

## **Transparency in International Investment Law: The Good, the Bad, and the Murky\***

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Transparency is the buzzword *du jour* within international investment law. Oft invoked and seldom defined,<sup>2</sup> it slides like butter on toast across the debates saturating nearly every facet of the international legal regime governing foreign direct investment. How can we improve the content of investment treaties? Introduce more transparency into the negotiating process.<sup>3</sup> What can be done to reduce the mounting public criticism of investor-state arbitration? Make the investor-state dispute resolution process and the institutions that support it more transparent.<sup>4</sup>

Of course, few would deny that transparency is generally a good thing. It is necessary to the functioning of any democratic means of organizing our cooperative relations, whether social or economic, domestic or international.<sup>5</sup> But transparency is not a panacea. As in all things, context matters. We must ask ourselves not only whether transparency is desirable within international investment law, but also transparency in respect of what and vis-à-vis whom? Only in light of the answers to these questions can we begin to fulfill the present book's mandate of querying the degree to which the international investment regime may manifest an existing or evolving international law norm of transparency.

I approach the task in four parts. I begin by considering how the complex and decentralized nature of the international investment law system complicates the quest for transparency from

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<sup>2</sup> A notable exception is Carl-Sebastian Zoellner, 'Transparency: an Analysis of an Evolving Fundamental Principle in International Economic Law', *Michigan Journal of International Law* 27 (2006), pp. 580-81 (identifying three notions of transparency commonly evoked in international economic law).

<sup>3</sup> See the discussion in Part II.A below.

<sup>4</sup> See eg James Harrison, 'Recent Developments to Promote Transparency and Public Participation in Investment Treaty Arbitration', University of Edinburgh School of Law Working Paper No. 2011/01, available at: <http://ssrn.com/abstract=1739181>; Jason W. Yackee & Jarrod Wong, 'The 2006 Procedural and Transparency-Related Amendments to the ICSID Arbitration Rules: Model Intentions, Moderate Proposals, and Modest Returns', in Karl P. Sauvant (ed.), *The Yearbook on International Investment Law & Policy* (Oxford: Oxford University Press, 2010), ch 6.

<sup>5</sup> Variations on this theme have been recognized not only by important Western thinkers – including Kant, Rousseau, Smith, Bentham, Hume, Foucault, and their more contemporary progeny – but also by classical scholars in the Confucian and Greek traditions. See Christopher Hood, 'Transparency in Historical Perspective', in Christopher Hood/David Heald (eds.), *Transparency, the Key to Better Governance?* Proceedings of the British Academy 135 (Oxford: Oxford University Press, 2006).

the outset by both proliferating and obfuscating the lines of communication through which information flows. I then adopt a rough working definition of transparency that is appropriate to this multifarious environment, emphasizing the availability, accessibility, usability and relevance of the information for all affected stakeholders. In part II, I construct a framework for evaluating the status of the posited transparency norm within the international investment law (IIL) system. This framework identifies transparent, semi-transparent, and non-transparent aspects of the system and examines the major types of information falling within each category. I demonstrate that these do not necessarily map onto prevailing normative judgments concerning what might constitute good, bad, and murky transparency practices. Part III sketches a few strategies that might be explored in future prescriptive analyses of transparency questions. Part IV concludes with a tentative assessment of the penetration, recent evolution, and likely trajectory of transparency principles within the contemporary international investment law regime.

### **I. What does it mean to examine transparency in international investment law?**

Before broaching the topic of transparency, it is first necessary to specify the domain of inquiry. What precisely is the international investment law ‘system’ or ‘regime’? There is no simple answer to this question. In contradistinction to other international legal regimes – such as those associated with the World Trade Organization, International Labor Organization, or United Nations – international investment law has no hierarchy, no central organizing body, and no historical genesis or originating document commonly acknowledged by all. It is clearly not a ‘regime’ in the strict constitutional sense. Rather, as I have argued elsewhere,<sup>6</sup> the only practicable way to identify international investment law is by its constituent elements:

- 1) Textually, the regime is a ‘spaghetti bowl’ of around 3000 overlapping bilateral and regional treaties,<sup>7</sup> tens of thousands of transnational contracts, and an unknown number of domestic statutes<sup>8</sup> whose purported aim is to stimulate economic development by attracting and protecting foreign investments within the sovereign territories of individual host states.<sup>9</sup>

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<sup>6</sup> Julie A. Maupin, *Reconciling Public and Private Interests in International Investment Law*, PhD dissertation (forthcoming, June 2013).

<sup>7</sup> According to the most recent UNCTAD count, ‘at the end of 2010 the IIA universe contained... 2,807 BITs [bilateral investment treaties]... and 309 “other IIAs” [international investment agreements]’, excluding double taxation treaties (which fall beyond the scope of this chapter). UNCTAD, ‘World Investment Report 2011, Non-equity Modes of International Production and Development’, p. 100, available at: <http://www.unctad.org/Templates/WebFlyer.asp?intItemID=6018&lang=1>.

<sup>8</sup> I have never seen an authoritative compilation of such statutes, though many are accessible via the websites of governments’ investment promotion agencies.

<sup>9</sup> The vigorous debate over whether these texts actually accomplish their intended purpose rages on. See, most recently, Jason Webb Yackee, ‘Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence’, *Virginia Journal of International Law* 51 (2011), p. 397; Todd Allee and Clint Peinhardt, ‘Contingent Credibility: the Impact of Investment Treaty Violations on Foreign Direct Investment’, *International Organization* 65 (2011), pp. 401-32; Axel Berger, Matthias Busse, Peter Nunnenkamp and Martin Roy, ‘More Stringent BITs, Less Ambiguous Effects on FDI? Not a BIT!’, *Economics Letters* 112 (2011), p. 270.

- 2) Substantively, it is a half-dozen or so vaguely worded but relatively standardized legal principles constraining the permissible actions of sovereign governments in their dealings with foreign investors.<sup>10</sup>
- 3) Institutionally, it is a handful of competing arbitration-related institutions and their associated sets of procedural rules for investor-state dispute resolution.<sup>11</sup>
- 4) Jurisprudentially, it is an ever-growing body of decisions through which ephemeral arbitral tribunals interpret and develop the substantive law of international investment.<sup>12</sup>

To make this description more concrete, consider three hypothetical manifestations of international investment law. In scenario one, a Russian investor relies on a bilateral investment treaty (BIT) to claim compensation from the United States for enacting a new environmental law, which the investor claims has unfairly and inequitably diminished the value of its investment. The claim is heard by an international arbitral tribunal functioning under the UNCITRAL arbitration rules,<sup>13</sup> with institutional support provided by the Permanent Court of Arbitration. The final award is enforceable under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.<sup>14</sup> In scenario two, a Chinese investor brings a claim of uncompensated expropriation against the government of Côte d'Ivoire pursuant to the latter's domestically enacted investment statute. An international arbitral tribunal functioning under the auspices of the International Centre for Settlement of Investment Disputes (ICSID) hears the claim, applying the ICSID rules of arbitration. The tribunal's final award is governed by and enforceable under the ICSID Convention.<sup>15</sup> In scenario three, a Saudi investor brings a claim for breach of contract against the government of Vanuatu pursuant to a concession agreement between the two parties. The claim is heard by an international arbitral tribunal constituted under the auspices of the International Chamber of Commerce and applying the ICC arbitration rules. The final award is subject to enforcement under the domestic laws of the jurisdiction(s) where enforcement is sought, as Vanuatu is not a party to an applicable international enforcement convention.

In such a world, it is difficult to fathom how one might begin to trace the content and pervasiveness of any single overarching transparency norm. Simple combinatorics would

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<sup>10</sup> These include: non-discrimination, national treatment, most-favored nation treatment, fair and equitable treatment, the free transfer of returns, and protection against uncompensated expropriation. Some international investment texts provide further protections, but these core disciplines are common to most.

<sup>11</sup> Most notably the International Centre for Settlement of Investment Disputes (ICSID), the United Nations Commission on International Trade Law (UNCITRAL), the International Chamber of Commerce (ICC), the Stockholm Chamber of Commerce (SCC), the London Court of International Arbitration (LCIA) and the Permanent Court of Arbitration (PCA).

<sup>12</sup> The number of publicly available awards currently stands at around 500. These awards are accessible at: <http://italaw.com/investmenttreaties.htm>.

