

## Openness in International Investment Law: Too Much of a Good Thing?

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ABSTRACT: In recent years, investment treaty practice and arbitral case law have increasingly recognized government transparency as an obligation of international investment law. Yet, there could hardly be less of a consensus regarding what level of transparency is required, with case law ranging from one strand requiring “total transparency” to another merely prohibiting “complete lack of transparency”. This apparent paradox seems to be about to change. Some of the most recent treaty practice appears to endorse the latter, restrictive interpretation of transparency. How come? This article sets forth two arguments: First, transparency is in part a binary concept, similar to many other familiar and related legal concepts, such as good faith, lack of arbitrariness and due process, and that transparency could thus, without contradiction, be said to be either “total” or “completely lacking” and nothing in between. Second, restrictive case law and the most recent treaty practice refuses to recognize as a legal requirement the concept of transparency as denoting a gradual quality of the law and of the administration of law.

KEYWORDS: *Transparency; Investment Arbitration; Rule of law; Normativity*

UNIVERSITY OF BOLOGNA LAW REVIEW

ISSN 2531-6133

[Vol.3:2 2018]

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## 1. INTRODUCTION

In the last decade, investment treaty clauses relating to government transparency have become increasingly common, as the proportion of treaties signed with such clauses has grown exponentially. According to U.N.C.T.A.D.,<sup>1</sup> 82% of all treaties with investment provisions signed in 2015 contained transparency clauses, compared to 50% for the first half of the decade, up from 20% in the previous decade and 9% in the period since records started being collected until the end of the last century. A closer look reveals that an inflexion point occurred around 2014, when treaties signed with such clauses surged to 71%, up from 50% the year before. The proportion has remained at or above that level.

Recent years have also witnessed claims relating to government transparency being asserted with increasing frequency in investment arbitration, resulting in a steady stream of arbitral awards. So far, thirty odd such cases have been decided and published, worth more than \$19 billion in damages claims, of which 69% have been decided in favor of investors, resulting in more than \$3 billion worth of damages awarded.<sup>2</sup>

While it figures prominently in both treaty and arbitral practice, there is a great divergence of opinion on the exact meaning of transparency as a substantive requirement. Early cases derived a requirement to act “totally transparently”.<sup>3</sup> By contrast, another early strand of cases was more restrictive

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<sup>1</sup> U.N.C.T.A.D. Retrieved from [investmentpolicyhub.unctad.org](http://investmentpolicyhub.unctad.org) (Jan. 18, 2017). (Including bilateral investment treaties (B.I.Ts.), other international investment agreements (I.I.As.), free trade agreements (F.T.As.) and other treaties with investment provisions (T.I.Ps.)).

<sup>2</sup> See U.N.C.T.A.D. Retrieved from [investmentpolicyhub.unctad.org](http://investmentpolicyhub.unctad.org) (Jan. 24, 2017). Most of the cases relate to events that took place when express transparency clauses were not nearly as common as they are today. In only half of the cases the relevant treaty included such a clause, but they were all of early types that were too narrow to cover the alleged transparency breach, and, in half of these cases in turn, the transparency clause was not even subject to investor-state dispute settlement. Instead, the cases so far have characterized the lack of transparency as a breach of the F.E.T. standard. The focus here is therefore on transparency as an element of the F.E.T. standard.

<sup>3</sup> Técnicas Medioambientales Tecmed, S.A. v. United Mexican States, I.C.S.I.D. Case No. ARB(AF)/00/2, ¶154 (May 29, 2003).

and merely identified a requirement not to act with “complete lack of transparency”.<sup>4</sup> This seemingly diametrical divergence of views has yet to be decisively resolved.

Against this backdrop, a restrictive approach can be discerned from recent treaty practice. A notable step in that direction is the Canada-EU Comprehensive Economic and Trade Agreement (hereinafter C.E.T.A.), which introduced a “closed-end” list of what constitutes a fair and equitable treatment (hereinafter F.E.T.) violation, comprising, among other things, a “fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings”. These words appear to be directly drawn from the restrictive strand of case law.

