

Three Manifestations of Transparency in International Investment Law: A Story of Sources, Stakeholders and Structures*

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* This article is the winner of GoJIL's 8th Student Essay Competition on *Transparency in International Law*.

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My thanks to the two anonymous reviewers from the Scientific Advisory Board for their detailed and helpful comments, as well as to the Editorial Board of the Journal for their assistance throughout the publication process.

Abstract

The notion of transparency manifests in three contexts in international investment law. It manifests first at the point of norm creation, regulating the public availability of information about the norms included in investment treaties and the capacity for interested stakeholders to view or participate in the creation of those norms. Transparency secondly features in the content of substantive investment obligations. In this incarnation, transparency norms empower foreign investors to bring proceedings against States for failures of transparency in State dealings with investors. Finally, transparency features as a procedural requirement for investment arbitration proceedings. Here, transparency refers to the extent to which individual dispute settlement proceedings are publicly accessible or documents produced in those proceedings made publicly available. The precise features of transparency in each of these contexts differ, as do the stakeholders which stand to benefit from transparency. Studying these three distinct manifestations of transparency offers insights into the development of international investment law and the sources, stakeholders and structures which shape it. This article considers each manifestation of transparency in turn (Section I), before considering what they reveal about the nature and structure of international investment law and arbitration (Section II).

A. Transparency's Three Manifestations

Transparency is a difficult term to define. As Bianchi notes in a recent anthology devoted to transparency in international law, “[n]ot even the one NGO that is expressly devoted to transparency issues provides a general definition of transparency”.¹ Given this, transparency is typically treated as a broad concept which takes shape in a range of guises in different contexts.² For the purposes of this article, the notion of transparency is understood broadly to relate to the availability and accessibility of information about norms and institutions.³ Transparency may be favoured for instrumental reasons or as “an intrinsic value in its own right”.⁴ Instrumentally, transparency may facilitate

¹ A. Bianchi & A. Peters (eds), *Transparency in International Law* (2013), 7.

² See, especially *ibid.*, 8.

³ See further ECOSOC, *Definition of Basic Concepts and Terminologies in Governance and Public Administration*, UN Doc E/C.16/2006/4, 5 January 2006, 10, para. 49.

⁴ L. E. Peterson, ‘Amicus Curiae Interventions: The Tail That Wags the Transparency Dog’ (2003), available at <http://kluwerarbitrationblog.com/2010/04/27/amicus-curiae-interventions-the-tail-that-wags-the-transparency-dog/> (last visited 18 December 2017).

stakeholder participation and/or engagement with legal regimes, and support the legitimacy and accountability of actors or norms operating in them. As noted above, the term *transparency* has been given a range of meanings in discussions of international investment law. The below subsections examine three such manifestations of transparency to highlight how the concept has been operationalized in international investment law.⁵

I. Transparency of Norm-Making

State to State negotiations of treaties providing investment protection are a major source of substantive international investment norms.⁶ Historically, investment treaties were negotiated in confidence and only made public following their signature or ratification. This reflects the fact that early investment treaties were oftentimes mere photo opportunities. As such, little time or energy was devoted to drafting or negotiation, and there was therefore little scope for early disclosure of the negotiated terms or in-depth public consultation.⁷ This also reflects broader trends. As Bianchi notes, “[t]he world of international diplomacy and high politics has long been depicted as secretive and enigmatic, far removed from the public’s eye”.⁸ In more recent times, however, investment treaties have come to be more widely perceived as important tools of economic policy, and States have therefore dedicated more time to their drafting and negotiation. States have nevertheless sought to defend continued secrecy of treaty negotiations on the grounds that greater transparency would undermine State bargaining positions and reduce the frankness of exchanges between negotiating parties.⁹

⁵ Of course, transparency may manifest in this and other regimes in ways other than those highlighted in this article. The article therefore does not aim to be comprehensive in its treatment of manifestations of transparency, instead aiming to highlight three key sites of transparency in international investment law as a means of examining the importance of that concept to this body of law.

⁶ Other sources include investment contracts between investors and States, and domestic legislation relating to foreign investment. This article focusses principally upon international investment law created through treaties. The observations in Sections 1(B) and (C) may hold relevance to these other sources of international investment law, particularly insofar as they are applied by international arbitral tribunals for example within the ICSID framework.

⁷ See further L. N. Poulsen & E. Aisbett, ‘When the Claims Hit: Bilateral Investment Treaties and Bounded Rational Learning’ 65 *World Politics* (2013) 273, 280, 296.

⁸ Bianchi & Peters, *supra* note 1, 3.

⁹ Australian Government Department of Foreign Affairs and Trade, ‘Release of Confidentiality Letter’ (2011), available at <http://dfat.gov.au/trade/agreements/tpp/news/>

States have come under increasing pressure to adopt more transparent and consultative approaches to the negotiation of trade and investment treaties.¹⁰ These calls for greater transparency are linked to the increasing public interest in the social and economic effects of investment treaties, including their dispute settlement clauses. In October 2015, for example, over 150,000 protestors took to the streets of Germany to protest against the Trans-Pacific Investment Partnership then under negotiation between the United States and the European Union.¹¹ Like other contemporaneous protests, this protest featured calls from civil society for more transparent treaty making and the opportunity for public input into treaty negotiations.¹² Such protests constitute an element of a broader public “backlash” against international investment law and arbitration.¹³ Recent civil society mobilisation against the investment treaty regime is arguably as much about the content of norms as it is about the processes used to make them.¹⁴ Thus, “[t]he public backlash against trade deals points to a process that leaves many feeling excluded and to terms that are presented publicly for the first time

Pages/release-of-confidentiality-letter.aspx (last visited 18 December 2017).

¹⁰ See for example G. Ruscilla, ‘Transparency in International Arbitration: Any (Concrete) Need to Codify the Standard?’, 3 *Groningen Journal of International Law* (2015) 1, 2.

¹¹ J. Delcker & C. Kroet, ‘More than 150,000 Protest against EU-US Trade Deal’, Politico (9 October 2015), available at <http://www.politico.eu/article/germany-mobilizes-against-eu-u-s-trade-deal-merkel-ttip-ceta/> (last visited 18 December 2017). Some reports put the number of protestors as high as 250,000: ‘Hundreds of Thousands Protest in Berlin against EU-U.S. Trade Deal’, Reuters (10 October 2015), available at <http://www.reuters.com/article/us-trade-germany-ttip-protests-idUSKCN0S40L720151010> (last visited 18 December 2017); C. Johnston, ‘Berlin Anti-TTIP Trade Deal Protest Attracts Hundreds of Thousands’, The Guardian (10 October 2015), available at <http://www.theguardian.com/world/2015/oct/10/berlin-anti-ttip-trade-deal-rally-hundreds-thousands-protesters> (last visited 18 December 2017).

¹² F. Francioni, ‘Foreign Investments, Sovereignty and the Public Good’, 23 *Yearbook of International Law* (2013) 3, 4–5; UNCTAD, *World Investment Report 2015. Reforming International Investment Governance*, UNCTAD/WIR/2015, 2015, 176; K. Nowrot, ‘How to Include Environmental Protection, Human Rights and Sustainability in International Investment Law?’, 15 *The Journal of World Investment & Trade* (2014) 3–4, 612, 619; M. Langford, ‘Cosmopolitan Competition: The Case of International Investment’, in C. Bailliet & K. Aas (eds), *Cosmopolitan and its Discontent* (2011), 178, 183.

¹³ See, generally M. Waibel et al. (eds), *The Backlash against Investment Arbitration: Perceptions and Reality* (2010).

¹⁴ I. Cate, ‘International Arbitration and the Ends of Appellate Review’ 44 *New York University Journal of International Law and Politics* (2012) 4, 1109, 1111. See also L. Trakman, ‘Resolving Investor-State Disputes under a Transpacific Partnership Agreement – What Lies Ahead?’ *Transnational Dispute Management* (2012) 7, 17–8.

as final”.¹⁵ Proponents of greater transparency contend that civil society access to, and participation in, investment treaty negotiations might both improve the bargains reached by States and make the public more amenable to accepting them.¹⁶

States have been somewhat receptive to these calls for greater transparency. Responses have ranged from the publication of negotiating records or position papers¹⁷ to the inclusion of civil society representatives in negotiations,¹⁸ the holding of consultation processes,¹⁹ and provision for greater parliamentary oversight of treaty negotiations or ratification.²⁰ Most of these approaches have generated some level of passive transparency: stakeholders can observe treaty negotiations, but not directly intervene in them. States have, however, also achieved some level of active transparency by engaging civil society in the development of model treaties. Model treaties reflect a State’s conception of its *ideal* treaty bargain, and form a basis for State negotiations with prospective treaty partners.²¹ Transparency during the development of model treaties does not raise the same strategic issues associated with transparent treaty negotiation. The drafting of model treaties is also not subject to particular time pressures, such that stakeholder engagement can be both iterative and comprehensive.

