

UNCTAD/ITE/IIT/2003/4

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

# TRANSPARENCY

UNCTAD Series  
on Issues in International Investment Agreements



UNITED NATIONS  
New York and Geneva, 2004

### NOTE

UNCTAD serves as the focal point within the United Nations Secretariat for all matters related to foreign direct investment and transnational corporations. In the past, the Programme on Transnational Corporations was carried out by the United Nations Centre on Transnational Corporations (1975-1992) and the Transnational Corporations and Management Division of the United Nations Department of Economic and Social Development (1992-1993). In 1993, the Programme was transferred to the United Nations Conference on Trade and Development. UNCTAD seeks to further the understanding of the nature of transnational corporations and their contribution to development and to create an enabling environment for international investment and enterprise development. UNCTAD's work is carried out through intergovernmental deliberations, research and analysis, technical assistance activities, seminars, workshops and conferences.

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

The following symbols have been used in the tables:

Two dots (..) indicate that data are not available or are not separately reported. Rows in tables have been omitted in those cases where no data are available for any of the elements in the row;

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

A blank in a table indicates that the item is not applicable;

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

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

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

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

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

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

UNCTAD/ITE/IIT/2003/4
<b>UNITED NATIONS PUBLICATION</b>
<i>Sales No.E. 04.II.D.7</i>
ISBN 92-1-112614-2
ISSN 1810-3987

Copyright © United Nations, 2004  
All rights reserved  
Printed in Switzerland

---

## **IIA Issues Paper Series**

The main purpose of the UNCTAD Series on issues in international investment agreements – and other relevant instruments – is to address concepts and issues relevant to international investment agreements and to present them in a manner that is easily accessible to end-users. The series covers the following topics:

- Admission and establishment
- Competition
- Dispute settlement: investor-State
- Dispute settlement: State-State
- Employment
- Environment
- Fair and equitable treatment
- Foreign direct investment and development
- Home country measures
- Host country operational measures
- Illicit payments
- Incentives
- International investment agreements: flexibility for development
- Investment-related trade measures
- Lessons from the MAI
- Most-favoured-nation treatment
- National treatment
- Scope and definition
- Social responsibility
- State contracts
- Taking of property
- Taxation
- Transfer of funds
- Transfer of technology
- Transfer pricing
- Transparency
- Trends in international investment agreements: an overview

### Preface

The secretariat of the United Nations Conference on Trade and Development (UNCTAD) is implementing a work programme on international investment agreements. It seeks to help developing countries to participate as effectively as possible in international investment rule-making at the bilateral, regional, plurilateral and multilateral levels. The programme embraces policy research and development, including the preparation of a Series of issues papers; human resources capacity-building and institution-building, including national seminars, regional symposia, and training courses; and support to intergovernmental consensus-building, as well as dialogues between negotiators and groups of civil society.

This paper is part of this Series. It is addressed to Government officials, corporate executives, representatives of non-governmental organizations, officials of international agencies and researchers. The Series seeks to provide balanced analyses of issues that may arise in discussions about international investment agreements. Each study may be read by itself, independently of the others. Since, however, the issues treated closely interact with one another, the studies pay particular attention to such interactions.

The Series is produced by a team led by Karl P. Sauvant and James Zhan. The principal officer responsible for its production is Anna Joubin-Bret who oversees the development of the papers at various stages. The members of the team include Federico Ortino and Jörg Weber. The Series' principal advisors are Peter Muchlinski, and Patrick Robinson. The present paper was prepared by Federico Ortino. It benefited from a background paper prepared by Stephen C. Vasciannie. The final version reflects comments received from Joachim Karl, Peter Muchlinski and Christoph Schreuer. The paper was desktop published by Teresita Sabico.



Rubens Ricupero  
Secretary-General of UNCTAD

Geneva, December 2003

---

## Acknowledgements

UNCTAD's work programme on international investment agreements is implemented by a team of UNCTAD staff members and consultants headed by James Zhan, under the overall guidance of Karl P. Sauvant and Khalil Hamdani. The team includes Hamed El-Kady, Deepali Fernandes, Nicolas Guerrero, Anna Joubin-Bret, Aurélie Legrand, Moritz Hunsmann, Federico Ortino, Jörg Weber and Susanna Zammataro. Administrative support is provided by Séverine Excoffier-El Boutout and Jayanti Gupta.

UNCTAD has carried out a number of activities related to the work programme in cooperation with other intergovernmental organizations, including the Agence pour la Francophonie, Banco Centroamericano de Integración Económica, CARICOM Secretariat, German Foundation for Development, Inter-Arab Investment Guarantee Corporation, Inter-American Development Bank (IDB/INTAL), League of Arab States, Organization of American States, Secretaria de Integración Económica Centroamericana and the Secretaria General de la Comunidad Andina. UNCTAD has also cooperated with non-governmental organizations, including the Centre for Research on Multinational Corporations, the Consumer Unity and Trust Society (India), the Dutch Foundation for Research on Multinationals (SOMO) (The Netherlands), the Economic Research Forum (Egypt), the European Roundtable of Industrialists, the Friedrich Ebert Foundation (Germany), the German Foundation for International Development, the International Confederation of Free Trade Unions, the Labour Resource and Research Institute (LaRRI) (Namibia), Oxfam, the Third World Network and World Wildlife Fund International. Since 2002, a part of the work programme has been carried out jointly with the World Trade Organization (WTO).

Funds for the work programme have so far been received from Australia, Brazil, Canada, France, Japan, The Netherlands, Norway, Sweden, Switzerland, the United Kingdom and the European Commission. Argentina, Botswana, China, Colombia, Costa Rica, Croatia, Cuba, Czech Republic, Djibouti, Egypt, Gabon, Germany, Guatemala, India, Indonesia, Jamaica, Malaysia, Mauritania, Mexico, Morocco, Namibia, Pakistan, Peru, Qatar, Singapore, South Africa, Sri Lanka, Thailand, Trinidad and Tobago, Tunisia and Venezuela have

also contributed to the work programme by hosting regional symposia, national seminars or training events.

In pursuing this programme of work, UNCTAD has also closely collaborated with a number of international, regional and national organizations, particularly with the Centro de Estudios Interdisciplinarios de Derecho Industrial y Económico (the Universidad de Buenos Aires), the Indian Institute of Foreign Trade, the Legon Centre of Accra (Ghana), ProInversión (Peru), Pontificia Universidad Católica del Perú, the National University of Singapore, Senghor University (Egypt), the University of Dar Es Salaam (Tanzania), the University de Los Andes (Colombia), the University of Campinas (Brazil), the University of Lima (Peru), the Universidad del Pacífico (Peru), the University of Pretoria (South Africa), the University of Tunis (Tunisia), the University of Yaoundé (Cameroon), the Shanghai WTO Affairs Consultation Center (China) and the University of the West Indies (Jamaica and Trinidad and Tobago). All of these contributions are gratefully acknowledged.

---

# Table of contents

Preface .....	iv
Acknowledgements .....	v
Executive summary.....	1
INTRODUCTION.....	3
I. EXPLANATION OF THE ISSUE .....	7
II. STOCKTAKING AND ANALYSIS .....	13
A. Addressees .....	13
1. Transparency provisions addressing all parties to an IIA .....	14
2. Transparency provisions imposed on the host country alone .....	16
3. Transparency on the part of corporate entities .....	18
B. Items of information .....	22
1. Governmental information .....	23
2. Corporate information .....	30
C. Modalities .....	35
1. Consultation and exchange of information .....	36
2. Making information publicly available .....	37
3. Answering requests for information .....	43
4. Notification requirements.....	45
D. Timing .....	48
E. Exceptions .....	50
III. INTERACTION WITH OTHER ISSUES AND CONCEPTS .....	61
CONCLUSION: ECONOMIC AND DEVELOPMENT IMPLICATIONS AND POLICY OPTIONS .....	69

References .....	85
<b>Selected UNCTAD publications on transnational corporations and foreign direct investment .....</b>	<b>91</b>
Questionnaire .....	109

### Boxes

II.1. Corporate disclosure duties under national law and Klöckner v. Cameroon .....	19
II.2. Items of information subject to transparency obligations in the WTO.....	25
II.3. Items of information subject to corporate disclosure.....	34
II.4. The Havana Charter .....	45
III.1. The NAFTA Metalclad case.....	63

### Tables

III.1. Interaction across issues and concepts .....	61
---	----



## **Executive summary**

The aim of this paper is to examine how transparency issues have been addressed in international investment agreements (IIAs) and other relevant instruments dealing with international investment.

The paper identifies some of the main issues that influence State and corporate approaches to the question of transparency in international investment relations (section I). First, it is necessary to identify the potential addressees of a transparency obligation. The paper takes a novel approach and addresses the nature and extent of transparency obligations in IIAs and other international instruments as they apply to all three participants in the investment relationship – the home country, the host country and the foreign investor. In this respect, the addressees of transparency requirements depend on the objective and scope of the transparency provision in question and, more generally, on the nature of the agreement that contains the transparency provision.

Secondly, the content of the transparency obligation needs to be delimited. The key issue here concerns the degree of “intrusiveness” of transparency obligations, which in turn principally depends on the selection of items of information to be made public. A third key issue concerns the modalities employed to implement transparency, which may involve, for example, the exchange of information or the publication of relevant government measures. Further issues characterizing transparency provisions in IIAs concern the time limits for meeting transparency requirements and the exceptions to transparency obligations.

Section II reviews the various ways in which transparency requirements are addressed in IIAs, focussing on the key issues identified in section I. Section III highlights points of interaction between transparency, on the one hand, and other general issues addressed in IIAs (i.e. those covered in other papers of this Series), on the other. Finally, in the conclusion, the paper briefly examines the significance of different approaches to transparency for economic development in individual countries and considers the various options

## Transparency

---

open to negotiators when drafting transparency provisions. The most basic choice is whether to include or to exclude provisions on this subject. Where the former choice is made, further alternatives exist as to how to deal with each of the issues identified in section I.

## INTRODUCTION

The concept of transparency is closely associated with promotion and protection in the field of international investment. In the present context, transparency denotes a state of affairs in which the participants in the investment process are able to obtain sufficient information from each other in order to make informed decisions and meet obligations and commitments. As such, it may denote both an obligation and a requirement on the part of all participants in the investment process.

Although issues concerning transparency have long been of concern to States and transnational corporations (TNCs), they have often been addressed as matters of national law. Even today, this may still be true, as transparency questions arise in the context of the relationship between one foreign investor and one State, with the national legislation of the State being of particular relevance. In recent years, however, questions concerning transparency have also assumed prominence in a number of bilateral, regional and multilateral treaties. Transparency issues relevant to the investment process have also found a place in a variety of instruments of more general scope. Hence, the instruments to be considered in this paper include treaties and other documents concerning for example illicit payments, environment and corporate social responsibility; however, these specific subjects are not reviewed in this paper due to their coverage in other papers of this Series.

Transparency provisions in an IIA are usually formulated in general terms imposing requirements on all parties to the agreement. However, such provisions have traditionally been viewed as imposing obligations on host countries alone, perhaps because host country measures are usually viewed as one of the major determinants of foreign direct investment (FDI). Despite this perception, however – and if not expressly limited in this manner – general transparency provisions appear to impose obligations upon both the host country and the home country. This is so because home countries too, typically have measures in place that affect investment flows.

Similarly, the traditional application of the transparency concept can be extended to corporate entities – the third participant in the investment relationship. Although this issue has traditionally been dealt with under the heading of “disclosure”, several examples exist in which “transparency” requirements have been imposed specifically on TNCs.

This is an area in which traditional interpretations of international legal obligations as well as the addressees of such obligations need to be examined with a view towards a more inclusive approach to transparency.<sup>1</sup> In particular, while the traditional approach in international law has been concerned primarily with inter-State relations, and has not sought to enunciate rules that are specifically addressed to, and are directly binding upon, individuals (including corporate entities), more recently there has been a discernable tendency for international law, and especially for treaty law, to set out rules that have a direct bearing on individuals and corporations. Given this development, and the increasing interest in corporate disclosure and accountability, there may be an increased belief that transparency obligations in IIAs should apply to corporate actors as well as to countries. Accordingly, this paper will address the nature and extent of transparency obligations in IIAs as they apply to all three participants in the investment relationship – home country, host country and foreign investor.

A second key issue concerns the degree of intrusiveness of transparency obligations in IIAs, i.e., the impact that such obligations have on national policies. The degree of intrusiveness principally depends on the items of information, both of a governmental and corporate nature, that are to be made available (policies, laws, regulations, administrative decisions, etc., as well as corporate business information).

A third key issues relates to the modalities that may be employed in order to provide such information, which include, for example, the exchange of information, the publication as well as the notification of relevant measures. Further key issues relate to other variables that characterize transparency provisions. These include the time limits for meeting transparency obligations and the exceptions or safeguards to such obligations.

The main task of the paper is to analyze and take stock of the various ways in which transparency requirements are addressed in IIAs, focussing on the key issues identified above. This exercise is ultimately aimed at an examination of the various options open to negotiators when drafting transparency provisions in IIAs and at a brief review of the significance of these options for economic development.

### Note

<sup>1</sup> See Sauvant, 2002.



## **Section I**

### **EXPLANATION OF THE ISSUE**

As a general term that is broadly synonymous with openness, transparency connotes the idea that any social entity should be prepared to subject its activities to (public) scrutiny and consideration.

The overriding aim of transparency in relation to FDI policy is to enhance the predictability and stability of the investment relationship and to provide a check against circumvention and evasion of obligations, by resort to covert or indirect means. Thus, transparency can serve to promote investment through the dissemination of information on support measures available from home countries, investment conditions and opportunities in host countries and through the creation of a climate of good governance, including, for example, a reduction of the likelihood of illicit payments in the investment process. In addition, transparency is important for treatment and protection as without it, these cannot be assessed. Transparency is also necessary for the monitoring of disciplines, restrictions, reserved areas, exceptions and the like, that are provided for in IIAs. Equally, the extension of transparency obligations to corporate disclosure can help to protect the interests of host countries and home countries, as well as other stakeholders. For instance, with regard to host countries, corporate disclosure may enhance a country's ability in the formulation and management of its policies in company, environmental and labour matters; with regard to home countries, corporate disclosure may facilitate *inter alia* the application of fiscal and competition laws. Finally, the need for transparency is a logical corollary to certain established assumptions about the legal knowledge of individuals affected by the law, in particular that ignorance of the law is no defence.

The issue of transparency, as developed in IIAs, concerns a number of specific matters. First, it is necessary to identify the potential addressees of the transparency obligation. As noted in the Introduction, these are not only host countries, but also home countries and investors. The review of practice set out in section II below examines the extent to which current agreements and other international instruments create obligations for each of these addressees. In this respect, the addressee of transparency requirements may depend on the objective and scope of a

transparency provision and, more generally, on the nature of the agreement that contains the transparency provision.

In the area of international investment, typically, the need for transparency is viewed from the perspective of foreign investors. Thus emphasis is usually placed on the desire of foreign investors to have full access to a variety of information in a host country that may influence the terms and conditions under which the investor has to operate. At the same time, however, transparency issues may also be of particular concern to the host country in an investment relationship. At the broadest level of generality, the host country may wish to have access to information about foreign investors as part of its policy-making processes and for regulatory purposes. If the foreign investor is exempt from providing information on its operations to the host country, this will naturally not only undermine the capacity of the host country to assess the nature and value of the contribution being made by particular foreign investors, but also restrict its capacity to assess the appropriateness and effectiveness of its regulatory framework. Also, still at the level of generality, transparency questions may arise with respect to the home country of the foreign investor. The latter may wish to acquire information about the operations of the investor in other countries, both for taxation purposes and as a means of assessing whether the foreign investor is acting in accordance with the home country's legal rules and policies that have extraterritorial reach. Similarly, the host countries and the foreign investor may want to have access to information concerning home country measures designed to promote development oriented outward FDI (UNCTAD, 2003b, chapter VI, section A).

Second, the content of transparency obligations needs to be delimited. Although the trend in investment relations is supportive of greater disclosure on the part of both governments and enterprises, there is the question of the degree of “intrusiveness” of such action, i.e. what, precisely, to make transparent. The scope of a transparency obligation is determined by the precise items of information to be made public by the



relevant addressees. In relation to governmental information, the range of items includes, at the least intrusive level, general policies that may be of importance to investment. This is followed, in terms of increasing intrusiveness, by laws and regulations and administrative rulings and procedures. Specific administrative decisions pertaining to individual cases are still more intrusive as they concern directly identifiable applications of policies, laws and regulations to individual cases. The same applies to the information relating to a proposed law or regulation, which may be disclosed to afford interested parties the possibility to express their views on such a proposal before its final adoption. On the other hand, judicial proceedings in open court are subject to a general duty of reporting in an open society; thus, a duty to disclose their content may be relatively unintrusive, as it is part of a general commitment to the rule of law. An additional issue that arises in this connection concerns the cost of transparency, as it may impose a significant financial and administrative burden on developing countries, and least developed countries in particular.

In relation to corporate information, the range of items depends on a distinction between traditional disclosure for the purposes of the correct application of national company, fiscal and prudential laws (e.g. anti-competitive conducts, transfer pricing, financial system stability) and newer items of “social disclosure” which are not always required under national laws, but which can serve to inform specific groups of stakeholders other than shareholders, as to the operations of the company in question, so that they can better understand the effects of its operations upon their vital interests. The latter type of information may be more intrusive, as it deals with a wider range of information than is traditionally required of corporations, and may require a greater devotion of time, expertise and resources to be delivered than mere financial information, which a company needs to compile as a matter of normal business management. The range of other stakeholders interested in such information includes potentially employees, trade unions, consumers, and the wider community as represented by governmental institutions at the local, regional and national levels.

It should be noted that the development of transparency obligations in IIAs could create conflicting approaches to the degree of intrusiveness required to achieve the policy aims in question. For instance, a host developing country may require a broad duty of disclosure on the part of TNCs, while particular TNCs may prefer to restrict the level of information they are required to divulge publicly concerning their financial and technical operations. Thus the precise degree of intrusiveness is an issue of some delicacy, and it is not easy to draw a clear line as to the appropriate level of transparency. What is clear, however, is that this line has shifted over the past decade or two in the direction of more transparency.

A third issue relates to the different types of mechanisms that can be used to implement a transparency obligation. Here, the emphasis is not so much on *what* items of information should be disclosed (which may be listed as part of the transparency provision to which the mechanism in question applies) but *how* this disclosure should occur. This may have a direct bearing upon the content of a transparency obligation, as each modality entails a different degree of commitment to the process of disclosure thereby affecting the quality of the disclosure provided. (Compare, for example, an obligation to consult and exchange information and an obligation to make the same information unilaterally available to the public.) In particular, four different modalities stemming from past and present IIA practice can be identified. These are:

- consultation and information exchange,
- making information publicly available,
- answering requests for information, and
- notification requirements of specific measures that need to be notified to the other party or to a body set up for the purpose under the agreement.

In each case, the modality can be:

- voluntary or mandatory;
- reciprocal and based on mutual agreement to disclose or a unilateral obligation involving disclosure by one party only;
- an *ad hoc* obligation or part of a continuing and repeated process.

The weakest obligation would be a voluntary, mutually agreed *ad hoc* exchange or disclosure requirement while the strongest one would be a mandatory, unilateral and continuing obligation to disclose. In between, a number of variables can be devised based on these basic parameters of choice. Once again, these several forms of transparency requirements may be imposed both upon countries and/or corporate investors.