So, what exactly is the meaning today of government transparency as an element of the F.E.T. standard? How do the different notions of transparency, as elucidated within the different strands of case law, relate to each other, and can they be reconciled? How is the recent restrictive trend towards transparency to be understood? These questions are of fundamental importance to states seeking to understand the level of government transparency expected under international investment law and to investors seeking to gauge the nature and extent of the political risk of foreign investment.

To answer these questions, this article proceeds (1) to outline the main strands of arbitral case law with respect to the scope of application of the concept of transparency as an element of the F.E.T. standard (Part II), (2) to conceptualize government transparency as an emanation of the rule of law (Part III), and, finally, (3) to explore the implications of these findings on the interpretation of substantive transparency in international investment law (Part IV).

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<sup>4</sup> *Waste Management, Inc. v. United Mexican States*, I.C.S.I.D. Case No. ARB(AF)/00/3, ¶198 (Apr. 30, 2004).

## 2. THE SCOPE OF APPLICATION OF SUBSTANTIVE TRANSPARENCY AS AN ELEMENT OF FAIR AND EQUITABLE TREATMENT

In the 1980s the language of transparency in international investment law became associated with the requirement to publish laws and regulations pertaining to investments, beginning.<sup>5</sup> A clause entitled “transparency of laws” was introduced in Australia’s first bilateral investment treaty (hereinafter B.I.T.), Article VI Australia-China B.I.T. (1988). A similar clause, although without the “transparency” label, had been a consistent feature of U.S. B.I.T. practice since first introduced in the original U.S. model B.I.T. (1981)<sup>6</sup> and pioneered in the second ever B.I.T. signed by the United States, Article II(10) U.S.-Senegal B.I.T. (1983) in a wording that became standard: “Each Party shall make public all laws, regulations, administrative practices and procedures, and adjudicatory decisions that pertain to or affect investments in its territory of nationals or companies of the other Party.”

The U.S. model B.I.T. was influential for other states’ bilateral negotiations as well, and clauses modeled on its requirement to publish laws and regulations appeared in a number of treaties concluded in the 1980s.<sup>7</sup> By the early 2000s, basic transparency clauses providing for the publication of laws and regulations became increasingly common, and by the mid-2010s they had emerged as a standard clause appearing in the vast majority of new treaties.<sup>8</sup>

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<sup>5</sup> For an account of the emergence of transparency as term used in a figurative sense (i.e. beyond its original meaning in physics and art) describing a concept related to governance, see Greg Michener & Katherine Bersch, *Identifying Transparency*, 18 INFO. POLITY 233, 234-36 (2013), (tracing its current figurative use to an academic article by Danish economist, Knud Erik Svendsen in 1962).

<sup>6</sup> Pre-cursors had existed in the earlier practice of friendship, commerce and navigation treaties (hereinafter FCNs), see e.g., Treaty of Friendship, Commerce and Navigation, U.S.-Republic of China, art. XVII(1), Nov. 4, 1946, T.I.A.S. 1871 and Treaty of Friendship, Commerce and Navigation, U.S.-Nicaragua, art. XV(1), Jan. 21, 1956, T.I.A.S. 4024, but were rare. There appears to be no examples of such clauses prior to the negotiations leading up to the Havana Charter, Article 38 of which included the elaborate blueprint for subsequent treaty practice, which reappeared with minimal changes as General Agreement on Tariffs and Trade art. X, Oct. 30, 1947, 55 U.N.T.S. 194 and is retained in General Agreement on Tariffs and Trade art. X, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187.

<sup>7</sup> See, e.g., Bilateral Investment Treatie, Can.-Phil. , art. XVI, Nov.9, 1995 (earlier Canadian B.I.T. practice had provided for exchange of information between the contracting parties on laws and regulations). A similar provision was later elaborated in the O.E.C.D. draft Multilateral Agreement on Investment. By contrast, transparency provisions of this type were not common in European B.I.Ts. until the E.U. began concluding investment treaties following the Lisbon Treaty. Other states, including Canada, began to include this type of transparency provision from the mid-1990s.

<sup>8</sup> Cf. n2.