¹⁵ M. Geist, ‘In Ottawa, TPP’s Death Could Open the Door to Transparent Trade Dealing’, *The Globe and Mail* (16 November 2016), available at <https://beta.theglobeandmail.com/report-on-business/rob-commentary/in-ottawa-tpps-death-could-open-the-door-to-transparent-trade-dealing/article32860162/> (last visited 18 December 2017).

¹⁶ D. Barstow Magraw Jr. & N. Amerasinghe, ‘Transparency and Public Participation in Investor-State Arbitration’ 15 *ILSA Journal of International & Comparative Law* (2008) 2, 337, 351; C. Birchall, ‘Introduction to ‘Secrecy and Transparency’: The Politics of Opacity and Openness’, 28 *Theory Culture and Society* (2011) 7, 9.

¹⁷ European Commission, ‘Opening the Windows: Commission Commits to Enhanced Transparency in TTIP’, 25 November 2014, available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1205&title=Opening-the-windows-Commission-commits-to-enhanced-transparency-in-TTIP> (last visited 18 December 2017).

¹⁸ See, further L. Sadat, ‘An American Vision for Global Justice: Taking the Rule of (International) Law Seriously’, 4 *Washington University Global Studies Law Review* (2005) 2, 329, 334.

¹⁹ See, for example European Commission, ‘Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)’ Commission Staff Working Document - Report SWD (2015).

²⁰ Australian Senate Standing Committee on Foreign Affairs, Defence and Trade References, *Blind Agreement: Reforming Australia’s Treaty-Making Process* (2015), 39–57.

²¹ See further N. Calamita, ‘The Making of Europe’s International Investment Policy: Uncertain First Steps’ 39 *Legal Issues of Economic Integration* (2012) 3, 301.

Through reforms at a number of stages of the treaty-making process, States are thus taking important steps towards achieving greater transparency during the development of international investment treaty norms.

There are important parallels between these current debates about the transparency of investment treaty negotiations, and those which featured in the context of the first modern multilateral negotiation of an arbitration treaty. States party to the 1899 Hague Peace Conference – which ultimately led to the development of the Permanent Court of Arbitration – were confronted with very similar issues. At the start of the Conference, “a strenuous effort was made [...] to keep all reports of the debates secret from the public”.²² Such secrecy was, however, met with resistance, particularly from the press.²³ The delegates at the Conference were ultimately forced to acknowledge “the legitimate curiosity of the public attentive to our labors”.²⁴ By the 1907 Conference, publicity was viewed with less suspicion: members of the public were permitted to witness the negotiations, and reports about the Conference were prepared for public release.²⁵ The shift from secrecy to transparency had an important, albeit unexpected, benefit: the public came to accept that the States were negotiating for, and guided by, their interests. As Baroness von Suttner observed at the time:

“That which impresses me most is [the negotiating delegates’] respectful obedience to the desires of public opinion [...] The fact is that the delegates are only the hands on a watch; their movements are governed by a great invisible spring. This spring is public opinion [...] That is the master, and even the god, of the conference.”²⁶

Provision of greater transparency during negotiations ultimately supported the results achieved during the Conference. Hull goes so far as to observe that:

“the conference itself would very probably have failed in its most important work, the promotion of arbitration, had it not been fortified at a critical time by the power of public opinion”.²⁷

²² W. I. Hull, *The Two Hague Conferences and Their Contributions to International Law* (1970), 21.

²³ *Ibid.*

²⁴ Resolution of the Conference of 20 May 1899, cited in *ibid.*, 22.

²⁵ *Ibid.*

²⁶ *Ibid.*, 24–25.

²⁷ *Ibid.*, 23.

At a time of low community confidence in international investment law and arbitration, transparency has similarly come to play an increasingly central and important role during the creation of modern investment treaty norms.²⁸ Greater transparency during this phase holds the potential to improve substantive negotiated outcomes, whilst also generating greater public acceptance of the international investment regime and the treaties which constitute it.²⁹

II. Transparency as a Substantive Investment Obligation

Transparency also features as one of the obligations imposed upon States by international investment treaties. Many treaties, for example, include a requirement that States make publicly available any laws and regulations which affect investment activities.³⁰ Arbitral tribunals have also interpreted the *fair and equitable treatment* obligation (FET) to require that States accord transparency to foreign investors. The dispute settlement procedures adopted in many investment treaties means that this latter obligation is directly enforceable by investors through investor-State dispute settlement proceedings.

Transparency was first identified as a constituent element of FET by a tribunal in 2000.³¹ Like many other FET provisions, the provision interpreted by

²⁸ See generally Australian Senate Standing Committee on Foreign Affairs, Defence and Trade References, *supra* note 20; N. Gal-Or, 'The Investor and Civil Society as Twin Global Citizens: Proposing a New Interpretation in the Legitimacy Debate' 32 *Suffolk Transnational Law Review* (2008) 2, 271; Waibel *et al.*, *supra* note 13; Geist, *supra* note 15; S. Puig, 'Recasting ICSID's Legitimacy Debate: Towards a Goal-Based Empirical Agenda', 36 *Fordham International Law Journal* (2013) 2, 465.

²⁹ F. Megret, 'Private Actor Litigation and the Evolving Legitimacy of Supranational Adjudication', in A. S. Dreyzin De Klor, L. M. Maduro & A. Vauchez (eds), *Courts, Social Change and Judicial Independence* (2012), 3.

³⁰ See for example *Agreement Among the Government of Japan, the Government of the Republic of Korea and the Government of the People's Republic of China for the Promotion, Facilitation and Protection of Investment*, 13 May 2012, Japan, China and Republic of Korea, I-52807, Art 10.; *Treaty Between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment*, 14 November 1991, United States of America and Argentina, (1992) 31 ILM 124, Art. II (7).

³¹ *Metalclad Corporation v. United Mexican States*, Award, ICSID Case No. ARB(AF)/97/1, 30 August 2000 [Metalclad v. Mexico].

the tribunal in that case did not contain an express reference to transparency.³² The tribunal referred, however, to the objectives of the investment treaty, which indicated the desire of the treaty parties to achieve “national treatment, most-favored-nation treatment and transparency”.³³ In light of these objectives, the tribunal held that the FET provision imposed upon States an obligation to accord to investors a “transparent and predictable framework”.³⁴ For the tribunal, this FET-based transparency norm required that:

“[A]ll relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known to all affected investors of another Party. There should be no room for doubt or uncertainty on such matters. Once the authorities [...] become aware of any scope for misunderstanding or confusion in this connection, it is their duty to ensure that the correct position is promptly determined and clearly stated so that investors can proceed with all appropriate expedition in the confident belief that they are acting in accordance with all relevant laws.”³⁵

This interpretation of the FET provision was challenged in subsequent proceedings before a Canadian court.³⁶ Two of the States party to the treaty contended that “the Tribunal went beyond the transparency provisions contained in the [investment treaty] and created new transparency obligations”.³⁷ They noted the linkage of the FET provision at issue to the minimum standard of treatment under customary international law (MST), contending that an obligation of

³² *North American Free Trade Agreement*, 17 December 1992, Canada, Mexico and the United States of America, 32 ILM 289, 605 (1993), Art. 1105. [NAFTA] (‘Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.’). Compare, though *Energy Charter Treaty*, 17 December 1994, 2080 UNTS 95, Art. 10 (1), interpreted in *Electrabel SA v. Hungary*, Decision on Jurisdiction, Applicable Law and Liability, ICSID Case No ARB/07/19, 30 November 2012, para. 7.73.

³³ NAFTA, *supra* note 32, Art. 102(1).

³⁴ *Metalclad Corporation v. United Mexican States*, *supra* note 31, para. 76.

³⁵ *Ibid.*

³⁶ *The United Mexican States v. Metalclad Corporation and Attorney General of Canada and la procureure generale du quebec on behalf of the Province of Quebec*, 2 May 2001, Supreme Court of British Columbia L002904.

³⁷ *Ibid.*, para. 66.

transparency had not yet crystallised as a component of that standard.³⁸ The court observed that “[n]o authority was cited or evidence introduced [in the award] to establish that transparency has become part of customary international law”.³⁹ It nevertheless held that it was unnecessary to decide this point, instead holding that the tribunal’s decision in respect of transparency was “a matter beyond the scope of the submission to arbitration”.⁴⁰ The tribunal’s finding of a breach of the FET provision for failures in transparency was set aside on this basis.

Despite this mixed result in 2000, some forty-six other tribunals have since held that some form of transparency is required as part of FET/MST. Figure 1, below, maps these decisions over time.⁴¹

³⁸ *Ibid.*, paras. 66–76.

³⁹ *Ibid.*, para. 68.

⁴⁰ *Ibid.*, paras. 72, 76.

