyor of further information, the functions of *amici* are also linked in with notions of creating a culture of transparency within the arbitral system. They provide a further layer of public scrutiny and input to support greater transparency, and enhance the perception of public participation in processes, possibly having an impact on public interest issues.

2. Conceptual shift in the application of transparency

Processes of change such as the significant new developments and emerging approaches within international investment law can be better understood by giving some thought to conceptual frameworks and considerations that are, perhaps, more usually associated with explorations into theory. With this in mind, the analysis in this section on ISDS opens by briefly noting the conceptual shift from transparency as solely an issue of host economy conduct, that is, one only concerned with reviewing the transparency of government actions, to an issue that is also about transparency within the process of investor-State arbitration itself.

There are, naturally, multiple factors at play in a development of this kind. However, a shift of such significance in our understanding of transparency within investment disputes can, perhaps, also be viewed as illustrative of a more fundamental characteristic of the system, namely the evolving nature of investor-State arbitration. In a general sense, international law is, of course, an ever-evolving system itself, both in substance and in its structures.[32] Comprising a set of processes and embodying a complex 'normative' system,[33] international law has gradually shifted on many levels, embracing new actors, new substantive areas, new mechanisms such as 'soft law' and 'emerging' rules of customary international law, and new institutions.[34] Falling

[32] James Crawford, *International Law as an Open System: Selected Essays* (2002) 17; Philippe Sands, 'Turtles and Torturers: The Transformation of International Law' (2001) 33 *New York University Journal of International Law and Politics* 527; Gillian D Triggs, *International Law: Contemporary Principles and Practices* (2006) 17–20.

[33] See the discussion in Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (1994) 1.

[34] Philippe Sands, 'Turtles and Torturers: The Transformation of International Law' (2001) 33 *New York University Journal of International Law and Politics* 527.

within the wider context of public international law, international investment law has also been operating against this more generalised backdrop of transformation and has itself been subject to change.

From a historical perspective, the development of ISDS as a mechanism in the 1960s introduced new actors to the international plane, namely the individual foreign investors. The use of investor-State arbitration in the late 1990s and first decade of the 21st century, in turn, brought new levels of complexity, uncertainty, and substantive expansion to the field. Several factors, in particular, have contributed to rapid developments in international investment law over the last decade, including the sharp increase in the rate of investor claims, the tendency in recent arbitral awards to contain very detailed reasoning, and the fact that governments have continued to enter into IIAs and have explored different formulations in treaty texts. The effects of changing practices of this kind have reached into many significant aspects of IIAs and ISDS, including shaping new interpretations of substantive obligations in IIAs, an intensified focus on procedural matters in ISDS, the participation of new actors such as *amici curiae*, the more nuanced content of recent IIAs, and the accumulation of such a substantial body of awards that it is now regularly described as investment treaty jurisprudence.[35] When viewed within this general context of changing understandings, it can be seen that the shift in the application of transparency, from primarily a host economy obligation to provide information and accord investors due process to also encompassing issues in the conduct of ISDS, is part of the current period of evolution of international investment law and practice.

Controversy, however, surrounds these processes of change and acceleration of activity. The substance of IIAs and the conduct of ISDS continue to be high-profile areas of concern. Not only is this controversy reflected in the ongoing discourse surrounding the implications of substantive rules, but the debates are now also focused on more systemic issues, considering the operation of the system as a whole, such as the 'legitimacy' of the IIA system, its interaction with other areas of international law, the role of economic development in FDI, the problem of inconsistencies in awards, and the need for greater transparency in the conduct of ISDS. For the purposes of this section of the study, it is the conditions under which ISDS operates that is the central focus for consideration.

It appears that the ISDS system is currently very much in the midst of a period of transition itself. New measures have been included in recent IIAs addressing the conduct of ISDS, revisions have been made to arbitral rules, entities such as the European Commission have appeared in investor-State disputes as *amicus curiae*,[36] and there has been an increasing

[35] See, for example, the terminology used throughout Campbell McLachlan, Laurence Shore, and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford University Press, 2007).

[36] See, for example, *AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. Republic of Hungary*, ICSID Case No. ARB/07/22; *Electrabel S.A. v. Republic of Hungary*, ICSID Case No.ARB/07/19.

emphasis on procedural matters, such as challenges to arbitrators and counsel.[37] The issues surrounding transparency in ISDS and the participation of non-parties in the proceedings are also a part of this wider reappraisal of ISDS. A particularly interesting aspect of the emergence of transparency issues in the context of ISDS is that it constitutes such a dramatic re-conceptualisation of the original manifestation of the concept in IIAs. Originally conceived of as an obligation imposed on host economies and concerned with reviewing the transparency of government actions, it has been re-shaped as an issue that is also about transparency within the process of investor-State arbitration itself. From a systemic perspective, what makes this type of development so fascinating, is that it represents the way in which issues can evolve in, perhaps, unanticipated directions – and that the IIA and ISDS system can be expected to continue to do so throughout the next decade as well.

3. 'New' importance of procedure in ISDS

In observing some of the most recent trends emerging in ISDS, one of the most significant factors is the increasing appreciation of the importance of procedural issues.[38]In particular, it is the understanding that procedural structures, frameworks, and the specific rules themselves, can impact not only on the practical aspects of the conduct of hearings, but can, in fact, also shape the cultural setting for the hearing and the way in which substantive issues are considered. A key aspect in this regard has been the developments within ISDS on transparency and non-disputing party participation.[39] Accordingly, this study's analysis of transparency within ISDS is conducted expressly against this background, acknowledging that the intensification of interest in this form of transparency is a component of this wider trend in focusing on procedural issues.

4. New approaches to transparency in ISDS: Recent IIAs, arbitral rules and awards

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. In particular, attention has been drawn to the fact that:[40]

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[37] *See, for example, Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic, ICSID Case No. ARB/97/3; The Rompetrol Group N.V. v. Romania, ICSID Case No. ARB/06/3.*

[38] Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, forthcoming 2011).

[39] See the discussion in Joachim Delaney and Daniel Barstow Magraw, 'Procedural Transparency' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008).