Meanwhile, the scope of government transparency clauses has steadily grown wider.<sup>9</sup>

In the early 2000s transparency in arbitral case law began being referred to in abstract as an aspect of the core standards of protection—F.E.T. and the customary international minimum standard of treatment (hereinafter I.M.T.).<sup>10</sup> In all but one case, tribunals have uniformly affirmed such interpretation.<sup>11</sup> By the 2010s, arbitral practice reflected the shared view that transparency had emerged as an essential aspect of the F.E.T. standard, including in cases where such standard applied with reference to the I.M.T. standard.<sup>12</sup> Where tribunals have differed is in the degree of transparency required. Here, two lines of precedent exist. In *Tecmed v. Mexico*, the tribunal concluded that F.E.T. required “total transparency”:<sup>13</sup>

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<sup>9</sup> For a comprehensive review of express treaty transparency clauses, see Jens Hillebrand Pohl, *Substantive Transparency Requirements in International Investment Law*, REVISTA INSTITUTO COLOMBIANO DE DERECHO TRIBUTARIO [REV. ICDT], Nov. 2017, at 179 (Colom.).

<sup>10</sup> See *Metalclad Co. v. United Mexican States*, I.C.S.I.D. Case No. ARB(AF)/97/1, ¶¶76, 88, 99 (Aug. 30, 2000) (set aside by a municipal court noting that “[n]o authority was cited or evidence introduced to establish that transparency has become part of customary international law”, *Mexico v. Metalclad Corporation*, [2001] B.C.S.C. 664, 68 (Can).); see also Emilio Agustín Maffezini v. Kingdom of Spain, I.C.S.I.D. Case No. ARB/97/7, ¶83 (Nov. 30, 2000); *S.D. Myers, Inc. v. Government of Canada*, U.N.C.I.T.R.A.L., Partial Award (Separate Opinion by Dr. Bryan Schwartz, concurring except with respect to performance requirements, in the partial award of the tribunal), ¶¶249–58 (Nov. 12, 2000); *Tecmed*, *supra* note 3, at 154; *Waste Management*, *supra* note 4, at 98; *M.T.D. Equity Sdn. Bhd. and M.T.D. Chile S.A. v. Republic of Chile*, I.C.S.I.D. Case No. ARB/01/7, Award, ¶114 (May 24, 2004); *Occidental Exploration and Production Co. v. Republic of Ecuador*, L.C.I.A. Case No. UN3467, ¶¶184–7 (July 1, 2004); *Saluka Investments BV v. Czech Republic*, U.N.C.I.T.R.A.L., Partial Award, ¶¶307, 309, 360 (Mar. 17, 2006); *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, I.C.S.I.D. Case No. ARB/02/1, Decision on Liability, ¶¶127–31, 137 (Oct. 3, 2006); *Champion Trading Company and Ameritrade International, Inc. v. Arab Republic of Egypt*, I.C.S.I.D. Case No. ARB/02/9, ¶4.3.2 (Oct. 27, 2006). It should also be noted that occasionally transparency has been analyzed indirectly under other principles, such as non-discrimination (*Champion Trading v. Egypt*, above), or arbitrariness, *Parkerings-Compagniet AS v. Republic of Lithuania*, I.C.S.I.D. Case No. ARB/05/8, ¶295 (Sept. 11, 2007).

<sup>11</sup> See *Cargill, Incorporated v. United Mexican States*, I.C.S.I.D. Case No. ARB(AF)/05/2, ¶290 (Sept. 18, 2009).

<sup>12</sup> See *Joseph C. Lemire v. Ukraine*, I.C.S.I.D. Case No. ARB/06/18, Decision on Jurisdiction and Liability, ¶¶284, 418 (Jan. 14, 2010); see also *Frontier Petroleum Services, Ltd. v. Czech Republic*, U.N.C.I.T.R.A.L. (P.C.A.), ¶285 (Nov. 12, 2010); *Ioan Micula and others v. Romania*, I.C.S.I.D. Case No. ARB/05/20, ¶¶530–33 (Dec. 11, 2013); *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, I.C.S.I.D. Case No. ARB(AF)/09/1, ¶¶569–70 (Sept. 22, 2014); *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania*, I.C.S.I.D. Case No. ARB/11/24, ¶¶599, 613–17; *William R. Clayton, Bilcon of Delaware and others v. Government of Canada*, U.N.C.I.T.R.A.L. (P.C.A. Case No. 2009–04), Award on Jurisdiction and Liability, ¶¶442–44 (Mar. 17, 2015), cited favorably by *Mesa Power Group, LLC v. Government of Canada*, U.N.C.I.T.R.A.L. (P.C.A. Case No. 2012–17), ¶¶501–2 (Mar. 14, 2016); *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, I.C.S.I.D. Case No. ARB(AF)/11/2, ¶¶543, 545, 579 (Apr. 4, 2016); *Philip Morris Brand Sàrl (Switzerland) and others v. Oriental Republic of Uruguay*, I.C.S.I.D. Case No. ARB/10/7, ¶¶320, 324, 486 (July 8, 2016).