⁴¹ Based upon a unique dataset coding publically available decisions by investment treaty tribunals as at November 2016, at least 49 tribunals were identified to have analysed whether transparency forms a part of FET/MST provisions. Figure 1 reflects the total number of decisions of tribunals endorsing such a requirement, as follows: *Metalclad v. Mexico*, *supra* note 31, para. 75–76, 88, 91, 99; *Emilio Agustín Maffezini v. The Kingdom of Spain*, Award, ICSID Case No ARB/97/7, 13 November 2000, para. 83; *Técnicas Medioambientales Tecmed, SA v. United Mexican States*, Award, ICSID Case No. ARB(AF)/00/2, 29 May 2003, para. 153–155 [TECMED v. Mexico]; *Waste Management, Inc v. United Mexican States*, Final Award, ICSID Case No. ARB(AF)/00/3, 30 April 2004, para. 98 [Waste Management v. Mexico]; *Iurii Bogdanov, Agurdino-Invest Ltd and Agurdino-Chimia JSC v. Republic of Moldova*, Award, 22 September 2005 [Bogdanov/Agurdino v. Moldova]; *Saluka Investments BV. v. The Czech Republic*, Partial Award, 17 March 2006 (UNCITRAL), paras. 309, 407, 420–425 [Saluka v. Czechia]; *LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc v. Argentine Republic*, Decision on Liability, ICSID Case No. ARB/02/1, 3 October 2006, paras. 128–131 [LG&E v. Argentina]; *Siemens AG v. Argentine Republic*, Award, ICSID CASE No. ARB/02/8, 6 February 2007, paras. 308–309 [Siemens v. Argentina]; *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, Award, ICSID Case No. ARB/05/22, 24 July 2008 [Biwater v. Tanzania]; *Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v. Republic of Kazakhstan*, Award, ICSID Case No ARB/05/16, 29 July 2008, paras. 609, 617–618 [Rumeli/Telsim v. Kazakhstan]; *Plama Consortium Limited v. Republic of Bulgaria*, Award, ICSID Case No. ARB/03/24, 27 August 2008, para. 178 [Plama v. Bulgaria]; *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, Award, ICSID Case No. ARB/05/15, 1 June 2009, para. 450 [Waguih/Clorinda v. Egypt]; *Glamis Gold, Ltd v. The United States of America*, Award, 8 June 2009 (UNCITRAL), para. 771, 789, 798–801, 808 [Glamis v. USA]; *Invesmart v. Czech Republic*, Award, 26 June 2009 (UNCITRAL) [Invesmart v. Czechia]; *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v. Islamic Republic of Pakistan*, Award, ICSID Case No. ARB/03/29, 27 August 2009, para. 178 [Bayindir v. Pakistan]; *Mohammad*

Ammar Al-Bahloul v. Tajikistan, Partial Award on Jurisdiction and Liability, Partial Award, CASE No. V (064/2008), 2 September 2009, paras. 183, 187–188 [Al-Bahloul v. Tajikistan]; *EDF (Services) Limited v. Romania*, Award, ICSID Case No. ARB/05/13, 8 October 2009, para 286; *Joseph Charles Lemire v. Ukraine*, Decision on Jurisdiction and Liability, ICSID Case No. ARB/05/13, 14 January 2010, 267; *SGS Société Générale de Surveillance SA v. Republic of Paraguay*, Decision on Jurisdiction, ICSID Case No ARB/07/29, 12 February 2010, para. 149; *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, Excerpts of Award, ICSID Case No ARB/08/8, 1 March 2010, para. 265; *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia*, Award, ICSID Case No ARB/05/18 and ARB/07/15, 3 March 2010, para. 441, 446; *Merrill & Ring Forestry LP v. The Government of Canada*, Award, 31 March 2010 (UNCITRAL), para. 189, 208, 231, 238–239 [Merrill & Ring v. Canada]; *Frontier Petroleum Services Ltd v. The Czech Republic*, Final Award, 12 November 2010 (UNCITRAL), para. 285–286 [Frontier v. Czechia]; *Total SA v. The Argentine Republic*, Decision on Liability, ICSID Case No ARB/04/1, 27 December 2010, para. 110; *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, Award on Jurisdiction and Liability, 28 April 2011, para. 304 [Paushok/CJSC v. Mongolia]; *Binder v. Czech Republic*, Final Award, 15 July 2011, para. 446 [Binder v. Czechia]; *Peter Franz Vocklinghaus v. Czech Republic*, Award, 19 September 2011, para.201; *Spyridon Roussalis v. Romania*, Award, ICSID Case No ARB/06/1, 7 December 2011, paras. 314, 498–505; *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, Final Award, 23 April 2012 (UNCITRAL), para. 221; *Marion Unglaube and Reinhard Unglaube v. Republic of Costa Rica*, Award, ICSID Case No. ARB/08/1 and ARB/09/20, 16 May 2012, para. 245; *Railroad Development Corporation v. Republic of Guatemala*, Award, ICSID Case No. ARB/07/23, 29 June 2012, para. 219; *Bosh International, Inc and B&P, LTD Foreign Investments Enterprise v. Ukraine*, Award, ICSID Case No ARB/08/11, 25 October 2012; *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, Award, ICSID Case No ARB/09/2, 31 October 2012, paras. 420–421, 486–488; *Electrabel S.A. v. Hungary*, Decision on Jurisdiction, Applicable Law and Liability, ICSID Case No. ARB/07/19, 30 November 2012, paras. 7.73-7.79 [Lectrabel S.A. v. Hungary]; *ECE Projekmanagement v. The Czech Republic*, Award, PCA Case No. 2010-5, 19 September 2013, paras. 4.752, 4.807-4.808 [ECE v. Czechia]; *Franck Charles Arif v. Republic of Moldova*, Award, ICSID Case No. ARB/11/23, 8 April 2013; *Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL v. Romania*, Final Award, ICSID Case No. ARB/05/20, 11 December 2013, paras. 517–520, 530–535, 864–871; *Renée Rose Levy de Levi v. Republic of Peru*, Award, ICSID Case No. ARB/10/17, 26 February 2014, paras. 327–328; *Perenco Ecuador Limited v. Republic of Ecuador*, Decision on Jurisdiction and Liability, ICSID Case No. ARB/08/6, 12 September 2014, paras. 558–559; *Gold Reserve Inc v. Bolivarian Republic of Venezuela*, Award, ICSID Case No ARB(AF)/09/1, 22 September 2014, paras. 568–570, 609, 613; *Valeri Belokon v. The Kyrgyz Republic*, Award, 24 October 2014 para. 237; *Bernhard von Pezold v. Zimbabwe*, Award, ICSID Case No ARB/10/15, 28 July 2015, paras. 545–546; *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, Award, ICSID Case No ARB/11/33, 3 November 2015, paras. 386, 394, 399, 426–431 [Al Tamimi v. Oman]; *Oxus Gold v. Uzbekistan*, Award, 17 December 2015 (UNCITRAL), para. 811–815; *Crystallex v. Venezuela*, Award,

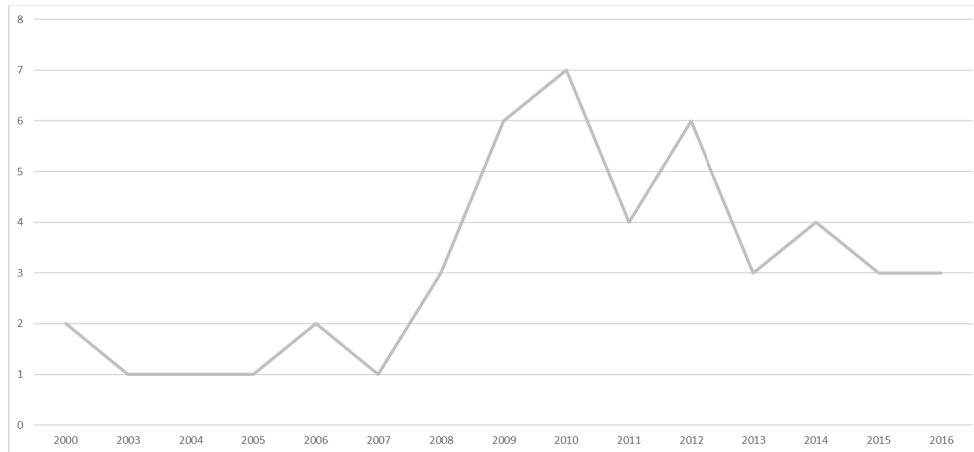


Figure 1: References to transparency as a component of treaty-based FET or MST (2000-2016)

In contrast to the first decision of 2000, later tribunals have not sought a similar textual or preambular hook to justify the interpretation of FET/MST as imposing a transparency obligation upon States. Instead, tribunals have justified recognising transparency as part of FET/MST through one of two approaches. Under the first approach, the obligation to accord transparency is identified by reference to previous arbitral decisions endorsing such requirement.⁴² Under the