<sup>13</sup> UN Commission on International Trade Law (UNCITRAL) Arbitration Rules, 15 International Legal Materials 701 (1976).

<sup>14</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted June 10, 1958, 330 United Nations Treaty Series 3.

<sup>15</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature Mar 18, 1965, 575 United Nations Treaty Series 159.

suggest that an impossibly large number of transparency norms would be required to cover all of the potential permutations of legal texts, substantive rules, and institutions that might arise. By way of counterpoint, the WTO system allows for legal challenges based upon varied causes of action. But these must be state-to-state challenges, must arise under one of only 16 treaties,<sup>16</sup> and must be settled in accordance with a single dispute settlement mechanism, applying a single set of rules and overseen by a single administering institution. Expanding the lens to include regional and bilateral trade relations adds about 300 additional treaties to the picture<sup>17</sup> – around one tenth the number involved in the IIL regime – not counting the latter’s incorporation of investor-state contracts and domestic investment statutes.

Yet, somehow, the center holds. The IIL regime indeed operates as a ‘system’ – complex and decentralized, to be sure, but neither anarchic nor disorganized.<sup>18</sup> To understand why, one must look beyond international law’s traditional pillars of inquiry<sup>19</sup> and give due consideration to two additional constituent elements of the IIL regime:

- 5) Politically, it is a collection of actual and potential stakeholders – some individual and some corporate (including investors, states, and civil society) – who either have been or believe that they may one day be impacted in some way by the functioning of the IIL regime.
- 6) Sociologically, it is a particularized epistemic community comprised of arbitrators, counsel, experts, scholars, institutional employees, journalists, treaty negotiators, government advisors, and a select few knowledgeable civil society advocates – all of whom are connected to one another by a revolving door which facilitates frequent and facile movement between these roles.<sup>20</sup>

I have examined these elements in detail in other work.<sup>21</sup> For present purposes, it suffices to note that the fifth and sixth elements of the IIL system are interrelated in two important ways. First, there is a discernible overlap between some – though not all – of the actors inhabiting the political and sociological spheres. Second, actions taken within the political sphere often provoke reactions within the sociological sphere, and vice versa. The mechanism of influence differs, however. In the political sphere, the mechanism of influence is direct and overt; it occurs through the exercise of an actor’s *right* to influence policy decisions. In the sociological sphere, the mechanism is indirect and sometimes covert; it takes place through the actor’s *ability* (independent of any associated right) to influence policy developments.

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<sup>16</sup> Those listed in Appendix 1 of the Dispute Settlement Understanding.

<sup>17</sup> World Trade Organization, *World Trade Report 2011*, p 55, Figure B.1.

<sup>18</sup> This may be thanks, in part, to the centripetal force exerted by modern information technology. Cf José Alvarez, ‘The Democratization of the Invisible College’, ASIL IL Post (Nov 8, 2007), available at: <http://www.asil.org/ilpost/president/pres071108.html>; and Stephan Schill, ‘Whither Fragmentation? On the Literature and Sociology of International Investment Law’, *European Journal of International Law* 22(3) (2011), pp.886-87 (both discussing how the OGEMID listserv and other similar electronic communication tools band together the IIL epistemic community).

<sup>19</sup> I refer here to subjects, objects, and sources discourse.

<sup>20</sup> In the interest of full disclosure, I have worn several of these hats at various points in the past myself.

<sup>21</sup> Julie A. Maupin, *International Investment Law’s Epistemic Community: Who It Includes and Why It Matters*, Working Paper (in progress); see also Maupin, above note 6, chs 1-2.

By way of illustration, members of a given country's private arbitration bar may exercise domestic political power when making submissions to their own government concerning a proposed transparency-related amendment to that country's model BIT. Some of these same individuals may in turn exercise sociological power when deciding (while acting as arbitrators, counsel, or expert witnesses) within the context of particular investor-state arbitrations how to address transparency questions arising in proceedings involving other, similarly worded treaties.<sup>22</sup> Even these mechanical boundaries between the two realms may blur at times. Several governments have recently appointed members of their private arbitration bars to represent their states' national interests before the ongoing intergovernmental UNCITRAL Working Group on proposed transparency-related amendments to the UNCITRAL arbitration rules.<sup>23</sup> In such instances, it becomes unclear which mechanism – political or sociological – is actually at work.

What is clear from this discussion, however, is that any investigation of transparency within international investment law must pay heed to the many different forms and faces it can take. It must also devote sufficient attention to the individuals and groups whose joint and separate activities are shaping the system's trajectory. As it happens, a considerable number of practitioners, arbitrators, and academics straddle the international investment and international commercial arbitration worlds. This is understandable, since both systems embrace privately initiated claims and non-judicial dispute settlement options. Yet it would be a mistake to treat the two systems alike for purposes of any transparency inquiry.

Commercial arbitration principally involves ordinary contract claims whose resolution has little impact beyond the disputing parties and their immediate affiliates.<sup>24</sup> IIL disputes, by contrast, often involve challenges to generally applicable regulatory measures enacted by host state governments for public purposes.<sup>25</sup> Their resolution can therefore impact upon the public at large by limiting the scope of – or alternatively setting the price for – states' exercise of their sovereign regulatory powers. In such circumstances it is essential to examine the regime's transparency norms not only in view of its multiplicity of texts and institutions but also in light

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<sup>22</sup> Eg: Does public interest in the dispute warrant disclosure of the parties' pleadings in the case? How broad are the host state's transparency obligations toward the investor under the treaty's fair and equitable treatment standard?

<sup>23</sup> For example, the UK delegation reportedly includes prominent British arbitrators Johnny Veeder and Toby Landau alongside a British governmental official. Likewise for Switzerland, represented by a Swiss official plus private arbitrators Michael Schneider and Gabrielle Kaufmann-Kohler. Arbitrator Jan Paulsson (Swedish) initially co-authored the background report that framed the Working Group's discussions, then represented the views of the LCIA before the Working Group, and later served as an intergovernmental representative on behalf of Bahrain.

<sup>24</sup> Some jurisdictions do allow for private arbitration of tort claims, anti-trust claims, and other non-contract-based claims where an arbitration agreement specifically authorizes them. But in such jurisdictions, the effects of the arbitration ruling are still limited to the contracting parties themselves. See generally Redfern and Hunter, *Law and Practice of International Commercial Arbitration*, 4<sup>th</sup> ed. (London, Sweet & Maxwell, 2004).

<sup>25</sup> Examples of challenged measures have included environmental laws, human rights-promoting measures, and public health measures. For an overview of recent controversial cases, see 'International Investment Law and Sustainable Development: Key Cases from 2000-2010', International Institute for Sustainable Development (Nathalie Bernasconi-Osterwalder and Lise Johnson, eds), at: [http://www.iisd.org/pdf/2011/int\\_investment\\_law\\_and\\_sd\\_key\\_cases\\_2010.pdf](http://www.iisd.org/pdf/2011/int_investment_law_and_sd_key_cases_2010.pdf).

of the interests of a broad spectrum of stakeholders – including the general public – against the backdrop of contemporary democratic governance norms.<sup>26</sup>

In recognition of these facts, I will adopt herein a modified version of the single-treaty-based conception of transparency originally suggested by Chayes, Chayes and Mitchell. For present purposes, transparency means:

‘The adequacy, accuracy, availability, and accessibility of knowledge and information about the policies and activities of [the international investment law regime and its participants], and of the central organizations [functioning within] it on matters relevant to compliance and effectiveness, and about the operation of the norms, rules, and procedures [underlying the regime].’<sup>27</sup>

Three features of this rough working definition merit attention. First, it is intentionally open with respect to subject matter scope (transparency in respect of what?) and intended addressees (vis-à-vis whom?) This allows it to be flexible enough to function in a multitude of contexts. Second, the definition is equal parts objective and subjective. It calls for information to be not only ‘available’ but also ‘accessible’, ‘adequate’, ‘accurate’, and ‘relevant’. Each of these terms can be specified, but their precise specification will vary according to the number and type of stakeholders whose interests may be implicated in each context.<sup>28</sup>

Third, it is important to recognize what this conception of transparency excludes. In emphasizing information about the operation of the IIL regime, I omit two related but distinct phenomena – namely participation rights and accountability mechanisms. I do so to remain faithful to the present book’s objective of shedding light on the meaning of transparency *qua* transparency. Moreover, I do so to underscore that the debate over the appropriate form and content of transparency norms within international investment law cannot be reduced to the parallel debate over amicus curiae participation in investor-state arbitration proceedings.<sup>29</sup> Nor should it be conflated with the ongoing discussions as to how best to make investor-state dispute

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<sup>26</sup> Of course, not all states participating in the current IIL system are democratic. Yet few modern scholars would seriously suggest exempting a 21<sup>st</sup> century international legal order from democratic sensibilities for that reason.