[40] See Tienhaara, 'Third Party Participation in Investment–Environment Disputes: Recent Developments' (2007) 16(2) *Review of European Community and International Environmental Law*, 230; see also the discussion in International Institute for Sustainable Development (IISD), *Revising the UNCITRAL Arbitration Rules to Address Investor-State Arbitrations* (September 2007),

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

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 government in the arbitration triggers good governance obligations;
d) The costs of defending claims and financing compensation awards will draw on public funds;
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 raised by commentators has been that the matters in dispute in ISDS can also implicate the ability of the host economy to pursue sustainability projects and development trajectories. Without sufficient access to information on the claims and proceedings, public participation, a full consideration of relevant issues, and progress towards sustainable development can be impeded. For these reasons, it is increasingly acknowledged that it is not only the substantive obligations contained within IIAs that are instrumental in creating policy space for the development needs of host economies, but that the procedural rules of ISDS can also impact significantly on the circumstances in which such issues are considered.

Interestingly, there have been indications in recent IIAs of a desire amongst the negotiating contracting parties to address some of the concerns directed at transparency and public participation issues. Although the majority of IIAs does not contain enhanced transparency and non-party participation provisions, these new measures contained in a few recent IIAs may also point to emerging trends towards more openness in the conduct of proceedings and, possibly, the pursuit of more substantial reforms in other areas of relevance for development issues in the future. Recently, several significant decisions have also been made regarding transparency issues and the participation of *amici* petitioners in investor-State disputes. The following sub-sections of this study examine these recent developments in ISDS.

(a)Transparency in ISDS found 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.[41] This model is largely uncontroversial when applied to international commercial disputes between private parties. However, in its innate engagement of public and private interests, investor-State arbitration is a very different creature, and it is becoming increasingly apparent that the international commercial arbitration model is not

[41] Gus van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press, 2007) 159; M Sornarajah, 'The Clash of Globalizations and the International Law on Foreign Investment: The Simon Reisman Lecture in International Trade Policy' (2003) 10:2 *Canadian Foreign Policy* 1, 13–17; Kyla Tienhaara, 'Third Party Participation in Investment-Environment Disputes: Recent Developments' (2007) 16:2 *Review of European Community and International Environmental Law* 230, 230–231.

always 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.[42]

Recent attempts to reconcile the competing public-private interests can be seen in IIAs that contain significant enhancements on transparency in ISDS. Precipitated by the introduction within the United States' and Canadian model BITs of provisions for open proceedings and the submission of *amicus curiae* briefs,[43] a number of recent IIAs have adopted a more transparent approach to the conduct of hearings (see Box 28 for Articles 28 and 29 of the United States' Model BIT of 2004).

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.

…

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.* [emphases added]

[42] See the discussion in Andrea K Bjorklund, 'The Emerging Civilization of Investment Arbitration' (2009) 113 *Penn State Law Review* 1289.

[43] United States State Department, *Treaty between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investments* (2004) (United States' Model BIT) arts 28 and 29 <http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf>; Canada, *Model Foreign Investment Protection Agreement* (2004) (Canadian Model BIT) arts 34, 35, 38 and 39 <http://www.international.gc.ca/assets/trade-agreements-accords-commerciaux/pdfs/2004-FIPA-model-en.pdf>.

These provisions in the United States' and Canadian Model BITs have now formed 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. Similarly, the Canada–Peru BIT (2006) and the United States–Uruguay BIT (2005) provide for public access to the hearings, non-disputing party access to the pleadings and evidence, and the acceptance of non-disputing party submissions.[44]

It is increasingly common for recently negotiated IIAs to include more exacting transparency requirements regarding procedural steps in ISDS. For example, the Australia–Chile FTA (2005) (in Box 29) 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 29. Australia–Chile FTA (2008)

CHAPTER 10
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 and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. However, any disputing party that intends to use information designated as confidential business information or information that is privileged or otherwise protected from disclosure under a Party's law in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure including closing the hearing for the duration of any discussion of confidential information.

Another example can be found in the ISDS provisions of the Canada–Jordan BIT (2009) in Box 30. Again, it can be seen from Article 38(1) of this IIA that open hearings are required. Alongside these types of provisions, it is also usual to see measures to protect confidential business information. In this way, the negotiators have sought to balance the public interest in transparent proceedings and the disputing parties' need to keep certain business matters

[44] Canada–Peru BIT, *Agreement between Canada and the Republic of Peru for the Promotion and Protection of Investments* (2006) arts 34, 35, 38 and 39, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Canada-Peru10nov06-en.pdf>; United States–Uruguay BIT, *Treaty between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment* (2005) arts 28 and 29,
<http://www.unctad.org/sections/dite/iia/docs/bits/US_Uruguay.pdf>.

confidential. 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 in addition to that of the disputing parties, can address a matter within the scope of the dispute, and has an identifiable interest in the matters in dispute. Tribunals are also charged with ensuring that any intervention on the part of *amici* would not disrupt the proceedings or unfairly burden or prejudice the disputing parties. The participation of *amici* is not universally considered valuable in the context of ISDS, and, from the perspective of some developing economies, it has been argued that the participation of Western NGOs, however well-meaning, reinforces developed economy perspectives to the detriment of the interests of developing economies.[45]

Box 30. Canada–Jordan BIT (2009)

Article 38
Public Access to Hearings and Documents

1. ***Hearings held under this Section shall be open to the public****. To the extent necessary to ensure the protection of confidential information, including business confidential information, the Tribunal may hold portions of hearings* in camera. [emphasis added]

2. The Tribunal shall establish procedures for the protection of confidential information and appropriate logistical arrangements for open hearings, in consultation with the disputing parties.

3. All documents submitted to, or issued by, the Tribunal shall be publicly available, unless the disputing parties otherwise agree, subject to the deletion of confidential information.

4. Notwithstanding paragraph 3, any Tribunal award under this Section shall be publicly available, subject to the deletion of confidential information.

[…]

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 […]

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:

(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;

[45] S Andrea K Bjorklund, 'The Emerging Civilization of Investment Arbitration' (2009) 113 *Penn State Law Review* 1289.

(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.

On many levels, these developments are encouraging as they address key concerns surrounding the confidentiality and the lack of public participation in ISDS. In particular, they provide an opportunity for marginalised communities, which are affected by the matters in dispute in a specific arbitration, to have their perspective put before the presiding tribunal. They, perhaps, also point to the possibility of a future trend towards more openness in the conduct of proceedings. However, it may take some time before the procedural model set out in the examples shown in this section becomes the norm in practice, as, at present, the majority of IIAs do not contain these enhanced transparency and public participation measures. Accordingly, confidentiality and lack of capacity for *amicus* submissions still remains the predominant practice for ISDS.