ICSID Case No ARB(AF)/11/2), 4 April 2016; *Murphy Exploration v. Ecuador*, Partial Final Award, PCA Case No. 2012-16, 6 May 2016, paras. 206–207; *Rusoro Mining v. Venezuela*, Award, ICSID Case No ARB(AF)/12/5, 22 August 2016, paras. 524. The graph excludes two decisions in which the tribunal decided that there was no such requirement or was neutral as to the existence of such a requirement: *Cargill, Incorporated v. United Mexican States*, Award, ICSID Case No ARB(AF)/05/2, 18 September 2009, para. 294 [Cargill v. Mexico]; *Mesa Power v. Canada*, Award, PCA Case No 2012-17, 24 March 2016, para. 502, 512, 595, 607–612 [Mesa v. Canada]. At least four separate or dissenting opinions have also analysed whether FET/MST incorporates a requirement of transparency: *SD Myers, Inc v. Government of Canada*, Separate Opinion (Schwartz), 12 November 2000, para. 255; *Eastern Sugar BV(Netherlands) v. The Czech Republic*, SCC Case No. 088/2004, Dissenting Opinion of Volterra, 12 April 2007, paras. 28–31; *Mamidoil Jetoil Greek Petroleum Products Societe SA v. Republic of Albania*, ICSID Case No. ARB/11/24, Dissenting Opinion of Hammond, 20 March 2015, paras. 75, 111–122, 1720173; *Renée Rose Levy de Levi v. Republic of Peru*, ICSID Case No. ARB/11/24, Dissenting Opinion of Morales Godoy, 26 February 2014, para. 111–113.

⁴² See, for example *Siemens v. Argentina*, *supra* note 41, para. 308–309; *Biwater v. Tanzania*, *supra* note 41; *Rumeli/Telsim v. Kazakhstan*, *supra* note 41, para. 609; *Waguib/Clorinda v. Egypt*, *supra* note 41, para. 450; *Invesmart v. Czechia*, *supra* note 41, para. 200; *Bayindir v. Pakistan*, *supra* note 41, para. 178; *Bogdanov/Agurdino v. Moldova*, *supra* note 41.

second approach, the transparency obligation is linked to other components of the FET obligation.⁴³ Using this approach, tribunals have variously linked transparency to a State's obligations to respect investor expectations, provide a stable legal framework, or avoid arbitrariness.⁴⁴

These shifting bases of the transparency norm have resulted in a range of differing enunciations of its content. Most tribunals agree that host States are obliged to be transparent in their direct dealings with investors. This has included, for example, a requirement that States give notice to the investor of any meetings at which the State will assess permit applications filed by the investor.⁴⁵ The transparency requirement has also been interpreted to require transparency in State acts which affect the investor less directly. This includes, for example, a requirement that States ensure 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".⁴⁶ Broader and more active notions of transparency have also been endorsed by tribunals. In *Electrabel*, for example, the tribunal held that States must be "forthcoming with information about intended changes in policy and regulations that may significantly affect investments".⁴⁷

Other tribunals, though, have sought to restrict the scope of transparency requirements. In *Sergei Paushok*, the tribunal held that the State had not

⁴³ On the various components of the FET obligation see, generally J. R. Picherack, 'The Expanding Scope of the Fair and Equitable Treatment Standard: Have Recent Tribunals Gone Too Far?', 9 *Journal of World Investment & Trade* (2008) 4, 255; R. Dolzer, 'Fair and Equitable Treatment: Today's Contours', 12 *Santa Clara Journal of International Law* (2014) 1, 7; C. Schreuer, 'Fair and Equitable Treatment in Arbitral Practice', 6 *The Journal of World Investment & Trade* (2005) 3, 357.

⁴⁴ See, for example *Saluka v. Czechia*, *supra* note 41, para. 309; *LG&E v. Argentina*, *supra* note 41, para. 128; *Plama v. Bulgaria*, *supra* note 41, para. 178; *Frontier v. Czechia*, *supra* note 41, para. 285; *Glamis v. USA*, *supra* note 41, para. 798; *TECMED v. Mexico*, *supra* note 41, para. 155 (noting that "[t]he 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"); *Binder v. Czechia*, *supra* note 41, para. 446 (transparency having the effect of 'enhancing legal certainty' and thus being 'hand in hand' with stability and predictability of the legal order).

⁴⁵ See, for example *Al-Bahloul v. Tajikistan*, *supra* note 41, para. 188; *ECE v. Czechia*, *supra* note 41, 4.808.

⁴⁶ *Frontier v. Czechia*, *supra* note 41, para. 285; *Metalclad v. Mexico*, *supra* note 31, para. 88.

⁴⁷ *Electrabel S.A. v. Hungary*, *supra* note 32, 7.79.

breached the treaty despite having adopted a law “in less than one week” and with “no consultation [...] with the industry”.⁴⁸ The tribunal observed that “[l]egislative assemblies in all countries regularly adopt legislation within a very short time and, sometimes, without debates”.⁴⁹ States have also themselves sought to restrain broad interpretations of FET provisions by expressly linking those provisions to the MST. This has had important impacts on the scope of transparency obligations imposed by tribunals interpreting such provisions. Tribunals have consistently held that an MST-linked FET provision cannot be interpreted as imposing a general duty of transparency.⁵⁰ Instead, to breach an MST-linked FET provision, tribunals have held that State acts would need to display a “complete lack of transparency” or be “so unusual and non-transparent as to be manifestly arbitrary”.⁵¹ There have been, nevertheless, indications by some arbitral tribunals that the customary international law standard may evolve in the future to incorporate greater substantive transparency requirements.⁵²

III. Procedural Transparency

The final manifestation of transparency in international investment law occurs during dispute settlement proceedings, which constitute a key site for the interpretation and application of investment treaty obligations.⁵³ Investment arbitration has long been criticised as a non-transparent dispute settlement process.⁵⁴ This was because, until recently, treaties and institutional rules were

⁴⁸ *Paushok, CJSC v. Mongolia*, Award on Jurisdiction and Liability, *supra* note 41, para. 304.

⁴⁹ *Ibid.*

⁵⁰ See, especially *Cargill v. Mexico*, *supra* note 41, para. 294.

⁵¹ *Glamis v. USA*, *supra* note 41, para. 771; *Al Tamimi v. Oman*, *supra* note 41, paras. 386, 399; *Mesa v. Canada*, *supra* note 41, para. 502; *Waste Management, Inc v. Mexico*, *supra* note 41, para. 98.

⁵² *Merrill & Ring v. Canada*, *supra* note 41, para. 231 (observing that ‘it would be difficult today to justify the appropriateness of a secretive regulative system’).

⁵³ I analyze this form of transparency, as well as recent developments related to it, in more detail in: E. Shirlow, ‘Dawn of a New Era? The UNCITRAL Rules and UN Convention on Transparency in Treaty-Based Investor-State Arbitration’ 31 *ICSID Review* (2016) 3, 622.

⁵⁴ See, for example R. Teitelbaum, ‘A Look At the Public Interest in Investment Arbitration: Is It Unique? What Should We Do About It?’, 5 *Berkeley International Law Publicist* (2010), 54; A. Mourre, ‘Are Amici Curiae the Proper Response to the Public’s Concerns on Transparency in Investment Arbitration?’, 5 *The Law & Practice of International Courts and Tribunals* (2006) 2, 257, 257. See, to similar effect D. Euler, M. Gehring, & M. Scherer, *Transparency in International Investment Arbitration: A Guide to the UNICTRAL Rules on Transparency in Treaty-Based Investor-State Arbitration* (2015), 2;

largely silent as to the degree of transparency which should attach to the arbitral proceedings conducted pursuant to them. One empirical review, for example, indicates that approximately 88 percent of bilateral investment treaties concluded between 2010 and 2013 did not address the matter of procedural transparency.⁵⁵ Institutional rules also largely left the matter of procedural transparency to arbitral or party discretion.⁵⁶ The 1976 *United Nations Commission on International Trade Law* (UNCITRAL) *Arbitration Rules* (UNCITRAL Rules), for example, do not address the publication of information about disputes and prevent public access to awards and hearings other than with consent of both disputing parties.⁵⁷ *The Arbitration Rules of the International Centre for Settlement of Investment Disputes* (ICSID Rules) are slightly more permissive, providing for an online list containing basic details of proceedings registered by the International Centre for Settlement of Investment Disputes (ICSID) and the publication (from 1984) of excerpts of awards showing “the legal rules applied by the Tribunal”.⁵⁸ The *ICSID Rules* also permit attendance of third parties at hearings with party

J. A. VanDuzer, ‘Enhancing the Procedural Legitimacy of Investor-State Arbitration through Transparency and Amicus Curiae Participation’, 52 *McGill Law Journal* (2007) 4, 681, 684.