A fourth issue is that of the timing of disclosure. The time limits set in an IIA for making information available or for meeting transparency requirements will also have a bearing on the content of the transparency obligation, as this will determine the speed with which the disclosure is to take place. Usually, the shorter the period of disclosure the more demanding will the obligation be. However, with regard to a requirement to make public or notify a draft law or regulation in order to afford interested parties the possibility to comment on such draft instruments, the degree of intrusiveness will increase with the length of time available to comment, as this may permit for a more searching disclosure process to be undertaken.

A fifth issue relates to the possible safeguards and exceptions to transparency obligations that can be put into place to take into account difficulties in the implementation of such obligations or with their degree of intrusiveness. Such exceptions/ reservations will serve to reduce the overall impact of the transparency obligation in question. Exception can fall into a number of broad categories:

- *National security and defence*. Countries are likely to make transparency obligations subject to exceptions based on their vital

national security and defence interests. In some instances, foreign investors with investment projects in different countries may be prohibited from disclosing aspects of operations in one country to representatives of another country for national security reasons.

- *Law enforcement and legal processes.* When a matter is the subject of judicial process or under investigation by a State, limits may be placed on the availability of information to third parties so as to protect the integrity of that process. Both countries and private entities participating in such procedures may benefit from this restriction.
- *Internal policy deliberations and premature disclosure issues.* Both government and private entities will, of necessity, engage in internal deliberations before taking policy decisions on a wide range of questions pertaining to investment. Where this is not inconsistent with a public policy right of information, such deliberations could be excluded from a transparency obligation.
- *Intrusiveness in the duty to inform.* It may be a matter of discussion whether States should be required to provide information on the status of investment applications or to reveal each stage in the deliberative process (at the legislative and administrative levels) concerning foreign investment.
- *Protection of commercially confidential information or information that may affect the privacy rights of individuals.* This obligation will be primarily placed upon countries rather than corporate or other private actors, who are the principal beneficiaries of this restriction. In this connection, the need to protect intellectual property is increasingly accepted as a basis for restricting transparency.

\* \* \*

## **Section II**

### **STOCKTAKING AND ANALYSIS**

Traditionally, references to transparency in IIAs have been quite limited. Even today many such agreements, especially at the bilateral level, do not include references to transparency in their terms (UNCTAD, 1998, p. 85). This approach is exemplified by the model bilateral investment treaties (BITs) of the United Kingdom and the Federal Republic of Germany.<sup>1</sup> In these model treaties, it is expressly or implicitly acknowledged that foreign investors shall be subject to national laws and regulations; but, there is no requirement that these laws and regulations be published.<sup>2</sup> A number of regional instruments share similar features. For example, the Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference, which entered into force in 1986, provides various safeguards for foreign investors, but does not include a reference to transparency.

However, more recent IIAs have sought expressly to incorporate transparency requirements. These requirements differ depending on certain key features, such as the addressees, the scope of transparency, the mechanisms employed to implement transparency, the time-limits and the exceptions to transparency obligations. This section analyses in more detail existing IIAs dealing with transparency by focussing in particular on these issues.

#### **A. Addressees**

Transparency provisions in IIAs are usually formulated in general terms, imposing requirements on every party to the agreement. Unless otherwise specified, such general provisions arguably impose obligations upon both host and home countries to ensure that their conduct under the IIA is in accordance with transparency obligations. And, of course, provisions can deal with TNCs. But certain provisions are clearly drafted so as to impose obligations upon the host country alone or as targeting investors. At the same time, there do not appear to be any cases where transparency provisions are imposed exclusively on home countries. In this respect, the addressee of transparency requirements may depend on the objective and scope of a transparency

provision and, more generally, on the nature of the agreement that contains the transparency provision. As already mentioned, transparency is essentially a means to other ends in investment policy, and this is also reflected in the addressees of transparency provisions in IIAs.

### **1. Transparency provisions addressing all parties to an IIA**

Generally speaking, transparency obligations arise out of the reciprocal character of all provisions in IIAs and so are formulated to cover any contracting party. Accordingly, it can be argued that all transparency requirements and provisions that are expressly spelled out are applicable to both the host and the home country of a foreign investor. In this connection, there are two main types of provisions that apply to both home and host countries:

First, certain transparency obligations apply to all parties to an IIA as a matter of logic. For example, exchange of information and consultation requirements, as well as requirements to notify “lists of exceptions”, apply to any party to an investment agreement simply because of the nature of these requirements. With regard to exchange of information and consultation, this is exemplified by the model BITs of both Egypt and Indonesia: the former indicates that “the Contracting Parties” may periodically consult on investment opportunities to determine where investments may be most beneficial (article 2.3); the latter indicates that “either Contracting Party” may request consultations on any matter concerning the agreement, and that such requests are to be given sympathetic consideration (article XII.1).<sup>3</sup> A good example of a transparency requirement related to the possibility of listing exceptions is the 1997 BIT between Canada and Thailand. While article II(3) (a) requires each contracting party to permit the establishment of an investor of the other contracting party on a national treatment basis, article IV(3) permits each contracting party to make or maintain measures inconsistent with article II(3) (a) within the sectors

or matters listed in Annex I to the Agreement itself. In order to render such lists of exceptions operational and transparent, article XVI(1) of the BIT between Canada and Thailand provides that:

“The Contracting Parties shall, within a two year period after the entry into force of this Agreement, exchange letters listing, to the extent possible, any existing measures that do not conform to the obligations in subparagraph (3)(a) of Article II, Article IV or paragraphs (1) and (2) of Article V.”

Secondly, there are other transparency obligations that apply to both host and home countries as a matter of law. For example, an obligation “to make laws and regulations *pertaining to investment* publicly available” applies not only to the laws and measures of the host country but also to those of the home country, since both host and home country laws potentially *pertain* to investment. Accordingly, the obligation to make laws publicly available may extend to the laws of both the host and home countries. For example, article II.5 of the revised model BIT of the United States of America stipulates that:

“Each Party shall ensure that its laws, regulations, administrative practices and procedures of general application, and adjudicatory decisions, that pertain to or affect covered investments are promptly published or otherwise made publicly available”.<sup>4</sup>

Similarly, article XIV of the 1999 BIT between Canada and El Salvador provides that:

“Each Contracting Party shall, to the extent practicable, ensure that its laws, regulations, procedures, and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made available in such a manner

as to enable interested persons and the other Contracting Party to become acquainted with them.”

This exact provision can also be found in the 2003 free trade agreement between Singapore and the United States (article 19.3).

As explained above, the general reference to laws and regulations “respecting any matter covered by this Agreement” or “that pertain to or affect covered investments” suggests that the transparency obligations contained in the two above-mentioned instruments apply to both host and home countries.<sup>5</sup> In other words, since it may be possible that foreign investment is *affected* by the regulatory framework of *both* the host and home countries, any transparency obligations, formulated in these terms, should thus cover laws and regulations of both countries involved.<sup>6</sup> Although this reading appears logical, there is a tendency of interpreting these types of transparency obligations as covering host countries only. This may perhaps be explained on the simplistic and incorrect view that only host countries measures affect FDI.

## **2. Transparency provisions imposed on the host country alone**

As suggested above, transparency requirements may also be imposed exclusively on the host country. This occurs often within BITs, since there is a perception that some host country measures in particular affect negatively the establishment and operation of foreign affiliates.

This approach may clearly be found in the 1988 BIT between Australia and China imposing various transparency requirements on the contracting parties. Article VI provides that:

“Each Contracting Party shall, with a view to promoting the understanding of its laws and policies that pertain to or affect investments in its territory of nationals of the other Contracting Party:



(a) make such laws and policies public and readily accessible; [...]"

By expressly limiting the subject-matter of the transparency obligation to laws and policies pertaining to the investment *in each country's territory of nationals of the other contracting party*, such provision clearly applies only to host country measures. In other words, this means that the obligation to make laws and policies public will apply to Australia and China in their capacity as the host country.

Recent developments in model texts of BITs also show a trend to include explicit transparency obligations on the host country. This is exemplified by article 15 of the 2001 model BIT of Finland. It reads as follows:

“Each Contracting Party shall promptly publish, or otherwise make publicly available, its laws, regulations, procedures [...] *which may affect the investments of investors of the other Contracting Party* in the territory of the former Contracting Party” [emphasis added].

Article 2.3 of the 2000 model BIT of Peru requires each contracting party to “publicize and disseminate laws and regulations related to investments of investors of the other Contracting Party”.

A very similar approach is also taken in the amended Association of Southeast Asian Nations (ASEAN) Agreement for the Protection and Promotion of Investment. Article III-B of the revised version of the Agreement, signed in September 1996, incorporates a provision on “Transparency and Predictability” requiring each contracting party to ensure the provision of up-to-date information on all laws and regulations pertaining to foreign investment *in its territory*. Similarly, the transparency provision of the Asia-Pacific Economic Cooperation (APEC) Non-binding Investment Principles requires all

“Member economies” to make publicly available “all laws, regulations, administrative guidelines and policies *pertaining to investment in their economies*” [emphasis added].

### 3. Transparency on the part of corporate entities

Notwithstanding the fact that most IIAs, whether bilateral, regional or multilateral, do not refer to corporate disclosure duties, there is an increasing number of IIAs that specifically require TNCs to disclose certain information or that give governments the right to collect specific information directly from foreign investors. Given that each country has the sovereign right to pass legislation governing investors in its territory, provisions to this effect are, strictly speaking, superfluous. However, transparency provisions in IIAs may clarify that nothing in a particular treaty is meant to undermine each country’s regulatory sovereignty in this respect. They indicate moreover the parties’ clear knowledge that matters pertaining to transparency raise important issues for the relations between a country (especially a host country) and investors.

Where an investment treaty does not specify transparency requirements for foreign investors, this does not necessarily mean that foreign investors are exempt from such requirements. On the contrary, most investment instruments, and in particular BITs, expressly confirm that foreign investors are at a minimum subject to the laws and regulations of the host country (e.g. article 2 of the model BIT of Jamaica; article 2 of the model BIT of Malaysia; article 2 of the model BIT of The Netherlands; article 8 of the BIT between the Republic of Korea and Sri Lanka; and article 10 of the BIT between China and New Zealand). It thus follows that foreign investors need to adhere to applicable transparency rules in force in the host country. Under national law, however, it is not always clear under what conditions disclosure duties exist (box II.1).

**Box II.1. Corporate disclosure duties under national law  
and *Klöckner v. Cameroon***

One issue addressed by the ICSID arbitral tribunal in this case (ICSID Case No ARB/81/2) concerned whether Klöckner, a corporate investor party to various contractual arrangements for the construction and operation of a turnkey plant, owed a duty of disclosure to the Government of Cameroon, where no duty of corporate disclosure was specified (a) in any relevant treaty between Cameroon and the Federal Republic of Germany (the home country of Klöckner), (b) between the parties to the various contracts and (c) under national law. The tribunal found that in the circumstances of the case a duty of full disclosure existed under national law, since “the principle according to which a person who engages in close contractual relations, based on confidence, must deal with its partner in a frank, loyal and candid manner is a basic principle of French civil law”, the source of the major principles of Cameroonian law. The failure of Klöckner to divulge particular items of financial and commercial information to the Government, as Klöckner’s joint venture partner, helped to relieve the Government of liabilities claimed by Klöckner.

The ensuing decision by an *ad hoc* committee annulling the arbitral award in *Klöckner v. Cameroon* emphasised the problematic issues of relying simply on national law. Among the stated grounds for annulment, the *ad hoc* committee noted that the arbitral tribunal was at fault in not identifying the rules of French or Cameroonian law justifying the existence of a duty of corporate disclosure between joint venture partners in the circumstances of the case. For the *ad hoc* committee, it was not enough to presume the existence of a rule requiring corporate disclosure simply from general principles of law.

The approach taken by the *ad hoc* committee gives little support for the view that corporate disclosure requirements may be implied from the relationship between investors and host countries, even where both are parties to a commercial joint venture.

*Source:* UNCTAD, based on ICSID Award of 21 October 1983, *Journal du droit international*, 111 (1984), p. 409-421; *Ad hoc* Committee Decision of 3 May 1985, *Journal du droit international*, 114 (1987), pp. 163-184.

With regard to transparency provisions expressly attributing to the State the authority to gather information from foreign investors, several examples exist in IIAs. Article 17-09 of the 1990 Treaty on Free Trade between Colombia, Mexico and Venezuela, which entered into force in 1995, ensures that each State party, notwithstanding national and most-favoured-nation (MFN) treatment obligations, may require an investor of another party to provide information about the particular investment, consistent with applicable laws in the State party. Article 1111 (2) of the NAFTA takes a similar approach by granting each State party, notwithstanding the national and MFN treatment obligations, the right to “require an investor of another Party, or its investment in its territory, to provide routine information concerning that investment solely for informational or statistical purposes.”<sup>7</sup>

A variety of other investment instruments follow a different approach: corporate disclosure is not simply recognized as a State's prerogative, but it is required. One of the more detailed formulations of this approach is contained in the draft United Nations Code of Conduct on Transnational Corporations (draft United Nations Code). Although these provisions have never assumed legal force, they can serve as precedent, especially because they were acceptable to most countries (UNCTC, 1988b, p. 16). Paragraph 44 of the draft United Nations Code stated in part that:

“Transnational corporations should disclose to the public in the countries in which they operate, by appropriate means of communication, clear, full and comprehensible information on the structure, policies, activities and operations of the transnational corporation as a whole. [...]”

The disclosure provisions of the draft United Nations Code were justified partly on the grounds that they could lead to improvements in the comparability of information disclosed by foreign investors relying

on different accounting and reporting practices in various jurisdictions with divergent expectations (UNCTC, 1988b, p. 17).

Even after the recent changes, the wording of the OECD Guidelines on Multinational Enterprises (OECD Guidelines), imposing disclosure requirements on “enterprises”, reflects substantially the approach on corporate disclosure taken in the draft United Nations Code. This suggests that both capital-exporting and capital-importing countries are not averse to corporate transparency. Corporate transparency under the OECD approach, for instance, benefits host countries by enhancing their information base; simultaneously, though, the broadening of the host country’s information base may also reduce some of its suspicion and fear towards foreign investors. Codes such as the OECD Guidelines can help to improve investor-State relations, and thus improve the prospects of foreign investors (Wallace, 1994, p. 210).<sup>8</sup>

The recommendations advanced in the OECD Guidelines have been supplemented by the OECD Principles of Corporate Governance (OECD Principles), approved in May 1999. Expressly designed to assist both OECD member countries and non-members in examining and developing their legal and regulatory frameworks for corporate governance, the OECD Principles include, among other things, a framework on corporate disclosure and transparency suggesting that all companies – and not only TNCs – should be required to disclose all material matters regarding the corporation. More recently, a set of guidelines for businesses worldwide to ensure their compliance with international human rights treaties and conventions (“Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises With Regard to Human Rights”) was adopted by the United Nations Sub-Commission for the Promotion and Protection of Human Rights. These draft Norms, which contain an explicit requirement to recognize and respect transparency and accountability obligations,

apply not only to TNCs but also to private businesses (see E/CN.4/Sub.2/2003/12/ Rev.2, 13 August 2003).

In addition to treaty provisions, the duty of corporate disclosure has also received support from various non-governmental organizations (NGOs) as well as business organizations. This development underlines the fact that the activities of foreign investors in host countries are likely to affect not just governments, but also private persons in both home and host countries. The draft NGO Charter on Transnational Corporations (published in 1998 by the People's Action Network to Monitor Japanese Transnational Corporations Abroad) and the International Right To Know (IRTK) campaign calling on United States companies doing business abroad for more public disclosure, transparency and accountability,<sup>9</sup> are indicative of one line of opinion among NGOs.

Numerous transparency initiatives also stem from business organisations. In order to improve greater transparency in payments and contributions made by companies (as well as revenues received by governments) for natural resource extraction, the 2003 draft Voluntary Compact of the Extractive Industries Transparency Initiative (EITI) includes *inter alia* certain commitments by companies with regard to the publication and report of any transfer of funds or the payments of a tax, dividend, royalty, and fee.<sup>10</sup> Moreover, the Association of British Insurers has put forward in 2003 Disclosure Guidelines on Socially-Responsible Investment, taking the form of disclosures, which institutions would expect to see included in the annual report of listed companies.<sup>11</sup>

### **B. Items of information**

A first point of variation in IIAs concerns the identification of the items of both governmental and corporate information that are to be made available pursuant to an investment agreement. Although the

range of possibilities with regard to the items of information subject to the transparency provisions in IIAs is substantial, certain general points are discernible.

## 1. Governmental information

Almost all IIAs that impose a transparency obligation upon States apply it to the “laws and regulations” of the States party to the agreement. This seems to constitute one of the least intrusive items of information subject to the transparency obligation in IIAs, for two major reasons:

- The terms “laws” and “regulations” are viewed as referring to measures of general application usually requiring further implementing legislation; thus these measures might not in themselves be seen as constituting a significant concern for FDI.
- Laws and regulations are usually subject to disclosure requirements under national laws, independently of IIAs obligations; this excludes in turn the need for any further actions to ensure compliance with international obligations.

Several of the IIAs that contain transparency provisions also include a reference to “procedures”,<sup>12</sup> “administrative procedures”,<sup>13</sup> and/or “administrative rulings”.<sup>14</sup> There are also cases in which the reference to “laws and regulations” is accompanied by a reference to both “administrative procedures” and “administrative rulings”,<sup>15</sup> or to both “procedures” and “administrative rulings”.<sup>16</sup> With regard to “administrative procedures”, transparency obligations may also extend to criteria and procedures for applying for or renewing relevant investment authorizations, as well as to deadlines for processing applications.<sup>17</sup> This type of procedural transparency enhances the ability of foreign investors to operate in a host country. However, transparency on these items of information, dealing with specific administrative

procedures and decisions pertaining to individual cases, also involves a higher degree of intrusiveness as it concerns directly identifiable applications of laws and regulations to individual cases and might involve extra financial costs.

Relevant to the discussion is also the question of the type of approach one might have with regard to the listing of the items of information in an IIA: is the reference to laws, regulations and administrative procedures enough or should other items of governmental information be specifically included in the transparency obligation in order for all relevant information to be covered? Arguably, the laws, regulations and administrative procedures of the parties to an agreement cover the range of items that are legitimately of interest to a foreign investor. On this view, matters such as international agreements or judicial decisions of national courts would fall within the scope of the term “laws”, as long as one interprets this term in a broad manner. Similarly, the reference to administrative procedures would also include any administrative practices that are not clearly expressly addressed in the laws, regulations and administrative procedures of the State. (See box II.2 for two different approaches followed by the WTO with regard to the issue of the items of information.)

Although this argument carries some force, a number of investment agreements contain broader formulations that expressly include, next to laws and administrative procedures, reference to judicial decisions and/or international agreements. Thus, for example, the model BIT of Finland includes transparency provisions applicable to “laws, regulations, procedures and administrative rulings and judicial decisions of a general application as well as international agreements” (article 15.1).<sup>18</sup> A similar formulation can be found in article 67 of the 2002 Free Trade Agreement between the European Free Trade Association (EFTA) States and Singapore, which includes “international agreements that may affect the operation of this Agreement” within the scope of the transparency obligation. For some



countries, the reference to international agreements would possibly be superfluous, given that in some constitutional arrangements treaties properly concluded are automatically part of the municipal law of the

**Box II.2. Items of information subject to transparency obligations in the WTO**

The identification of the items of information subject to transparency in the WTO follows two different approaches. Article 63 of TRIPS, reflecting the majority practice in investment agreements, lists expressly the several items to be covered by the transparency provision. It states that:

“Laws and regulations, and final judicial decisions and administrative rulings of general application, made effective by a Member pertaining to the subject matter of this Agreement [...] shall be published, or where such publication is not practicable, made publicly available, in a national language, in such a manner as to enable governments and rights holders to become acquainted with them. Agreements concerning the subject matter of this Agreement which are in force between the government or a governmental agency of a Member and the government or a governmental agency of another Member shall also be published.”