<sup>13</sup> *Tecmed*, *supra* note 3, at 154.

The Arbitral Tribunal considers that this provision of the Agreement, in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.

By contrast, in *Waste Management v. Mexico (II)* the tribunal held that only “complete lack of transparency” was actionable, and only in the context of an administrative process:<sup>14</sup>

Taken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process.

The *Waste Management* standard has been cited in all cases where the F.E.T. standard is subject to the I.M.T. standard,<sup>15</sup> such as in the U.S. model B.I.T.s 2004 and 2012 and NAFTA. Of all other cases, 67% have followed the *Tecmed*

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<sup>14</sup> *Waste Management*, *supra* note 4, at 98.

<sup>15</sup> *Cargill*, *supra* note 11; *Railroad Development Corporation (R.D.C.) v. Republic of Guatemala*, I.C.S.I.D. Case No. ARB/07/23, ¶1219 (Jul. 29, 2012); *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, I.C.S.I.D. Case No. ARB/11/33, ¶¶384, 396 (Nov. 3, 2015); *Clayton and Mesa Power*, *supra* note 12.

standard.<sup>16</sup> Overall, the choice of precedent is thus correlated with the formulation of the F.E.T. clause, with the exception of the cases involving an autonomous F.E.T. formulation, where the choice of precedent instead is more strongly correlated with outcome. Of such cases, Tecmed was cited in 77% of awards where a transparency breach was found (with the remaining 23% citing Waste Management),<sup>17</sup> compared to only 37% of awards where no transparency breach was found (with the remaining 63% citing Waste Management).<sup>18</sup> This leaves unanswered the question of what motivated the choice of citation; whether it was the choice of cited precedent that determined the outcome, or rather the outcome that determined the choice of precedent. It is indeed statistical revelations such as these that lend credibility to legal skepticist methodologies that focus on analyzing case facts and legal outcomes as a counterfactual to formalist analysis of tribunals' stated judicial reasoning and case citations. It suffices here to re-emphasize that the cases differ only as to the degree of transparency required, not as to the acceptance in principle of transparency as a standard. Thus, although these two discernible strands of caselaw have thus crystallized, each of which focuses, in abstract, on the degree of required transparency, it may be surprising that there is no parallel

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<sup>16</sup> M.T.D., Occidental, and Saluka, LG&E, *supra* note 10; PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey, I.C.S.I.D. Case No. ARB/02/5, , ¶¶173-4, 246 (Jan. 19, 2007); Siemens A.G. v. Argentine Republic, I.C.S.I.D. Case No. ARB/02/8, , ¶¶1297-9, 308 (Feb. 6, 2007); Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan, I.C.S.I.D. Case No. ARB/05/16, , ¶¶584-5; Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, I.C.S.I.D. Case No. ARB/03/29, , ¶¶168-70, 178-9; and Lemire, Frontier, Micula, Gold Reserve, and Crystallex, *supra* note 12; cf Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, I.C.S.I.D. Case No. ARB/97/3, , ¶¶7.4.31 (Aug. 20, 2007); Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania, I.C.S.I.D. Case No. ARB/05/22, , ¶¶597, 602 (July 25, 2008); Nordzucker AG v. Republic of Poland, U.N.C.I.T.R.A.L., Second Partial Award, ¶¶12, 14, 84-5 (Jan. 28, 2009); Bosh International, Inc. and B&P, L.T.D. Foreign Investments Enterprise v. Ukraine, I.C.S.I.D. Case No. ARB/08/11, , ¶¶210, 212 (Oct. 25, 2012); Deutsche Bank A.G. v. Democratic Socialist Republic of Sri Lanka, I.C.S.I.D. Case No. ARB/09/2, , ¶¶420 (Oct. 31, 2012); Renée Rose Levy de Levi v. Republic of Peru, I.C.S.I.D. Case No. ARB/10/17, , ¶¶327-8 (Feb. 26, 2014); and Mamidoil and Philip Morris, *supra* note 12.