This continued absence of transparency in ISDS raises additional development-related issues. In particular, it can be queried whether absence of transparency hinders assessments of investor impact on domestic sustainability issues and the development trajectories of host economies. The primary rationale for developing economies in signing IIAs is to attract foreign investment that will enhance their economic wellbeing and development programmes. The unanticipated interaction that IIA obligations have recently had in ISDS with domestic public policy and public welfare regulation has significant implications for the development and implementation of new policies and regulation. Host economies also become more aware of the risks involved in revising regulatory frameworks. Furthermore, with many investor-State disputes heard under the UNCITRAL procedural rules and occasionally at the International Chamber of Commerce's International Court of Arbitration, which do not require disclosure of even the existence of the dispute, it can be difficult for governments to gain a contextual understanding of issues that are in dispute, and to exchange information on corporate practices or experiences with individual investors. In this respect, it is also difficult for host economies to gain any form of 'institutional knowledge' of domestic measures that may be problematic for investors and that have been, or are currently being, challenged, thereby precluding opportunities for the proactive design of regulation that is less likely to breach IIAs. Without being fully informed of current issues in this regard, developing economies may not wish to take the risk of implementing regulatory reform and possibly attracting investor claims.

(b)Arbitral rules

Recently, in response to concerns surrounding the legitimacy of ISDS, there have been a number of initiatives directed towards improving transparency and public participation conditions within the system. This section takes stock of revisions to the transparency-related provisions that currently exist within arbitral rules commonly used in ISDS, such as the ICSID Arbitration Rules and the UNCITRAL Arbitration Rules. Together with the following section examining arbitral awards, recent developments and contentious issues surrounding these rules are examined, particularly with respect to: (a) the commencement and registration of proceedings; (b) access to documents during the proceedings; (c) open hearings; (d) *amicus curiae* briefs; (e) publication of the final award; and (f) exceptions to transparency, particularly concerning confidential business information and disclosure of privileged information by governments.

(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.[46] ICSID Rule 37(2) (set out in Box 31) embodies a significant step towards creating space for the consideration of public interest issues within investment arbitration as it allows the tribunal to receive *amicus* briefs even without the consent of the parties.

Box 31. ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules, as amended 2006)

Rule 37:

(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.

[46] The amended ICSID Rules are available at <http://www.worldbank.org/icsid/highlights/03-04-06.htm>; see also the discussion in Campbell McLachlan, Laurence Shore, Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford University Press, 2007) 57–60.

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, a number of safeguards that must be in place before the arbitrators can accept the written submissions of a non-disputing party (see Rule 37(2)(a–c)). In this way, a balance has been struck between, on the one hand, the parties' need for a fair resolution to the dispute uncomplicated by irrelevant or prejudicial submissions and, on the other hand, the public interest in ensuring that all relevant issues are addressed. These safeguards include the need for non-disputing parties to establish a sufficient interest in the subject matter of the dispute, the consideration of the extent to which the non-disputing party would assist the tribunal by contributing a perspective, knowledge, or insight that is in some way different from the parties to the dispute, and the consideration whether or not the submission would address a matter within the scope of the dispute.[47]This particular procedural reform marks a significant shift in approach to ISDS.

Even following the 2006 amendments, however, it has been suggested that the ICSID Rules on access to the oral hearings do not go far enough in ensuring adequate levels of transparency in investment disputes. ICSID Rule 32(2) only allows non-disputing party access if the parties agree (see Box 32). Accordingly, if one party objects, the non-disputing party will be excluded from the oral hearings.[48]

Box 32. ICSID Arbitration Rules

Rule 32:

(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 Rules and transparency

Revising the UNCITRAL Rules, which were originally designed for commercial arbitration, has been the focus of a working group for several years. Those deliberations were concluded in 2010, during which the working group decided not to make specific recommendations on

[47] ICSID Rule 37(2); see the discussion in Kyla Tienhaara, 'Third Party Participation in Investment–Environment Disputes: Recent Developments' (2007) 16(2) *Review of European Community and International Environmental Law* 230; see also Andrew Newcombe, 'Sustainable Development and Investment Treaty Law' (2007) 8 *The Journal of World Investment & Trade* 357.; Campbell McLachlan, Laurence Shore, Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford University Press, 2007) 57–60.

[48] ICSID Rule 32(2); Andrew Newcombe, 'Sustainable Development and Investment Treaty Law' (2007) 8 *The Journal of World Investment & Trade* 357; see also Kyla Tienhaara, 'Third Party Participation in Investment–Environment Disputes: Recent Developments' (2007) 16(2) *Review of European Community and International Environmental Law* 230.

transparency issues in ISDS. Rather, separate discussions were organized that focused on the feasibility of further revisions to the UNCITRAL Arbitration Rules based on the specific needs of ISDS, including better accommodation of transparency and public participation needs.

These discussions are currently ongoing and have so far resulted in the preparation of a set of "draft rules on transparency in treaty-based investor-State arbitration".[49] These draft rules currently contain a set of drafting options for further consideration by the working group. Intended to be drafted as 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.[50]

(c) Recent awards

There have been several important decisions in investor-State disputes with respect to transparency and public participation, the implications of which are considered in this section. In the course of this discussion, however, it needs to be borne in mind that, although these decisions indicate trends towards increasing openness in ISDS, the area remains very much contested, and not all governments and interested parties wish for greater transparency and public participation within investment arbitration.

The analysis begins with commentary on a particularly significant decision made prior to the commencement of the recent UNCITRAL revisions and the changes to the ICSID Rules, namely *Methanex Corp. v United States of America*.

(i) Methanex Corp. v United States of America[51]

The *Methanex* decision set the scene for more creative interpretations of procedural rules, and further developments in transparency measures and the role of *amici* in ISDS. *Methanex* involved a challenge by a Canadian investor to health and environmental regulation enacted in the United States. NGOs petitioned the tribunal, requesting permission to file *amici* submissions, to attend the hearings, and to make oral submissions to the tribunal. The tribunal relied on an innovative interpretation of Article 15(1) of the UNCITRAL Rules, on the basis of which to accept the *amici* written submissions for consideration (see Box 33).

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[49] General Assembly Document No. A/CN.9/WG.II/WP.166, United Nations Commission on International Trade Law, Working Group II (Arbitration and Conciliation). Available at: http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html.

[50] Ibid.

[51] *Methanex Corp. v United States of America* (2005) 44 *International Legal Materials* 1345; Decision of the Tribunal on Petitions from Third Parties to Intervene as 'Amici Curiae' (15 January 2001).

Box 33. UNCITRAL Rules

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.