On the other hand, article III of the GATS does not specify a list of the items that need to be published by each member; rather, it stipulates, in broad language, that “all relevant measures of general application which pertain to or affect the operation of this Agreement” shall be published or made public.

Evidently, both approaches are intended to be comprehensive. However, while the approach taken by the GATS may be favoured because of the flexibility it embodies, it may as well be subject to the criticism that it is too vague.

*Source:* WTO, 2002.

State. But this is not true for all countries. Bearing in mind the possibility that in some cases treaty provisions on investment may be different from local law provisions, this approach could provide an additional layer of confidence for foreign investors.

Several BITs signed by Canada adopt a similar approach listing a broad range of governmental information in their transparency provisions. For example, in the 1991 BIT between Argentina and Canada, article XI provides for a duty of consultation between the parties, and indicates that, in the course of such consultations, information may be exchanged on the impact that “the laws, regulations, decisions, practices or procedures, or policies” of the other contracting party may have on investments covered by the agreement.<sup>19</sup> The draft MAI also indicated that policies not expressed in laws, regulations and related instruments that could affect the operations of the MAI should also be published or made public. In this regard, it should be emphasised that, although “policies” appear to constitute one of the least intrusive items of governmental information, they are only rarely included in transparency obligations in recent IIAs.

A few recent IIAs contain transparency obligation with regard to *draft* laws and regulations. These obligations usually require parties to make public or notify their proposed laws or regulations with the view of affording interested parties the possibility to comment on such laws and regulations before they are formally adopted. In NAFTA, article 1802 provides that “to the extent possible, each Party shall: (a) publish in advance any such measure it proposes to adopt; and (b) provide interested persons and Parties a reasonable opportunity to comment on such proposed measures.” Although this approach may not amount to a binding obligation to publish information in advance, for it is qualified by the phrase “to the extent possible”, it is an example of how requirements of prior notification and comment work together.

Generally, provisions contemplating the advance publication of investment measures are exceptional and represent a greater degree of

intrusion than some countries are willing to accept. Publication of draft laws and regulations provides States as well as foreign investors with the opportunity to express their views on investment initiatives, and thereby to influence the decision-making process. However, host countries could advance at least two sets of objections with regard to this type of obligation:

- Host countries may view a requirement of advance publication as undermining their sovereign right to discuss and decide on investment rules without formal intervention by foreign investors and home countries.
- In cases in which there is a power imbalance between host and home countries, the weaker host country may fear undue influence on its legislative and administrative decision-making processes. However, it may also be true that undue influence on legislative and administrative processes may nevertheless be imposed on host countries independently from the existence of any requirement of advance publication. On the contrary, the lack of any transparency provisions in this regard may contribute to this influence being exercised away from the eyes of other stakeholders and the public in general.

Furthermore, article 3 of chapter VI on “Transparency-Related Provisions” of the 2000 Free Trade Agreement between the United States and Viet Nam also provides for nationals of the parties, and not only to State parties, “the opportunity to comment on the formulation of laws, regulations and administrative procedures of general application that may affect the conduct of business activities covered by this Agreement”.<sup>20</sup>

Transparency requirements that tend to enhance the level of participation of foreign actors (whether States or private parties) in national legislative processes have recently been extended to national administrative proceedings in particular by granting any persons

directly affected by such a proceeding “a reasonable opportunity to present facts and arguments in support of their positions prior to any final administrative action, when time, the nature of the proceeding, and the public interest permit”.<sup>21</sup> Furthermore, this type of transparency requirement (aimed at broadening the participation of interested parties) has also been introduced for purposes of international dispute settlement. For example, in the context of its investor-State dispute settlement provisions, the 2003 Free Trade Agreement between Chile and the United States provides that:

“The tribunal shall have the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party (the ‘submitter’). The submissions shall be provided in both Spanish and English, and shall identify the submitter and any Party, other government, person, or organization, other than the submitter, that has provided, or will provide, any financial or other assistance in preparing the submission” (article 10.19, paragraph 3).<sup>22</sup>

A final issue to consider in this section deals with the circumstance that, as already noted in the section dealing with the addressees of transparency requirements, in many IIAs, the particular items of governmental information covered by transparency requirements may be a matter of legal assessment. Most agreements requiring transparency – in respect of the publication of laws and in other ways – apply transparency rules to matters “pertaining to investment”, “relevant to investment”, or “affected by” investment. This raises the question of where the boundary line is to be drawn between investment matters *per se*, and other matters that touch and concern investment in a remote or indirect manner. On a broad interpretation, transparency rules concerning investment mean that rules concerning the environment, taxation and employment are also subject to transparency requirements, for each of these items are linked in some sense to investment. On a more narrow interpretation, however, only

those rules directly applicable to investment matters will be subjected to transparency rules. In this regard, the attempt should be noted in the recent Free Trade Agreement between Chile and the United States to limit the scope of transparency requirements by qualifying the otherwise broad term “affect”: article 20.3, paragraph 1, of this Agreement specifies that the duty to notify applies with respect to any measures “that the Party considers might *materially* affect the operation of this Agreement or otherwise *substantially* affect the other Party’s interests under this Agreement” [emphasis added].

Similarly, the scope of the transparency requirements may depend on whether the relevant provisions make reference to rules “relevant to foreign investment”,<sup>23</sup> rules “affecting this Agreement”,<sup>24</sup> or rules “respecting any matter covered by this Agreement”.<sup>25</sup> Although terms such as “relevant” or “respecting” appear to be broader than the term “affecting”, much would depend on the actual interpretation of the different terminology employed in IIAs.

Finally, from the perspective of developing countries, the question of costs may be a significant factor in determining the material scope of provisions concerning transparency. Usually, the obligation to provide information requires countries to act promptly, and where this covers a broad range of items, some developing countries may encounter problems. It is however difficult to argue that transparency must be sacrificed simply because countries cannot afford publication. Accordingly, although the cost factor is not always entirely ignored, it tends not to be given much weight. The more recent United States model BIT requires transparency in respect of “laws, regulations, administrative practices and procedures of general application, and adjudicatory decisions”. The reference to general application in this provision provides some scope for flexibility with regard to transparency, since it means that a country will not be pressed to undertake the presumably costly exercise of making public or publishing practices and procedures that affect only small groups of individuals. Implicit in this approach, however, is the notion that

individuals affected by localized regulations or practices will have access to information on such regulations or practices.

### 2. Corporate information

A few cases exist in which transparency provisions pertaining to TNCs in IIAs are formulated in very general terms, without any clear indication of the type of corporate information that need to be disclosed. For example, the 1990 Treaty on Free Trade between Colombia, Mexico and Venezuela employs general language. Article 17-09 of this Treaty ensures that each State party, notwithstanding national and MFN treatment obligations, may require an investor of another party to provide information about the particular investment in accordance with applicable laws in the State party. Similarly, the draft MAI merely contains the possibility for a contracting Party to require an investor of another contracting Party or its investment to provide “routine information concerning that investment solely for information or statistical purposes.”<sup>26</sup> However, the reference to *routine* information and the specification that such information is only for *information* or *statistical* purposes seem to imply that the information subject to the transparency obligation in the MAI deals mainly with business-related information dealing with the structure and operation of the corporate entity.<sup>27</sup>

In other IIAs, the transparency obligation imposed on TNCs provides for a more detailed list of items of information that need to be disclosed. While traditionally such obligations have required the disclosure of mainly business and financial information, more recently the scope of these provisions has been extended to other broader social, environmental and ethical concerns.

An example of the more traditional, relatively less intrusive approach is the draft United Nations Code suggesting that a large amount of information, including both financial and non-financial

items, should be made available by the TNC to the country in which it operates. This information deals principally with business information. As to financial matters, TNCs should provide *inter alia* the following:

- (a) a balance sheet;
- (b) an income statement, including operating results and sales;
- (c) a statement of allocation of net profits or net income;
- (d) a statement of the sources and uses of funds;
- (e) significant new long-term capital investment;
- (f) research and development expenditure.

As to non-financial matters, the items to be provided by the TNC should include *inter alia* the following:

- (a) the structure of the transnational corporation, showing the name and location of the parent company, its main entities, its percentage ownership, direct and indirect, in these entities, including shareholdings between them;
- (b) the main activities of its entities;
- (c) employment information including average number of employees;
- (d) accounting policies used in compiling and consolidating the information published;
- (e) policies applied in respect of transfer pricing.

All information provided should, as far as practicable, be broken down according to geographical area or on a country-by-country basis, and by major line of business, depending on the nature of the TNC's operations and its significance for the areas or countries concerned. In addition, it was expressly acknowledged that the information to be provided should, as necessary, be in addition to information required under the laws, regulations and practices of the host country.

Along the same lines, the draft NGO Charter on Transnational Corporations (the draft NGO Charter) provides that the information publicized shall include at least the following:

- (1) names and addresses of the local corporation and the investing corporations including the parent company, the form and breakdown of the investments, the fond [sic] or nature of the business relationship such as technology transfers and related local and overseas business entities;
- (2) the contents of the major businesses, the financial statements including the balance sheet and the revenue statement and other relevant information of the local corporation;
- (3) the number of employees, working conditions and the information on the labour and management relationship of the local corporation and;
- (4) the pricing policy for merchandise/commodity transfers among the affiliates and other related companies.

In the context of establishment agreements, the Economic Community of West African States, in Protocol A/P1/11/84 relating to Community Enterprises, provides that all enterprises that have been admitted to the status of Community Enterprise shall:

- (a) submit progress reports, annual balance sheets and audited accounts to the relevant authorities of the Member States involved in the project;
- (b) furnish the Member States and the Executive Secretariat with information relating to the fulfilment of the conditions of any permit and the extent to which benefits and permits have been utilised; [...]
- (d) inform the Executive Secretariat of any intended deviations from or difficulties in the implementation of the terms of an Approval Agreement, so as to enable any necessary re-assessment to be made between the parties to the Approval Agreement.



The more recent and potentially more inclusive approach to corporate disclosure may be found in the OECD Principles. Next to the information relating to business matters (such as material information on their financial and operating results, share ownership and voting rights, issues concerning employees, and governance structures), the OECD Principles go further by stipulating that all companies – and not only enterprises involved in foreign investment – be required to provide information on each of the following:

- company objectives (including commercial objectives, policies relating to business ethics, the environment and other public policy commitments);
- members of the board and key executives, together with their remuneration;
- material foreseeable risk factors: these may include risks that are not specific to a particular area or industry, dependence on commodities, financial market risk, risk related to derivatives and off-balance sheet transactions, and risks pertaining to environmental liabilities;
- material issues regarding other stakeholders. So, apart from reporting on issues concerning employees, the company should be required to make public material affairs concerning creditors, suppliers, local communities, and other stakeholders, as appropriate.

Following the 2000 revision, the OECD Guidelines combine disclosure requirements of both business and non-business information. According to the OECD Guidelines, the main items of information to be disclosed include the financial and operating results of the company, major share ownership and voting rights, members of the board and key executives (and their remuneration) and material issues regarding employees and other stakeholders (part III, paragraph 4). In addition, however, paragraph 5 of part III of the OECD Guidelines encourages enterprises to communicate information that could include (a) value

statements or statements of business conduct intended for public disclosure including information on the social, ethical and environmental policies of the enterprise and other codes of conduct to which the company subscribes, (b) information on systems for managing risks and complying with laws, and on statements or codes of business conduct and (c) information on relationships with employees and other stakeholders.

This expanded approach to the items of corporate disclosure is also found in instruments stemming from several NGOs (box II.3).

### **Box II.3. Items of information subject to corporate disclosure**

The Disclosure Guidelines on Socially-Responsible Investment put forward in 2003 by the Association of British Insurers (ABI) indicate the items that listed companies are expected to include in their annual reports. They focus principally on information dealing with social, environmental and ethical matters.

With regard to disclosure relating to the board, the ABI Guidelines provide that the company should state in its annual report whether the board: (1) takes regular account of the significance of social, environmental and ethical (SEE) matters to the business of the company; (2) has identified and assessed the significant risks to the company's short and long term value arising from SEE matters, as well as the opportunities to enhance value that may arise from an appropriate response; (3) has received adequate information to make this assessment and that account is taken of SEE matters in the training of directors; (4) has ensured that the company has in place effective systems for managing significant risks, which, where relevant, incorporate performance management systems and appropriate remuneration incentives.

/...

**Box II.3 (concluded)**

With regard to disclosures relating to policies, procedures and verification, the ABI Guidelines require that the annual report should: (1) include information on SEE-related risks and opportunities that may significantly affect the company's short and long term value, and how they might impact on the business; (2) describe the company's policies and procedures for managing risks to short and long term value arising from SEE matters and, if the company has no such policies or procedures, provide reasons for their absence; (3) include information about the extent to which the company has complied with its policies and procedures for managing risks arising from SEE matters; and finally (4) describe the procedures for verification of SEE disclosures. The verification procedure should be such as to achieve a reasonable level of credibility.

The International Right to Know campaign also calls for broad disclosure requirements by United States, companies including specific environmental and labour information concerning their foreign operations. For example, corporations would be required to provide information about the number of workers injured or killed in work-related accidents, workers' exposure to hazardous substances, child labour, forced labour and discrimination in the workplace. Corporations would also be obligated to disclose security arrangements with military, paramilitary or private security forces, as well as human rights complaints brought by local communities.

*Source:* <http://www.abi.org.uk/> and <http://www.irtk.org/>.

### C. Modalities

A third point of variation in IIAs deals with the issue of “modalities”, that is the different types of transparency mechanisms that may be employed in order to further transparency. The emphasis here is on the manner in which disclosure should occur, rather than on the items of information to be disclosed.

### 1. Consultation and exchange of information

Many IIAs contain provisions either encouraging or mandating consultation and/or exchange of information between parties to an IIA. When parties agree to cooperate and exchange information, this is likely to enhance transparency in foreign investment. To that extent, the willingness of a country to participate in consultations may be regarded as a component of the degree of transparency offered by that country, under an IIA. The main objective of this type of transparency mechanism is the reciprocal promotion of investment flows. Several examples may be found in current IIAs. In the 1993 BIT between the People's Republic of China and Lithuania, article 11 stipulates that:

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

Under the terms of this provision, there is an undertaking for each party to consult and to exchange information. However, as regards transparency in terms of the provision of information concerning laws, regulations and investment procedures, it is to be noted that this provision does not compel transparency. Specifically, the provision stipulates that meetings shall be held for the exchange of legal information and related matters, but there is no particular rule to the effect that the legal information exchanged must include an authoritative or timely statement of the investment laws and procedures

of the State; rather, the existence of the consultative mechanism may be seen as a means of encouraging transparency, without compelling it.

In some cases, too, consultation is recommended, but not required, by investment agreements. This is exemplified by the model BITs of both Egypt and Indonesia. The former indicates that contracting parties may periodically consult on investment opportunities to determine where investments may be most beneficial (article 2). The latter indicates that either party may request consultations on any matter concerning the agreement, and that such requests are to be given “sympathetic consideration” (article XII(1)). The model BIT of The Netherlands also contemplates that sympathetic consideration should be given to requests for consultations over matters concerning the interpretation or application of the investment agreement. Although all these provisions do not amount to a duty to consult, they suggest a partial acknowledgement of the importance of consultations among the parties concerned.<sup>28</sup>

## **2. Making information publicly available**

As far as this modality is concerned, points of variation may be noted by reference to past and current IIA practice.

A first point of variation depends on whether the IIA contains simply a requirement “to make information public” or whether it clearly includes a publication requirement. In the earlier versions of its model BIT, the United States’ preference was simply for a provision requiring the parties to the treaty to “make public” their investment-related rules. Accordingly, article II (7) of the 1984 revised text of the United States Prototype Treaty concerning the Reciprocal Encouragement and Protection of Investment read as follows:

“Each Party shall make public all laws, regulations, administrative practices and procedures, and

adjudicatory decisions that pertain to or affect investments” (UNCTC, 1988a, annex V).

This wording is identical to the formulation used in the 1983 draft of the United States model agreement, and it has been incorporated into the respective provisions on transparency in United States BITs with Turkey (article II (9)), Grenada (article II (7)), Argentina (article II (6)), the then Czechoslovakia (article II (7)), and Kyrgyzstan (article II (7)), among others.<sup>29</sup> It is also used, *verbatim*, in article 2 of the 1991 BIT between Malaysia and the United Arab Emirates (UNCTAD, 1998, p. 85).<sup>30</sup>

By contrast, more recent United States model BITs contain modified language on the question under consideration. In both the 1994 and 1998 versions of the prototype treaty, for example, article II (5) stipulates that:

“Each Party shall ensure that its laws, regulations, administrative practices and procedures of general application, and adjudicatory decisions, that pertain to or affect covered investments are promptly published or otherwise made publicly available”.

One apparent point of contrast between the 1984 United States model and the more recent United States models concerns the difference between “making information public” and “publishing it”. Where an investment agreement requires parties to make public certain items of information, this may be satisfied as long as the State makes those items of information available, i.e. it is a restriction against secrecy. In all likelihood, it requires the information to be in written form, but it does not imply that the information should be widely available (UNCTAD, 1998, p. 85). In contrast, if an agreement requires the parties to publish particular items of information, this implies that the information will be in printed form and widely distributed. In the more recent United States

model BITs, however, the publication requirement may take either of two alternatives, for the States have the option either to publish the information or to make it otherwise publicly available. In practice, therefore, there may be no real difference between the “make public” approach, on the one hand, and the combined “publish or make public” approach, on the other.<sup>31</sup>

Another approach to the question of making State information available to foreign investors is reflected in the 1996 revised version of the ASEAN Agreement for the Protection and Promotion of Investments, where the new article III-B on “Transparency and Predictability” provides as follows:

“Each Contracting Party shall ensure the provision of up-to-date information on all laws and regulations pertaining to foreign investment in its territory and shall take appropriate measures to ensure that such information be made as transparent, timely and publicly accessible as possible”.

In practical terms, there might not be much difference between the approach followed in the ASEAN Treaty and that featuring in the United States model BITs. The former combines two obligations, namely, the obligation to ensure the provision of up-to-date information, and the obligation to take appropriate measures to ensure that the information be made as publicly accessible as possible. Together, these obligations may constitute the basis for a duty among the State parties to disseminate widely information concerning investment-related laws and regulations. At the same time, however, it should be noted that the mandate requiring such information to be made “as publicly accessible as possible” is inherently subjective.

To reduce the subjectivity and thus uncertainty of these types of transparency provisions, certain IIAs have stipulated more fully how the transparency requirement may be met in particular instances. In this

regard, the International Monetary Fund (IMF)/World Bank Guidelines on the Treatment of Foreign Direct Investment (IMF/World Bank Guidelines) serves as a useful point of reference. Paragraph 8 of article III on “Treatment” of the IMF/World Bank Guidelines contemplates a duty on the part of each State to take “appropriate measures” to promote accountability and transparency in its dealings with foreign investors. In addition, however, paragraph 6 of article II of the IMF/World Bank Guidelines concerning the admission of foreign investors gives a more specific form to the transparency obligation. This paragraph indicates that:

“Each State is encouraged to publish, in the form of a handbook or other medium easily accessible to other States and their investors, adequate and regularly updated information about its legislation, regulations and procedures relevant to foreign investment and other information relating to its investment policies [...]”.

Although this approach gives an indication of the formula that may enhance the accessibility of legislation and other investment-related material, at the same time, it does not contemplate that the use of a handbook or other easily accessible medium should be set out as a legal requirement in IIAs.