<sup>17</sup> M.T.D. and Occidental, *supra* note 10; LG&E, P.S.E.G., Siemens, and Rumeli, *supra* note 17; Lemire, Micula, Gold Reserve, and Crystallex, *supra* note 12; *compare* Vivendi, Nordzucker, and Deutsche Bank, *supra* note 16.

<sup>18</sup> Biwater, Bosh, and De Levi, *supra* note 17; Mamidoil and Philip Morris, *supra* note 12; *compare* Saluka, *supra* note 10; Bayindir, *supra* note 17; and Frontier, *supra* note 12.

bifurcation with respect to the material scope of transparency.<sup>19</sup> Rather, both strands appear to assume the same material scope, while differing only in the interpretation of the scope of application.

### 3. CONCEPTUALIZING TRANSPARENCY AS AN EMANATION OF THE RULE OF LAW

If the material scope of transparency is approached from a legal skepticist perspective by analyzing the facts of arbitral cases rather than the legal reasoning of judges, a very different and more concrete picture emerges. Leaving aside the abstract statements of the Metalclad, Tecmed and Frontier tribunals,<sup>20</sup> the material scope then neatly falls into four broad categories: (1) disclosure of existing measures of general application—laws, regulations, adjudicatory decisions and administrative procedures and practices—,<sup>21</sup> (2) disclosure of prospective measures of general application,<sup>22</sup> (3) clear and comprehensible measures of general application, i.e. where transparency was treated as a *quality* of the relevant legal framework,<sup>23</sup> and (4) disclosure in the administration of measures of general application.<sup>24</sup> The vast majority of transparency cases, accounting for 72% of all such cases (and 94% of such cases where lack of

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<sup>19</sup> In Metalclad, *supra* note 10, the tribunal understood “transparency” to mean that: “all 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.” This definition was echoed by the tribunal in Tecmed, *supra* note 3, at 154, which understood the transparency requirement to ensure: “that [the foreign investor] 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.” Another perspective was added by the tribunal in Frontier, *supra* note 12, at 285, which stated: “Transparency means that the legal framework for the investor’s operations is readily apparent and that any decisions of the host state affecting the investor can be traced to that legal framework.” For practical purposes, such abstract definitions are not very helpful.

<sup>20</sup> *Id.*

<sup>21</sup> Champion Trading, *supra* note 10, Cargill, *supra* note 11, Mamidoil, *supra* note 12, De Levi, *supra* note 16, and Occidental (where lack of transparency was found), *supra* note 10.

<sup>22</sup> S.D. Myers, *supra* note 10, and Cargill, *supra* note 11.

<sup>23</sup> Metalclad (where lack of transparency was found), *supra* note 10 and Saluka, *supra* note 10, and Mamidoil, *supra* note 12.

<sup>24</sup> Tecmed, *supra* note 3, Maffezini, M.T.D., Occidental, and LG&E, *supra* note 10, Lemire, Micula, Gold Reserve, Clayton, Crystallex, *supra* note 12, P.S.E.G., Siemens, Vivendi, and Rumeli, Nordzucker, Deutsche Bank, *supra* note 16, where lack of transparency was found, as well as Waste Management, *supra* note 4, Frontier, Mesa Power, Philip Morris, *supra* note 12, R.D.C. and Al Tamimi, *supra* note 15, and Biwater, Bayindir, Bosh, De Levi, *supra* note 16.



transparency was found), have concerned the fourth category, i.e. failure to disclose information prior to an administrative act.<sup>25</sup>