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 in part motivated 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.*"[52]

(ii) Glamis Gold v United States of America[53]

Glamis Gold v United States of America was a NAFTA dispute conducted under the UNCITRAL Rules. It involved mining on lands of indigenous cultural significance and several entities sought to file non-disputing party submissions. Although a number of these non-disputing parties were, indeed, environmental NGOs, several were also far from this traditional conceptualisation of a non-disputing party, namely the Quechan Indian Nation and the National Mining Association. Their participation highlights both the way in which investment arbitration can develop in, perhaps, unanticipated ways, and the importance that procedural aspects can have in shaping the issues considered in investor-State disputes.

This development raises issues concerning the identity of other entities to which participatory rights could be extended and the possible implications of their involvement. This includes the participation of the European Commission as an *amicus* in recent ICSID disputes, an issue which is discussed in detail below. In considering the role of *amicus curiae* in ISDS, Bjorklund has also drawn attention to the function of sub-national government entities, such as state rather than federal governments, within investment arbitration. Her analysis provides an interesting exploration into the possibility of provincial governments appearing as disputing parties or amicus curiae in investment disputes, together with both the public interest implications and the problematic aspects of doing so. Bjorklund discusses recent examples of an expansionary

[52] *Methanex Corp. v United States of America*, Decision of the Tribunal on Petitions from Third Parties to Intervene as 'Amici Curiae' (15 January 2001).

[53] Glamis Gold Ltd. v. United States, UNCITRAL (Application for Leave to File a Non-Party Submission) (19 August 2005).

approach to participation in investment arbitration, focusing on the Quechan tribe submission in Glamis Gold v United States of America[54] and the argument that the federal government could not fully represent the tribe's perspective. She contemplates the potential application of such arguments to the circumstances of other sub-national entities, such as a provincial state, and both the advantages and difficulties this could pose for the host economy in, for example, either reinforcing or undermining its defence dependent on the position taken by the sub-national body.[55]

(iii) Biwater Gauff (Tanzania) v United Republic of Tanzania

The differing approach between the two ICSID Rules (Rule 37(2) and Rule 32(2)) illustrated above was reflected in the procedural decision in *Biwater Gauff (Tanzania) v United Republic of Tanzania*. A*micus* submissions were permitted, but access to documents and the hearings was denied (UNCTAD 2008c).[56]

This dispute 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.*"[57]

The tribunal determined that the petitioners met the requirements of Rule 37(2) and accepted their written submissions. Access to the documents filed in the proceedings, however, was not granted. 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.

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[54] Glamis Gold Ltd. v. United States, UNCITRAL (Application for Leave to File a Non-Party Submission) (19 August 2005).

[55] Andrea Bjorklund, '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* (Cambridge University Press, forthcoming 2011).

[56] *Biwater Gauff (Tanzania) v United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order N. 5, 2 February 2007; see also the discussion in Kyla Tienhaara, 'Third Party Participation in Investment–Environment Disputes: Recent Developments' (2007) 16(2) *Review of European Community and International Environmental Law* 230.

[57] *Biwater Gauff (Tanzania) v United Republic of Tanzania*, ICSID Case No. ARB/05/22, Petition for Amicus Curiae Status, <http://www.ciel.org/Publications/Tanzania_Amicus_1Dec06.pdf>.

(iv) AES Summit v. Hungary[58] and *Electrabel v. Hungary*[59]

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 decision-making processes of arbitral tribunals.[60] With this in mind, the paper also discusses two further cases, largely because the identity of the non-disputing party that petitioned to make submissions under the new ICSID Rules was the European Commission. These are two cases filed against Hungary: *AES Summit Generation Limited and AES-Tisza Erőmű Kft v. Republic of Hungary* and *Electrabel S.A. v. Republic of Hungary*.

These disputes involved power purchase agreements and 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 on the basis that such power purchase agreements are incompatible with European Community Law. The European Commission was permitted by each of the tribunals in these disputes to make its submission, although those submissions have not been made publically available.

In making its substantive decision, the *AES* tribunal did refer to the European Commission's submission, but, in much the same way as was done in the *Biwater* award, it did little more than note that it took the submission into consideration. It is likely that this will be the way in which tribunals will address the issue of the role of *amicus s*ubmissions within particular disputes – not identifying specifically which aspects were, or were not, considered by the tribunal or what the impact of the submission was on the final decision. It is, perhaps, an understandable approach to take, as it makes clear that the submission was considered by the tribunal, but precludes any analysis of the extent of any influence.

These developments do, however, raise additional issues surrounding the role of the European Commission in these and other proceedings. In particular, the quintessential non-disputing party traditionally envisaged when measures on transparency and public participation had been advocated is the environmental or human rights NGO or a grassroots activist group presenting perspectives from local affected communities. The European Commission, of course, is a very different entity altogether. With this development, it is necessary to query whether the intervention of a political heavyweight such as the European Commission might carry undue weight in the deliberations of the tribunal or compared to other petitioners, and whether this

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

[59] *Electrabel S.A. v. Republic of Hungary*, ICSID Case No.ARB/07/19.

[60] Christina Knahr, '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* (Cambridge University Press, forthcoming 2011).

introduces an additional layer of politicisation into the dispute, shifting the dynamics of the arbitral process.[61]

In addition to the profound implications that these developments in transparency issues can have for economies, investors, and local communities, these issues also interact closely with other cross-cutting elements and principles. The next section considers several key issues and concepts that have become of increasing importance in terms of such interaction.

D. Interaction between transparency and other issues

Transparency obligations within IIAs and ISDS do not occur in isolation. Indeed, they are closely related to several important concepts, principles, and issues that arise both within investment frameworks and with respect to considerations unrelated to investment. These modes of interaction can, in particular, have significant implications for developing economies in seeking to attract foreign investment that supports their development objectives and in assessing the administrative and financial burdens associated with meeting the transparency obligations contained within IIAs to which they are parties.

1. FET

One of the most significant modes of interaction found in recent awards is between transparency obligations and the FET standard, particularly to ensure legitimate expectations. This issue has been addressed in a variety of ways by arbitral tribunals. Overall, it has become increasingly clear that compliance with host economy transparency obligations is considered a central component of meeting the requirements of the FET standard.