Another method of ensuring clarity in respect of the publication requirement is incorporated in the 1988 BIT between Australia and China, where article VI, after providing that each party shall make laws and policies on investment public and readily accessible, states further that, if requested, each party shall provide copies of specified laws and policies to the other party (article VI (b)), and shall consult with the other party in order to explain specified laws and policies (article VI (c)).<sup>32</sup>



A further point of variation deals with whether the duty to make laws publicly available is limited in order to take into account the issue of feasibility and cost. For example, article 6 of the BIT between Australia and Laos indicates that:

“Each Contracting Party shall, with a view to promoting the understanding of its laws that pertain to or affect investments in its territory by nationals of the other Contracting Party, make, *to the best of its ability*, such laws public and readily accessible” [emphasis added].

By limiting the transparency obligation through reference to the best of each party's ability, this provision implies sensitivity to the technical capacity and costs of making laws public.<sup>33</sup> At the same time, however, a certain degree of vagueness in determining the best of a country's ability remains.<sup>34</sup>

With regard to multilateral agreements, the GATS specifies the manner in which information is to be made available that reflects the overall structure of the WTO scheme and, at the same time, takes into account some of the concerns that affect investment interests generally. Article III of the GATS reads in its relevant part as follows:

“1. Each Member shall publish promptly and, except in emergency situations, at the latest by the time of their entry into force, all relevant measures of general application which pertain to or affect the operation of this Agreement. International agreements pertaining to or affecting trade in services to which a Member is a signatory shall also be published.

2. Where publication as referred to in paragraph 1 is not practicable, such information shall be made otherwise publicly available.”

The duty to “publish promptly” therefore does not arise when publication is “not practicable”, although even in this case, the information shall nevertheless be made “publicly available”. This provision could allow developing countries lacking the financial resources to publish all measures of relevant application the opportunity to argue that in some circumstances they are not obliged to meet the full costs of publication (including the wide dissemination of certain material). This possibility may be undermined, however, by the vagueness implicit in the criterion of practicability. Article III of the GATS does not indicate whether the criterion is to be applied by the State independently, with reference to foreign investors, or with reference to objective standards from within the GATT framework. Accordingly, it will be difficult to identify, *a priori*, when a country will not be obliged to publish relevant information concerning investments in service industries.

Finally, publication mechanism may be used in order to impose on countries an obligation to disclose draft laws and regulations with the aim of affording other interested parties the possibility to comment on such proposals before they are formally adopted.<sup>35</sup> As noted in the section on the items of information, this type of advance publication requirements is exceptional and represents a greater degree of intrusion than some members are willing to accept.

With regard to transparency obligations on investors, a contrast in the binding force of such obligations may be noted for example by comparing the draft United Nations Code and the OECD Principles, on the one hand, and the draft NGO Charter on the other. While both the draft United Nations Code and the OECD Principles provide that TNCs “should” disclose to the public relevant business information (paragraph 44 and article IV, respectively), the draft NGO Charter states, as a general principle, that each TNC “must” publicize to the public in its host countries detailed information concerning the company’s organizational structure, business activities and management conditions (paragraph 7 of part II). In particular, the draft NGO Charter specifies

that the information so provided “shall” include at least a breakdown of investments undertaken, financial statements of the local entity (including a balance sheet and revenue statement), labour information, and the pricing policy of the company. Moreover, the TNC “must” provide all relevant information on its business activities where required by local governments, authorities and general public of the place where it operates as well as its labour union (paragraph 8 of part II). Elsewhere, the draft NGO Charter also indicates that each TNC shall freely disclose information on its environmental policy (paragraph 13 (3) of part II).

### 3. Answering requests for information

A third set of transparency provisions deals with the obligation to answer specific questions or provide information upon request.

Recent BITs contain such provisions, as for example, the model BIT of Austria. While paragraph 1 of article 4 imposes the duty to promptly publish or make publicly available laws, regulations, etc. affecting the operation of the Agreement, paragraph 2 of article 4 provides that:

“Each Contracting Party shall promptly respond to specific questions and provide, upon request, information to the other Contracting Party on matters referred to in paragraph (1).”

Similar provisions can be found in several bilateral treaties that contain specific transparency provisions. For instance the 1997 BIT between Canada and Lebanon provides that, upon request by either party, “information shall be exchanged” on the measures of the other party that may have an impact on investments covered by the agreement (article XIV.2).<sup>36</sup> The 2003 Free Trade Agreement between Singapore and the United States also includes the obligation of each party, on request of the other party, to “promptly provide information and

respond to questions pertaining to any actual or proposed measure, whether or not the other Party has been previously notified of that measure” (article 19.4, paragraph 2).

The right to require information is also extended by several IIAs to the State with regard to the foreign investor. Each party in the 1990 Treaty on Free Trade between Colombia, Mexico and Venezuela may “require an investor of another Party or its investment in its territory to provide information concerning that investment in accordance with the laws of that Party” (article 17-09). Likewise, as noted above, the NAFTA in its article 1111, provides, that “Notwithstanding Articles 1102 or 1103 [National Treatment and Most-Favoured-Nation Treatment], a Party may require an investor of another Party, or its investment in its territory, to provide routine information concerning that investment solely for informational or statistical purposes”.

In addition to general obligations to provide information, some IIAs provide for the establishment of permanent enquiry or contact points charged with the duty to provide information on relevant matters. For example, article III of the GATS requires members to establish enquiry points to facilitate transparency, with each enquiry point providing information to other members in response to requests for specific information or in connection with information that is to be provided pursuant to the notification provisions. Generally, each enquiry point was to be established within two years of the entry into force of the agreement establishing the WTO. But this rule is not strictly applicable to developing countries, for whom “appropriate flexibility with respect to the time-limit within which such enquiry points are to be established may be agreed upon for individual developing country members” (article III:4 GATS).<sup>37</sup>

#### 4. Notification requirements

A further form of transparency provision requires notification procedures. This type of transparency obligation is principally aimed at monitoring parties' compliance with regard to substantive obligations contained in IIAs. As noted above, regional and multilateral treaties oblige each State party in some cases to provide information to a central agency concerning actions taken by each party in respect of investment-related matters. This notification requirement does not usually exist in lieu of a duty to publish information; on the contrary, the duty to notify and the duty to publish information are frequently perceived as complementary means of promoting transparency.

##### **Box II.4. The Havana Charter**

The Havana Charter for an International Trade Organization (ITO), which was negotiated in 1948, is an early example of an investment-related instrument that incorporates a duty of notification. The Charter never entered into force, but its approach to notification merits brief consideration. Specifically, by virtue of article 50(3) of the Charter, each member of the proposed ITO was obliged to furnish the Organization, as promptly and as fully as possible, such information as the Organization may have requested either to address member State complaints or to conduct studies on trade and investment. Sensitive to the possible conflict between transparency and confidentiality, the duty of notification in article 50(3) was made subject to certain conditions.

In keeping with its monitoring objective, the ITO also required each member to report on action taken to comply with requests and follow through on recommendations of the Organization. Where action required or recommended by the Organization was not taken by a State, article 50(5) required each State party concerned to report on the reasons for inaction.

*Source:* UNCTAD.

In various respects, the broad template set out in the Havana Charter in the early post-World War II period is reflected in the WTO Agreements (box II.4). The TRIMs Agreement, for example, requires WTO members to notify the Council for Trade in Goods of all trade-related investment measures they are applying – whether general or specific – that do not conform with the Agreement. Thus, each non-conforming trade-related investment measure (such as local content requirements) notified to the Council was scheduled to be eliminated on a time-scale that accords preferential consideration to developing and least developed countries. The link between notification and the right to extend non-conforming measures may have served as an incentive for developing and least developed countries to report on such measures to the Council. In addition to transparency in respect of transitional arrangements, the TRIMs Agreement also requires each member State to notify the WTO Secretariat of the publications in which its trade-related measures may be found, including those applied by regional and local governments and authorities.

The GATS and the TRIPS Agreement also contain notification requirements designed to enhance centralized monitoring. Under the former, each member must promptly and at least annually notify the Council for Trade in Services of any new laws, regulations or administrative guidelines that significantly affect commitments on trade in services, or of any changes to existing provisions. Similarly, under the latter, members are obliged to notify the Council for TRIPS of all laws, regulations and final judicial decisions and administrative rulings that pertain to the matters concerning trade-related intellectual property rights.

The WTO notification provisions are designed primarily to give the Organization the means to monitor whether member countries are showing due deference to their obligations, and to administer the gradual abolition of particular exceptions to WTO requirements (UNCTAD, 1999d, p. 50).<sup>38</sup> However, some developing countries may reasonably question whether the cumulative impact of notification

requirements within the WTO system is unduly burdensome from a financial and bureaucratic standpoint. As discussed below, WTO law does take these concerns into account by providing for “exceptions” or “waivers” to notification requirements.

Notification requirements are imposed on States for the benefit of private investors as well as directly on private investors. With regard to the first type of requirements, certain IIAs contain obligations imposed on national administrative authorities to notify certain decisions taken of direct concern of investors. For example, article VI:3 of the GATS provides that “where authorization is required for the supply of a service [...], the competent authorities of a Member shall [...] inform the applicant of the decision concerning the application”.<sup>39</sup>

A duty to notify may also apply directly to TNCs. In the Economic Community of West African States, Protocol A/P1/11/84, for example, provides that all enterprises that have been admitted to the status of Community Enterprises shall:

“(d) inform the Executive Secretariat of any intended deviations from or difficulties in the implementation of the terms of an Approval Agreement, so as to enable any necessary re-assessment to be made between the parties to the Approval Agreement, (e) comply with such audit as may be requested by the Executive Secretary in collaboration with the relevant authorities of the Member State where they are located in order to ascertain compliance with the terms of the Approval Agreement; [...] (h) not fix or alter the prices of its product or services without prior consultation with the Executive Secretariat and the competent authorities of the Member States where they are located”.

These provisions emphasize at least two points: first, the duty to notify may include an obligation on corporate entities *vis-à-vis* both “central agencies” and “competent authorities of member States”;

second, the duty to notify may be included in order to allow the parties to reassess previous agreements (sub (d)) as well as permit central agencies or states to participate to some extent in the decision-making process of the investor (sub (h)).

Similar transparency mechanisms have been applied to dispute settlement provisions in IIAs. There are a number of notification requirements surrounding the 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, establishing the International Centre for Settlement of Investment Disputes (ICSID). These include the designation and notification by contracting states of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre (article 25 of the ICSID Convention), and the designation and notification of courts or other authorities competent for the recognition and enforcement of awards rendered pursuant to the Convention (article 54).<sup>40</sup> These activities constitute an important contribution to transparency in the context of dispute settlement, in particular in light of the increasing role played by the ICSID in international investment disputes.

### D. Timing

Bearing in mind current systems of communication, and the nature of competition in a liberalized economic environment, time is often of the essence in modern investment relationships. Thus, for example, the more recent BITs and free trade agreements entered into by the United States, the TRIMs Agreement, the Energy Charter Treaty (annex 1, article 20 (2)), and the draft MAI, all require the host country to publish its laws, regulations and related information “promptly”, while the ASEAN treaty indicates that the information should be published in as timely a manner as possible, and the World Bank Guidelines recommend that a country's handbook of investment information should be “regularly” updated.



Other treaties, however, omit reference to timing considerations in respect of publication. Among these are the BIT between Haiti and the United States, and the TRIPS Agreement. Similarly, the BIT between Canada and Hungary, and that between China and Viet Nam, do not carry any reference to time in their provisions requiring consultation and sharing of information between the countries involved.

Where a treaty requiring information to be made public does not contain a reference to timing, the host country may have some degree of latitude, and may be inclined to assume that laws and regulations in place are binding on foreign investors even if they are yet to be made public. Likewise, because expressions such as “promptly” and “as timely as possible” are subjective in nature, the host country may not feel obliged to make its laws and regulations public immediately upon their entry into force. With these concerns in mind, some IIAs incorporate language that lends urgency to the duty to make laws and regulations public. Hence, article III of the GATS indicates that, in the normal course of events, all relevant measures (including laws and regulations) must be published at the latest by the time of their entry into force, and that this rule should apply save in emergency situations. Admittedly, the exception for undefined emergency situations reduces the force of the provision somewhat. But the intent is clear. And, in the case of litigation concerning the meaning of this provision, the onus is likely to be on the host country to demonstrate the existence of an emergency.

Similar timing provisions apply to TNCs. For example, Protocol A/P1/11/84 of the Economic Community of West African States requires Community Enterprises to submit on a regular basis progress reports, annual balance sheets and audited accounts.

More specifically, paragraph 44 of the draft United Nation Code (providing for certain transparency requirements on TNCs) states that the required information should be provided on a “regular annual basis, normally within six months and in any case not later than 12

months from the end of the financial year of the corporation”. The same paragraph also provides that, where appropriate, a semi-annual summary of financial information should also be made available. Similarly, paragraph 7 of Part II of the draft NGO Charter provides that the required information on the corporate entity shall be “regularly publicised every six months in general or in exceptional cases, every year”. In this regard, the specification on timing contained in the 1976 OECD Declaration on International Investment and Multinational Enterprises, as reviewed in 1991 (information by firms “should be published within reasonable time limits, on a regular basis, but at least annually”), should be compared with the 2000 OECD Guidelines on Multinational Enterprises which now contain no specific provision on the timing of the disclosure obligations.<sup>41</sup>

### **E. Exceptions**

A last element relating to the content of transparency provisions in IIAs deals with safeguards or exceptions to transparency obligations. In section I, a number of considerations were advanced tending to support restrictions on the transparency principle. These considerations seek to determine the extent of intrusiveness that a transparency obligation may carry. Although this may be done by defining the scope of the transparency obligation itself (for example by limiting the items of information), IIAs have also used specified exception provisions in order to accomplish such goals.

A recent example of an IIA that includes extensive confidentiality safeguards is the 2003 Free Trade Agreement between Singapore and the United States. This Agreement contains both specific and general provisions protecting confidential information of parties to the Agreement, as well as corporate entities. In the chapter on Investment, article 15.13, paragraph 2, requires each party to protect “business information that is confidential from any disclosure that would prejudice the competitive position of the investor or the covered

investment”. In addition, article 21.4 provides for a general exception to disclosure obligations which states as follows:

“Nothing in this Agreement shall be construed to require a Party to furnish or allow access to confidential information, the disclosure of which would impede law enforcement, or otherwise be contrary to the public interest, or which would prejudice the legitimate commercial interests of particular enterprises, public or private.”

At the multilateral level, the ITO Charter, for example, was sensitive to the possible conflict between transparency and confidentiality. For this reason, the duty of notification in article 50 (3) was made subject to the proviso that:

“any Member on notification to the Organization may withhold information which the Member considers is not essential to the Organization in conducting an adequate investigation, and which, if disclosed, would substantially damage the legitimate business interests of a commercial enterprise. In notifying the Organization that it is withholding information pursuant to this clause, the Member shall indicate the general character of the information withheld and the reason why it considers it not essential”.

The balance struck in this provision is mainly in favour of disclosure, for the information to be withheld would have had to be both inessential to the ITO and its disclosure would have had to be substantially damaging to a particular commercial enterprise.

Today, WTO agreements incorporate certain exceptions to the duty of notification in order to take into consideration host countries'

reluctance in certain cases to divulge confidential information with respect to particular measures. These safeguard provisions include:

- *Exceptions to notification requirements.* In order to preserve confidentiality, the TRIMs and TRIPS Agreements, and the GATS, all contain provisions that allow members to withhold some items of information. In the TRIMs Agreement, a note to article 5(1) on notification indicates that, where investment measures are applied under the discretionary authority of the State, the general notification requirement need not apply to information that would prejudice the legitimate commercial interests of particular enterprises. The TRIPS Agreement and GATS adopt a similar approach; in either case, the notification and other transparency requirements in the agreement are not applicable to confidential information, the disclosure of which “would impede law enforcement, or otherwise be contrary to the public interest, or which would prejudice legitimate commercial interests of particular enterprises, public or private” (article III *bis*, GATS).<sup>42</sup> The component of this exception allowing confidentiality on grounds of public interest raises issues of definition; for, it is possible to argue that, without qualification, an exception to transparency on the basis of public interest could give the host country a wide margin of discretion, and reduce considerably the scope of the notification provisions.
- *Waivers.* Under the TRIPS Agreement, there is express acknowledgement that some notification provisions may become onerous. Thus, with respect to each State party’s duty to notify the Council for TRIPS about laws and regulations, the Council “shall attempt to minimize the burden on Members in carrying out this obligation and may decide to waive the obligation to notify such laws and regulations directly to the Council if consultations with WIPO on the establishment of a common register containing these laws and regulations are successful.” This waiver possibility also

applies to notification obligations for members arising from the terms of article 6ter of the Paris Convention of 1967. This approach is intended to reduce notification requirements for individual countries for which the information concerned is otherwise available. However, because the waiver possibility applies only to laws and regulations, while the notification requirement also includes final judicial decisions and administrative rulings of general application, the waiver covers only a portion of what is normally to be disclosed.

- *Time limits.* The transitional provisions of the TRIPS Agreement allowed developing countries the opportunity to delay the implementation of some TRIPS obligations (including duties as to notification) for five years from the date of entry into force of the WTO Agreements (article 65). This exception to the notification provisions of the TRIPS Agreement was also expressly made available for economies in transition (article 65.3). Article 66 of the TRIPS Agreement grants least developed country members a delay of ten years for the application of several TRIPS obligations, which can be extended by the Council for TRIPS for duly motivated reasons. Flexibility through the use of time limits is also exemplified by article III of the GATS, which was described above.

Turning to the question of exceptions related to corporate disclosure, the draft United Nations Code sets limit to such disclosure in the light of concerns often raised by foreign investors. Thus, paragraph 44 (penultimate sub-paragraph) states that:

“The extent, detail and frequency of the information provided should take into account the nature and size of the transnational corporation as a whole, the requirements of confidentiality and effects on the transnational corporation’s competitive position as well as the cost involved in producing the information”.

This qualification – sensitive to costs, competitiveness and confidentiality – may have helped to make the terms of proposed paragraph 44 more acceptable to capital-exporting countries at the time of the deliberations on the draft United Nations Code. As is sometimes the case, however, the qualification is worded in very general terms, thus leaving open the question of how exactly it would apply in practice. The disclosure provisions in the OECD Guidelines on Multinational Enterprises, like those in the draft United Nations Code, are also limited by considerations of costs, business confidentiality and other competitive concerns.<sup>43</sup>

A further example may be found in the draft MAI. Although the draft MAI contains provisions clarifying that none of its other terms would prohibit State parties from applying transparency rules to foreign investors for information or statistical purposes, this provision is limited in two significant respects. First, the provisions of the draft MAI would not require any State party to furnish or allow access to information concerning the financial affairs and accounts of individual customers of particular investors or investments. And, second, these provisions would not require any State party to furnish or allow access to confidential or proprietary information. Included in this category of confidential or proprietary information is “information concerning particular investors or investments, the disclosure of which would impede law enforcement or be contrary to its laws protecting confidentiality or prejudice legitimate commercial interests of particular enterprises.” Thus, under the draft MAI, it is envisaged that each contracting party would have the power legally to enforce disclosure rules with respect to foreign investors in its territory, but restrictions would apply to the items of information derived from foreign investors that the contracting party could reveal to other contracting parties.

The approach followed in the draft United Nations Code, the OECD Guidelines and the draft MAI may be contrasted with that adopted by the draft NGO Charter, which does not provide for

exceptions to the principle of corporate transparency on grounds of confidentiality or otherwise.