⁵⁵ C. Nyegaard Mollestad, ‘See No Evil? Procedural Transparency in International Investment Law and Dispute Settlement’, 38.

⁵⁶ D. Euler, ‘UNCITRAL Working Group II Standards in Treaty Based Investor-State Arbitration: How Do They Relate to Existing International Investment Treaties?’ 12 *Asper Review of International Business and Trade Law* (2012), 139, 143; J.A. Maupin, ‘Transparency in International Investment Law: The Good, the Bad, and the Murky’, *Transparency in International Law* (2013); C. Knahr & A. Reinisch, ‘Transparency Versus Confidentiality in International Investment Arbitration – The Biwater Gauff Compromise’, 6 *The Law and Practice of International Courts and Tribunals* (2007) 1, 97, 116; Nyegaard Mollestad, *supra* note 55, 36–38.

⁵⁷ *UNCITRAL Arbitration Rules* (1976), GA Res. 31/98, UN Doc A/RES/31/98, 15 December 1976, Art. 25(4), 32(5) (the latter providing that an award cannot be disclosed by either the tribunal or the parties without the consent of both parties). *UNCITRAL Arbitration Rules* (2010), GA Res. 65/22, UN Doc A/RES/65/22, 6 December 2010, Art. 34(5). As Crook notes, however, enforcement proceedings under the New York Convention often mean that such awards do become public: J. R. Crook, ‘Joint Study Panel on Transparency in International Commercial Arbitration’, 15 *ILSA Journal of International & Comparative Law* (2008) 2, 361, 364.

⁵⁸ *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 14 October 1965, 575 UNTS 159, Art. 48(5); *ICSID Rules of Procedure for Arbitration Proceedings*, Rules 6(2), 48(4); *ICSID Administrative and Financial Regulations*, Reg 22(1).

consent (up to 2006) or unless a party objects (from 2006).⁵⁹ In light of silence in treaties and institutional rules, parties to investment disputes held significant residual discretion to deal with many aspects of transparency by agreement. In the absence of agreement, tribunals were left to decide matters of transparency under the rubric of their general powers to regulate the proceedings.⁶⁰ This led to the adoption of unpredictable and at times inconsistent approaches.

This *status quo* has shifted in recent times, particularly due to the development of the *UNCITRAL Rules* (2013) and *Convention on Transparency in Investor-State Treaty-Based Arbitration* (2014).⁶¹ The Rules apply to treaty-based investor-State arbitrations and regulate a range of matters previously unaddressed in procedural rules and treaties.⁶² They provide for the public release of

⁵⁹ ICSID Rules of Procedure for Arbitration Proceedings, *supra* note 58, Rules 32(2), 37(2). For further information on the changes made to the ICSID Rules in 2006 see, generally Nyegaard Mollestad, *supra* note 55, 101; P.J. Martinez-Fraga, 'Juridical Convergence in International Dispute Resolution: Developing a Substantive Principle of Transparency and Transnational Evidence Gathering', 10 *Loyola of Los Angeles International and Comparative Law Review* (2012) 1, 37, 53; VanDuzer, *supra* note 54, 706, 717; R. Polanco Lazo, 'International Arbitration in Times of Change: Fairness and Transparency in Investor-State Disputes', 104 *American Society of International Law* (2010), 591, 594; A. Kawharu, 'Public Participation and Transparency in International Investment Arbitration: Suez v. Argentina', 4 *New Zealand Year Book of International Law* (2007), 159, 166; E. de Brabandere, 'NGOs and the 'Public Interest': The Legality and Rationale of Amicus Curiae Interventions in International Economic and Investment Disputes' 12 *Chicago Journal of International Law* (2011), 1, 85.

⁶⁰ See, for example, the approaches adopted in *United Parcel Service of America Inc v. Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, 17 October 2001; *Methanex Corporation v. United States of America*, Decision of the Tribunal on Petitions for Persons to Intervene as 'Amici Curiae', 15 January 2001; *Glamis v. USA*, *supra* note 41, Decision on Application and Submission by Quechan Indian Nation, 16 September 2005.

⁶¹ The Convention was designed to ensure the wider applicability of the Rules, providing a mechanism for their application to arbitral proceedings conducted under treaties already in force when the Rules came into effect on 1 April 2014. The Convention was adopted by the UN General Assembly on 10 December 2014 but at the time of writing is yet to enter into force: UNCITRAL, 'Status: United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration (New York, 2014)', available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention_status.html (last visited 21 December 2017) [UNCITRAL, Status: Convention on Transparency in Arbitration].

⁶² For a detailed analysis of the approaches taken in other rules, see F. Ortino, 'External Transparency of Investment Awards' (2008), 9, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1159899 (last visited 21 December 2017).

information⁶³ and documents generated as part of investment treaty arbitrations as well as the capacity for non-disputing third parties to attend or even participate in the proceedings.⁶⁴

The Rules and Convention establish what has been hailed as “the most wide-ranging set of transparency commitments seen thus far in international practice”.⁶⁵ The Rules and Convention have already had some impacts upon State practice and arbitral procedures. The UNCITRAL website currently lists thirteen treaties concluded after entry into effect of the Rules “where the Rules on Transparency, or provisions modelled on the Rules on Transparency, are applicable”.⁶⁶ Two proceedings have also, by disputing party consent, been conducted under the Rules.⁶⁷ States have furthermore signalled a willingness to go beyond the provisions on transparency contained in the Rules.⁶⁸ The

⁶³ This is often referred to as a ‘foundational’ form of transparency, insofar as it precedes or informs all other forms of procedural transparency. A. Peters, ‘The Transparency Turn of International Law’, 1 *The Chinese Journal of Global Governance* (2015) 1, 3, 3; Nyegaard Mollestad, *supra* note 55, 79; J. Koepf & C. Sim, ‘The Application of Transparency’ in D. Euler and others (eds), *Transparency in International Investment Arbitration: A Guide to the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration* (2015), 65. This was recognised during the drafting of the Transparency Rules: UNCITRAL, ‘Report of Working Group II (Arbitration and Conciliation) on the Work of Its Fifty-Third Session (Vienna, 4-8 October 2010)’ (2010) UN Doc. A/CN.9/712, para. 32. [UNCITRAL, Report II, 2010].

⁶⁴ UNCITRAL, Report II, 2010, *supra* note 63, para. 52; See, further Peterson, *supra* note 4; European Parliament Directorate-General for External Policies, ‘The Investment Chapters of the EU’s International Trade and Investment Agreements in a Comparative Perspective’ (2015) EP/EXPO/B/INTA/2015/01 70; N. Jansen Calamita, ‘Dispute Settlement Transparency in Europe’s Evolving Investment Treaty Policy: Adopting the UNCITRAL Transparency Rules Approach’, 15 *The Journal of World Investment & Trade* (2014) 3-4, 645, 649; O. Bennaïm-Selvi, ‘Third Parties in International Investment Arbitrations: A Trend in Motion’, 6 *The Journal of World Investment & Trade* (2005) 5, 773.

⁶⁵ Jansen Calamita, *supra* note 64, 667.

⁶⁶ UNCITRAL, Status: Convention on Transparency in Arbitration, *supra* note 61.

⁶⁷ *BSG Resources (Guinea) Limited and BSG Resources (Guinea) SARL v. Republic of Guinea*, ICSID Case No. ARB/15/46, Procedural Order No. 1, 13 May 2015 and Procedural Order No. 2, 17 September 2015; *Iberdrola, SA (España) and Iberdrola Energía, SAU (España) v. The Plurinational State of Bolivia*, PCA Case No. 2015-05, Procedural Order No. 1, 7 August 2015.

⁶⁸ The Rules expressly anticipate the scope for States to modify the transparency framework of the Rules by treaty. Where a treaty provides for a different approach to transparency that approach will, under Article 1(7), apply: UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration 2014, available at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention.html (last visited

Trans-Pacific Partnership provides, for example, for the “prompt” disclosure of the notice of arbitration after receipt, rather than following the tribunal’s constitution as provided in the Rules.⁶⁹ The European Union’s Transatlantic Trade and Investment Partnership proposal similarly proposes enlarging the list of documents to be made public to incorporate documents relating to arbitrator challenges.⁷⁰

Despite these advances, international investment arbitration is still frequently referred to as a secretive dispute resolution process. To some extent, this might be due to disputing party choices. An empirical study of the ICSID reforms to transparency, for example, suggests that parties involved in arbitrations initiated subsequent to the reforms were “more likely to conceal the outcome of arbitration than are the parties to disputes that took place prior to ICSID’s intensive efforts to increase transparency”.⁷¹ The recent *UNCITRAL Rules* attempt to abrogate disputing parties’ capacity to similarly exercise choice in overriding the transparency framework they establish.⁷² It is too early to tell, however, whether these safeguards will impact upon the capacity of parties to file disputes under instruments to which the Transparency Rules do not apply.