Tribunals have found that the key elements in the standard of FET are the legitimate expectations of the investor regarding the regulatory framework and whether due process has been followed. Within those factors, there are a number of other considerations, such as an obligation to maintain a stable business and legal environment, whether any express statements were made to the investor on which the investor then relied, or whether the government has engaged in any arbitrary or discriminatory conduct. The discourse on transparency in this context has, for example manifested in recent awards such as *Tecnicas Medioambientales Tecmed, SA v United Mexican States* (*Tecmed*), which illustrates the intertwining of transparency requirements with the FET standard:

"The Arbitral Tribunal considers that this provision of the Agreement, in light of the good faith principle established by international law, requires the Contracting Parties to provide to

[61] This point has recently been made by Christina Knahr, see the discussion in Christina Knahr, '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* (Cambridge University Press, forthcoming 2011)..

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."[62] [emphasis added]

It can be seen from the extract above that the *Tecmed* analysis of the requirements of the FET standard contains extensive transparency obligations for host economies. The tribunal's interpretation includes not only the obligation to act transparently in all dealings with foreign investors and to provide all rules and regulations that will govern the investment, but also the *goals* of relevant policies, administrative practices, and directives. Such an approach entails significant administrative and financial demands on the host economy as well as a certain amount of technical knowledge and initiative even to be able to anticipate the likely impact of future policies on an investment.

Subsequent awards have since affirmed the central role of transparency in the FET standard. For example, the award in Lemire v. Ukraine (2010) reiterated that transparency was a component of the standard, stating that an assessment of whether the fair and equitable standard had been breached will include a consideration of "… whether there is an absence of transparency in the legal procedure or in the actions of the State …".[63] The issue of transparency has also been linked with the legitimate expectations of the investor when tribunals have considered the elements of the FET standard, and whether any of these expectations have been breached by the conduct of the host economy. Specifically, the tribunal in Frontier Petroleum Services Ltd v. Czech Republic (Frontier Petroleum) (2010) described the interaction between these concepts 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*

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[62] *Tecnicas Medioambientales Tecmed, SA v United Mexican States* (2004) 43 *International Legal Materials* 133, 173. This approach has been adopted in a number of subsequent awards, such as, *MTD Equity Sdn Bhd & anor v Republic of Chile* (Award) (2005) 44 *International Legal Materials* 91, 105–106; *CMS Gas Transmission Co v Argentine Republic* (2005) 44 *International Legal Materials* 1205, 1235; *Azurix Corp. v Argentine Republic* (Award) (2006) ICSID Case No. ARB/01/12, para. 360–361, 372, 392, 408.

[63] *Lemire v. Ukraine*, ICSID Case No ARB/06/18, IIC 424 (2010), Decision on Jurisdiction and Liability, 14 January 2010.

well as on representations and undertakings made by the host state including those in legislation, treaties, decrees, licenses, and contracts."[64]

Again, there are some concerns about the investor-friendly nature of this particular framing of the transparency obligation as embedded within the FET standard. Most significantly, the content of IIA transparency requirements as interpreted in *Frontier Petroleum* could be very difficult for a number of developing economies to comply with given current limitations in their regulatory and administrative capacities.

What these recent awards highlight is the importance of the interpretations given by arbitral tribunals to the provisions within IIAs that impact upon transparency obligations. And it is evident that consideration of these issues is already beginning to influence the decisions of treaty negotiators. From a number of provisions in recent IIAs, it appears that attempts have been made to limit the potentially negative effects of FET clauses. For example, the Mexico–Singapore BIT (2009) expressly states that FET is to be in accordance with international customary law (see Box 34), and the ASEAN–China Investment Agreement (2009) restricts the application of FET to denial of justice issues.[65]

Box 34. Mexico–Singapore BIT (2009)

Article 4
Minimum Standard of Treatment
1. Each Contracting Party shall accord to investments of investors of the other Contracting Party treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.

These are certainly interesting options for negotiating parties to consider when there is a desire to limit the reach of the FET standard into domestic regulatory spheres. Again, however, it should be noted that, although these clauses appear to indicate a variation of the traditional emphases of FET clauses, these newer provisions will also be given effect by the interpretations of arbitral tribunals. This includes assessments as to what the customary international standard of FET requires – and that has, at times, been found to correlate with evolving contemporary understandings surrounding the concept. This also tends to create uncertainty for governments in assessing precisely what their obligations are in a practical sense.

[64] *Frontier Petroleum Services Ltd v. Czech Republic*, PCA–UNCITRAL Arbitration Rules, IIC 465 (2010), Final Award, 12 November 2010.
[65] See the discussion in Mahnaz Malik, *Recent Developments in International Investment Agreements: Negotiations and Disputes* (2010), 4.

2. Corporate social responsibility

This section explores and examines recent developments in the relationship and interaction between transparency obligations and the concept of CSR. This includes an examination of recent trends towards voluntary CSR reporting and the proliferation of annual corporate CSR reports.

(a)Voluntary codes of corporate conduct

The trend towards voluntary CSR reporting has continued to evolve in recent years, which is significant for the context in which the transparency-related conduct of corporate investors is considered. For example, the requirements of the Equator Principles, a voluntary code directed at the private equity sector, attach conditions to the provision of loans in transnational project finance. A significant procedural consequence of signing on to this particular code is the required publication of reports by signatory banks – known as Equator Principles Financial Institutions (EPFIs) – on their implementation of the Equator Principles. This reporting requirement tends to be satisfied through the embedding of that information within wider CSR Annual Reports. All of this increases the general expectations of more transparent conduct on the part of transnational investors. Although this form of requirement is voluntary and does not appear as such within IIAs, the regular provision of this type of information contributes to the creation of expectations of greater transparency in transnational corporate conduct. In addition, such readily accessible information is useful for governments when assessing the suitability of potential investors for proposed investment projects within their jurisdiction.

The increasing prominence of socially responsible institutional investment (SRII) is also relevant, as disclosure of corporate activities and transparent approaches have become particularly important in this context. The ability to make informed SRII decisions is dependent on the availability of non-financial information. SRII tends to involve a process of screening companies according to environmental and social criteria to determine whether or not to invest in them.[66] Screening can take a positive or negative approach to categorising companies. As a result, the social and environmental criteria on which investment decisions are based vary between funds, although the essential methodology tends to be similar. By way of illustration, positive screening can entail versions of the following:

- Investing in companies that actively engage in environmentally positive activities, such as research and development into renewable energy sources; and

[66] Marcel Jeucken, *Sustainability in Finance: Banking on the Planet* (2004) 188–190; Benjamin J Richardson, 'Sustainable Finance: Environmental Law and Financial Institutions' in Benjamin J Richardson and Stepan Wood (eds), *Environmental Law for Sustainability* (2006) 309, 311–312; Robert Heinkel, Alan Kraus and Josef Zechner, 'The Effect of Green Investment on Corporate Behavior' (2001) 36 *The Journal of Financial and Quantitative Analysis* 431, 431–432.