\* \* \*

This section has shown that a number of IIAs as well as related instruments have addressed the issue of transparency by imposing different sets of obligations on the three main participants in foreign investment, i.e. the host country, the foreign investor and the home country. Among these obligations, IIA practice includes the duty to make information publicly available, the obligation to answer requests for information, and notification and consultation requirements. Transparency being essentially a means to other ends in investment policy, the addressees, content and modalities of any transparency provision depend on the nature and objective of the particular international agreement under consideration. For example, agreements for the protection of investment, on the one hand, and investment liberalization agreements, on the other, do not address the same actors of the investment relationship (the former dealing mainly with the “host country”, the latter with all “members” of the agreement); and if they do, the type of transparency provisions may differ (notification and monitoring requirements are usually more comprehensive in investment liberalization agreements than in investment protection agreements). With regard to corporate disclosure, the preceding survey has shown the diversity of approaches contained in IIAs and related instruments. For example, while traditionally transparency provisions imposed on investors have required disclosure of mainly business and financial information, more recently the scope of these provisions has been extended to other broader social, environmental and ethical concerns.

### Notes

- <sup>1</sup> Unless otherwise noted, all instruments cited herein may be found in UNCTAD, 1996c, 2000b, 2001f, 2002a and forthcoming b; the texts of the BITs mentioned in this paper may be found in the collection of BITs maintained online by UNCTAD at [www.unctad.org/ia](http://www.unctad.org/ia).
- <sup>2</sup> The approach in the model BIT of the United Kingdom is actually borne out in BITs completed between the United Kingdom and various countries: see, for example, the BITs between the United Kingdom and Dominica (1987), Bolivia (1988), China (1988) and the Russian Federation (1989).
- <sup>3</sup> See also article 11 of the 1997 model BIT of The Netherlands, and article 12 of the 1994 model BIT of the People's Republic of China.
- <sup>4</sup> See also article 5 on "Transparency" of chapter IV on "Development of Investment Relations" of the 2000 free trade agreement between the United States and Viet Nam.
- <sup>5</sup> See further below section B (1) on items of information subject to transparency obligations.
- <sup>6</sup> Very similar provisions are also contained in plurilateral and multilateral instruments such as the Organisation for Economic Co-operation and Development (OECD) draft Multilateral Agreement on Investment (draft MAI) (paragraph 1 of the section on "Transparency"), the Energy Charter Treaty (article 20(2) of Annex 1), the North American Free Trade Agreement (NAFTA) (article 1802.1), the 1961 OECD Code of Liberalisation of Capital Movements (Article 11(a)), and the 1992 International Monetary Fund (IMF)/World Bank Guidelines on the Treatment of Foreign Direct Investment (Guideline II, Section 6). Moreover, several agreements of the World Trade Organization (WTO) contain transparency provisions applying to all parties without distinction: for example, article X of the General Agreement on Tariff and Trade (GATT), article 6.1 of the Agreement on Trade-Related Investment Measures (TRIMs Agreement), article III of the General Agreement on Trade in Services (GATS), article 63 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), article 7 and Annex B of the Agreement on Sanitary and Phyto-sanitary Measures (SPS Agreement), and article 10 of the Agreement on Technical Barriers to Trade (TBT Agreement).



- <sup>7</sup> The draft MAI contains provisions clarifying that none of its other terms would prohibit State parties from applying transparency rules to foreign investors. In the section on Transparency of Part III concerning treatment of investors, the draft MAI states that “(n)othing in this Agreement shall prevent a Contracting Party from requiring an investor of another Contracting Party, or its investment, to provide routine information concerning that investment solely for information or statistical purposes.” However, certain restrictions would apply to the items of information derived from foreign investors that the contracting party could reveal to other contracting parties. See below the sub-section addressing the “content of transparency provisions”.
- <sup>8</sup> In the Joint Declaration in the 2002 Association Agreement between Chile and the European Union, parties remind their TNCs “of their recommendation to observe the OECD Guidelines for Multilateral Enterprises, wherever they operate”. (UNCTAD, 2003b, p. 167).
- <sup>9</sup> The specific objective of the IRTK campaign is to require United States companies to report to agencies of the Government of the United States and then to disclose to the public specific environmental and labour information concerning their operations abroad. See <<http://www.irtk.org>>.
- <sup>10</sup> See <<http://www.dfid.gov.uk/>>.
- <sup>11</sup> See <<http://www.abi.org.uk/>>.
- <sup>12</sup> Article 4 of the 2001 model BIT of Austria.
- <sup>13</sup> Article 5(b) of the 1998 Framework Agreement of the ASEAN Investment Area (AIA).
- <sup>14</sup> Article 15 of the 2001 model BIT of Finland.
- <sup>15</sup> Article 2 of the 2002 Agreement between Japan and the Republic of Singapore for a New-Age Economic Partnership.
- <sup>16</sup> Article XIV of the 1997 BIT between Canada and Lebanon and article 19.3, paragraph 1, of the 2003 FTA between Singapore and the United States.
- <sup>17</sup> See article 20.4 of the 2003 FTA between Chile and the United States and article VI:3 of the GATS.
- <sup>18</sup> The Convention Establishing the European Free Trade Association (EFTA) (article 51) and the draft MAI (paragraph 1 of the section on Transparency) also follow this approach.

- <sup>19</sup> Similar provisions may be found in the 1991 BIT between Canada and Hungary (article X), and the 1999 BIT between Canada and El Salvador (article XIV). In the latter treaty, however, there is no reference to “policies”.
- <sup>20</sup> See also article 20 of the 2000 Free Trade Agreement between the European Community and Mexico with regard to the financial service sector and annex B, paragraph 5, of the SPS Agreement.
- <sup>21</sup> Article 20.4(a) of the 2003 Free Trade Agreement between Chile and the United States.
- <sup>22</sup> For a similar approach with regard to the dispute settlement mechanism of the WTO, see further Mavroidis, 2002.
- <sup>23</sup> See International Monetary Fund (IMF)/World Bank Guidelines on the Treatment of Foreign Direct Investment.
- <sup>24</sup> See paragraph 1 of the section on Transparency in Part III of the draft MAI.
- <sup>25</sup> See the 1997 BIT between Canada and Lebanon (article XIV.1) and the 2003 Free Trade Agreement between Chile and the United States (article 20.2, paragraph 1).
- <sup>26</sup> See paragraph 3 of the section on “Transparency” in Part II.
- <sup>27</sup> For an example that adopts a combination of the two above-mentioned approaches, see article 1111(2) of NAFTA which stipulates as follows: “a Party may require an investor of another Party, or its investment in its territory, to provide routine information concerning that investment solely for informational or statistical purposes” and “(n)othing in this paragraph shall be construed to prevent a Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its law.”
- <sup>28</sup> See also the Partnership and Cooperation Agreements entered into by the European Communities and other States, which provides for cooperation to establish stable and adequate business law and conditions, and to exchange information on laws, regulations and administrative practices in the field of investment and to exchange information on investment opportunities in the form of, *inter alia*, trade fairs, exhibitions, trade weeks and other events. See for example, article 47 of the 1995 Partnership and Cooperation Agreement Establishing a Partnership between the European Communities and their Member States, of the one Part, and the Kyrgyz Republic, of the other Part.

- <sup>29</sup> Some BITs between the United States and other countries modify the language of the 1984 United States model to clarify that the duty to make information public refers to those laws, regulations and the like that concern the investments of nationals of either State. This drafting clarification may be superfluous. See, e.g., the BITs between the United States and Haiti and Cameroon, respectively.
- <sup>30</sup> In 1992, Vandavelde reported that, in negotiations between the United States and various other countries on this particular wording, there were no objections on principle. Vandavelde, 1992, p. 207.
- <sup>31</sup> For a wording similar to the one in the 1994 model BIT of the United States see also paragraph 1 of the section on "Transparency" of the draft MAI indicating that: "Each Contracting Party shall promptly publish, or otherwise make publicly available, its laws, regulations, [...]".
- <sup>32</sup> This approach, also followed in the BIT between Australia and Papua New Guinea, is not reflected in some other BITs involving Australia. For example, the Hungarian and Polish BITs with Australia provide that the parties shall make their laws and policies on investment "public" and "readily accessible", respectively, but omit reference to specific means of clarification.
- <sup>33</sup> See also the BIT between Senegal and the United States which adopts the language of article II (7) of the 1984 model text, but adds that the pertinent information needs to be made public only "by existing official means". Similarly, article II (6) of the BIT between Morocco and the United States requires laws and regulations to be made public, but specifies that administrative practices and procedures, as well as adjudicatory decisions, "can be consulted" by investors of either party. Vandavelde, 1992, p. 208.
- <sup>34</sup> Similar issues may be emphasized in the BIT between Canada and Thailand where article XVI (1) expressly provides that each contracting party shall publish or make available "to the extent practicable" laws, regulations, procedures and administrative rulings of general application.
- <sup>35</sup> See article 1802 of NAFTA and article 3, chapter VI, of 2000 Free Trade Agreement between United States and Viet Nam.
- <sup>36</sup> Also see the transparency provisions of the draft MAI.
- <sup>37</sup> The 2003 Free Trade Agreement between Singapore and the United States also contains several provisions requiring the establishment of contact points (e.g. articles 11.5, 17.4, 18.7 and 19.2). See also the Implementation

Procedures of the OECD Guidelines for Multinational Enterprises (part I of the Decision of the OECD Council in June 2000).

38 There may be cases in which the burden of collecting specific information is attributed to an agency or organization. An example of such a type of transparency mechanism is found in the 1980 Unified Agreement for the Investment of Arab Capital in the Arab States. Article 18 (4) provides that the Economic Council has the faculty to collate and coordinate the reports, information, statements, legislation, regulations and statistics relating to investment, the fields of investment, the sectors open to investment and the preconditions for investment in such sectors in the States parties.

39 See also article 20.4 (a) of the 2003 Free Trade Agreement between Chile and the United States.

40 See <http://www.worldbank.org/ic/sid>.

41 Paragraph 1 of part III on “Disclosure” simply states that “[e]nterprises should ensure that timely, regular, reliable and relevant information is disclosed [...]”

42 The formulation in article 63 (4) of the TRIPS Agreement adopts this form of words; but, of course, it applies to a different set of items for disclosure. In respect of requests for information from other members (not, strictly speaking, a notification function), article 6 (3) of the TRIMs Agreement requires a State to treat enquiries with sympathetic consideration; it allows the State to withhold such information on terms similar to those applicable in the TRIPS Agreement and the GATS.

43 See the first paragraph of part III on “Disclosure”. In this regard, it should be noted that in the previous version of the OECD Guidelines, there was no reference to “competition concerns” (see the first paragraph of the section on “Disclosure of Information”).



The level of interaction between transparency and each of the following concepts is extensive:

- **Admission and establishment.** In keeping with international law, countries have traditionally retained for themselves the right to determine whether, and under what conditions, foreign investors may participate in the domestic economy (UNCTAD, 1999a). Generally, the putative investor, contemplating investment abroad, wishes to acquire information about the terms and conditions of admission and establishment and, for that purpose, needs information about the host country's regulatory framework in this area. In addition, the investor also would want to know the processes by which decisions concerning investment are made, and the criteria used for deciding which investments are to be granted approval (where a scheme requiring host country approval is in place). Before making an investment commitment, some foreign investors may wish to know that mechanisms for consultation between home and host countries on investment issues are in place.
- **Competition.** In recent years, various countries have entered into agreements designed to enhance the efficacy of their laws concerning competition between corporate entities (UNCTAD, forthcoming a). It may be too early to speak of a typical agreement in this area, but some patterns are already discernible. For instance, in the Agreement between the European Communities and Canada, which entered into force in June 1999, fairly detailed provision is made for cooperation through notification, consultation and exchange of information, among other things. One underlying idea is that, where a party intends to take enforcement action to counter anti-competitive behaviour on the part of a corporation, it has to notify other parties that are likely to be significantly affected. The parties may undertake consultations on specific matters that have arisen, and in the course of enforcement activities may opt to work in coordination with each other. The parties also undertake to share information that enhances the application of their respective

competition laws, though all information requirements are subject to confidentiality exceptions. Here again, the duty of transparency is not placed upon countries exclusively as home countries, but in particular cases such agreements concerning competition will place particular responsibilities on home countries for conduct carried out by their enterprises abroad.

- **Fair and equitable treatment.** Where a host country is obliged to grant fair and equitable treatment to foreign investors, it may be argued that this also implies a duty on the part of the host country to make public the laws, regulations and practices that are applicable to foreign investors. This would be implicit in the concept of fairness. For, if a foreign investor wishes to establish whether or not a particular host country action is fair and equitable, as a practical matter, the investor needs to ascertain the pertinent rules and practices that govern that country's action. The degree of transparency in the regulatory environment therefore helps to determine the extent to which a host country may be regarded as acting in accordance with the concept of fair and equitable treatment (UNCTAD, 1999b; Vasciannie, 2000). As is shown by the *Metalclad* controversy (box III.1), the precise relationship between transparency and fair and equitable treatment is ultimately determined by the terms of the given agreement.<sup>1</sup>

#### **Box III.1. The NAFTA Metalclad case**

In the case between Metalclad Corporation and Mexico, the Arbitral Tribunal constituted under Chapter Eleven of the NAFTA found that:

“74. NAFTA Article 1105(1) provides that 'each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security'. For reasons set out below, the Tribunal finds that Metalclad's investment was not accorded fair and equitable treatment in accordance with international law, and that Mexico has violated the NAFTA Article 1105(1).

/...

### **Box III.1 (concluded)**

75. An underlying objective of NAFTA is to promote and increase cross-border investment opportunities and ensure the successful implementation of investment initiatives (NAFTA Article 102(1)).

76. Prominent in the statement of principles and rules that introduces the Agreement is the reference to 'transparency' (NAFTA Article 102(1)). The Tribunal understands this to include the idea 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. [...]

99. Mexico failed to ensure a transparent and predictable framework for Metalclad's business planning and investment. The totality of these circumstances demonstrates a lack of orderly process and timely disposition in relation to an investor of a party acting in the expectation that it would be treated fairly and justly in accordance with the NAFTA. [...]

101. The Tribunal therefore holds that Metalclad was not treated fairly or equitably under the NAFTA and succeeds on its claim under Article 1105.”

The Government of Mexico successfully challenged this finding in a review of the award in accordance with Article 1136 of NAFTA before the Supreme Court of British Columbia. It was held that the Tribunal had gone beyond its jurisdiction by relying on Article 102(1) to include transparency obligations. Transparency was not an objective of NAFTA but was listed in Article 102(1) as one of the principles and rules contained in NAFTA through which the objectives were elaborated. While the principles of national treatment and MFN treatment were contained in Chapter 11 of NAFTA, transparency was not. Given that the Tribunal could only determine whether rights under Chapter 11 had been breached it did not have jurisdiction to arbitrate claims in respect of alleged breaches of other provisions of NAFTA. Therefore, while, as a general proposition, it may be argued that transparency forms part of the fair and equitable treatment principle, its actual operation as a binding obligation depends on the precise terms and structure of the IIA in question.

*Source:* UNCTAD, based on ICSID Case No. ARB(AF)/97/1, in International Law Materials, 40 (2001), pp. 36-40; Supreme Court of British of Columbia, in British Columbia Law Reports, 89 (2001), pp. 359-366.

- **Illicit payments.** Generally, the main methods of tackling the



problem of illicit payments at the international level have involved considerable reliance on transparency (UNCTAD, 2001b; Sornarajah, 1990). Consequently, the extent of interaction between both concepts is substantial. There are several examples of international instruments employing transparency provisions to combat corruption. The Inter-American Convention against Corruption, which entered into force in 1997, exemplifies this approach with regard to transparency in at least two respects. First, by virtue of article X, each party is required to notify the Secretary General of the Organization of American States when it adopts legislation to combat transnational bribery and illicit enrichment, with the Secretary General being obliged to transmit this information to other parties. Second, article XIV requires each of the parties to afford to each other “the widest measure of mutual assistance” in the gathering of evidence and in the preparation of legal proceedings against corruption, and to participate in cooperative efforts to prevent, detect, investigate and punish corruption. Broadly similar rules that allow for the cross-border sharing of information concerning corrupt activities are also incorporated in the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and in the Council of Europe’s Criminal Law Convention on Corruption, while United Nations General Assembly resolutions, including Resolutions 51/191 and 52/87, exhort States to undertake international cooperative efforts in this area (see more recently, the United Nations Convention against Corruption, adopted on 31 October 2003 at the fifty eighth session of the General Assembly by resolution A/RES/58/4). Strictly speaking, these instruments are not concerned exclusively with investment matters. In practice, countries are obliged to act in accordance with principles of transparency to combat bribery and corruption and, in some instances, will be among States with the means to gather substantial information for this purpose. The 1992 World Bank Guidelines on the Treatment of Foreign Direct Investment (guideline III, section

8) also use the promotion of transparency as a tool for the prevention and control of corrupt business practices. The relationship between transparency and the fight against corruption has also been at the core of NGOs activities. For example, Transparency International seeks to curb corruption by mobilizing a global coalition to promote and strengthen international and national “Integrity Systems”. Its work includes business advocacy, awareness raising, monitoring, and national Integrity Systems building.

- **Incentives.** The majority of IIAs that specifically address the issue of transparency do so in general terms. It is therefore not always clear whether the resulting transparency obligations extend to incentives. The usual formulation is to refer to laws, regulations, procedures and administrative practices of general application in respect to any matter covered by the IIA in question, coupled with the obligation that these are promptly published or otherwise made available to interested parties. To the extent that incentives provisions are contained in such instruments, the transparency obligation extends to them as well. Beyond that, certain agreements make an explicit connection between incentives and transparency. Thus, the section on Investment Incentives in the draft MAI included a provision that expressly applied the transparency provision in the draft MAI to investment incentives. In other instruments, transparency in the operation of investment incentives is placed on a hortatory basis. Thus, the OECD Declaration on International Investment and Multinational Enterprises, paragraph IV (International Investment Incentives and Disincentives), states, *inter alia*, that member countries will endeavour to make measures concerning investment incentives and disincentives “as transparent as possible, so that their importance and purpose can be ascertained and that information on them can be readily available”. In a similar fashion, Article 160 of the Treaty Establishing the Common Market for Eastern and Southern Africa addresses the need for the member

States to undertake “to increase awareness of their investment incentives, opportunities, legislation, practices, major events affecting investments and other relevant information through regular dissemination and other awareness–promoting activities.” The SCM Agreement contains mandatory, detailed transparency provisions dealing with incentives. For example, article 25 of this Agreement requires members to notify subsidies covered by the Agreement in order to enable other members to evaluate the trade effects and to understand the operation of the notified subsidy programmes. Article 22 also requires members to notify and make publicly available the initiation of an investigation on the legality of subsidy programmes of other members, providing clearly the types of information to be included in the public notice.

- **Social responsibility.** In investment law, the idea underlying the concept of corporate social responsibility is the notion that TNCs should seek in their operations to promote the economic and social interests of host and home countries in the course of their activities (UNCTAD, 2001c). Several components of social responsibility interact in significant ways with the concept of transparency. For instance, if TNCs are required to adhere to ethical business standards and to promote and protect human rights, there must be means by which transnational activities in these areas are assessed and verified by the wider public; for this to occur, the activities of TNCs must be transparent and open. Similarly, if TNCs are required to show due regard for environmental, labour and consumer concerns, there will need to be adequate means of communication between TNCs and the various stakeholders, as well as methods by which actions on the part of TNCs may be verified (Muchlinski, 1999). Transparency as a means of promoting social responsibility may be achieved by the use of national legislation, but in some instances, the force and direction of national laws may need to be strengthened by international agreements and policy pronouncements.
- **Transfer pricing.** The methods by which TNCs place a value on

goods, services and other assets transferred from one country to another but within the same corporate structure has raised important accounting and management problems for both governments and corporations (UNCTAD, 1999e). Transfer pricing questions interact with issues of transparency in a number of ways. For one thing, if home and host governments fear that a TNC may rely on invoicing methods that do not reflect the market value of goods and services being transferred within the corporate structure, they may monitor intra-company transfers by requiring transparency on the part of the company, under taxation law and also under the law concerning funds transfer from the particular jurisdiction. Indeed such probity on the part of the TNC is also required by the OECD Guidelines section on Taxation. At the same time, however, for reasons of efficiency, TNCs need information about the applicable laws concerning taxation and funds transfers, and will thus require transparency as to laws in both home and host countries. Also, bearing in mind the risks of illicit payments in this area, the emerging treaty rules concerning corruption that require transparency on the part of home and host countries are relevant.