Transparency, as pronounced in arbitral practice, thus comprises the disclosure of information by host states with respect to (a) the existence of legal requirements (publication of laws, regulations, etc.), (b) prospective legal requirements (advance notice and consultation of changes in laws and regulations), (c) the substance of existing legal requirements (transparency as a quality of legislative, regulatory and adjudicatory decision-making), and (d) the administration of existing legal requirements (administrative and judicial transparency), in such manner as to make the information effectively known by investors, and at such time as to make the information useful to them.<sup>26</sup>

To be effective, transparency requirements must ensure that investors are in a position to understand what the legal requirements are and how they are applied. Doing so enables them to predict the consequences of compliance (and non-compliance) more easily, and thus to deliberately comply (or not) with the relevant legal requirements. By contrast, if they were not able to understand this, investors would be unable, or at least have difficulties in, anticipating whether their conduct was in accordance with applicable legal requirements. Furthermore, they would not be able, with certainty, to deliberately satisfy those requirements. In addition, the host state would not be justified in expecting investors to comply with its legal requirements. In other words, the legal requirements would not provide *effective normative guidance*.

The exercise of power under the guidance of norms, rather than at the whim of whoever happens to be in a position to exercise such power, lies at the heart of the rule of law. In his famous 1958 debate with Harvard professor of law, Lon L. Fuller, on morality and law, the eminent legal philosopher and Oxford professor H.L.A. Hart argued that relying on legal norms to guide the action of legal subjects serves to protect against arbitrary exercise of power. However, he also recognized that this aim requires a delicate balancing act between achieving predictability, which controls arbitrariness, and avoiding inflexibility, which

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<sup>25</sup> *Id.*

<sup>26</sup> See, e.g., Saluka, *supra* note 10, at 360, P.S.E.G., *supra* note 16, ¶246, Siemens, *supra* note 16, ¶308, and Micula, *supra* note 12, ¶872.

generates arbitrariness on its own.<sup>27</sup> The desired equilibrium is achieved through judicial flexibility, but since judges may formulate their considerations in the cloak of rule-bound decision making, judicial flexibility too undermines the ability to control arbitrariness and to guide conduct by means of norms.<sup>28</sup> Fuller, in his public response to Hart, pioneered the view that the law in itself is expressive of a set of primordial principles, or *desiderata*, without which law fails at its basic function of providing normative guidance.<sup>29</sup> Fuller's principal contribution to the understanding of the law was to focus attention to the minimum criteria that must exist in order for law to be effective, although he himself insisted that his *desiderata* were (also) of a moral nature.<sup>30</sup>

In order for the law to provide normative guidance, it must therefore be *capable of being complied with*.<sup>31</sup> This is self-evident, i.e. nigh impossible to argue against. For this to happen, the existence and contents of the law must be *knowable*—capable of being known.<sup>32</sup> Normative guidance is inherently future-oriented, so that retroactive laws cannot be said to exert normative guidance.<sup>33</sup> For laws to guide conduct without the need for arbitrary exercise of power, their scope of application must be determinable,<sup>34</sup> their substance ascertainable,<sup>35</sup> their continued application stable<sup>36</sup> and their administration in practice congruent with their content as pronounced.<sup>37</sup>

Beyond this minimum requirement of the *possibility* of compliance, normative guidance appears as a gradual quality or a matter of degree. The more readily knowable the law is—with respect to its existence, as well as its scope of application and substantive content—, the more likely it is, all other things being equal, that the law will be complied with. The more stable the laws are, the

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<sup>27</sup> Herbert L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958). See also Gerald J. Postema, *Positivism and the Separation of Realists from their Scepticism: Normative Guidance, the Rule of Law and Legal Reasoning*, in THE HART-FULLER DEBATE IN THE TWENTY-FIRST CENTURY 259, 272 (Peter Cane ed., 2010).

<sup>28</sup> *Id.*

<sup>29</sup> Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

<sup>30</sup> LON L. FULLER, THE MORALITY OF LAW 33 (rev. ed. 1969).

<sup>31</sup> Cf. Fuller's sixth *desideratum*.

<sup>32</sup> Cf. Fuller's second *desideratum*.

<sup>33</sup> Cf. Fuller's third *desideratum*.

<sup>34</sup> Cf. Fuller's first *desideratum*.