- Investing in companies that pursue policies that are beneficial for the environment, such as those that adopt energy efficiency programmes, obtain energy from renewable sources and implement comprehensive recycling and waste reduction programmes.[67]

By contrast, the approaches adopted by funds using negative screening can involve:

- Excluding companies from share portfolios that engage in environmentally harmful activities, such as those employing unsustainable logging practices; and
- Excluding whole sectors from share portfolios, so that investments are not made in any company belonging to sectors of industry considered by the fund to be environmentally or socially harmful, such as the fossil fuel, pesticide, tobacco or mining industries.[68]

Given the reliance of SRII on screening, it is clear that increased corporate transparency is a necessity if SRII is to function in a meaningful way. Although not without its problems, a voluntary code was developed to assist with the mainstreaming of SRII, namely the United Nations Principles for Responsible Investment (UNPRI). The UNPRI consist of six principles and 35 'possible actions' through which investors can integrate environmental, social, and corporate governance matters into their operations and decision-making.

The interaction of SRII with transparency issues in IIAs is bound up with notions of an increasing culture of transparency requirements for all actors within the investment relationship. These instruments do not, of course, create international legally binding obligations on investors in the way that IIAs do for economies.[69] However, they are important for transparency issues in IIAs in two particular ways. Firstly, voluntary codes such as the Equator Principles and UNPRI contribute to expectations of corporate transparency in transnational dealings; and, secondly, through their reporting requirements, they also generate source material for governments to consider in determining whether proposed investments fit within the development needs of the economy.

(b)Draft Norwegian Model BIT

An interesting development in January 2008 was the release for public comment of the draft Norwegian Model BIT (2007), which expressly sought to introduce a more balanced approach to

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[67] Marcel Jeucken, *Sustainability in Finance: Banking on the Planet* (2004), 188–190; Elizabeth Glass Geltman and Andrew E Skvoback, 'Environmental Law and Business in the 21st Century: Environmental Activism and the Ethical Investor' (1997) 22 *Iowa Journal of Corporation Law* 465, 473–475.

[68] Marcel Jeucken, *Sustainability in Finance: Banking on the Planet* (2004), 188–190; see also the discussion in Harry Hummels and Diederik Timmer, 'Investors in Need of Social, Ethical, and Environmental Information' (2004) 52 *Journal of Business Ethics* 73.

[69] Traditionally, obligations in treaties are imposed solely upon economies. This traditional position no longer reflects the realities of international interaction, and obligations have been imposed upon non-State actors in other contexts, such as individual international criminal responsibility.

host economy needs within IIAs. Accordingly, the Norwegian Model BIT contained a number of novel aspects. For example, it extended carve-outs for public welfare regulation beyond indirect expropriation to national treatment and most-favoured-nation treatment standards.[70] It also introduced the concept of CSR into the substantive provisions of BITs, framing 'corporate social responsibility' in terms of an obligation on governments 'to encourage investors' to conduct themselves in accordance with the OECD Guidelines for Multinational Enterprises and to participate in the United Nations Global Compact (see Box 35 below).[71] The draft was, however, withdrawn from public consideration in 2009 due to the polarised nature of the positions taken by stakeholders and the inability to find common ground in order to progress the instrument beyond this draft stage.

Box 35. Norwegian Model BIT (2007)

Article 32
Corporate Social Responsibility
The Parties agree to encourage investors to conduct their investment activities in compliance with the OECD Guidelines for Multinational Enterprises and to participate in the United Nations Global Compact.

(c)CSR in recent IIAs

In recent IIAs, the phrase "*corporate social responsibility*" has also appeared in the Preamble. In this context, of course, the phrase does not comprise part of the substantive obligations contained within the agreement. However, in the past, arbitral tribunals have certainly turned to Preambles as an interpretative tool (see, for example, *Azurix etc.*), and so the contents of Preambles have assumed a greater significance than was, perhaps, previously appreciated. This is particularly so when the references to CSR are embedded within a series of issues such as environmental protection, labour rights, and human rights (see, for example, the Canada-Republic of Colombia FTA of 2008, shown in Box 36).

[70] Ministry of Trade and Industry, Norway, *Draft Model Bilateral Investment Agreement* (December 2007) <http://www.regjeringen.no/nb/dep/nhd/dok/Horinger/Horingsdokumenter/2008/horing---modell-for-investeringsavtaler/-4.html?id=496026>, arts 3 and 4.

[71] Ministry of Trade and Industry, Norway, *Draft Model Bilateral Investment Agreement* (December 2007) <http://www.regjeringen.no/nb/dep/nhd/dok/Horinger/Horingsdokumenter/2008/horing---modell-for-investeringsavtaler/-4.html?id=496026>, art. 32.

Box 36. Canada–Republic of Colombia FTA (2008)

Preamble

Canada and the Republic of Colombia resolve to:
[…]

Encourage enterprises operating within their territory or subject to their jurisdiction, to respect internationally recognized ***corporate social responsibility*** *standards and principles and to pursue best practices;* [emphasis added]

As 'best practice' in CSR involves more transparency in corporate conduct and enhanced corporate disclosure, the inclusion of such references within the Preambles of IIAs points to expectations of governments regarding the conduct of foreign investors and the willingness on the part of investors to engage in more transparent approaches to their activities. These developments should also assist host economies in both the initial decision-making phase regarding a proposed project and in maintaining on-going investor transparency throughout the investment relationship.

3. Global administrative law

A further issue that is somewhat less concrete than those discussed above is also considered in this stocktaking analysis – that of 'global administrative law' and IIAs. This section raises, in a preliminary way, this issue for consideration, querying what the implications might be of the recent trend in re-framing ISDS as a component of global administrative law and the emerging tendency towards describing investor-State arbitration as the epitome of the rule of law, good governance and neutrality.[72] ISDS is, indeed, an element of international administrative functions and entities,[73] although it is an international dispute resolution mechanism unique in its structure and function.[74] For example, individuals may bring a claim to an international adjudicatory body directly against a government; individuals may compel a government to respond to claims at the international level without first exhausting local remedies; these claims involve a review of public government actions; a public law remedy of damages is sought by investor claimants; and enforcement of damages awarded can be implemented against government assets through the courts of other economies.[75]

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[72] See, for example, the discussion in Stephan Schill, 'Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law' (2006) *IILJ Working Paper2006/6, Global Administrative Law Series* <http://www.iilj.org/publications/documents/2006-6-GAL-Schill-web.pdf>; Benedict Kingsbury and Stephan Schill, 'Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law' (2009) *IILJ Working Paper2009/6, Global Administrative Law Series* <http://www.iilj.org/publications/2009-6Kingsbury-Schill.asp>.