### Note

- <sup>1</sup> In this regard the evolution of the ASEAN Agreement for the Protection and Promotion of Investment should be noted. While in its original form this Agreement contained no express language on the provision of information by host countries to foreign investors, the revised version of the Agreement, signed in September 1996, does incorporate a provision on "Transparency and Predictability", even though the original version of the ASEAN Treaty did incorporate a provision guaranteeing fair and equitable treatment for foreign investors in article IV(2) (see further UNCTAD, 1999b).

## **CONCLUSION ECONOMIC AND DEVELOPMENT IMPLICATIONS AND POLICY OPTIONS**

The concept of transparency is applicable to the three main sets of participants in the international investment process. Accordingly, the present paper has examined transparency issues from the different perspectives of the host country, the home country and the foreign investor. For all three sets of investment participants, the question for consideration here is whether, and to what extent, different approaches to transparency may influence the development prospects of countries participating in IIAs.

This question has no straightforward answer, for a variety of reasons. First, there is the familiar point that transparency is only one of a number of factors that influence development possibilities for countries or companies. Thus, even where the most rigorous standards of transparency are enforced, it will be difficult to state that this has contributed to, or retarded, the investment process. To illustrate, a developing host country may have a transparent FDI framework, but the laws and regulations that it publishes widely happen to have features that are inimical to investment promotion. Indeed, the country in question may simply have too few locational advantages to be a worthwhile investment destination. In such cases, there will be no direct relationship between transparency and the development prospects of the country concerned. The converse may also be true, namely that a developing country that has a non-transparent FDI framework may have natural advantages as an investment location making the risk of investment worthwhile.

Secondly, the impact on development prospects of different approaches to transparency may be difficult to discern because transparency is still largely perceived as an issue for national law. In most cases, in which there is a reference to transparency in an IIA, this reference is meant to reinforce the national law treatment of the subject. To be sure, several concepts in IIAs share this feature, so that, for instance, treatment standards for foreign investors in BITs are often meant to supplement or confirm national law approaches. However, in

the case of transparency, this characteristic is especially pronounced because almost all countries maintain, in principle, that transparency is important. With this in mind, some countries argue that, as transparency is included in their legal systems as a matter of course, there is no need for transparency issues to be included in IIAs. Thus, the absence of a provision on transparency in an investment agreement may not be fully indicative of a country's attitude towards transparency. Similarly, even where an investment agreement does incorporate provisions on transparency, the strictures in the agreement are likely to be somewhat general, leaving scope for countries to indicate more detailed rules on transparency in their national law. Again, this underlines the difficulty in assessing the extent to which the transparency provisions in an IIA may actually influence the investment process in regard to a particular country.

Thirdly, the impact that specific approaches to transparency in IIAs may have is sometimes obscured by the fact that some agreements incorporate more than one approach to transparency. For instance, a host country may accept a legal duty to publish its laws and regulations, and simultaneously accept a duty to consult with some other countries on investment matters. If the host country is successful in attracting FDI, the particular contribution made either by the country's broad acceptance of transparency, or by the country's acceptance of one form of transparency as against the other, will almost certainly be beyond calculation.

Fourthly, administrative and cost factors should be borne in mind. Efforts to ensure transparency – whether in the form of information-disclosure or consultation – involve administrative costs (WTO, 2002, p. 14), a burden particularly for developing countries with scarce resources. Administrative costs of maintaining transparency may also be high with duties to notify, provision of information and response to requests.

Fifthly, transparency obligations imposed with regard to home country measures may enhance the information capacity of both the host country and the foreign investor since such measures play a role in promoting FDI, generally and development-oriented FDI more specifically. Similarly, disclosure requirements imposed on TNCs may be beneficial to both host and home countries. The latter may wish to acquire information about the operations of the investor in other countries for example for taxation purposes and as a means of assessing whether a foreign investor is acting in accordance with its own rules and policies that have extraterritorial reach. The former will want to have access to information concerning TNCs in order to strengthen its capacity to assess the nature and value of the contribution being made by particular foreign investors, as well as to assess the effectiveness of its national policies and regulations.

In light of the preceding discussion the following policy options present themselves:

### **A. No reference to transparency**

Although transparency is not a major determinant of FDI, as a general proposition, foreign investors do expect a certain degree of transparency, especially from host countries. Since foreign investors may regard the absence of legal rules compelling transparency in host countries unfavourably, this option might not be ideal to enhance a country's image among foreign investors and to a certain extent weakens their prospects for improving inward capital flow.

In fairness, however, this is not to suggest that reliance on an approach that makes no reference to transparency necessarily conveys hostility to transparency, or to foreign investors more generally. Much will depend on the circumstances of each case. More specifically, a country may support this option for reasons that do not reflect its perspective on the importance of transparency in practice. A country

may, for instance, accept investment agreements without a reference to transparency because it believes that this type of transparency is inherently an issue for national law, and may thus be best addressed by domestic legislation. This, in itself, makes no negative statement as to the need to ensure transparency safeguards in the interests of foreign investors. Moreover, a country may accept the omission of a treaty reference to transparency on the assumption that this type of transparency is implicitly incorporated in all agreements which provide for fair and equitable treatment for foreign investors. In this case, too, silence on the question of transparency ought not to be construed as hostility to foreign investment.

Similarly, depending on the circumstances of the case, a lack of transparency provisions dealing with home country measures and foreign investors' activities may, on the one hand, restrict the investment-promotion potential of the former measures and, on the other, impede both host and home countries' capacity to implement and monitor their national policies and laws.

### **B. Reference to transparency**

#### **1. Addressees**

When transparency requirements are incorporated into IIAs, there may exist at least three different options with regard to the addressees of such requirements.

##### **Option 1. Reference to all State parties to an IIA.**

A transparency requirement that is imposed on all State parties to an IIA means that such a requirement is applicable not only to host countries but also to home countries. It thus makes sure that the regulatory framework for FDI of the home country, including any measures for the promotion of FDI to developing countries, is subject to



transparency as is the regulatory framework of host countries (UNCTAD, 2003b). In this respect, the scope *ratione personae* (the addressees) of a transparency obligation may often depend on its actual drafting and on the related issue of the scope *ratione materiae* (the items of information that are subject to transparency). In addition, reference to all parties to an IIA means that home countries might be called to provide information for purposes of assisting host countries in the conduct of their regulatory policies such as, for example, tackling corruption and promoting economic competition (UNCTAD, 2003b, p. 156). This comprehensive approach would also enhance the investment-promotion features of home country measures in as much as it would provide potential investors with the necessary information.

### **Option 2. Specific reference to host country.**

A transparency requirement imposed on host countries only is narrower in coverage than the requirement in option 1. If a country wishes to make a clear statement to the effect that it is hospitable to FDI, it may consider adopting this option. By acknowledging a legal obligation on the part of the country to comply with transparency requirements in different ways, this option should, subject to other investment considerations, encourage investor confidence. However, this option would have the same possible shortcomings signalled above with regard to the lack of transparency provisions dealing with home country measures.

### **Option 3. Specific reference to corporate entities.**

The inclusion of specific transparency obligations on corporate entities would ensure broad access to information, in particular by the host country. This would in turn facilitate the planning and monitoring responsibilities of both host and home governments, for example, in the fields of taxation, company, competition and labour regulations. In addition, having regard to trends in favour of corporate social

responsibility, host countries that place obligations of transparency on TNCs would also be able adequately to assess the evolving relationship between particular foreign investors and the wider public affected by their operations in the host country.

However, disclosure requirements in IIAs are not always supported by foreign investors or by capital-exporting countries. For one thing, disclosure requirements in an IIA may imply a possible discrimination of foreign investors (in violation of the national treatment obligation) if they are imposed on them only (i.e. if the domestic law of the host country does not include similar requirements). For another, foreign investors may fear that such requirements are really the foundation for unduly intrusive disclosure rules and regulations under national law. Furthermore, where mandatory corporate disclosure rules are placed in investment instruments, they may not – in the view of foreign investors – incorporate appropriate protection for information to be safeguarded from public scrutiny on grounds of confidentiality or otherwise. Mandatory disclosure requirements in investment agreements may therefore be regarded as a factor that may deter foreign investors, though the extent to which they may actually deter such investment will vary from case to case.

## **2. Items of information**

Transparency requirements incorporated into IIAs may display a different degree of intrusiveness depending first of all on the items of information that are subject to such requirements. Different options may be available depending on whether the transparency requirements deal with governmental or corporate information.

### **a. Governmental information**

With regard to governmental information, at least four different basic options may be envisaged. These could be used alone, or on a

combined basis so as to increase the types of information that have to be disclosed under the transparency obligation:

- Option 1. The first option is to include a transparency obligation with regard to “general policies” pertaining or affecting investment.
- Option 2. A broader option, and one that would be more intrusive would be to add “laws and regulations” and “administrative procedures” to the relevant items of information subject to transparency.
- Option 3. In order to supplement the scope of the information subject to transparency, a third option would be also to include explicit reference to “judicial decisions” and “international agreements” pertaining or affecting investment.
- Option 4. A further, more intrusive option would be to add specific “judicial procedures”, “administrative practices” and/or “administrative decisions” on individual cases to the transparency obligation.
- Option 5. A final option would be to include a transparency obligation with regard to “draft” or “proposed” laws and regulations, in order to give other interested parties the possibility to comment on such draft laws or regulations before their finalization.

The key issue here concerns with the extent of intrusiveness a country (host or home) is comfortable with.

There is also a related issue, that of costs. Countries (and particularly, developing countries) may realistically fear that a duty to publicize every item of legal information could become burdensome and, indeed, even developed countries do not publicize every low level administrative or judicial decision that may affect investment in particular communities. This factor, however, may be overcome by a country's commitment to make some items of information public

(without publishing it), so that foreign investors will have access even to information of specific scope in appropriate instances.

In practice, there may be questions about the treatment of items of confidential information, but these issues do not undermine the basic point that core items of information concerning the operation of the host country's legal regime for investors need to be placed in the public domain if that country wishes to promote investor interest. Public disclosure of laws, regulations and administrative practices allows foreign investors to assess different regimes for fairness and non-discrimination, and tends to reduce opportunities for petty corruption and arbitrary behaviour within countries, factors that have bearing on the investment climate. Public disclosure of laws, regulations and administrative practices, too, allows investors to obtain information that may be relevant to their locational decision. Such disclosure may also facilitate the promotional strategies of host countries seeking to attract FDI by providing them with information that can then become an integral part of promotion strategies geared towards particular countries.

### **b. Corporate information**

With regard to corporate information, two general options may be envisaged.

- Option 1. A first option would be to require disclosure of business and financial information only. This would include information relating to the structure of the corporation and its main activities, as well as information relating to financial matters such as the balance sheet, income statement, statement of sources, significant new long-term capital investment, etc.
- Option 2. A second, and more modern and inclusive, option would be to require, in addition to business and financial information, disclosure of information on company policies relating to

business ethics, the environment and other public policy commitments.

As noted above, corporate information is important for both home and host countries to be able to formulate and manage their national policies and laws, whether dealing with development, taxation or environmental issues. Within the context of an IIA this may apply with greater emphasis depending on whether or not transparency requirements already exist in the national laws of the countries concerned. Where the actual disclosure requirements are widely drawn, countries may be allowed to gather information about commercial plans, opportunities and prospects of particular foreign investors, information which could enhance, on the one hand, host countries' capacity to benefit more from FDI and, on the other, home countries' ability to improve development-oriented FDI measures. While foreign investors frequently do not support broad mandatory disclosure requirements that include business and non-business information, this may ultimately be beneficial also for foreign investors at least where governments make use of the information collected in a manner that is receptive to investors' interests. In any event, the inclusion of safeguards or exceptions to transparency requirements (e.g. to protect confidential information), as explained below, constitutes an option addressing some of these concerns.

### **3. Modalities**

Different degrees of intrusiveness may also depend on the types of mechanisms that are employed to further transparency. In this regard, several options are available, which may also be used concurrently. In each case the commitment could be mandatory or voluntary. Clearly, where the latter approach is taken, the burden of compliance on countries is much lesser than in the case of a mandatory obligation. The discussion continues on the assumption that a binding obligation is to be taken, as this is where the most significant issues of intrusiveness lie.

### **Option 1. Consultation and exchange of information.**

Where such a commitment is mandatory, some countries may consider that they do not have the administrative and technical capacity to undertake frequent rounds of consultations on matters that, ultimately, may be of little practical consequence. This suggests that the duty to consult could be framed to include the notion that consultations shall take place following specified intervals, or that the time interval between rounds of consultation should be reasonably spaced.

### **Option 2. Making information publicly available.**

Information could be made publicly available, whether through formal publication or by simply allowing interested parties access to relevant information. This type of transparency mechanism is basic to the investment relationship. Moreover, this option does not seem to involve any problematic issues per se, since it is often the case that such obligations exist already under national laws. However, depending on the items of information that are required to be made public, even this mechanism may become more controversial (see above B.2).

As noted above, publication requirements may also be imposed on countries with regard to draft laws or regulations with the aim of affording interested parties the opportunity to express their views before the formal adoption of these laws and regulations. This is the most intrusive type of publication requirement. Although it is based on the general idea that broader participation of all interested parties to the regulatory process might contribute to the final result, such a mechanism may also be seen as compromising a country's sovereign right to discuss and decide on investment rules without intervention by "external" parties (whether host, home countries or private investors). This is especially true in case of a broad power imbalance between the countries involved.

**Option 3. Answering requests for information.**

A third option may be to provide a duty to answer requests for information stemming from any of the other parties to an IIA. Although this option may be seen as more burdensome than the previous two, it would be advancing FDI flows in the sense that it may help countries as well as investors to obtain relevant information more easily.

**Option 4. Notification.**

A further option involves a requirement to notify general or specific actions taken by each party in respect of investment-related matters and/or changes to the regulatory framework affecting investment. These types of transparency requirements are usually specified in multilateral schemes, such as those set out in WTO agreements, in which a central agency is mandated to monitor the degree of country compliance to agreed rules. Acceptance of the duty to notify is therefore part of a wider package of rules, and if a country wishes to continue enjoying the benefits of the relevant multilateral scheme, it will need, as a matter of law, to adhere to the notification requirements. In the light of the possible costs and technical capacity problems involved in complying with detailed notification requirements, some multilateral schemes have sought to incorporate flexibility in the interests of developing countries and economies in transition by allowing certain exceptions to notification, waivers and/or relaxed time periods for satisfying notification rules.

Notification requirements may be imposed on States with the specific aim to guarantee procedural transparency in administrative proceedings directly affecting foreign investors. While this option enhances investors' information and thus their ability to operate efficiently in a host country, this type of transparency obligation also involves a higher degree of intrusiveness as it might require a greater administrative burden and extra financial costs. Foreign investors may

also want for administrative transparency obligations to be imposed on home countries in order to make sure that any administrative proceedings in the home country affecting outward FDI (e.g. taxation, financial assistance, promotion schemes) be carried out in a fair and impartial manner. Similar arguments are applicable with regard to notification requirements imposed directly on TNCs.

### **4. Timing**

The issue of timing also offers certain options.

#### **Option 1. No timing provision.**

Of course one option is not to include any time obligations within the transparency provision. That would give the country the maximum discretion as to when to disclose the information required under the transparency provision. However, it could also be seen as a license to treat compliance with that obligation rather lightly.

#### **Option 2. Inclusion of timing provision.**

On the other hand, should such a provision be decided upon, two main approaches to this issue can be discerned:

##### **a. General timing clause**

This offers no specific dates or deadlines by which the transparency obligation has to be fulfilled. Rather, it requires a general commitment to the prompt publication, or to making available, the items of information that have been included under the transparency obligation. A further variation of this approach is to have a commitment to a regular submission and/or updating of the required information, but without a specified deadline.



From a development perspective such a general commitment has the advantage of allowing for a measure of discretion and policy space as to the process of compliance with the transparency obligation. This may be important for a country that wishes to show a commitment to effective and regular disclosure of information under its transparency obligation, but which does not wish to be bound by strict deadlines, possibly due to concerns about the resource implications of such a commitment. Equally, where the addressee of this general approach is a corporation, it too would benefit from a wider discretion as to time for compliance. Such an approach might be particularly helpful for small and medium-sized enterprises. On the other hand, large TNCs could be expected to have the resources to comply with strict deadlines where these are required.

### **b. Specific deadlines**

A number of ways can be used to establish specific deadlines for compliance with the transparency obligation. These include compliance:

- by the date of entry into force of the policy measure, law, regulation or administrative decision, as the case may be;
- by a specific date in the calendar year;
- by the lapse of a specific period of time from the chosen point in time from which that period is to be measured. For example, six months after the date of the annual budget statement of a country or the date of the publication of a company's annual financial statement;
- for regular reporting or notification commitments, these can be specified at particular periods of the calendar year, for example, annually, half-yearly, quarterly and the like.

The common development implication of such measures is that they will place a greater burden of compliance upon the home or host country addressee of the obligation than a more flexible period. On the

other hand, such a commitment will show a degree of seriousness in the country's approach to transparency. In relation to corporate addressees, while small and medium-sized enterprises might find such deadlines relatively burdensome, larger firms should not. However, effective regulation may depend on effective and timely disclosure of information regardless of firm size. Thus such deadlines may be of value in ensuring regulatory compliance.

### **5. Exceptions**

As noted in section I, a number of policy reasons exist for expressly limiting the transparency obligation. In this light the following options present themselves:

#### **Option 1. No exceptions.**

A transparency obligation could be made absolute and unconditional. This would show a significant commitment towards such a principle. However, it would be perhaps unrealistic to expect countries or corporations to accept such a wide ranging commitment, given the vital issues that exceptions to transparency commitments entail. Thus exceptions are more likely to be put into place than not.

#### **Option 2. Exceptions to the transparency obligation.**

The main exceptions to this obligation are:

- Exclusion of information on public interest or national security grounds on the part of the addressee government.
- Exceptions to a notification requirement of certain items of information.
- Waiver of the duty to disclose in cases in which the item of information is otherwise available, as where another international agreement requires its disclosure.

- The protection of confidential information obtained in the course of governmental activities, on the part of a country addressee, or by a corporation in the course of its business operations.
- Exclusion of commercially sensitive information, or the content of intellectual property rights or secret know-how, in the possession of the addressee corporation.

The precise implications of such exceptions on development are hard to discern, especially as their purpose is not directed at this precise issue. They are aimed more at making the parameters of the intrusiveness of the transparency obligation acceptable within the boundaries of essential public policy and national security goals for countries, while for firms they seek to protect their sources of comparative advantage. In addition a general principle of confidentiality is needed to ensure that the transparency obligation is not abused through the disclosure of information that has been obtained by countries or corporations in confidence and in good faith. To the extent that essential public policy goals are not undermined through unconditional disclosure it could be said that such exceptions preserve the policy space needed by, in particular, developing host countries, in furthering their economic development policies. In addition, an assurance of confidentiality for firms may reduce the risk of compliance with disclosure regulations and so enhance their effectiveness as policy tools for development.

A final possibility that has not yet appear to have been used in IIA provisions is to provide for a capacity exception for small and medium sized enterprises that may be unable to meet all the requirements of full transparency and disclosure.