<sup>35</sup> Cf. Fuller's fourth and fifth *desiderata*.

<sup>36</sup> Cf. Fuller's seventh *desideratum*.

<sup>37</sup> Cf. Fuller's eighth *desideratum*.

more likely it is that the subjects will be able to adapt their conduct and comply. Likewise, the more faithfully laws are administered, the more probable it is that the law will guide conduct in the manner foreseen.

It is this latter aspect that relates most pertinently to the vast majority of transparency related cases in arbitral practice, which, as discussed, involve a lack of transparency in the administration of the law. This has two aspects. *First*, providing information with a view to inviting and obtaining critique, such as in the context of administrative proceedings, serves to promote rational decision-making. This in turn is conducive to ensuring that the aims of legal rules can be realized in practice, or, put in other words, ensuring that compliance with the law is liable to realize the legislative will, which in turn obviates the need to intervene to exercise power arbitrarily. Conversely, laws that are irrational means to an end are unlikely to attain their intended purpose. How this works in practice is clearly on display in pre-legislative or pre-regulatory public consultations, where input from academics, professionals, civil society and members of the general public, particularly those with an interest or expertise in the subject matter, serve to provide (free of charge) valuable advice and insights to the legislator or regulator in order to improve the proposed measure. It can also be seen in the notice and hearing requirements of administrative and judicial due process.

*Second*, the law's propensity for normative guidance depends crucially on the law's acceptance by those to whom it is addressed and by whom it ultimately looks to for its enforcement: its subjects. The law must be accepted as such, *i.e.* out of a sense of legal obligation, and not as an arbitrary exercise of power—accepted merely as a result of coercion or coercive threat. This is certainly partly a matter of providing clear and transparent compliance incentives. Knowing the pros and cons of compliance is one way in which transparency can ensure that the incentives to comply are capable of being effectively assessed. Similarly, knowing what is at stake in an administrative or judicial proceeding is a central function of being on notice about an impending adverse measure.

#### 4. IMPLICATIONS

Normative guidance, being the hallmark of the rule of law, can be achieved only if laws are *possible to comply with* and is promoted the more readily the laws are capable of being complied with, the more means-to-end rational the laws are and the more readily the promulgated laws are accepted as law in practice by the laws' addressees.

Understood as a device to promote normative guidance, transparency serves to enable and promote compliance with legal requirements. The former function is *binary* in nature as compliance is either possible or not. Transparency that makes compliance possible can either exist or not. Where laws are not promulgated, compliance is impossible and transparency can be said to be “completely lacking” (*cf.* Waste Management) or “fundamentally breached” (*cf.* Article 8.10(2) C.E.T.A.). The same applies to, e.g., failure to disclose relevant evidence in an administrative proceeding, which denies the other party the opportunity to defend its position and makes it impossible to meaningfully participate in and influence the outcome of the proceedings. In that situation, either the relevant evidence is disclosed or not. This is also a binary transparency requirement, similar to many other familiar and related legal concepts, such as good faith, lack of arbitrariness and due process.

By contrast, even where possible, compliance may be *unlikely to be promoted*, e.g., because of cost, effort, delay or difficulty in discovering the existence of applicable measures of general application (laws, regulations, adjudicatory decisions, procedures, practices, policies, standards, authoritative interpretations, etc.), or in ascertaining, analyzing and interpreting their scope of application or substantive requirements or entitlements. Where transparency is understood as *the degree to which* the legal framework is readily knowable, transparency clearly appears not as a binary but as a *gradual* quality. Promoting this aspect of transparency is certainly conducive to normative guidance, *viz.* to minimizing the scope of potentially arbitrary exercise of authority and to the realization of legislative will. However, it is nevertheless clear that “total transparency” in this respect is something wholly different from transparency that is merely not “completely lacking”.

While this binary aspect appears upheld by restrictive case law and treaty practice as a required minimum level of transparency, the same cannot be said about transparency over and above that minimum level. Impossibility of compliance, rather than practicability, thus appears as the only uncontested justification for transparency as upheld even in the restrictive strand of case law and treaty practice. However regrettably, the same cannot yet be said about the policy ideal of facilitating compliance and promoting normative guidance, and hence the rule of law.