1 May 2017) [UNCITRAL Rules on Transparency 2014]; See, further UNCITRAL, ‘Report of the Working Group on Arbitration and Conciliation on the Work of Its Fifty-Fifth Session (Vienna, 3–7 October 2011)’ (2011) A/CN.9/736, para. 31; A different approach applies for arbitrations conducted pursuant to the Convention, which excludes the operation of Article 1(7) and prevails to the extent of conflict with a treaty unless the treaty provides otherwise: UNCITRAL, ‘Report of Working Group II (Arbitration and Conciliation) on the Work of Its Fifty-Ninth Session (Vienna, 16–20 September 2013)’ (2013) A/CN.9/794, paras 80, 101.

⁶⁹ *Trans-Pacific Partnership*, Art 9.24(1), available at <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership> (last visited 21 December 2017).

⁷⁰ This matter was raised before the WG, but did not receive support for inclusion in the rules: UNCITRAL, ‘Report of Working Group II (Arbitration and Conciliation) on the Work of Its Fifty-Fourth Session (New York, 7–11 February 2011)’ (2011) UN Doc. A/CN.9/717 para. 153 [UNCITRAL, Report II, 2011]. See, for further information about the EU proposal I. Venzke, ‘Investor-State Dispute Settlement in TTIP from the Perspective of a Public Law Theory of International Adjudication’, Amsterdam Law School Legal Studies Research Paper Series (2016), Paper No. 2016-11.

⁷¹ E. Hafner-Burton, Z. Steinert-Threlkeld & D. G. Victor, ‘Predictability versus Flexibility: Secrecy in International Investment Arbitration’, Laboratory on International Law and Regulation Working Papers, Paper No. 18 (2015), 34.

⁷² UNCITRAL Rules on Transparency 2014, *supra* note 68, Art. 1(3)(a) (providing that neither disputing party may ‘derogate from these Rules, by agreement or otherwise, unless permitted to do so by the treaty’).

B. Transparency as a Reflection of the Sources, Stakeholders and Structures of Investment Arbitration

In addition to highlighting the three differing manifestations of transparency in international investment law, the above discussion facilitates an analysis of the sources, stakeholders and structures which shape the regime. This section examines the sources of transparency norms in international investment law, and the stakeholders which have contributed to their development. It then considers the ways in which each site of transparency influences and reinforces the presence of transparency at other sites, and the prospects for each type of transparency to influence the future development of other transparency norms.

I. Sources and Stakeholders

At each of the above three sites, requirements of transparency are imposed through a variety of sources. Transparency finds expression through treaties, unilateral State decisions, disputing party agreements, arbitral decisions, and institutional rules. These sources reflect the diversity of authors of international investment norms. Whereas States have led efforts to incorporate greater transparency at the point of norm negotiation, arbitral tribunals have been instrumental in identifying a role for transparency as part of substantive investment norms, and international institutions have performed a similarly important role in securing transparency of arbitral proceedings.

The formal authors of international investment norms have also acted in conjunction with or at the behest of other, more external, stakeholders. Advances in transparency have been prompted by a diversity of stakeholders. The consultation process run by the European Union in relation to the Trans-Pacific Investment Partnership provides a good illustration of the range of stakeholders currently engaging with international investment law. That process generated some 150,000 responses, which were provided *inter alia* by trade associations, trade unions, non-governmental organisations, think tanks, consultancy firms, government institutions, academics, and law firms.⁷³ In other areas, public engagement as a result of increased transparency has been less numerically overwhelming. ICSID's experience of webcasting, for example, indicates that the public may have so far only exhibited modest interest in attending or viewing

⁷³ European Commission, *supra* note 19, 10.

webcast hearings.⁷⁴ In 2010, for example, ICSID reported that the webcast *Pac Rim*⁷⁵ proceedings generated “150 hits during the live webcast”.⁷⁶

As transparency at each site has been a relatively recent development, it remains to be seen which outputs will be used, by whom and for what purpose. In particular, it is as yet unclear whether greater transparency at the sites of norm creation by States, or application and interpretation by investment tribunals, will rely upon public uptake and engagement to achieve significance, or whether benefits will accrue merely by the promise of enhanced transparency.⁷⁷ Thus far, institutions and States have worked under the assumption that there is both an interested public and that that public would seek to engage with negotiating processes and arbitral proceedings in some detail.⁷⁸ There has, however, been little comprehensive consideration of who might constitute that public, how big it might be, or what it might be interested in. Given the costs and burdens associated with transparency these are important issues for future study.

The differing levels of engagement at each site of transparency indicate the differing audiences and stakeholders that each form of transparency seeks to engage. Different constituents of the public are likely to have differing levels of interest in the various aspects of international investment law. Webcasting of proceedings might, for example, only engage an “audience that already exists and is already engaged”, such as law students, academics or practitioners.⁷⁹ The publication of pleadings may be of utility to States, investors and third parties actively participating in proceedings, but of less interest to a more diffuse *civil society*. Conversely, State officials and investors are likely to form the major beneficiaries of arbitral interpretations of substantive transparency norms.

⁷⁴ J. J. Coe Jr., ‘Transparency in the Resolution of Investor-State Disputes – Adoption, Adaptation, and NAFTA Leadership’, 54 *University of Kansas Law Review* (2006) 5, 1339, 1361–1362.

⁷⁵ *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No ARB/09/12.

⁷⁶ Reported in: S. Plagakis, ‘Webcasting: A Tool to Increase Transparency in Judicial Proceedings’ in J. Nakagawa (ed.), *Transparency in International Trade and Investment Dispute Settlement* (2012), 84.

⁷⁷ UNCITRAL, Report II, 2010, *supra* note 63, para. 65.

⁷⁸ See for example the discussion in *ibid.*, 34; UNCITRAL, Report II, 2011, *supra* note 70, para. 84.

⁷⁹ L. J. Moran, ‘Visible Justice: YouTube and the UK Supreme Court’, 5 *Annual Review of Interdisciplinary Justice Research* (2016), 253, 256 [Moran, Visible Justice]; C. Green, ‘Footage of Supreme Court Hearings Proves an Unlikely Hit with the Public’, *The Independent* (3 January 2016), available at <http://www.independent.co.uk/news/uk/home-news/footage-of-supreme-court-hearings-proves-an-unlikely-hit-with-the-public-a6795041.html> (last visited 21 December 2017).

To the extent an interested public exists (and this seems likely), a second issue is how best to engage that public. Instrumentally, transparency has been viewed as “an important step to respond to the increasing challenges regarding the legitimacy of international investment law and arbitration as such”.⁸⁰ Transparency has, in this light, been viewed as a tool to bolster public confidence in investment treaty law and to assuage public suspicion of the regime.⁸¹ The effects of transparency on public education and understanding have, however, yet to be properly tested.⁸² Domestic studies overwhelmingly indicate that few members of the public are likely to learn about judicial systems through direct observation of proceedings.⁸³ Instead, the media or third parties may need to perform intermediary functions in transmitting details about transparent proceedings to a mass audience.⁸⁴ Depending upon the ultimate goals pursued by transparency norms, then, future developments may be necessary. Transparency norms may increasingly, for example, need to evolve from passive to active forms of transparency in order to generate the desired levels of public awareness and acceptance of the regime. The former refers to the ability of non-disputing parties to be informed about proceedings, whereas the latter refers to the scope for a non-disputing party to participate in proceedings.

Regardless of the concrete impacts of increased transparency in international investment law, its development indicates an important shift in focus from formal source-based legitimacy to a richer understanding of legitimacy as the basis for the legitimacy of the investment treaty regime.⁸⁵ Generally speaking,

⁸⁰ UNCITRAL, Report II, 2010, *supra* note 63, paras. 16–17, 46, 62; UNCITRAL, Report II, 2011, *supra* note 70, paras. 25, 60, 112. See generally Euler, Gehring & Scherer, *supra* note 54, 355; VanDuzer, *supra* note 54, 687; Teitelbaum, *supra* note 54, 60.

⁸¹ UNCITRAL, Report II, 2010, *supra* note 63, 17, 63; UNCITRAL, ‘Report of the Working Group on Arbitration and Conciliation on the Work of Its Forty-Eighth Session (New York, 4–8 February 2008)’ (2008) UN Doc. A/CN.9/646 para. 57; Barstow Magraw Jr. & Amerasinghe, *supra* note 16, 351; D. Stepniak, Audio-Visual Coverage of Courts: A Comparative Analysis (2012), 1; Nyegaard Mollestad, *supra* note 55, 13; Moran, Visible Justice, *supra* note 79.

⁸² See, further P. Lambert, *Courting Publicity: Twitter and Television Cameras in Court* (2011), 1–2, 69, 178–233; Stepniak, *supra* note 81, 397.