### **Option 3. Development exceptions.**

In this connection a further possible option arises, namely, whether special, development oriented exclusions should not be added to a transparency provision. At least two such exceptions can be envisaged:

- Transitional provisions that exclude the transparency obligation (or certain parts thereof) for developing and/or least developed countries for a specified time after entry into force of the IIA in question, so as to allow for time to adapt to the demands of compliance with the full obligation.
- Capacity based exceptions that limit the scope of transparency (or parts thereof) for countries that cannot sustain the administrative and financial burdens of full compliance.

Such provisions could also be used in conjunction with technical assistance provisions requiring such cooperation from developed home countries in ensuring that developing and least developed host countries can meet the standards required by a transparency obligation.

\* \* \*

From the foregoing discussion, it is clear that the inclusion of transparency provisions in IIAs offers a range of possibilities as to the addressees, the type or scope of information covered, the modalities for the delivery of the information, the timing of transparency disclosures and any relevant exceptions. On the other hand, there is a growing understanding, based on lengthy national policy experience, that transparency in the conduct of FDI policy, and transparency on the part of private investors, are conducive to the development of an effective, open and accountable system of economic activity that is particularly conducive to economic development. The use of appropriately formulated transparency obligations in IIAs can enhance this process by complementing national policies and by ensuring the acceptance of transparency as an increasingly valuable principle of international economic co-operation that may acquire the status of a general legal obligation.

## REFERENCES

- Asante, S.K.B. (1989). "The concept of the good corporate citizen in international business", *ICSID Review – Foreign Investment Law Journal*, 4, pp. 1-38.
- Blumberg, P.I. (1993). *The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality* (New York, Oxford: Oxford University Press).
- Brown, R., S. Joeques and L. Humphrey, (1998). "Private good = public gain? Has ethical pressure squared the circle?", Institute of Development Studies, *id21 insights*, <http://www.id21.org/insights28/insights-iss28-art00.html>.
- Commonwealth Association for Corporate Governance (1999). "Principles for corporate governance in the Commonwealth", in R.I. Tricker (ed.), *Corporate Governance* (2000) (Aldershot: Ashgate Publishing), pp. 458-474.
- Hong Kong, China (2000). "Communication from Hong Kong, China: transparency of investment environment", World Trade Organization, Working Group on the Relationship between Trade and Investment, doc. WT/WGTI/W/90, 9 October, mimeo, <http://docsonline.wto.org/>.
- International Monetary Fund (IMF) (1999). *Code of Good Practices on Transparency in Monetary and Financial Policies: Declaration of Principles*, 26 September (Washington, D.C.: IMF), <http://www.imf.org/external/np/mae/mft/code/index.htm>.
- Japan (2000). "Communication from Japan: improving transparency", World Trade Organization, Working Group on the Relationship between Trade and Investment, doc. WT/WGTI/W/87, 5 July, mimeo, <http://docsonline.wto.org/>.
- Mann, F.A. (1990). *Further Studies in International Law* (Oxford: Clarendon Press).

- Mavroidis, P. (2002). “*Amicus curiae* briefs before the WTO: much ado about nothing”, in A. von Boddandy et al. (eds.), *European Integration and International Co-ordination: Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann* (The Hague and London: Kluwer Law International), pp. 317-330.
- Muchlinski, P. (1999). *Multinational Enterprises and the Law* (Oxford and Cambridge: Blackwell).
- Organisation for Economic Co-operation and Development (OECD) (1967). “Council Resolution of 12 October 1967 on the Draft Convention on the Protection of Foreign Property”, *International Legal Materials*, vol. 7, pp. 117-143.
- \_\_\_\_\_ (1998). “Corporate governance: improving competitiveness and access to capital in global markets” (A Report to the OECD by the Business Sector Advisory Group on Corporate Governance) (Paris: OECD), mimeo.
- Paulsson, J. (1984). “The ICSID *Klockner v. Cameroon* Award: the duties of partners in North-South economic development agreements”, *Journal of International Arbitration*, vol. 1, pp. 145-184.
- Sauvant, K. (2002). “Transparency”, UNCTAD presentation at the Meeting of the WTO Working Group on the Relationship between Trade and Investment, 18-19 April 2002, DITE/IPCB/IA/PUB/2002/14.
- Sauvant, K. and V. Aranda, (1994). “The international legal framework for transnational corporations”, in A.A. Fatouros (ed.), *Transnational Corporations: The International Legal Framework, United Nations Library on Transnational Corporations, Vol. 20* (London and New York: Routledge), pp. 85-115.

Sornarajah, M., (1990). *International Commercial Arbitration: The Problem of State Contracts* (Singapore: Longman Singapore).

United Kingdom (1993). *Open Government*, Command Paper 2290, Presented to Parliament by the Chancellor of the Duchy of Lancaster by Command of Her Majesty, July 1993, mimeo.

\_\_\_\_\_ *Freedom of Information*, Command Paper 4355, mimeo.

United Nations Conference on Trade and Development (UNCTAD) (1996). *International Investment Instruments: A Compendium*, vols. I, II and III (New York and Geneva: United Nations), United Nations publications, Sales Nos. E.96.II.A.9, 10 and 11.

\_\_\_\_\_ (1998). *Bilateral Investment Treaties in the Mid-1990s* (New York and Geneva: United Nations), United Nations publication, Sales No. E.98.II.D.8.

\_\_\_\_\_ (1999a). *Admission and Establishment. UNCTAD Series on Issues in International Investment Agreements* (New York and Geneva: United Nations), United Nations publication, Sales No. E.99.II.D.10.

\_\_\_\_\_ (1999b). *Fair and Equitable Treatment. UNCTAD Series on Issues in International Investment Agreements* (New York and Geneva: United Nations), United Nations publication, Sales No. E.99.II.D.15.

\_\_\_\_\_ (1999c). *Most-Favoured-Nation Treatment. UNCTAD Series on Issues in International Investment Agreements* (New York and Geneva: United Nations), United Nations publication, Sales No. E.99.II.D.11

\_\_\_\_\_ (1999d). *National Treatment. UNCTAD Series on Issues in International Investment Agreements* (New York and

Geneva: United Nations), United Nations publication, Sales No. E.99.II.D.16.

\_\_\_\_\_ (1999e). *Transfer Pricing. UNCTAD Series on Issues in International Investment Agreements* (New York and Geneva: United Nations), United Nations publication, Sales No. E.99.II.D.8.

\_\_\_\_\_ (1999f). *Trends in International Investment Agreements: An Overview. UNCTAD Series on Issues in International Investment Agreements* (New York and Geneva: United Nations), United Nations publication, Sales No. E.99.II.D.23

\_\_\_\_\_ (2000a). *International Investment Instruments: A Compendium*, vols. IV and V (New York and Geneva: United Nations), United Nations publications, Sales Nos. E.00.II.D.13 and 14.

\_\_\_\_\_ (2000b). *International Investment Agreements: Flexibility for Development. UNCTAD Series on Issues in International Investment Agreements* (New York and Geneva: United Nations), United Nations publication, Sales No. E.00.II.D.6.

\_\_\_\_\_ (2001a). *Home Country Measures. UNCTAD Series on Issues in International Investment Agreements* (New York and Geneva: United Nations), United Nations publication, Sales No. E.01.II.D.19.

\_\_\_\_\_ (2001b). *Illicit Payments. UNCTAD Series on Issues in International Investment Agreements* (New York and Geneva: United Nations), United Nations publication, Sales No. E.01.II.D.20.

\_\_\_\_\_ (2001c). *Social Responsibility. UNCTAD Series on Issues in International Investment Agreements* (New York and



- Geneva: United Nations), United Nations publication, Sales No. E.01.II.D.4.
- \_\_\_\_\_ (2001d). *International Investment Instruments: A Compendium*, vol. VI (New York and Geneva: United Nations), United Nations publication, Sales No. E.01.II.D.34.
- \_\_\_\_\_ (2002a). *International Investment Instruments: A Compendium*, vols. VII, VIII, IX and X (New York and Geneva: United Nations), United Nations publications, Sales Nos. E.02.II.D.14, 15, 16 and 21.
- \_\_\_\_\_ (2003a). *Investor-State Dispute Settlement. UNCTAD Series on Issues in International Investment Agreements* (New York and Geneva: United Nations), United Nations publication, Sales No. E.03.II.D.5.
- \_\_\_\_\_ (2003b). *World Investment Report 2003. FDI Policies for Development: National and International Perspectives* (New York and Geneva: United Nations), United Nations publication, Sales No. 03.II.D.8.
- \_\_\_\_\_ (forthcoming a). *Competition. UNCTAD Series on Issues in International Investment Agreements* (New York and Geneva: United Nations).
- \_\_\_\_\_ (forthcoming b). *International Investment Instruments: A Compendium*, vols. XI and XII (New York and Geneva: United Nations).
- United Nations Centre on Transnational Corporations (UNCTC) (1988a). *Bilateral Investment Treaties* (London: Graham & Trotman).

- \_\_\_\_\_ (1988b). *The United Nations Code of Conduct on Transnational Corporations. UNCTC Current Studies* (London: Graham & Trotman).
- United States (1953). *United States Treaties and other International Agreements*, vol. 4, Part 2, 1953.
- Vandeveld, K.J. (1992). *United States Investment Treaties: Policy and Practice* (Deventer, Netherlands: Kluwer).
- Vasciannie, S. (2000). “The fair and equitable treatment standard in international investment law and practice”, *British Year Book of International Law*, vol. LXX, pp. 99-164.
- Walker, Herman Jr. (1957-1958). “Modern Treaties of Friendship, Commerce and Navigation”, *Minnesota Law Review*, vol. 42 (April), pp. 805-824.
- Wallace, C.D. (1994). “Control through disclosure legislation: foreign multinational enterprises in industrialized States”, in S.J. Rubin and D. Wallace (eds.), *Transnational Corporations and National Law* (London and New York: Routledge), pp. 200-235.
- World Trade Organization (WTO) (2002). “Transparency: note by the secretariat”, Working Group on the Relationship between Trade and Investment, doc. WT/WGTI/W/109, 27 March, mimeo, <http://docsonline.wto.org/>.

***Selected UNCTAD publications on transnational corporations  
and foreign direct investment***

(For more information, please visit [www.unctad.org/en/pub](http://www.unctad.org/en/pub))

**A. Serial publications**

***World Investment Reports***

(For more information visit [www.unctad.org/wir](http://www.unctad.org/wir))

***World Investment Report 2003: FDI Policies for Development: National and International Perspectives.*** Sales No. E.03.II.D.8. \$49. [http://www.unctad.org/en/docs/wir2003\\_en.pdf](http://www.unctad.org/en/docs/wir2003_en.pdf).

***World Investment Report 2003: FDI Policies for Development: National and International Perspectives. An Overview.*** 66 p. [http://www.unctad.org/en/docs/wir2003overview\\_en.pdf](http://www.unctad.org/en/docs/wir2003overview_en.pdf).

***World Investment Report 2002: Transnational Corporations and Export Competitiveness.*** 352 p. Sales No. E.02.II.D.4. \$49. [http://www.unctad.org/en/docs/wir2002\\_en.pdf](http://www.unctad.org/en/docs/wir2002_en.pdf).

***World Investment Report 2002: Transnational Corporations and Export Competitiveness. An Overview.*** 66 p. [http://www.unctad.org/en/docs/wir2002overview\\_en.pdf](http://www.unctad.org/en/docs/wir2002overview_en.pdf).

***World Investment Report 2001: Promoting Linkages.*** 356 p. Sales No. E.01.II.D.12 \$49. <http://www.unctad.org/wir/contents/wir01content.en.htm>.

***World Investment Report 2001: Promoting Linkages. An Overview.*** 67 p. <http://www.unctad.org/wir/contents/wir01content.en.htm>.

***Ten Years of World Investment Reports: The Challenges Ahead. Proceedings of an UNCTAD special event on future challenges in the area of FDI.*** UNCTAD/ITE/Misc.45. <http://www.unctad.org/wir>.

***World Investment Report 2000: Cross-border Mergers and Acquisitions and Development.*** 368 p. Sales No. E.99.II.D.20. \$49. <http://www.unctad.org/wir/contents/wir00content.en.htm>.

***World Investment Report 2000: Cross-border Mergers and Acquisitions and Development. An Overview.*** 75 p. <http://www.unctad.org/wir/contents/wir00content.en.htm>.

***World Investment Report 1999: Foreign Direct Investment and the Challenge of Development.*** 543 p. Sales No. E.99.II.D.3. \$49. <http://www.unctad.org/wir/contents/wir99content.en.htm>.

***World Investment Report 1999: Foreign Direct Investment and the Challenge of Development. An Overview.*** 75 p. <http://www.unctad.org/wir/contents/wir99content.en.htm>.

***World Investment Report 1998: Trends and Determinants.*** 432 p. Sales No. E.98.II.D.5. \$45. <http://www.unctad.org/wir/contents/wir98content.en.htm>.

***World Investment Report 1998: Trends and Determinants. An Overview.*** 67 p. <http://www.unctad.org/wir/contents/wir98content.en.htm>.

***World Investment Report 1997: Transnational Corporations, Market Structure and Competition Policy.*** 384 p. Sales No. E.97.II.D.10. \$45. <http://www.unctad.org/wir/contents/wir97content.en.htm>.

***World Investment Report 1997: Transnational Corporations, Market Structure and Competition Policy. An Overview.*** 70 p. <http://www.unctad.org/wir/contents/wir97content.en.htm>.

***World Investment Report 1996: Investment, Trade and International Policy Arrangements.*** 332 p. Sales No. E.96.II.A.14. \$45. <http://www.unctad.org/wir/contents/wir96content.en.htm>.

***World Investment Report 1996: Investment, Trade and International Policy Arrangements. An Overview.*** 51 p. <http://www.unctad.org/wir/contents/wir96content.en.htm>.

*World Investment Report 1995: Transnational Corporations and Competitiveness.* 491 p. Sales No. E.95.II.A.9. \$45. <http://www.unctad.org/wir/contents/wir95content.en.htm>.

*World Investment Report 1995: Transnational Corporations and Competitiveness. An Overview.* 51 p. <http://www.unctad.org/wir/contents/wir95content.en.htm>.

*World Investment Report 1994: Transnational Corporations, Employment and the Workplace.* 482 p. Sales No. E.94.II.A.14. \$45. <http://www.unctad.org/wir/contents/wir94content.en.htm>.

*World Investment Report 1994: Transnational Corporations, Employment and the Workplace. An Executive Summary.* 34 p. <http://www.unctad.org/wir/contents/wir94content.en.htm>.

*World Investment Report 1993: Transnational Corporations and Integrated International Production.* 290 p. Sales No. E.93.II.A.14. \$45. <http://www.unctad.org/wir/contents/wir93content.en.htm>.

*World Investment Report 1993: Transnational Corporations and Integrated International Production. An Executive Summary.* 31 p. ST/CTC/159. <http://www.unctad.org/wir/contents/wir93content.en.htm>.

*World Investment Report 1992: Transnational Corporations as Engines of Growth.* 356 p. Sales No. E.92.II.A.19. \$45. <http://www.unctad.org/wir/contents/wir92content.en.htm>.

*World Investment Report 1992: Transnational Corporations as Engines of Growth. An Executive Summary.* 30 p. Sales No. E.92.II.A.24. <http://www.unctad.org/wir/contents/wir92content.en.htm>.

*World Investment Report 1991: The Triad in Foreign Direct Investment.* 108 p. Sales No. E.91.II.A.12. \$25. <http://www.unctad.org/wir/contents/wir91content.en.htm>.

***World Investment Directories***

(For more information visit

[http://r0.unctad.org/en/subsites/dite/fdistats\\_files/WID2.htm](http://r0.unctad.org/en/subsites/dite/fdistats_files/WID2.htm))

***World Investment Directory 2003: Central and Eastern Europe. Vol. VIII.*** 397 p. Sales No. E.03.II.D.24. \$80.

***World Investment Directory 1999: Asia and the Pacific. Vol. VII (Parts I and II).*** 332+638 p. Sales No. E.00.II.D.21. \$80.

***World Investment Directory 1996: West Asia. Vol. VI.*** 138 p. Sales No. E.97.II.A.2. \$35.

***World Investment Directory 1996: Africa. Vol. V.*** 461 p. Sales No. E.97.II.A.1. \$75.

***World Investment Directory 1994: Latin America and the Caribbean. Vol. IV.*** 478 p. Sales No. E.94.II.A.10. \$65.

***World Investment Directory 1992: Developed Countries. Vol. III.*** 532 p. Sales No. E.93.II.A.9. \$75.

***World Investment Directory 1992: Central and Eastern Europe. Vol. II.*** 432 p. Sales No. E.93.II.A.1. \$65. (Joint publication with the United Nations Economic Commission for Europe.)

***World Investment Directory 1992: Asia and the Pacific. Vol. I.*** 356 p. Sales No. E.92.II.A.11. \$65.

***Investment Policy Reviews***

(For more information visit <http://r0.unctad.org/ipr>)

***Investment Policy Review – Algeria.*** Forthcoming.

***Investment Policy Review – Sri Lanka.*** Forthcoming.

*Investment Policy Review – Nepal.* 85 p. UNCTAD/ITE/IPC/MISC/2003/1. <http://r0.unctad.org/ipr/Nepal.pdf>.

*Investment Policy Review – Lesotho.* 84 p. UNCTAD/ITE/IPC/MISC.25/Corr.1. <http://r0.unctad.org/ipr/lesotho.pdf>.

*Investment Policy Review – Ghana.* 98 p. Sales No. E.02.II.D.20. \$ 20. <http://r0.unctad.org/ipr/ghana.pdf>.

*Investment Policy Review – United Republic of Tanzania.* 98 p. Sales No. 02.E.II.D.6 \$ 20. <http://r0.unctad.org/ipr/Tanzania.pdf>.

*Investment Policy Review – Botswana.* 91 p. Sales No. E.01.II.D. \$ 20. <http://r0.unctad.org/ipr/botswana.pdf>.

*Investment Policy Review – Ecuador.* 117 p. Sales No. E.01.II D.31. \$ 25. <http://r0.unctad.org/ipr/Ecuador.pdf>.

*Investment and Innovation Policy Review – Ethiopia.* 115 p. UNCTAD/ITE/IPC/Misc.4. Free of charge. <http://r0.unctad.org/ipr/Ethiopia.pdf>.

*Investment Policy Review – Mauritius.* 85 p. Sales No. E.01.II.D.11. \$22. <http://r0.unctad.org/ipr/Mauritius.pdf>.

*Investment Policy Review – Peru.* 101 p. Sales No. E.00.II.D.7. \$22. <http://r0.unctad.org/ipr/Peru.pdf>.

*Investment Policy Review – Uganda.* 65 p. Sales No. E.99.II.D.24. \$15. <http://r0.unctad.org/ipr/UGANDA.PDF>.

*Investment Policy Review – Egypt.* 113 p. Sales No. E.99.II.D.20. \$19. <http://r0.unctad.org/ipr/EGYFIN1.PDF>.

*Investment Policy Review – Uzbekistan*. 64 p. UNCTAD/ITE/IIP/Misc.13.  
<http://r0.unctad.org/ipr/Uzbekistan.pdf>.

### *International Investment Instruments*

*International Investment Instruments: A Compendium. Vol. XII.*  
forthcoming.

*International Investment Instruments: A Compendium. Vol. XI.*  
forthcoming.

*International Investment Instruments: A Compendium. Vol. X.* 353 p.  
Sales No. E.02.II.D.21. \$60. <http://www.unctad.org/en/docs/psdited3v9.en.pdf>.