<sup>27</sup> Abram Chayes, Antonia Handler Chayes, and Ronald Mitchell, ‘Managing Compliance: A Comparative Perspective’, in Edith Brown Weiss & Harold K. Jacobson (eds.), *Engaging Countries: Strengthening Compliance with International Environmental Accords* 39 (Cambridge Mass, MIT Press, 1998) at p. 41 (present author’s adaptations indicated in square brackets).

<sup>28</sup> Eg in my above hypotheticals, one would expect to encounter a large number of potentially impacted stakeholders in scenario one (environmental regulation). The size of the stakeholder group in the other two scenarios, however, might range from very small to very large, depending upon the reasons for the expropriation (scenario two) and the type of concession agreement (scenario three).

<sup>29</sup> For relevant discussions, compare Daniel Magraw Jr. and Niranjali Amerasinghe, ‘Transparency and Participation in Investor-State Arbitration’, *ILSA Journal of International and Comparative Law* 15 (2009), pp. 337-60; Alexis Mourre, ‘Are Amici Curiae the Proper Response to the Public’s Concerns on Transparency in Investment Arbitration?’, *Law and Practice of International Courts and Tribunals* 5 (2006), pp. 257-71; Florian Grisel and Jorge Viñuales, ‘L’amicus curiae dans l’arbitrage d’investissement’, *ICSID Review – Foreign Investment Law Journal* (2006), pp. 380-432; and Luke Eric Peterson, ‘Amicus Curiae Interventions: the Tail that Wags the Transparency Dog’, *Kluwer Arbitration Blog* (April 27, 2010), at: <http://kluwerarbitrationblog.com/blog/2010/04/27/amicus-curiae-interventions-the-tail-that-wags-the-transparency-dog/> (visited 21 November 2011).

resolution more politically accountable to various key constituencies<sup>30</sup> and how to increase the IIL regime's stability, predictability, and legitimacy overall.<sup>31</sup> Transparency plays an instrumental role in all of these debates, but it also has an inherent value which transcends them. Focusing on transparency for its own sake can thus help to advance our understanding on multiple fronts simultaneously.

## II. The IIL regime's three levels of transparency

Beginning with this information-centric notion of transparency, the next step is to map out the present state-of-the-art. What follows is not a comprehensive discussion of every facet of the system.<sup>32</sup> Rather, the aim is to flesh out a conceptual framework that can help to facilitate more detailed future analyses of the IIL regime's key transparent, semi-transparent and non-transparent features. As with all labeling exercises, sorting information into these categories entails making both descriptive and normative judgments. In what follows I shall try to be explicit about these as and when they arise.

### A. Transparent aspects of the IIL regime (things generally known or easy to discover)

First, some heartening news: we actually know a great deal today about the functioning of the IIL regime, or at least, a great deal more than in the past. In respect of foundational texts, the major multilateral conventions that serve as the cornerstones of the system – namely, the ICSID and New York Conventions – have always been matters of public record. The same is true of a large proportion of the investment regime's more than 3000 bilateral and regional treaty texts granting substantive protections to foreign investors and/or placing national or international enforcement mechanisms at their disposal. Advances in information technology have made most of these treaties accessible to anyone with an internet connection.<sup>33</sup> Country-specific transparency practices, meanwhile, now ensure the ready availability of many states' unilateral investment promotion statutes.<sup>34</sup> As a result, with the important exception of investor-state

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<sup>30</sup> See eg Brigitte Stern, 'L'entrée de la société civile dans l'arbitrage entre Etat et investisseur', *Revue de l'arbitrage* 2 (2002), p. 329; and José Alvarez, 'Why are We "Re-calibrating" our Investment Treaties?', *World Arbitration and Mediation Review* 4(2) (2010), pp. 143-62.

<sup>31</sup> See, on this point, the emerging 'international public law' movement, as propounded by Stephan Schill, 'Enhancing the Legitimacy of International Investment Law: Conceptual and Methodological Foundations of a New Public Law Approach', *Virginia Journal of International Law* 52 (2011), pp. 57-102 (and references cited therein).

<sup>32</sup> Eg space constraints prevent me from exploring the transparency implications of contract-based investor-state disputes, whose dynamics are often closer to those of ordinary commercial arbitration. For views on transparency in the international commercial arbitration context, see the articles in 'Confidentiality versus Transparency in International Arbitration', *Transnational Dispute Management*, Special Issue (advance publication online, 7 March 2012). See also Catherine Rogers, 'Transparency in International Commercial Arbitration', *University of Kansas Law Review*, 54 (2006), p. 1301.

<sup>33</sup> UNCTAD maintains the most up-to-date compilation of bilateral investment treaties at: [http://www.unctadxi.org/templates/DocSearch\\_\\_\\_779.aspx](http://www.unctadxi.org/templates/DocSearch___779.aspx). Key regional investment treaties and model investment treaties may be accessed at: <http://italaw.com/investmenttreaties.htm>.

<sup>34</sup> One example is Article 22 of Venezuela's law on the promotion and protection of foreign investment (Law No. 356 of 3 October 1999), which has recently received wide publicity in the context of several investor-state arbitrations, including *Mobil v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction (June 10, 2010).

contracts, the majority of the IIL regime's rights-granting and jurisdiction-delimiting texts are, as a general rule, publicly available.<sup>35</sup>

Transparency proponents have nevertheless found themselves unsatisfied with this state of affairs, and understandably so. It is one thing to place existing investment treaties in the public domain after-the-fact. It is quite another to render transparent the process by which such treaties are concluded. Concerns linger because, until quite recently, major capital exporting countries drafted boiler-plate investment treaty texts in closed processes controlled by internal agency bureaucrats and arguably influenced by big business. Some of these texts then became the templates for bilateral investment treaties that were often signed as 'photo ops' by visiting dignitaries upon the occasion of official state visits. Recent scholarly work suggests that thousands of investment treaties went into force in the 1990s with very little input into, or even awareness of, the treaties on the part of either civil society or the legislative branches of many countries.<sup>36</sup>

Inauspicious as these beginnings may seem, transparency has made significant inroads into the treaty negotiating process in recent years. Thanks to the civil society outcry engendered by a few notorious early NAFTA claims,<sup>37</sup> the United States and Canada moved to introduce greater openness into several aspects of the investment law regime. This gave rise to a new generation of 'model BITs' whose proposed contents are routinely disclosed in advance by the responsible government agencies and then revised in response to extensive public comment and legislative review processes. Numerous countries have followed suit, instituting model BIT programs or otherwise conducting public reviews of their investment treaty practices.<sup>38</sup> The EU organs recently endowed by the Lisbon Treaty with the competence to determine the EU's future investment treaty relations so far appear to be falling in line with this trend.<sup>39</sup> Indeed, it seems that the adoption of transparent processes for the drafting of investment treaty texts is quickly becoming the norm, at least for democratic states.<sup>40</sup>

Should this practice eventually achieve universal acceptance, it would eliminate a notable incongruity within the IIL system, since most investment treaties already impose substantive transparency obligations upon host state governments in their dealings with foreign investors.<sup>41</sup> Even where investment treaties lack explicit transparency obligations, scholars and arbitrators often read implicit obligations into the texts by identifying transparency as a core component of

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<sup>35</sup> But see note 65 below and accompanying text.

<sup>36</sup> For a persuasive empirical validation of this narrative of the diffusion of BITs, backed by qualitative accounts from numerous investment treaty negotiators, see Lauge Skovgaard Poulsen & Emma Aisbett, 'When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning', Crawford School Research Paper No. 5 (July 29, 2011), available at: <http://ssrn.com/abstract=1899342>.

<sup>37</sup> An overview is provided in Jack R. Coe Jr., 'Transparency in the Resolution of Investor-State Disputes—Adoption, Adaptation, and NAFTA Leadership', *University of Kansas Law Review* 54 (2006), p. 1339.