[73] Gus Van Harten and Martin Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) 17 *European Journal of International Law* 121.

[74] Ibid 122–123, 149–150.

[75] Ibid 122–123, 149–150.

Global administrative law is said to be concerned with issues of transparency, public participation, and due process, amongst other aspects. In the context of IIAs, its application is said to manifest in the review of host government conduct so as to ensure transparency and due process in the decision-making and actions of government officials and entities with respect to foreign investors. Ironically, however, the procedural framework for ISDS does not itself allow for full transparency, public participation, or review of awards.[76] In other words, only certain aspects of the 'global administrative project' appear to be currently applicable to investment – that is, facilitating the enforcement of transparency obligations undertaken by host economies in IIAs, but not in the conduct of proceedings in ISDS.

It is also worth questioning the need for this additional way of framing investor-State arbitration – why has this particular form of framing ISDS come about? The network of administrative entities and functions at both domestic and international levels, of which ISDS is a component, has existed and been performed for decades. To assign to these operations the particular label of 'global administrative law' has implications that go beyond the fact of the occurrence of these functions. Susan Marks has described this as the 'power of naming'.[77] In the context of ISDS, the question is whether the label of 'global administrative law' contributes to a legitimisation of the system, simply by association with the terminology, just at the time when that system is facing challenges regarding its legitimacy. In other words, it is conceptually difficult to argue that there are problems with a system that is framed as being the embodiment of the rule of law and good governance. It will be interesting to see whether central concerns of global administrative law, such as transparency, are applied to the investment context and manifest fully within the operation of ISDS.

[76] Kyla Tienhaara, 'Third Party Participation in Investment–Environment Disputes: Recent Developments' (2007) 16(2) *Review of European Community and International Environmental Law*, 230–231; M Sornarajah, 'A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration' in Karl P Sauvant (ed) *Appeals Mechanism in International Investment Disputes* (2008) 39; see also the discussion in Susan D Franck, 'Integrating Investment Treaty Conflict and Dispute System Design' (2007) 92 *Minnesota Law Review* 161.

[77] Susan Marks, 'Naming Global Administrative Law' (2005) 37 *New York University Journal of International Law and Politics* 995.

III. ASSESSMENT AND POLICY OPTIONS

Transparency serves many functions within IIAs. It can be used to enhance the investment relationship amongst all participants, contributing to a more open investment environment and building trust between investors and the host economy. In this sense, transparency performs a key function in investment promotion and in creating an attractive investment climate within prospective host economies. In a less direct way, transparency obligations can also contribute to good governance objectives, fostering expectations that decision-making will be fair, obligations will be honoured, and that all parties are striving to achieve best practice conditions within the investment relationship. A further key issue is the appearance of transparency and public participation-related provisions within ISDS provisions of recent IIAs and the development implications of particular formulations. At a fundamental level, increased transparency obligations within ISDS serve similar functions to their more traditional manifestation within IIAs, as they also contribute to a culture of openness in investor-State interaction. Greater transparency in the context of disputes can contribute to a sense of enhanced accountability for all actors and goes hand-in-hand with increased opportunities for public participation in the processes for resolution of investor-State disputes.

The development-related questions surrounding transparency obligations contained in IIAs centre on the extent to which different approaches may lead to different development outcomes for host economies. Such questions are of course complex, and it is not feasible to ascertain with any certainty direct causal links between particular transparency provisions and specific development trajectories. What can be said, however, is that the increased costs of compliance and monitoring attached to certain transparency provisions and not to others will have general development implications for developing economies. Although the particular formulations of transparency obligations that are chosen for inclusion in IIAs will only be one consideration amongst many for treaty negotiators, the formulation chosen will undoubtedly have flow-on effects of some kind on the investment relationship between the government and foreign investors, on the actions required of the host economy, on the financial consequences of the obligations assumed, on the technical capacity to comply, and on the wider development trajectories of developing economies. From a development perspective, it is the scope and extent of transparency provisions that is of considerable significance and, in this regard, there are choices available to negotiators in determining whether to import a more expansive or limited set of obligations into new IIAs. In this sense, many of the development-related policy concerns of the past remain very much in play and have in some respects intensified. Most notably, the focus on transparency issues has widened to encompass the area of ISDS. As discussed earlier in this study, transparency within ISDS has recently proven to be a controversial area in which economies have been unable to agree upon even the need for increased transparency measures. This final section draws conclusions from the analyses conducted above. It seeks to understand the implications of individual provisions and to assist in making decisions regarding the contents of proposed treaties.

A. Transparency references

Almost all IIAs contain some reference to transparency obligations assumed by the parties in their capacity as host economies, and a lack of any such reference could be regarded by foreign investors as an adverse indication of the investment climate within an economy. To avoid any such implication, it may be advisable for negotiating governments to include some form of transparency obligation – the questions then primarily relate to the addressee, extent, scope, form, and delivery mechanism for the obligation.

1. Addressees

As discussed above, there are a number of potential addressees of the transparency obligations contained within IIAs. The options available are to direct transparency obligations to all contracting parties, solely to the host economy, or also towards investors.

(a) Option 1: References to all contracting parties

This type of formulation that frames transparency obligations in an expansive way and imposes them on all contracting parties to an IIA has a broad regulatory reach. It imposes on all contracting parties the responsibility to ensure adequate disclosure of the requisite information, whether as home or host economies. This approach means that the home economy can be expected to disclose information regarding its own regulatory framework or to provide information that could assist host economy governments with their policies on, for example, corrupt practices (UNCTAD 2004). Of the three options for addressees, this option also potentially provides prospective investors with the most access to relevant information.

Suggested formulation
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.

(b) Option 2: Obligations imposed solely on the host economy

By definition, this option takes a narrower approach compared to the first option. This alternative approach can be used to deflect any concerns that host economy regulatory changes pose a particularly significant threat to the operation or profitability of foreign-owned investments. Specifically imposing obligations solely on the host economy in this way can send a strong message to potential investors that the investment climate within that jurisdiction is a favourable one. It is, of course, a more limited option than the first in that it does not encompass transparency obligations for home government measures (UNCTAD 2004).

Suggested 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.

(c) Option 3: Transparency obligations for investors

The third option for addressees is to include references to investors or corporate entities within the IIA transparency obligations. As noted above, this can be done either directly or indirectly.