*International Investment Instruments: A Compendium. Vol. IX.* 353 p.  
Sales No. E.02.II.D.16. \$60. <http://www.unctad.org/en/docs/psdited3v9.en.pdf>.

*International Investment Instruments: A Compendium. Vol. VIII.* 335 p.  
Sales No. E.02.II.D.15. \$60. <http://www.unctad.org/en/docs/psdited3v8.en.pdf>.

*International Investment Instruments: A Compendium. Vol. VII.* 339 p.  
Sales No. E.02.II.D.14. \$60. <http://www.unctad.org/en/docs/psdited3v7.en.pdf>.

*International Investment Instruments: A Compendium. Vol. VI.* 568 p.  
Sales No. E.01.II.D.34. \$60. [http://www.unctad.org/en/docs/ps1dited2v6\\_p1.en.pdf](http://www.unctad.org/en/docs/ps1dited2v6_p1.en.pdf) (part one).

*International Investment Instruments: A Compendium. Vol. V.* 505 p.  
Sales No. E.00.II.D.14. \$55.

*International Investment Instruments: A Compendium. Vol. IV.* 319 p.  
Sales No. E.00.II.D.13. \$55.



*International Investment Instruments: A Compendium. Vol. I.* 371 p. Sales No. E.96.II.A.9; *Vol. II.* 577 p. Sales No. E.96.II.A.10; *Vol. III.* 389 p. Sales No. E.96.II.A.11; the 3-volume set, Sales No. E.96.II.A.12. \$125.

*Bilateral Investment Treaties, 1959-1999.* 143 p. UNCTAD/ITE/IIA/2, Free of charge. Available only in electronic version from <http://www.unctad.org/en/pub/poiteiid2.en.htm>.

*Bilateral Investment Treaties in the Mid-1990s.* 314 p. Sales No. E.98.II.D.8. \$46.

### *LDC Investment Guides*

*Guide d'investissement en Mauritanie.* forthcoming.

*An Investment Guide to Cambodia: Opportunities and Conditions.* 80 p. UNCTAD/ITE/IIA/2003/6.

*An Investment Guide to Nepal: Opportunities and Conditions.* 88 p. UNCTAD/ITE/IIA/2003/2.  
[http://www.unctad.org/en/docs/iteia20032\\_en.pdf](http://www.unctad.org/en/docs/iteia20032_en.pdf).

*An Investment Guide to Mozambique: Opportunities and Conditions.* 72 p. UNCTAD/ITE/IIA/4. <http://www.unctad.org/en/docs/poiteiid4.en.pdf>.

*An Investment Guide to Uganda: Opportunities and Conditions.* 76 p. UNCTAD/ITE/IIT/Misc.30.  
<http://www.unctad.org/en/docs/poiteiitm30.en.pdf>.

*An Investment Guide to Bangladesh: Opportunities and Conditions.* 66 p. UNCTAD/ITE/IIT/Misc.29.  
<http://www.unctad.org/en/docs/poiteiitm29.en.pdf>.

*Guide d'investissement au Mali.* 108 p. UNCTAD/ITE/IIT/Misc.24.  
<http://www.unctad.org/fr/docs/poiteiitm24.fr.pdf>. (Joint publication with

the International Chamber of Commerce, in association with PricewaterhouseCoopers.)

*An Investment Guide to Ethiopia: Opportunities and Conditions.* 69 p. UNCTAD/ITE/IIT/Misc.19.

<http://www.unctad.org/en/docs/poiteiitm19.en.pdf>. (Joint publication with the International Chamber of Commerce, in association with PricewaterhouseCoopers.)

### *Issues in International Investment Agreements*

(For more information visit <http://www.unctad.org/ia>)

*Dispute Settlement: State-State.* Sales No. E.03.II.D.6. \$15.

*Dispute Settlement: Investor-State.* Sales No. E.03.II.D.5. \$15.

*Transfer of Technology.* 138 p. Sales No. E.01.II.D.33. \$18.

*Illicit Payments.* 108 p. Sales No. E.01.II.D.20. \$13.

*Home Country Measures.* 96 p. Sales No. E.01.II.D.19. \$12.

*Host Country Operational Measures.* 109 p. Sales No. E.01.II.D.18. \$15.

*Social Responsibility.* 91 p. Sales No. E.01.II.D.4. \$15.

*Environment.* 105 p. Sales No. E.01.II.D.3. \$15.

*Transfer of Funds.* 68 p. Sales No. E.00.II.D.27. \$12.

*Employment.* 69 p. Sales No. E.00.II.D.15. \$12.

*Taxation.* 111 p. Sales No. E.00.II.D.5. \$12.

*International Investment Agreements: Flexibility for Development.* 185 p. Sales No. E.00.II.D.6. \$12.

*Taking of Property.* 83 p. Sales No. E.00.II.D.4. \$12.

*Trends in International Investment Agreements: An Overview.* 112 p. Sales No. E.99.II.D.23. \$ 12.

*Lessons from the MAI.* 31 p. Sales No. E.99.II.D.26. \$ 12.

*National Treatment.* 104 p. Sales No. E.99.II.D.16. \$12.

*Fair and Equitable Treatment.* 64 p. Sales No. E.99.II.D.15. \$12.

*Investment-Related Trade Measures.* 64 p. Sales No. E.99.II.D.12. \$12.

*Most-Favoured-Nation Treatment.* 72 p. Sales No. E.99.II.D.11. \$12.

*Admission and Establishment.* 72 p. Sales No. E.99.II.D.10. \$12.

*Scope and Definition.* 96 p. Sales No. E.99.II.D.9. \$12.

*Transfer Pricing.* 72 p. Sales No. E.99.II.D.8. \$12.

*Foreign Direct Investment and Development.* 88 p. Sales No. E.98.II.D.15. \$12.

## B. Current Studies Series A

No. 30. *Incentives and Foreign Direct Investment.* 98 p. Sales No. E.96.II.A.6. \$30. [Out of print.]

No. 29. *Foreign Direct Investment, Trade, Aid and Migration*. 100 p. Sales No. E.96.II.A.8. \$25. (Joint publication with the International Organization for Migration.)

No. 28. *Foreign Direct Investment in Africa*. 119 p. Sales No. E.95.II.A.6. \$20.

No. 27. *Tradability of Banking Services: Impact and Implications*. 195 p. Sales No. E.94.II.A.12. \$50.

No. 26. *Explaining and Forecasting Regional Flows of Foreign Direct Investment*. 58 p. Sales No. E.94.II.A.5. \$25.

No. 25. *International Tradability in Insurance Services*. 54 p. Sales No. E.93.II.A.11. \$20.

No. 24. *Intellectual Property Rights and Foreign Direct Investment*. 108 p. Sales No. 93.II.A.10. \$20.

No. 23. *The Transnationalization of Service Industries: An Empirical Analysis of the Determinants of Foreign Direct Investment by Transnational Service Corporations*. 62 p. Sales No. E.93.II.A.3. \$15.

No. 22. *Transnational Banks and the External Indebtedness of Developing Countries: Impact of Regulatory Changes*. 48 p. Sales No. E.92.II.A.10. \$12.

No. 20. *Foreign Direct Investment, Debt and Home Country Policies*. 50 p. Sales No. E.90.II.A.16. \$12.

No. 19. *New Issues in the Uruguay Round of Multilateral Trade Negotiations*. 52 p. Sales No. E.90.II.A.15. \$12.50.

No. 18. *Foreign Direct Investment and Industrial Restructuring in Mexico*. 114 p. Sales No. E.92.II.A.9. \$12.

No. 17. *Government Policies and Foreign Direct Investment*. 68 p. Sales No. E.91.II.A.20. \$12.50.

**ASIT Advisory Studies  
(Formerly Current Studies, Series B)**

No. 17. *The World of Investment Promotion at a Glance: A survey of investment promotion practices*. UNCTAD/ITE/IPC/3. Free of charge.

No. 16. *Tax Incentives and Foreign Direct Investment: A Global Survey*. 180 p. Sales No. E.01.II.D.5. \$23. Summary available from <http://www.unctad.org/asit/resumé.htm>.

No. 15. *Investment Regimes in the Arab World: Issues and Policies*. 232 p. Sales No. E/F.00.II.D.32.

No. 14. *Handbook on Outward Investment Promotion Agencies and Institutions*. 50 p. Sales No. E.99.II.D.22. \$ 15.

No. 13. *Survey of Best Practices in Investment Promotion*. 71 p. Sales No. E.97.II.D.11. \$ 35.

No. 12. *Comparative Analysis of Petroleum Exploration Contracts*. 80 p. Sales No. E.96.II.A.7. \$35.

No. 11. *Administration of Fiscal Regimes for Petroleum Exploration and Development*. 45 p. Sales No. E.95.II.A.8.

No. 10. *Formulation and Implementation of Foreign Investment Policies: Selected Key Issues*. 84 p. Sales No. E.92.II.A.21. \$12.

No. 9. *Environmental Accounting: Current Issues, Abstracts and Bibliography*. 86 p. Sales No. E.92.II.A.23.

### C. Individual Studies

*FDI in Least Developed Countries at a Glance: 2003.* Forthcoming.

*Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries.* 318 p. UNCTAD/ITE/IIA/2003/7. Sales No. E.03.II.D.32.

*FDI in Land-Locked Developing Countries at a Glance.* 112 p. UNCTAD/ITE/IIA/2003/5.

*FDI in Least Developed Countries at a Glance: 2002.* 136 p. UNCTAD/ITE/IIA/6. [http://www.unctad.org/en/docs/iteiia6\\_en.pdf](http://www.unctad.org/en/docs/iteiia6_en.pdf).

*The World of Investment Promotion at a Glance. Advisory Studies, No. 17.* 80 p. UNCTAD/ITE/IPC/3. <http://www.unctad.org/en/docs/poiteipcd3.en.pdf>.

*The Tradability of Consulting Services.* 189 p. UNCTAD/ITE/IPC/Misc.8. <http://www.unctad.org/en/docs/poiteipcm8.en.pdf>.

*Compendium of International Arrangements on Transfer of Technology: Selected Instruments.* 307 p. Sales No. E.01.II.D.28. \$45. <http://www.unctad.org/en/docs/psiteipcm5.en.pdf>

*FDI in Least Developed Countries at a Glance.* 150 p. UNCTAD/ITE/IIA/3. <http://www.unctad.org/en/pub/poiteiiad3.en.htm>.

*Foreign Direct Investment in Africa: Performance and Potential.* 89 p. UNCTAD/ITE/IIT/Misc.15. Free of charge. Also available from <http://www.unctad.org/en/docs/poiteiitm15.pdf>.

*TNC-SME Linkages for Development: Issues–Experiences–Best Practices. Proceedings of the Special Round Table on TNCs, SMEs and Development, UNCTAD X, 15 February 2000, Bangkok, Thailand.* 113 p. UNCTAD/ITE/TEB1. Free of charge.

*Handbook on Foreign Direct Investment by Small and Medium-sized Enterprises: Lessons from Asia.* 200 p. Sales No. E.98.II.D.4. \$48.

*Handbook on Foreign Direct Investment by Small and Medium-sized Enterprises: Lessons from Asia. Executive Summary and Report of the Kunming Conference.* 74 p. Free of charge.

*Small and Medium-sized Transnational Corporations. Executive Summary and Report of the Osaka Conference.* 60 p. Free of charge.

*Small and Medium-sized Transnational Corporations: Role, Impact and Policy Implications.* 242 p. Sales No. E.93.II.A.15. \$35.

*Measures of the Transnationalization of Economic Activity.* 93 p. Sales No. E.01.II.D.2. \$20.

*The Competitiveness Challenge: Transnational Corporations and Industrial Restructuring in Developing Countries.* 283p. Sales No. E.00.II.D.35. \$42.

*Integrating International and Financial Performance at the Enterprise Level.* 116 p. Sales No. E.00.II.D.28. \$18.

*FDI Determinants and TNC Strategies: The Case of Brazil.* 195 p. Sales No. E.00.II.D.2. \$35. Summary available from <http://www.unctad.org/en/pub/siteiitd14.en.htm>.

*The Social Responsibility of Transnational Corporations.* 75 p. UNCTAD/ITE/IIT/Misc. 21. Free of charge. [Out of stock.] Available from <http://www.unctad.org/en/docs/poiteiitm21.en.pdf>.

*Conclusions on Accounting and Reporting by Transnational Corporations.* 47 p. Sales No. E.94.II.A.9. \$25.

*Accounting, Valuation and Privatization.* 190 p. Sales No. E.94.II.A.3. \$25.

*Environmental Management in Transnational Corporations: Report on the Benchmark Corporate Environment Survey.* 278 p. Sales No. E.94.II.A.2. \$29.95.

*Management Consulting: A Survey of the Industry and Its Largest Firms.* 100 p. Sales No. E.93.II.A.17. \$25.

*Transnational Corporations: A Selective Bibliography, 1991-1992.* 736 p. Sales No. E.93.II.A.16. \$75.

*Foreign Investment and Trade Linkages in Developing Countries.* 108 p. Sales No. E.93.II.A.12. \$18.

*Transnational Corporations from Developing Countries: Impact on Their Home Countries.* 116 p. Sales No. E.93.II.A.8. \$15.

*Debt-Equity Swaps and Development.* 150 p. Sales No. E.93.II.A.7. \$35.

*From the Common Market to EC 92: Regional Economic Integration in the European Community and Transnational Corporations.* 134 p. Sales No. E.93.II.A.2. \$25.

*The East-West Business Directory 1991/1992.* 570 p. Sales No. E.92.II.A.20. \$65.

*Climate Change and Transnational Corporations: Analysis and Trends.* 110 p. Sales No. E.92.II.A.7. \$16.50.

*Foreign Direct Investment and Transfer of Technology in India.* 150 p. Sales No. E.92.II.A.3. \$20.

*The Determinants of Foreign Direct Investment: A Survey of the Evidence.* 84 p. Sales No. E.92.II.A.2. \$12.50.



*Transnational Corporations and Industrial Hazards Disclosure.* 98 p. Sales No. E.91.II.A.18. \$17.50.

*Transnational Business Information: A Manual of Needs and Sources.* 216 p. Sales No. E.91.II.A.13. \$45.

*The Financial Crisis in Asia and Foreign Direct Investment: An Assessment.* 101 p. Sales No. GV.E.98.0.29. \$20.

*Sharing Asia's Dynamism: Asian Direct Investment in the European Union.* 192 p. Sales No. E.97.II.D.1. \$26.

*Investing in Asia's Dynamism: European Union Direct Investment in Asia.* 124 p. ISBN 92-827-7675-1. ECU 14. (Joint publication with the European Commission.)

*International Investment: Towards the Year 2002.* 166 p. Sales No. GV.E.98.0.15. \$29. (Joint publication with Invest in France Mission and Arthur Andersen, in collaboration with DATAR.)

*International Investment: Towards the Year 2001.* 81 p. Sales No. GV.E.97.0.5. \$35. (Joint publication with Invest in France Mission and Arthur Andersen, in collaboration with DATAR.)

*Liberalizing International Transactions in Services: A Handbook.* 182 p. Sales No. E.94.II.A.11. \$45. (Joint publication with the World Bank.)

*The Impact of Trade-Related Investment Measures on Trade and Development: Theory, Evidence and Policy Implications.* 108 p. Sales No. E.91.II.A.19. \$17.50. (Joint publication with the United Nations Centre on Transnational Corporations.)

*Transnational Corporations and World Development*. 656 p. ISBN 0-415-08560-8 (hardback), 0-415-08561-6 (paperback). £65 (hardback), £20.00 (paperback). (Published by International Thomson Business Press on behalf of UNCTAD.)

*Companies without Borders: Transnational Corporations in the 1990s*. 224 p. ISBN 0-415-12526-X. £47.50. (Published by International Thomson Business Press on behalf of UNCTAD.)

*The New Globalism and Developing Countries*. 336 p. ISBN 92-808-0944-X. \$25. (Published by United Nations University Press.)

*World Economic Situation and Prospects 2002*. 51 p. Sales No. E.02.II.C.2. \$15. (Joint publication with the United Nations Department of Economic and Social Affairs.)

*World Economic Situation and Prospects 2001*. 51 p. Sales No. E.01.II.C.2. \$15. (Joint publication with the United Nations Department of Economic and Social Affairs.)

### *D. Journals*

*Transnational Corporations Journal* (formerly *The CTC Reporter*). Published three times a year. Annual subscription price: \$45; individual issues \$20. [http://www.unctad.org/en/subsites/dite/1\\_itncs/1\\_tncs.htm](http://www.unctad.org/en/subsites/dite/1_itncs/1_tncs.htm).

**Selected UNCTAD publications on transnational  
corporations and foreign direct investment**

---

United Nations publications may be obtained from bookstores and distributors throughout the world. Please consult your bookstore or write,

For Africa, Asia and Europe to:

Sales Section  
United Nations Office at Geneva  
Palais des Nations  
CH-1211 Geneva 10  
Switzerland  
Tel: (41-22) 917-1234  
Fax: (41-22) 917-0123  
E-mail: unpubli@unog.ch

For Asia and the Pacific, the Caribbean, Latin America and North America to:

Sales Section  
Room DC2-0853  
United Nations Secretariat  
New York, NY 10017  
United States  
Tel: (1-212) 963-8302 or (800) 253-9646  
Fax: (1-212) 963-3489  
E-mail: publications@un.org

All prices are quoted in United States dollars.

For further information on the work of the Division on Investment, Technology and Enterprise Development, UNCTAD, please address inquiries to:

United Nations Conference on Trade and Development  
Division on Investment, Technology and Enterprise Development  
Palais des Nations, Room E-10054  
CH-1211 Geneva 10, Switzerland  
Telephone: (41-22) 907-5651  
Telefax: (41-22) 907-0498  
E-mail: [natalia.guerra@unctad.org](mailto:natalia.guerra@unctad.org)  
<http://www.unctad.org>

# QUESTIONNAIRE

## Transparency

Sales No. [ ]

In order to improve the quality and relevance of the work of the UNCTAD Division on Investment, Technology and Enterprise Development, it would be useful to receive the views of readers on this publication. It would therefore be greatly appreciated if you could complete the following questionnaire and return to:

*Readership Survey*  
*UNCTAD Division on Investment, Technology and Enterprise*  
*Development*  
*United Nations Office in Geneva*  
*Palais des Nations*  
*Room E-9123*  
*CH-1211 Geneva 10*  
*Switzerland*  
*Fax: 41-22-907-0194*

1. Name and address of respondent (optional):

---

---

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

Government	<input type="checkbox"/>	Public enterprise	<input type="checkbox"/>
Private enterprise	<input type="checkbox"/>	Academic or research Institution	<input type="checkbox"/>
International organisation	<input type="checkbox"/>	Media	<input type="checkbox"/>
Not-for-profit organisation	<input type="checkbox"/>	Other (specify)_____	

3. In which country do you work?\_\_\_\_\_

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

Excellent	<input type="checkbox"/>	Adequate	<input type="checkbox"/>
Good	<input type="checkbox"/>	Poor	<input type="checkbox"/>

## Transparency

---

5. How useful is this publication to your work?  
Very useful  Of some use   
Irrelevant
6. Please indicate the three things you liked best about this publication:
7. Please indicate the three things you liked least about this publication:
8. If you have read other publications of the UNCTD Division on Investment, Enterprise Development and Technology, what is your overall assessment of them?  
Consistently good  Usually good, but with some exceptions   
Generally mediocre  Poor
9. On the average, how useful are those publications to you in your work?  
Very useful  Of some use  Irrelevant
10. Are you a regular recipient of *Transnational Corporations* (formerly *The CTC Reporter*), UNCTAD-DITE's tri-annual refereed journal?  
Yes  No

If not, please check here if you would like to receive a sample copy sent to the name and address you have given above