<sup>38</sup> These include Australia, Canada, Colombia, France, Germany, India, Norway, South Africa, the UK, and the US. Unless otherwise noted, all of the investment treaty texts and model texts cited herein are available for download at one or both of the following websites: <http://italaw.com/investmenttreaties.htm>; [http://www.unctadxi.org/templates/DocSearch\\_\\_\\_779.aspx](http://www.unctadxi.org/templates/DocSearch___779.aspx).

<sup>39</sup> See generally Angelos Dimopoulos, *EU Foreign Investment Law* (Oxford: Oxford University Press, 2012), part II.

<sup>40</sup> Not surprisingly, non-democratic governments have proven less responsive to this trend.

<sup>41</sup> See eg US Model BIT 2012, article 11.

either the treaty-based ‘fair and equitable treatment’ standard, the customary international law-based ‘minimum standard of treatment’, or the general international law notions of ‘good governance’ and the ‘rule of law’.<sup>42</sup> Some of these reading-in exercises have invited considerable critique.<sup>43</sup> But most commentators now agree that the substantive law of international investment does, at a minimum, require host states to disclose to foreign investors the basic information concerning laws and regulations affecting their investments, both before and after the investor’s initial commitment of capital.<sup>44</sup> In light of this, substantive law may represent the area of the IIL regime wherein transparency principles have penetrated deepest.

The forward march of transparency has been less sweeping on the institutional front.<sup>45</sup> Information concerning the various arbitral institutions that play a role in investor-state arbitration proceedings – including their basic operating structures and associated sets of procedural rules – rests within the public domain.<sup>46</sup> But beyond this bare minimum, the transparency practices of the major institutions vary widely. NAFTA offers the most transparent institutional support structure for investor-state dispute settlement. In 2001, the three NAFTA state parties issued a ‘Note of Interpretation’ in which they made transparency the default norm in all investor-state complaints brought under NAFTA chapter 11.<sup>47</sup> As a result, the public now has free access to a wealth of information concerning every NAFTA dispute, including the composition of the tribunal, the memorials and pleadings of the parties (both written and oral), decisions on challenges to arbitrators, and the orders and awards of the tribunal.<sup>48</sup>

ICSID has so far taken a more reserved approach to transparency. The Centre publishes on its website basic procedural details concerning every dispute registered by the Secretariat,<sup>49</sup> but the revised 2006 ICSID Arbitration Rules still prohibit the Centre from publishing a tribunal’s award

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<sup>42</sup> Most famously, the *Tecmed* tribunal 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.’

*Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (May 29, 2003), para 154.

<sup>43</sup> Particularly those which attempt to tie a host state’s transparency obligations to a particular investor’s ‘legitimate expectations’. See e.g. Jürgen Bering et al, International Law Association German Branch Subcommittee on Investment Law Working Group, ‘General Public International Law and International Investment Law, a Research Sketch on Selected Issues’, *Beitrage zum Transnationalen Wirtschaftsrecht*, pp. 21-22, available at: [http://www.50yearsofbits.com/docs/0912211342\\_ILA\\_Working\\_Group\\_IIL\\_PIL.pdf](http://www.50yearsofbits.com/docs/0912211342_ILA_Working_Group_IIL_PIL.pdf).

<sup>44</sup> Even where a host state’s domestic law does not so require.

<sup>45</sup> The extent to which this fact has attracted popular notice became clear with the publication of ‘Behind Closed Doors, A hard struggle to shed some light on a legal grey area’, *The Economist* (Print Edition, 25 April 2009).

<sup>46</sup> Details may be downloaded from the websites of the respective institutions.

<sup>47</sup> Notes of Interpretation of Certain NAFTA Chapter 11 Provisions, NAFTA Free Trade Commission (July 31, 2001), part A, available at: [http://www.naftaclaims.com/files/NAFTA\\_Comm\\_1105\\_Transparency.pdf](http://www.naftaclaims.com/files/NAFTA_Comm_1105_Transparency.pdf). See also Coe, above note 37. Similar transparency requirements were later included in article 10.21 of the US-Dominican Republic-Central America Free Trade Agreement (DR-CAFTA) as well as article 29 of the 2012 US Model BIT.

<sup>48</sup> Redactions may be made to protect confidential, privileged or otherwise protected information.

<sup>49</sup> This includes the existence of a dispute, the composition of the arbitral tribunal, and the status of the proceedings.

in its entirety without the consent of both disputing parties.<sup>50</sup> Such consent is usually forthcoming in practice, with the result that most awards are published in full.<sup>51</sup> Even when this does not occur, the rules require ICSID to publish excerpts of the tribunal's legal reasoning. The oral and written submissions of the disputing parties and their experts and witnesses, by contrast, almost always remain confidential. In this respect, ICSID's institutional support for transparency in investor-state arbitration lags behind that of NAFTA.

As to the other major institutional players, UNCITRAL is the only one that has recently reviewed its transparency requirements for investor-state arbitration. At its 41st session in 2008, the Commission recognized 'the importance of ensuring transparency in investor-state dispute resolution'.<sup>52</sup> The Working Group tasked with implementing the Commission's mandate met numerous times over the course of several years, welcoming input not only from governmental delegates but also from civil society organizations and industry associations. A few pro-transparency delegations – notably the US and Canada – advocated the adoption of NAFTA-like transparency obligations for *all* future investor-state arbitrations to be conducted under the UNCITRAL rules.<sup>53</sup> But other delegations opposed this approach and instead favoured the mandatory application of the new transparency requirements only on a prospective basis.<sup>54</sup> In the end, this latter position carried the day. The upshot is that the new UNCITRAL transparency requirements will apply only in respect of investor-state claims arising out of any treaties adopted after the enactment of the revised rules. All claims arising under the existing universe of 3000 treaties will continue to be exempt from any transparency requirements unless the disputing parties agree otherwise or unless the treaties are proactively amended by their contracting state parties to explicitly incorporate the new rules.<sup>55</sup> It remains to be seen whether any states will actually take up the difficult task of treaty amendment so as to render the UNCITRAL transparency reforms effective in practice.<sup>56</sup>

To summarize, then, the following major features of the IIL regime currently exhibit a high degree of transparency: 1) the foundational texts which provide the architecture of the system (including the ICSID and New York Conventions); 2) the contents of a large proportion of the existing stock of bilateral and regional investment treaty texts and domestic investment statutes; 3) the model investment treaty-making processes employed prospectively by major developed countries and increasingly also by democratic developing countries; 4) the content of the laws and regulations imposed by host states upon foreign investors and their investments; and 5) the conduct of investor-state dispute resolution proceedings and their outcomes under NAFTA and,

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<sup>50</sup> Rule 48(4), ICSID Arbitration Rules; Rule 53, ICSID Arbitration (Additional Facility) Rules.

<sup>51</sup> Often one or both parties will have an interest in disclosing the award, eg for enforcement or public relations reasons, and nothing in the rules prevents the parties themselves (as opposed to the Centre) from doing so.

<sup>52</sup> Report of the United Nations Commission on International Trade Law, Forty-first session, June 16-July 3, 2008, para 314.

<sup>53</sup> Most civil society observers to the Working Group's sessions also took this position.

<sup>54</sup> These delegations argued that superimposing mandatory new transparency requirements onto already existing treaties would require an 'evolutive' interpretation of the existing treaties which would be impermissible under the standard interpretive principles of international law. This argument was rejected by the US and Canada.

<sup>55</sup> UNCITRAL, Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-eighth session (New York, 4-8 February 2013), UN Doc. A/CN.9/765, paras 75-78.

<sup>56</sup> Given the highly charged political climate surrounding the negotiation of investment treaties at present, the prospects do not seem high.

to a lesser extent, under ICSID. All of this readily available, accessible, and useful information adds up to a sizeable body of public knowledge. It is a limited body, to be sure, and perhaps difficult for the non-specialist to grasp, but it is significant nonetheless.

B. Semi-transparent aspects of the IIL regime (things most people could piece together if they really wanted to)

So much for the generally known aspects of the IIL regime. A more interesting category comprises things one *could* know about the international investment law system if only one tried a little harder. I label such aspects of the IIL system ‘semi-transparent’ because – although the raw information is out there – it is not readily available in a form that is useful to interested stakeholders. This information comes in two basic types.