⁸³ L. J. Moran, ‘Every Picture Speaks a Thousand Words: Visualizing Judicial Authority in the Press’, in P. Gisler, S. Steinert Borella & C. Wiedmer (eds), *Intersections of Law and Culture* (2012), 31 [Moran, Judicial Authority].

⁸⁴ Moran, Visible Justice, *supra* note 79, 234.

⁸⁵ See, for a further elaboration of this analysis Shirlow, *supra* note 53. See, further, on the notion of legal legitimacy D. Bodansky, ‘Legitimacy in International Environmental Law’ (2009), available at <https://ssrn.com/abstract=899988> (last visited 21 December 2017), 10; A. D’Amato, ‘On the Legitimacy of International Institutions’, Northwestern Public

legitimacy might be sourced in the qualities or mandate of the decisionmaker, the decisionmaking process (input legitimacy), or the decision itself (output legitimacy).⁸⁶ An example of source-based legitimacy is consent of treaty or disputing parties to the establishment of international courts or tribunals.⁸⁷ As Kumm notes, however, “such a thin notion of legitimacy has been gradually replaced by [a] considerably richer idea” such that, to be legitimate, “more is required of [an institution] than just its legal pedigree”.⁸⁸ This shift in focus has accompanied the developing remit of international courts and tribunals and the perception that they increasingly exercise not just private but also public functions.⁸⁹ An international court might not, for example, be able to rely upon consent as a basis for legitimacy to the extent that its decisions are perceived to impact upon parties other than those formally consenting to its existence.⁹⁰ In these cases, a wider input into the grant of the initial mandate of a court or tribunal might be demanded to bolster source-based legitimacy.⁹¹ Alternatively, the procedures or decisional outputs of the court or tribunal might be addressed in an effort to secure enhanced input or output legitimacy.

Early discussions of investment arbitration positioned States and investors as the two key stakeholders in the regime. This led to an almost complete denial

Law Research Paper No. 06-35 (2007), 1; M. Kumm, ‘The Legitimacy of International Law: A Constitutionalist Framework of Analysis’, 15 *European Journal of International Law* (2004) 5, 907, 920.

⁸⁶ See, generally *ibid.*, 926; T. Risse, ‘Transnational Governance and Legitimacy’ (2004), 7, available at http://userpage.fu-berlin.de/~atasp/texte/tn_governance_benz.pdf (last visited 21 December 2017); T. Broude, ‘The Legitimacy of the ICJ’s Advisory Competence in the Shadow of the Wall’, 38 *Israel Law Review* (2005) 1-2, 189, 5; Bodansky, *supra* note 85, 5; D. Schneiderman, ‘Legitimacy and Reflexivity in International Investment Arbitration: A New Self-Restraint?’ 1 *Oñati Socio-Legal Series, Socio-Legal Aspects of Adjudication of International Economic Disputes* (2011) 4, 5.

⁸⁷ See, further A. von Bogdandy & I. Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (2014), 3; Venzke, *supra* note 70, 10; Bodansky, *supra* note 85, 7–8.

⁸⁸ Kumm, *supra* note 85, 920. See, also Schneiderman, *supra* note 86, 5; Bodansky, *supra* note 85, 13.

⁸⁹ *Ibid.*, 2, 12; B. Kingsbury, ‘The International Legal Order’, New York University School of Law Public Law & Legal Theory Research Paper Series 2003/1, 22.

⁹⁰ Von Bogdandy & Venzke, *supra* note, 87, 3.

⁹¹ Public involvement in the creation of international norms or institutions might, for example, link the regime to “the will of the people” and result in a stronger form of source based legitimacy. See Bodansky, *supra* note 85, 15; A. Maurer, ‘The Creation of Transnational Law – Participatory Legitimacy of Privately Created Norms’, ZenTra Working Papers in Transnational Studies 2012/03, 1.

of the value of transparency where it operated against the interests of these parties. Increasingly, however, it has been recognised that investment arbitration has to cater to a broader audience. The value placed upon transparency in norm negotiation and application indicates that investment arbitration may be shifting from a private form of dispute settlement to a more public form that takes into account external interests and participants.⁹² As Professor Stern notes,

“[t]his system, which was traditionally based on private legitimacy arising from the consent of the parties, seems to now be in search of public legitimacy, which it is thought can be obtained from a certain degree of openness to civil society”.⁹³

II. Structural Linkages

The development of transparency at each of these three sites also offers important insights into how norms emerge, gain traction, and ultimately stabilise within the regime.⁹⁴ An analysis of transparency indicates, in particular, the ways in which the presence of transparency at one site in the life cycle of investment norms informs its emergence and status at other sites. These interactions are illustrated in Figure 2, below.

⁹² On this distinction, see R. Kolb, *The International Court of Justice* (2013), 47. This is something I develop further in Shirlow, *supra* note 53. See also scholarship considering these public law aspects of investment treaty arbitration E. de Brabandere, *Investment Treaty Arbitration as Public International Law: Procedural Aspects and Implications* (2015); A. Mills, ‘Antinomies of Public and Private at the Foundations of International Investment Law and Arbitration’, 14 *Journal of International Economic Law* (2011) 2, 469; A. Kulick, *Global Public Interest in International Investment Law* (2012).

⁹³ B. Stern, ‘Civil Society’s Voice in the Settlement of International Economic Disputes’, 22 *ICSID Review – Foreign Investment Law Journal* (2007) 22, 280, 347. See, also L. Bartholomeusz, ‘The Amicus Curiae before International Courts and Tribunals’, 5 *Non-State Actors and International Law* (2005) 3, 209, 283; J. Ribeiro & M. Douglas, ‘Transparency in Investor-State Arbitration: The Way Forward’ (2015), available at https://espace.curtin.edu.au/bitstream/handle/20.500.11937/47596/228217_228217.pdf?sequence=2&isAllowed=y (last visited 21 December 2017), 23; de Brabandere, *supra* note 59, 18.

⁹⁴ See, especially C. Borgen, ‘Transnational Tribunals and the Transmission of Norms: The Hegemony of Process’, St John’s University School of Law, Legal Studies Research Paper Series Paper No. 09-0024 (2005), 30 (identifying three life cycles associated with norms, as follows: “[1] norm emergence; [2] norm cascade; and [3] internalization”).

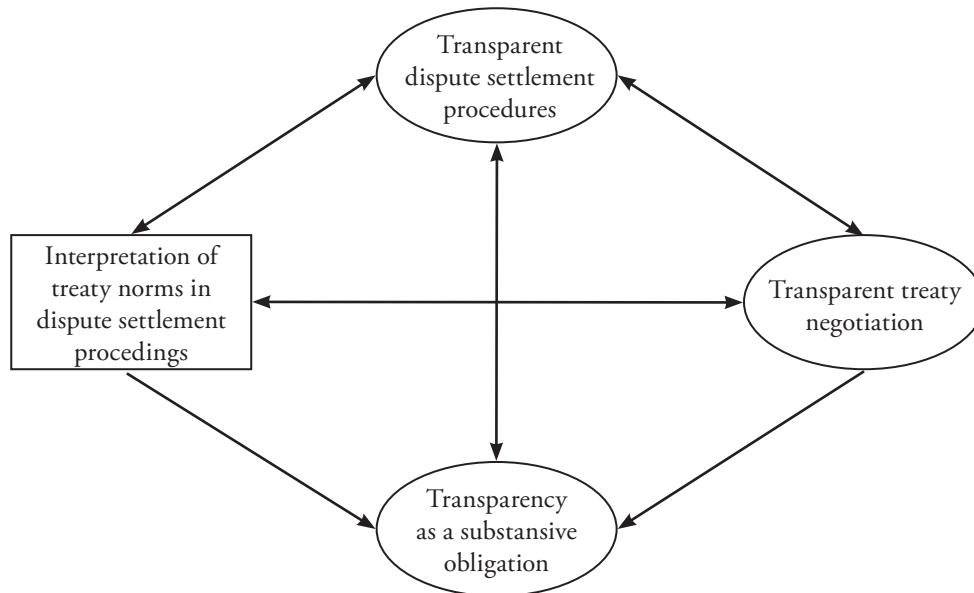


Figure 2: Interactions between the three sites of transparency in international investment law

As Figure 2 demonstrates, each source and site of transparency is interconnected with, and informed by, the manifestation of transparency at other sites and in other sources. Transparent dispute settlement procedures have, for example, influenced the development of transparency as a substantive obligation. As noted in Section I (B), arbitral tribunals have justified the interpretation of FET/MST provisions as incorporating a substantive requirement of transparency by reference to past arbitral awards. This is either because past tribunals have recognised a requirement of transparency as part of the FET/MST obligation, or because they have identified other components of FET/MST, like a requirement to respect an investor's legitimate expectations, from which a requirement of transparency is then derived. More transparent investor-State dispute settlement procedures have in this sense created a public body of decisions to which other tribunals refer to support the development or consolidation of new norms.⁹⁵ Procedural transparency has thus supported and informed the stabilisation of

⁹⁵ Nyegaard Mollestad, *supra* note 55, 13; Barstow Magraw Jr. & Amerasinghe, *supra* note 16, 345. This has also been a stated aim of transparency measures in other fora. See, for example ICSID Administrative and Financial Regulations, *supra* note 58, regulation 22(2) (providing for publication of legal reasoning "with a view to furthering the development of international law in relation to investments").

a body of jurisprudence recognising a substantive transparency obligation as a component of FET/MST.