(i) Indirect obligations

The simplest investor-related transparency obligations can be encompassed in an indirect form within provisions requiring foreign investors to comply with all laws and regulations of the host economy. In this way, if host economy corporate regulation requires disclosure of certain information, foreign-owned corporations will also need to comply with those transparency-related requirements. This is also, perhaps, the least controversial of the possible approaches to investor-related obligations, given that more direct obligations could be regarded by investors in a negative light.

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

(ii) Direct obligations

Some recent IIAs now also include more exacting disclosure requirements in which authority is expressly granted to the host economy government to collect information from the investor. This option provides the host economy government with a mechanism to carry out extensive due diligence on a potential investor and could, therefore, be particularly useful in assessing sources of capital via foreign investment for development programmes. The negative caveat is, again, that the more restrictive or demanding provisions within IIAs could be a deterrent for prospective investors and detract from economies being seen as a promising investment option.

Suggested 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.

2. Content of transparency provisions

A key issue in negotiating transparency provisions in new IIAs is the extent of their intrusiveness into the regulatory and administrative frameworks of the contracting parties and the associated financial burdens of compliance with and monitoring of the assumed transparency obligations. The scope and depth of such transparency obligations, and therefore their impact on the contracting parties, will largely depend upon the selection of items of information to be made public. In this regard, there are several options for consideration.

(a) Option 1: Laws and regulations

The first option is to limit the transparency obligation to solely disclosure of "*laws and regulations*". This model is one of the least intrusive for host economies (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 contracting parties to comply with provisions of this nature.

Suggested 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.

(b) 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 more items of information than laws and regulations. For this reason, negotiating parties may wish to consider the appropriate balance that should be struck between the disclosure needs of the investor and the cost implications for the government. 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, contracting parties may also wish to consider including *draft* or *proposed* laws and regulations. Such provision would significantly increase the administrative burden on the host economy government, 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.

Suggested 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.

(c) Option 3: Qualifiers

Governments may wish to draft their transparency provisions in a more open-ended way in terms of their application. In this regard, governments may assume obligations to publish designated items of information "*which pertain to or affect investment activities*" or "… *which may affect the investments of investors* …". These options potentially encompass a very wide range of material.

As an alternative approach and more restrictive version, contracting parties may wish to qualify the application of their transparency obligations to measures that "… *significantly affect* …" or "… *materially affect* …" investments. Governments may also wish to qualify their obligations to publish the required material with the phrase " … *to the extent possible.*" Again, these options will reduce the administrative and financial load on the host economy, but they also indicate that a more limited range of relevant information will be available to investors throughout the life of their investments.

3. Cooperation and exchange of information

There are a range of options relating to transparency that can assist with investment promotion, cooperation between economies on investment matters, and the enhancement of a culture of transparency. These include the insertion of provisions relating to the exchange of information or agreements to cooperate.

(a) Option 1: Agreement to cooperate

In practical terms, the inclusion of a provision agreeing to cooperate does not require a great deal from contracting parties. However, it can be particularly significant in creating cultures of greater transparency and cooperation. Such provisions can be taken to 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. For these reasons, contracting parties may wish to consider inserting such a provision into any new IIAs they are negotiating.

Suggested formulation

Consultation and cooperation
1. The representatives of the Contracting Parties shall 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.

(b) Option 2: Exchange of information

Further options for contracting parties to consider include requirements to consult, notify, request, or exchange information. These types of provision can require extensive levels of engagement between the contracting parties. For this reason, such provisions can contribute significantly to enhanced transparency conditions between the contracting parties. Correspondingly, including such provisions also means that the host economy would need to meet greater administrative and financial demands to respond to requests for information, establish contact points, and implement monitoring and compliance measures.

Suggested formulation

The contracting parties shall cooperate to exchange information on investment laws, regulations and administrative practices in the field of investment.

B. Transparency in ISDS

It is increasingly common to see transparency measures included in IIAs that refer to the conduct of arbitral proceedings. For this reason, the question of whether or not to include transparency provisions in ISDS will likely arise for contracting parties during the process of negotiating new IIAs. To assist with the process of decision-making, key options are set out below.

1. Availability of information

Greater availability of information is a central component that drives the increase in the transparency of arbitral proceedings in investor-State disputes. Governments have a series of options to consider in this regard, ranging from no public access to arbitral documentation to full availability. The options include permitting public access to any or all of the following:
(a) the notice of intent to arbitrate;
(b) the notice of arbitration;
(c) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions submitted by non-disputing parties and *amicus* submissions;

(d) minutes or transcripts of hearings of the tribunal, where available; and
(e) orders, awards, and decisions of the tribunal.

Suggested 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 submitted pursuant to Article [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.

Arguments against including such measures include the increase of costs to the disputing parties, the greater administrative burden involved in making such documentation available to the public, and the potential for confidential information to be compromised.

2. Access to oral hearings

A further key element in increased transparency measures within ISDS is whether or not to open the oral hearings to the public. Again, the relevant considerations include the balance to be struck between the public 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.

Suggested 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*

An issue closely entwined with transparency, and often seen as an indicator of the level of transparency within a particular ISDS arrangement, is that of *amicus* submissions. An option available to negotiating parties is to include provisions for the acceptance of *amicus* submissions. If so, the standard approach is to grant authority to tribunals to accept and consider *amicus* submissions, including the implicit power to *not* accept any proposed submission. In this

regard, recent changes to the arbitral rules at ICSID provide some guidance on possible approaches to incorporate in IIAs, which include the following for a tribunal to consider:

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

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

Suggested formulation

The tribunal shall have the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party.

Again, the increased costs and duration of the proceedings for the disputing parties is an issue for the negotiating parties to consider in determining the scope of any transparency provisions they may wish to include in new IIAs.

* * *

It is clear that there are a range of options available to negotiating parties when considering transparency issues in relation to new IIAs. These encompass traditional concerns from the perspective of the potential investor about the transparency of government conduct to more recent manifestations of transparency issues in ISDS. The issues are multi-layered and, for governments when negotiating new IIAs, consideration should be given to the delicate balance within IIAs of measures to promote investment liberalisation, protect established investments, enhance inter-economy relations, and preserve the public interest of each economy in their capacity as host economy. Furthermore, each drafting option has development-related considerations and outcomes which are significant for negotiating parties. It is clear, however, that these issues remain in a state of transition, although, in many respects, the trends are towards greater transparency in both its more traditional manifestation as an investor concern and within the context of ISDS.

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