1. Information that is unnecessarily difficult to obtain

This type encompasses information which is public in principle but which can only be accessed through opaque or unduly onerous procedures. The core problem, for purposes of my working definition of transparency, is availability. To take an example, under article 102 of the United Nations Charter, UN member states are required to deposit international treaties with the UN Secretariat, which must, in turn, publish them.<sup>57</sup> Where this is done, the treaties soon become available for free download through the UN Treaty Series website and, in the case of investment treaties, the online UNCTAD database.<sup>58</sup>

Yet many states are delinquent in notifying their investment treaties to either the UN Secretariat or UNCTAD.<sup>59</sup> In 2009, when a handful of South African civil society organizations sought to review two treaties under which some European investors had challenged a portion of South Africa’s Black Economic Empowerment legislation,<sup>60</sup> they found themselves unable to locate the treaties. To obtain them, the organizations had to lodge an application under South Africa’s Promotion of Access to Information Act – an efficacious but time-consuming administrative process.<sup>61</sup> Even today, more than three years after the South African government launched a public review of its investment treaty program, only 21 of South Africa’s reported total of 41 signed BITs are available on the UNCTAD website. This amounts to a 51% disclosure rate.<sup>62</sup>

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<sup>57</sup> Arguably this duty is not absolute, as many inter-state agreements on military cooperation, intelligence gathering, etc routinely go unpublished. But the confidentiality rationales applicable to such agreements seem inapposite in the case of economic treaties. Indeed, a major reason for the creation of the Bretton Woods institutions was to remove inter-state economic relations from the realm of secretive and de-stabilizing political wrangling by integrating them into an open and orderly international system of regulation.

<sup>58</sup> See [http://www.unctadxi.org/templates/DocSearch\\_\\_\\_779.aspx](http://www.unctadxi.org/templates/DocSearch___779.aspx). UNCTAD does not rely solely on the UN Secretariat for its data. It also directly solicits the responsible governmental agencies within each UN Member country on an annual basis, requesting a complete listing of each state’s investment treaties.

<sup>59</sup> And in fulfilling similar obligations under domestic law.

<sup>60</sup> *Piero Foresti and Others v. The Republic of South Africa*, ICSID Case No. ARB(AF)/07/01, Award, (4 Aug 2010), paras 27-29.

<sup>61</sup> One wonders how the European investors in *Piero Foresti* came to possess copies of the treaties. Perhaps they had been published in the domestic governmental register of one of the investors’ home countries.

<sup>62</sup> It may be that the majority of the undisclosed treaties are not yet in force, having been signed but not ratified. If so, this offers scant comfort to stakeholders who wish to comment on whether those treaties *should* be ratified – a

It is possible, of course, that South African practice is anomalous.<sup>63</sup> But it must be noted that South Africa's treaty partners in this episode – Italy, Belgium, Luxembourg, and the Netherlands – had also failed to submit the treaties to any international body.<sup>64</sup> And given the capacity constraints faced by many developing country governments and the political disincentives to disclosing potentially unpopular treaties, it seems likely that at least some other countries have likewise failed to make all existing investment treaties internationally available. The magnitude of the gap is probably not as negligible as many would presume.<sup>65</sup> Whatever the number of non-notified treaties may be, the IIL regime fails to meet the availability requirement of transparency in respect of this portion of its textual underpinnings.

## 2. Information that is difficult to make use of

A second type of semi-transparent information consists of that which is not fully transparent because it fails to satisfy contemporary standards of usefulness. It is here that the open-textured adjectives from my working definition of transparency make their entrance, calling for an evaluation of what constitutes 'adequate', 'accurate', 'accessible', and 'relevant' information. Some concrete examples will help clarify the dilemmas raised by this type of semi-transparent information.

Suppose one wanted to know how median arbitration costs or length of proceedings at ICSID compared to those for comparable cases administered under the UNCITRAL or ICC rules. Most arbitral institutions either don't collect such information or don't make it public.<sup>66</sup> One would need to download all of the available cases from a selection of websites, manually search through each one for relevant passages, and then construct a database to analyze the information. This is doable but highly labor-intensive.<sup>67</sup> Yet this information is relevant to the public, since the cost of conducting investor-state arbitration proceedings is paid, at least in part, out of the government fisc.<sup>68</sup>

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desire which seems particularly reasonable in respect of treaties that were originally negotiated without any public comment or parliamentary input.

<sup>63</sup> South Africa may have had a special incentive to withhold publication of its other treaties so as to dissuade other potential challenges to its Black Economic Empowerment policies.

<sup>64</sup> The two missing treaties have since been uploaded to the UNCTAD website.

<sup>65</sup> UNCTAD officials were not at liberty to provide an official estimate. But sources familiar with UNCTAD's methodology, including country response rates and various political considerations hampering data collection, suggest that UNCTAD's database (the most comprehensive available) is most likely 'significantly incomplete, perhaps on the order of 30% missing', particularly as regards signed-but-not-yet-ratified treaties.

<sup>66</sup> ICSID, for example, publishes a biannual statistical update disclosing basic information concerning its case load (eg number of claims registered and their geographic distribution). See 'ICSID Caseload – Statistics', available at: <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics>. Other institutions issue similar reports.

<sup>67</sup> No doubt this is why such research is presently performed only by those with a strong incentive to appropriate the information in some fashion – whether for financial gain (law firms), personal prestige (academics), or ideological influence (civil society organizations, including business lobbies).

<sup>68</sup> Even where no damages are awarded, the costs of the arbitration are often divided between the disputing parties unless one side has engaged in frivolous or vexatious behavior. For further detail, see Susan Franck, 'Rationalizing the Costs of Investment Treaty Arbitration', 88 *Washington University Law Review* 769 (2011).

Similar challenges face anyone wishing to review qualitative or quantitative information concerning: key aspects of institutional functioning within the IIL regime (including ethical rules and conflict standards applied); prior disputes (claims and outcomes, trends in interpretation, splits in the jurisprudence, areas of evolving consensus); funding sources (public, private, and third-party); the arbitrators who decide investor-state disputes (their backgrounds, training, areas of expertise, scholarly publications, record of previous arbitral appointments and decisions); etc.

All of these facets of the IIL regime are relevant to states, to investors, and to the public at large. They provide important information not only on the interrelationship between states' international obligations to foreign investors and the scope of their domestic regulatory powers, but also about the integrity and efficacy of the dispute resolution system which determines where these lines are drawn. The difficulty with this type of information is that it's not clear who should bear the burden of packaging it in ways that prove useful to interested stakeholders. Moreover, the packaging exercise itself can raise transparency concerns. There is a fine line between disclosure and marketing. This is especially true where pre-digested information is selectively released while the underlying raw data is withheld.<sup>69</sup>

### C. Non-transparent aspects of the IIL regime (things the general public doesn't know)

By definition, this category presents the greatest descriptive challenge, but thinking through the problem conceptually can provide some starting points for the inquiry. Here again, I divide the non-transparent aspects of the IIL regime into types. I employ the term 'public' to refer to anyone who is unable to access the relevant information independently of any privileged, confidential, or contractual relationship and independently of any personal or professional acquaintance with a person who stands in such a relationship.<sup>70</sup>

#### 1. Things the public has no right to know

Paradigmatic examples within this grouping include: trade secrets, confidential business information, state secrets, information protected by professional or other legal privilege, etc. Notwithstanding occasional alarmist protestations to the contrary, such information poses no special difficulties for international investment law.<sup>71</sup> Both the general principles of international law and the various sets of arbitral rules employed in investor-state dispute resolution allow for the protection of legally privileged information.<sup>72</sup> Within specific investor-state disputes, for example, protected information can be presented *in camera*, scrubbed from publically published documents, and otherwise dealt with using the usual methods well-known to

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<sup>69</sup> One should never presume that non-specialists are incapable of processing specialized information.

<sup>70</sup> This excludes, for example: parties to particular disputes; their counsel; arbitrators; arbitral law clerks; legal and administrative personnel of arbitral institutions; and persons who, by virtue of their relationships with any of these individuals, may become aware of the information.

<sup>71</sup> This is not to say that privilege questions will not be contested, only that their resolution is no more difficult in international investment law than in any other type of law.

<sup>72</sup> Even where arbitration rules do not make these mechanisms explicitly available, arbitrators retain the option to employ them under procedural discretion provisions. See e.g. article 17(1) of the 2010 revised UNCITRAL arbitration rules ("Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate...").

most domestic legal systems, as illustrated by current NAFTA practice.<sup>73</sup> As such, the topic of protected information enters the transparency debate within international investment law principally as a red herring. I therefore set it aside.