The public availability of arbitral decisions also informs the development of new investment treaties. The release of arbitral decisions increasingly prompts public debates around the permissible scope and structure of investment norms. This may support both State and scholarly analysis of treaties, which may come to inform the practice of States in drafting them.⁹⁶ In turn, these analyses will influence transparency at the point of dispute settlement. The European Union's consultation process for the Trans-Pacific Investment Partnership illustrates such inter-linkages. In that process, interested stakeholders had the opportunity to express views as to the appropriate scope of international investment treaties and the means of conducting dispute settlement proceedings pursuant to them. Many stakeholders used this opportunity to provide observations as to the desired level of transparency in investor-State arbitral proceedings, whilst also commenting upon substantive transparency norms. Some respondents, for example, noted developments in arbitral jurisprudence to emphasise the scope for enhanced substantive transparency obligations. This included suggestions that States include in future treaties new transparency provisions, including an obligation for States to make the investment admission regime "transparent and easily accessible" to investors and home States.⁹⁷ In this sense, transparent treaty negotiation has capacity to inform the development of both procedural and substantive transparency norms.

Transparent treaty negotiation may also inform the notion of transparency as a substantive obligation in further respects. An important outcome of transparent treaty negotiation is the increased likelihood that States will generate and make publicly available detailed records relating to investment treaty negotiations. Due to past approaches to negotiation, the records for the some 3,000 investment treaties in existence, if they even exist, are either inaccessible or incomplete.⁹⁸ Tribunals have consistently lamented that such "sparse negotiating history [...] offers little additional insight into the meaning of the aspects of

⁹⁶ See, though, on the impact of arbitral decisions on States' treaty-making L. N. Skovgaard Poulsen, *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries* (2015); W. Alschner, 'The Impact of Investment Arbitration on Investment Treaty Design: Myth versus Reality', 42 *Yale Journal of International Law* (2017) 1, 1.

⁹⁷ European Commission, *supra* note 19, 46.

⁹⁸ T. W. Wälde, 'Investment Arbitration under the Energy Charter Treaty: An Overview of Selected Key Issues Based on Recent Litigation Experience', in N. Horn & S. Kröll (eds), *Arbitrating Foreign Investment Disputes. Procedural and Substantive Legal Aspects*,

the [treaty] at issue”.⁹⁹ Even where they exist, such records are typically held in confidence by the negotiating States, placing investors at a relative disadvantage in terms of obtaining access to them.¹⁰⁰ The investor must typically rely upon assistance from its home State, a third State, or the arbitral tribunal to access such documents. The increased transparency of treaty negotiations makes it more likely that tribunals and investors will have at their disposal documents preceding the creation of investment treaties. Transparent negotiations are also likely to qualitatively improve the content of such documents, insofar as they are likely to be more detailed where they are provided as the basis for public consultation and comment.

Such materials are, under the *Vienna Convention on the Law of Treaties*, capable of informing arbitral interpretations of investment treaties as a subsidiary means of interpretation.¹⁰¹ Such documents might reveal, for example, State intentions concerning the interpretation of FET/MST provisions. Arbitral interpretations of the transparency norms incorporated within FET/MST provisions may thus come to be informed by the very documents created or released by greater transparency at the point of treaty negotiation.

As the above discussion illustrates, the manifestation of transparency at each of the three identified sites has the potential to inform and solidify developments in transparency norms at other sites. Each form of transparency also holds the potential to influence future arbitral approaches to procedural and substantive transparency,¹⁰² approaches to transparency in State treaty negotiations, and the transparency of State dealings with investors.¹⁰³ Each type of transparency also offers scope to generate new sources and stakeholders in

Vol. 19 (2004), 198; C. McLachlan, ‘Investment Treaties and General International Law’, 57 *International and Comparative Law Quarterly* (2008) 2, 361, 372.

⁹⁹ *Aguas del Tunari SA v. Republic of Bolivia*, Decision on Respondent’s Objections to Jurisdiction, ICSID Case No ARB/02/3, 21 October 2005, para. 274.

¹⁰⁰ See, further *Industrial Nacional de Alimentos, SA and Indalsa Perú, SA v. The Republic of Peru*, Annulment ICSID Case No ARB/03/4, 5 September 2007, para. 9.

¹⁰¹ *Vienna Convention on the Law of Treaties*, 23 May 1969, Art. 32, 1155 UNTS 331. See further J. R. G. Weeramantry, *Treaty Interpretation in Investment Arbitration*, (2012).

¹⁰² Ortino, *supra* note 62, 14; C. Lo, ‘On a Balanced Mechanism of Publishing Arbitral Awards’, 1 *Contemporary Asia Arbitration Journal* (2008) 2, 235, 243; Knahr & Reinisch, *supra* note 56, 115; L. LoPucki, ‘Court System Transparency’, UCLA School of Law, Public Law and Legal Theory Research Paper Series, Paper No. 07-28, 6; Euler, Gehring & Scherer, *supra* note 54, 355; Risse, *supra* note 86, 7; Barstow Magraw Jr. & Amerasinghe, *supra* note 16, 352; Kawharu, *supra* note 59, 168.

¹⁰³ C. Buys, ‘The Tensions between Confidentiality and Transparency in International Arbitration’, 14 *American Review of International Arbitration* (2003) 1-2, 121, 134;

international investment law. Transparency offers a means to raise the overall visibility of investment law and, in turn, encourage new stakeholders to enter the field.¹⁰⁴ Transparency may, for example, assist tribunals geographically removed from the persons who their decisions affect to garner a greater sense of proximity to those persons.¹⁰⁵ In so doing, transparency might give such persons greater familiarity with investment law, and the confidence to engage with and shape the regime going forward.¹⁰⁶ Transparency is also likely to generate more informed decision-making by the authors of international investment law, whilst ensuring that this body of law is shaped by a wide range of sources and responsive to a wider variety of stakeholders. By opening up access to a range of different perspectives, transparency holds the potential to improve the quality of awards, of State decisions concerning investors, and of treaties.¹⁰⁷

C. Conclusions

This article has charted the development of three forms of transparency in international investment law. Section I examined how transparency manifests at the points of norm creation, as a component of substantive investment norms, and as a procedural requirement during the interpretation and application of those norms by investment treaty tribunals. Section II highlighted how transparency has become an increasingly valued component of investment treaty law and arbitration, coming to be reflected in a range of different sources and at the prompting of a variety of stakeholders. Through this study of transparency, the article has highlighted the sources of international investment law, and the stakeholders which shape its development. The article has also highlighted systemic aspects of international investment law, examining how distinct sites

K. Nadakavukaren Schefer, 'Article 1: Scope of Application', in Euler, Gehring & Scherer, *supra* note 54, 33; LoPucki, *supra* note 102, 6; Jansen Calamita, *supra* note 64, 651.

¹⁰⁴ Plagakis, *supra* note 76, 106.

¹⁰⁵ K. Dzehtsiarou & A. Greene, 'Legitimacy and the Future of the European Court of Human Rights: Critical Perspectives from Academia and Practitioners' 12 *German Law Journal* (2011) 10, 1707, 1712; Plagakis, *supra* note 76, 104.

¹⁰⁶ Stepniak, *supra* note 81, 10; Ortino, *supra* note 62, 14; Bennaïm-Selvi, *supra* note 64, 803; Green, *supra* note 79.

¹⁰⁷ *Aguas Argentinas S.A and Others v. Argentina*, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae, 19 May 2005, paras 13, 21. See further P. Wieland, 'Why the Amicus Curia Institution Is Ill-Suited to Address Indigenous Peoples' Rights before Investor-State Arbitration Tribunals: Glamis Gold and the Right of Intervention', 3 *Trade, Law and Development* (2011) 2, 334, 335, 340; European Commission, *supra* note 19, 71.

of transparency interact with and inform each other to contribute to norm emergence, cascade and solidification. It remains to be seen whether transparency will arise in other areas of international investment law and in what form, and the extent to which those manifestations will be linked to the existing three sites considered herein. The story of transparency in international investment law brings into focus key components of the regime, and the potential for future developments. What is clear is that the story of transparency in international investment law is far from over, and perhaps has only just begun.