2. Things the public has reason to believe it should know, but cannot find out

The foregoing discussion has already hinted at some of the major contenders here. The low-hanging fruit is the subset of investment treaties that have neither been published domestically nor internationally and that – unlike the South African treaties described above – cannot be obtained through compulsory administrative processes. Here again, one can only speculate as to the number of such treaties,<sup>74</sup> yet their relevance to the public requires no speculation. Investors have an interest in knowing what protections they enjoy within the territory of foreign states, and citizens have a right to know how the scope or price of their governments’ regulatory powers might be affected by the treaties.

Investors, states, and the general public have an equally strong interest in knowing how tribunals conduct investor-state arbitration proceedings and how they interpret broadly applicable international investment texts in practice. Whether one looks at the question from the perspective of the rule of law, access to justice, public accountability,<sup>75</sup> or otherwise, it is difficult to conceive a convincing reason why statute- or treaty-based investor-state arbitration proceedings should not be conducted openly and transparently, subject to necessary measures for the protection of privileged information.<sup>76</sup> The worry that transparent proceedings might ‘re-politicize’ investor-state disputes seems misplaced in an era when public concern over intrusion by ‘secret tribunals’ into sovereign regulatory powers is itself politicizing the disputes and generating a popular backlash against the entire IIL regime.<sup>77</sup> Indeed, a growing number of commentators from the commercial arbitration world appear to accept that transparent proceedings should be the norm in investor-state disputes.<sup>78</sup> Some even suggest that many investors would happily accept this if they could obtain the assurance of fairer and more predictable dispute settlement in exchange.<sup>79</sup>

Yet under the most recent versions of the UNCITRAL (2010), ICC (2012), SCC (2010) and LCIA (1998) arbitration rules, there is no institutional publication of any information pertaining to the conduct of an arbitration proceeding unless both disputing parties agree otherwise.<sup>80</sup> Thus,

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<sup>73</sup> Mark Kantor, ‘The Transparency Agenda for UNCITRAL Arbitrations, Looking in All the Wrong Places’, Working Paper, presented at the NYU Investment Law Forum, February 7, 2011, available at: <http://www.iilj.org/research/documents/IF2010-11.Kantor.pdf>. pp. 18-20

<sup>74</sup> See above notes 62 - 64.

<sup>75</sup> Some tribunals have explicitly recognized such interests. See eg *Aguas Argentinas SA, Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v the Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae (19 May 2005), paras 19-23.

<sup>76</sup> Purely contract-based claims may present different considerations.

<sup>77</sup> Michael Waibel et al (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer, 2010).

<sup>78</sup> Rogers, *Transparency in International Commercial Arbitration*, p. 1308 (stating, ‘the right of public access seems self-evident in the context of WTO proceedings and investor-state arbitration, where transparency is important to the institutions’ perceived legitimacy’).

<sup>79</sup> Kantor, *UNCITRAL Transparency*, pp. 5-6.

<sup>80</sup> Estimates as to the percentage of unpublished treaty-based investor-state awards range from five to 25%.

not only the outcome but the very existence of an investor-state dispute may never be disclosed.<sup>81</sup> Further, the confidentiality provisions of these rules prohibit tribunals from ordering the disclosure of the disputing parties' pleadings and evidence without the parties' consent.<sup>82</sup> Some even prohibit the parties themselves from disclosing any information relating to the arbitration unless both provide written consent or unless one party is under a legal obligation to disclose.<sup>83</sup> Interim orders, settlement agreements, and orders relating to discontinuation or withdrawal of claims therefore likewise remain non-public.<sup>84</sup>

Of course, information about arbitral proceedings sometimes makes its way into the public domain notwithstanding the absence of any formal transparency requirement. One of the parties to a dispute may have an incentive to unilaterally disclose an arbitral award in order to tout its victory. Or disclosure may be legally required, as in the case of reporting requirements imposed by securities and exchange commissions or domestic laws requiring publication of all government budget expenditures (including legal claims paid). In cases subject to the New York Convention, obtaining satisfaction of an award often requires presenting it for recognition and enforcement to the domestic courts of some enforcing state. Domestic courts take judicial notice of relevant facts in the course of such proceedings, sometimes even placing the entirety of a previously unpublished award on the record. As to the disputing parties' pleadings, a noteworthy development recently occurred under the ICSID Additional Facility rules, which (like ICSID's primary arbitration rules) neither mandate nor prohibit disclosure of parties' pleadings. In a case attracting widespread civil society interest, the tribunal in *Piero Foresti v. South Africa* ordered the disputing parties to disclose their written pleadings to five non-governmental amicus petitioners even over the claimants' objections.<sup>85</sup>

Yet all such disclosures remain discretionary and are rarely complete. No binding directive requires anyone to publish information within this category, and the public has no effective means of demanding access to it, since the information's very existence may be unknown. Thus, despite the occurrence of substantial leakages, these aspects of the IIL regime remain largely non-transparent.

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<sup>81</sup> For a critical appraisal of the ICC's newly revised rules, see Gus van Harten, 'A total lack of transparency: Why responsible companies and governments should avoid the revised ICC rules in arbitrations involving states', *Canadian Lawyer Magazine* (24 Oct 2011), available at: <http://www.canadianlawyermag.com/3912/a-total-lack-of-transparency.html>.

<sup>82</sup> See eg article 46 of the SCC rules.

<sup>83</sup> See eg article 30.1 of the LCIA rules. Even where the rules do not prohibit parties from disclosing their own pleadings or those of the opposing party, this is rarely done in practice. Unilateral disclosures tend to annoy tribunals (who like to maintain control over such decisions), which may indirectly diminish the party's prospects of success. They could also subject the disclosing party to further legal claims, e.g. in the event that it inadvertently discloses confidential business information or trade secrets.

<sup>84</sup> In a notable development, the LCIA recently published scrubbed abstracts of decisions on challenges to arbitrators under the LCIA rules in *Arbitration International*, vol. 27, no. 3, 2011. Challenge decisions are also regularly published in NAFTA and ICSID proceedings but remain confidential in many other institutional settings. See Gabriel Bottini, 'Should Arbitrators Live on Mars? Challenge of Arbitrators in Investment Arbitration', *Suffolk Transnational Law Review*, 32 (2009), p. 341.

<sup>85</sup> *Piero Foresti and Others v. The Republic of South Africa*, ICSID Case No. ARB(AF)/07/01, Award, (4 Aug 2010), paras 27-29. Note, however, that the disclosures never actually occurred, because the claimant opted to discontinue the claim before (or rather than?) releasing the details of its claim to the public.

3. Things the public might not realize it doesn't know

I broach this final category not as one claiming to unveil some special body of insider knowledge, but rather from the perspective of an avid student of international investment law and a close observer of the regime's functioning. One way to generate useful questions is to consider the various features that make highly respected domestic judicial systems function well, ask what counterparts these mechanisms may have in the international investment arbitration world, and then evaluate whether the mechanisms are functioning in a transparent manner in the latter context, given the differences between the two systems. With this in mind, I consider two primary types of information under this heading.

a. Unwitting knowledge deficits

This type comprises things the public doesn't know only because no one has ever thought to ask. The individuals who belong to the IIL epistemic community might describe such information as 'open secrets'. To those standing outside of this community, however, it is entirely opaque. Much of the information chronicled in Dezalay and Garth's classic book, *Dealing in Virtue*,<sup>86</sup> which helped to demystify the international commercial arbitration world, is of this type.

Within the investment arbitration world, unwitting knowledge deficits abound in areas of practical importance to the general public. One topic of current debate among IIL practitioners concerns whether certain very active investment arbitrators are overextended. Commentators worry that heavy arbitration dockets proliferate scheduling conflicts among three-person arbitral panels, which in turn draws out the arbitration proceedings, delays drafting, and contributes to the growing concern that the entire process is too expensive.

It should come as no surprise that the investment arbitration community has developed a panoply of solutions to this dilemma. Some arbitrators open up boutique arbitration law firms and employ full-time, salaried associates to handle all manner of tasks behind the scenes. Others hire law student research assistants whom they pay at pre-set hourly rates. Still others engage no assistants of their own but instead farm out various tasks to the legal counsel<sup>87</sup> of whichever institutional secretariat is administering the arbitration at-hand. The specific arrangements may vary from one arbitration to the next, even in respect of the same arbitrator applying the same set of arbitration rules and under the administrative auspices of the same arbitral institution.

There is nothing inherently untoward in any of these practices. Most governments provide domestic judges with law clerks and other types of legal and administrative assistants to help judges handle more cases in a shorter period of time. This does not impact the authoritativeness of the ultimate decisions, which remain the responsibility of the decision-makers themselves irrespective of whatever involvement their underlings may have had along the way. But unlike the judicial setting, arbitrators are hired for their personal expertise and receive hefty sums for

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<sup>86</sup> Yves Dezalay & Brian Garth, *Dealing in Virtue, International Commercial Arbitration and the Construction of a Transnational Legal Order*, (Chicago: University of Chicago Press, 1996).

<sup>87</sup> Often the person designated on the award as the tribunal's secretary.

each day spent on a case.<sup>88</sup> The manner in which arbitrators make use of associates, assistants, and institutional secretariat personnel therefore has direct financial implications for taxpayers whose governments become embroiled in investor-state disputes, for which the tribunal's costs alone have sometimes exceeded US \$10 million.<sup>89</sup> It could be that arbitrators who perform every last scrap of work by themselves end up taking longer and costing disputing parties more than those who outsource a significant number of tasks to junior persons (and bill fewer arbitrator hours as a result). Or the converse might be true.

The difficulty, from a transparency standpoint, is that it is not presently possible to study the cost or quality implications of different models. While some arbitrators' assistance arrangements are disclosed in writing before the disputing parties finalize their arbitrator appointments, many are not. And even when they are disclosed in advance to the disputing parties, the information is not often made available to the public at large.<sup>90</sup>

In short, the great diversity and general opacity of the practices, combined with the lack of critical inquiry into their financial and ethical implications, turns this into an unwittingly non-transparent feature of the IIL regime. Similar examples could be given in respect of the inner workings of arbitral institutions, the ethical practices followed by counsel and expert witnesses, and numerous other topics debated within the IIL world.<sup>91</sup>

b. Intentional/strategic knowledge deficits

The information falling within this final class consists of things at least some people don't want the general public to know because they have strong incentives to keep the information private. These tidbits are different from the previous category in that they come to light, if at all, only when someone from inside the knowledge-holding community either slips up or revolts.

One high-profile example is the separate opinion penned by arbitrator Jan Hendrik Dalhuisen in the *Vivendi II* annulment decision.<sup>92</sup> Dalhuisen chastised the ICSID Secretariat for attempting to act as a 'fourth member' of the tribunal even to the point of approaching individual tribunal members 'informally, with a view to amending the text' of the tribunal's award.<sup>93</sup> He further lambasted the Secretariat's mistaken notion that it could act as 'the voice of a *jurisprudence*

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<sup>88</sup> In ICSID administered cases, the standard rate is \$US 3000.00 per day, although this is frequently negotiated up in practice. ICSID Schedule of Fees (Jan 1, 2008), para 3.

<sup>89</sup> This excludes the disputing parties' own legal costs, counsel's fees and any substantive damages as may be awarded by the tribunal on the merits. See figures cited in Franck, above note 68, p. 785 and references cited therein. Note that the arbitration costs must be paid irrespective of whether a claim succeeds or fails.

<sup>90</sup> The ICC rules are unique in requiring assistants' fees to be deducted from (rather than charged in addition to) the institutionally-set schedule of arbitrators' fees. Even so, the proportion of assistant to arbitrator fees need not be disclosed.

<sup>91</sup> The contents of various sets of existing and proposed ethical guidelines are well known, but this tells us little about which guidelines are followed in practice. For an overview, see Omar García-Bolívar, 'Comparing Arbitrator Standards of Conduct in International Commercial, Trade and Investment Disputes', in *AAA Handbook on International Arbitration*.

<sup>92</sup> *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Republic of Argentina*, ICSID Case No. ARB/97/3 (Annulment Proceeding) (10 August 2010), Additional Opinion of Professor JH Dalhuisen.

<sup>93</sup> *Ibid*, para 9.

*constante*’ which somehow gave it an ‘autonomous right of intervention’,<sup>94</sup> notwithstanding the fact that international investment arbitration has no doctrine of formal precedent and that the ICSID arbitration rules mandate the confidentiality of a tribunal’s internal deliberations. Several prominent investment arbitrators were quick to contest Dalhuisen’s depiction of ICSID’s general practices, which raises questions as to the generalizability of his observations. Even so, his remarks illustrate the type of information which could potentially tarnish the reputations or livelihoods of those in the know and which may be, for that reason, kept tightly under wraps.

Other examples prove less unseemly when viewed through the comparative lens of domestic judicial practice. For instance, the international law firms with the largest and most lucrative investment arbitration practices have amassed a great body of knowledge over time concerning the personal characteristics of individual arbitrators, including: which ones are easiest to work with; which are most effective at persuading their co-arbitrators; which are most and least likely to keep a case on schedule; etc. To some extent this knowledge is unfairly augmented by the firms’ access to unpublished arbitral awards, already discussed above; the remainder can be chalked up to pure experience, in the same manner that domestic trial lawyers become familiar with the personal characteristics of judges presiding in specific jurisdictions over time. Here again we encounter a non-transparent body of information which the information holders have a clear financial incentive not to disseminate broadly – it gives them an advantage when potential clients are looking to hire counsel. Yet few would suggest that law firms should be forced to disclose, in the name of transparency, the product of their lawyers’ cumulative experience. Clearly, some normative guidance is needed. It is to this quest that the next part turns.

### **III. Some considerations for future prescriptive analyses**

Given what we now know about the major transparent, semi-transparent, and non-transparent aspects of the international investment law system, how should we think about transparency as a norm within that system? Three things are certain. First, the IIL regime’s existing transparency practices are diverse. Second, the regime is too complex, decentralized, and multi-faceted to allow for the simple implementation of transparency principles across-the-board. Third, replacing this complex system with a simpler, more unified one from the ground up (as some have suggested) remains politically out of reach, at least for the foreseeable future.<sup>95</sup>

Yet throwing in the towel hardly seems an appropriate response. A better approach would be to think through the six interrelated prongs of the IIL regime identified at the outset – namely, its textual, substantive, institutional, jurisprudential, political, and sociological components – and consider how to leverage each of these in ways that promote the adoption of stakeholder-sensitive transparency practices within each corner of the system. To help kick-start the conversation, I offer here a roadmap of possible strategies to explore.

#### **1. Moderation**

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<sup>94</sup> Ibid, para 16.

<sup>95</sup> For a catalog of failed attempts to create a multilateral investment regime, see Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties* (Kluwer Law International, The Netherlands, 2009), ch. 1.

Productive debates about how to implement appropriate transparency practices will continue to falter for as long as vocal segments of the IIL epistemic community cling to the masts of sinking ships. The time has come to deal in facts. The continual demonization of investment arbitrators and practitioners by some in the NGO community is as unhelpful as the irrational insistence – by some in the arbitral community – that arbitral proceedings cannot be conducted transparently without compromising investors’ confidential business information. Rather than beginning at opposite poles, both sides would do better to work outwards from their common concern that the IIL regime’s transparency deficiencies are undermining its legitimacy and credibility.

## 2. Innovation

The North American experience with the IIL regime has shown that complexity need not be a recipe for paralysis. The United States and Canada have found ways to respond to public concerns over opaque investment treaty drafting practices by developing new model BIT processes that allow the public to monitor and participate in drafting debates. Likewise, the three NAFTA state parties were able to make transparent proceedings the default for investor-state claims under NAFTA by issuing an authoritative ex-post interpretation of the treaty. Prospective innovations of this kind may be resisted at first, but with time they gain both momentum and acceptance. Innovation thus represents a viable strategy for states in concluding, re-negotiating, and authoritatively interpreting their investment treaties and statutes,<sup>96</sup> particularly where civil society organizations actively support these efforts.

## 3. Cooperation

Some of the regime’s problems of information usability and accessibility are already being partially addressed by a patchwork of voluntary efforts. The ICSID Secretariat releases a semi-annual report detailing statistics on its activities, including cases registered and administered, sources of investor-state claims, regional and sectoral distribution of claims, arbitrator countries of origin, and dispute outcomes by type.<sup>97</sup> This is by far the most comprehensive of the institutionally compiled reports.<sup>98</sup> Yet it omits key items of interest, such as length of proceedings, administrative fees, tribunal costs, and amounts claimed and awarded.

Scholars are increasingly stepping in to fill the gaps.<sup>99</sup> The younger generation of scholars, in particular, is spearheading a wave of innovative efforts to improve the transparency of information on: investment treaties and investor-state contracts,<sup>100</sup> the selection and performance of arbitrators,<sup>101</sup> trends in arbitral jurisprudence,<sup>102</sup> and the ways in which normative values

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<sup>96</sup> Anthea Roberts, ‘Power and Persuasion in Investment Treaty Arbitration: The Dual Role of States’, *American Journal of International Law*, Vol. 104, p. 179 (2010).

<sup>97</sup> See, most recently, The ICSID Caseload – Statistics (Issue 2012-1), at: <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&CaseLoadStatistics=True&language=English31>.

<sup>98</sup> The ICC, by contrast, publicly reports only the annual percentage of ICC administered cases that involved a state party, without further detail.

<sup>99</sup> Susan Franck has been a leader in this effort. See eg above, note 68.

<sup>100</sup> See above, notes 9 and 36.

<sup>101</sup> Sergio Puig, ‘Social Capital in the Arbitration Market’, *European Journal of International Law*, vol. 25 (forthcoming, 2014) (using network analytics to map the social networks of investment arbitrators); Michael

impact perceptions of fairness in investor-state arbitration proceedings,<sup>103</sup> among other topics. All of these efforts remain hampered by lack of access to unpublished data, but they do promise to improve the accessibility and salience of what data is presently available. UNCTAD, meanwhile, has also been proactive in disseminating data on investment treaties and the development impacts of different types of investment promotion strategies.<sup>104</sup> Given its mandate as a ‘neutral’ intergovernmental organization, it may be best placed to play a coordinating role among the various academic, institutional, and governmental efforts to overcome the IIL regime’s deficiencies of information usability, accessibility, and relevance.

#### 4. Reputation

One often overlooked feature of the IIL regime is the extent to which it depends upon reputation for its survival. Both investment arbitrators and the arbitral institutions that support the industry have a vested interest in maintaining their reputations for impartiality and fair dealing lest investors or states decide to eschew their services. This suggests that many issues of the ‘unwitting knowledge deficits’ sort might be brought to light by a series of new Dezalay and Garth type studies focusing specifically on investment arbitration and taking account of its unique public dimensions. This approach could prove particularly fruitful in respect of informational deficiencies that touch upon ethical questions, such as arbitrator conflict disclosures, scheduling practices, policies on ex parte communications, etc.<sup>105</sup> One drawback is that many of the information holders may be reluctant to speak candidly on the record. Still, anonymous information is better than no information. And as scholars shed more empirical light on various aspects of the regime’s functioning, the epistemic community’s ‘inner circle’ will have greater incentives to discuss these openly.

#### 5. Competition

A final consideration to bear in mind is the degree to which competitive dynamics drive transparency practices within the IIL regime. This factor is especially relevant for institutions. Of the six arbitration-related institutions known to play the largest roles in the world of investor-state dispute resolution, three are intergovernmental in nature (ICSID, UNCITRAL, and the PCA) while three are private bodies (the SCC, ICC, and LCIA). Many of the 3000-plus existing

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Waibel and Yanhui Wu, ‘Are Arbitrators Political?’, Working Paper (on file with author) (examining empirical trends in arbitral outcomes as a function of arbitrators’ backgrounds).

<sup>102</sup> Gus Van Harten, *Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration*, (forthcoming, Oxford University Press) (using content analysis to examine trends in arbitral reasoning). Susan Franck also makes her data on the evolving investor-state arbitral jurisprudence publicly available at: <http://law.wlu.edu/faculty/page.asp?pageid=1185>.

<sup>103</sup> Daniel Behn, a PhD candidate at the University of Dundee, is using Q-survey methodology to study the ‘Subjectivity of Values in Legal Discourse: Configurative Jurisprudence, Q Methodology, and the Fairness of Investment Treaty Arbitration’.

<sup>104</sup> See the various publications listed at:

<http://www.unctad.org/en/pages/DIAE/International%20Investment%20Agreements%20%28IIA%29/International-Investment-Agreements-%28IIAs%29.aspx>.

<sup>105</sup> For an overview of some key ethical issues and ethics guidelines, see Omar E. García-Bolívar, ‘Comparing Arbitrator Standards of Conduct in International Commercial, Trade and Investment Disputes’, in *AAA/ICDR Handbook on International Arbitration Practice* (Juris, 2010).

investment treaties allow investors, at their sole option, to select among several possible institutional settings when initiating arbitration against a host state.<sup>106</sup> Therefore, to the extent that institutional transparency practices may impact upon investors' forum preferences, arbitration-related institutions have strong incentives to adopt practices that will maximize their chances of attracting investor-state claims. It remains unclear whether the institutions' best strategy will be to harmonize or to differentiate in the future. Much will depend upon the degree to which states signal their continued willingness to arbitrate investor-state disputes under non-transparent procedural rules as well as the reputational costs exacted by civil society campaigns against 'secretive' arbitral institutions. This underscores how the five strategies outlined in this section will be mutually determinative in practice.

#### **IV. Whence and whither transparency in international investment law? The good, the bad, and the murky.**

Transparency within international investment law has come a long way in a short period of time. In the pre-NAFTA era of only 18 years ago, it seems fair to say that opacity was the norm and transparency the exception. Today the situation is mixed. The investment treaty-making process has become much more transparent, particularly in the developed world but also increasingly in democratic countries within the developing world. Investor-state arbitration has likewise become more transparent on the whole. Thanks to the transparency reforms enacted in the NAFTA and ICSID contexts, the majority of investor-state arbitral awards are now publicly available. Given ICSID's apparent sensitivity to stakeholder perceptions of its legitimacy<sup>107</sup> and its demonstrated responsiveness to arbitrator-led transparency innovations in the past,<sup>108</sup> the smart money might be on further movements in the direction of an increasing institutionalization of transparency requirements at ICSID.

The fact that arbitrators have at times been the progenitors of transparency innovations is also encouraging. UNCITRAL's recent review of the appropriate practices to apply in investor-state cases shows that it, too, is sensitive to the growing demand for transparency within the regime – at least on a prospective basis. Meanwhile, more and more scholars are paying attention to transparency problems, and civil society critiques continue to add urgency to the debate. All of these developments are to be lauded.

The bad news is that, despite much progress, many corners of the IIL regime remain shrouded in darkness. From unpublished treaties and arbitration awards to basic information concerning costs and ethics, semi-transparencies and non-transparencies abound in areas that are of real

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<sup>106</sup> This stands in contrast to investor-state contracts, whose dispute resolution clauses tend to be symmetrical. But treaties, not contracts, form the basis for most contemporary investor-state claims. See e.g. *The ICSID Caseload – Statistics*, Issue 2012-1, p. 10 (showing treaty-based claims made up 80% of total ICSID claims through end of 2011).

<sup>107</sup> See ICSID Secretariat, Discussion Paper, 'Possible Improvements of the Framework for ICSID Arbitration' (22 Oct 2004), available at: <http://icsid.worldbank.org/ICSID/ICSID/ViewNewsReleases.jsp> (proposing changes to the ICSID arbitration rules and the possible creation of an ICSID appellate body in response to concerns over transparency, third-party participation, and inconsistent arbitral awards).

<sup>108</sup> ICSID's 2006 rule revisions included a new rule explicitly authorizing written amicus submissions after two ICSID tribunals had already exercised their discretionary authority to do so. See Rule 37, ICSID Arbitration Rules; Rule 41(3), ICSID Arbitration (Additional Facility) Rules.

importance to the public. The complexity of the IIL regime compounds and sometimes even creates these problems, making it difficult to remedy the regime's transparency deficits on anything other than a piecemeal basis.

We are left with a broad swath of murky territory in which it is not yet possible to know whether transparency can or will prevail. Not all of the possible strategies have yet been attempted, let alone exhausted. How much of the presently non-transparent information to which the public should have access can be made transparent simply by asking for it? How much of the information which is currently available but not useful can be rendered fully transparent by pursuing cooperative data analysis arrangements between governments, institutions, and scholars? We will never know until we try. For now, the ultimate fate of transparency as an overarching norm within international investment law remains to be determined. Only time will tell whether public support for the international investment law regime will rise or fall alongside of it.