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**Transparency: An Analysis of an Evolving Fundamental Principle in International Economic Law**

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TRANSPARENCY: AN ANALYSIS OF AN EVOLVING FUNDAMENTAL PRINCIPLE IN INTERNATIONAL ECONOMIC LAW

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I. INTRODUCTION

Throughout various sectors of international law, transparency already plays an important role.\(^1\) Given the fundamental structural changes in the international legal order—particularly the shift from Westphalian sovereignty to an international law of cooperation and integration—states today face many new obligations arising from a rapidly growing number of international legal instruments.\(^2\) Commentators have identified transparency as an essential concept to ensure compliance with these obligations in a number of fields, including international transport and communication, environmental protection, arms control, and debt reduction.\(^3\) Furthermore, transparency has become a subject of debates concerning the democratic legitimacy of the changing international legal order, particularly with respect to new obligations that arguably require the partial transfer of sovereignty and previously national competences to international regimes.\(^4\)

Transparency has received significant attention and continues to gain importance in international, regional, and national legal regimes.\(^5\) The current discussion of transparency in international law can be grouped along three different contexts: (1) as a concept underlying obligations international law places on a state's internal legal regimes and procedures;\(^6\) (2) as a concept governing the relations between institutions and

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regimes of international law and member states; and (3) as a concept denoting the openness of institutions and procedures of international law, especially vis-à-vis international civil society.

In international economic law, the notion of transparency is predominantly used in the latter sense. Critics of the manner in which international economic agreements are negotiated, institutions are governed, or dispute settlements operate often invoke the proverbial "lack of transparency" and allege a resulting illegitimacy or democratic deficit in this field of law. Nevertheless, transparency is a recognized legal concept in numerous transnational agreements in international economic law; with regard to the GATT/WTO system, scholars have compared transparency's significance to the highly prominent principles of national treatment and most-favored nation status. Yet legal scholars so far have been hesitant to engage in an in-depth analysis of the status of transparency as an independent legal principle that underlies comparable rules across specific treaty platforms or segments of international economic law.

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11. To be fair, however, Todd Weiler concludes in a recent, highly illuminating article that "[t]he principle of transparency ... appears ripe for further review. [This] is a task to be assigned to a future paper." See Todd Weiler, NAFTA Article 1105 and the Principles of International Economic Law, 42 COLUM. J. TRANSNAT'L L. 35, 78 (2003). Furthermore, some commentators have analyzed the underlying principle of transparency in the sphere of
In the following Note, I will therefore undertake to address this lacuna and assess the current status of transparency as a principle underlying the procedural and substantive obligations that international economic law places upon states. A better understanding of this aspect of transparency may serve to foster a trend of convergence and coherence in international economic law, thereby preventing fragmentation and conflicting interpretations of similar norms. Moreover, due to its economic implications, inter alia, this aspect of transparency is as vital to the effective functioning of the international economic order as the more prominent democracy—and legitimacy—related facet which presently dominates legal discourse.

In order to present a well-rounded account, this Note will first sketch the theoretical underpinnings of transparency in an interdisciplinary overview of its possible meanings and advantages in the present context. It will then survey documents and instruments of international economic law in which language embracing the transparency principle is already present. The Note's main section proceeds to ask whether, in the actual

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12. I use the term "procedural" to describe obligations that only influence the publication of a certain regulation or action without respect to its content, whereas "substantial" obligations would actually determine what kind of regulation or action will or may be taken.


14. The fact that this Note restricts its analysis to the transparency-related obligations placed on states is of course not to suggest that all questions regarding transparency in international economic decisionmaking and dispute settlement have been answered satisfactorily.

15. For the purpose of this Note, "international economic law" shall be limited to norms of public international law which govern economic regulation and activity by states in their relation not only to other states but predominantly to nonstate actors. "International economic law" thus primarily consists of international trade and investment law. While this definition excludes the fascinating developments belonging exclusively to the sphere of private international law (i.e. the Lex Mercatoria), parallels to the law governing financial markets will occasionally be drawn if it will further clarify a point. Otherwise, international economic law should be understood more broadly as all law governing the international economy. For an instructive discussion of the differing notions of international economic law, see Christian Tietje, Internationales Wirtschaftsrecht und Recht auf Entwicklung als Elemente einer
application of those agreements, the transparency principle has had any notable impact on the interpretation of state obligations. Finally, in addressing transparency's future role in international economic law, this Note briefly discusses additional problems which might be resolved through a transparency-based approach.

II. THEORETICAL FOUNDATIONS OF THE TRANSPARENCY PRINCIPLE

A. The Meaning of Transparency as a General Principle

Before the status of a principle in international economic law can be adequately evaluated, it should be defined as precisely as possible. It is not without irony, however, that there is a significant lack of clarity in scholarly debate regarding the exact meaning of transparency—it appears to be "non-transparent" or veiled itself. Nevertheless, this Note will attempt to develop a working definition of the concept below.

Transparency in its most colloquial and natural meaning is a term of analogy: a regulation, law, or legal procedure is transparent if it can be seen through easily, "just as one can see easily through a clean window." The process and effects of the legal instrument in question must be readily understandable, and the scope of its derivative rights and obligations must be easy to assess for the addressee and rights-holder respectively; if it does not meet these criteria, the law in question is deemed "opaque."

A more sophisticated abstract definition of transparency can emerge from these general observations. In the context of their groundbreaking discussion of factors contributing to compliance with international obligations, Chayes and Chayes define transparency as

the availability and accessibility of knowledge and information about: (1) the meaning of norms, rules, and procedures established by the treaty and practice of the regime, and (2) the policies and activities of parties to the treaty and of any central

konstitutionalisierten globalen Friedensordnung, in WELTINNENRECHT: LIBER AMICORUM JOST DELBRÜCK, 783, 786–99 (Klaus Dicke et al eds., 2005); Weiler, supra note 11, at 37–40.

16. In this respect, Sue Arrowsmith opines that this lack of clarity posed a "fundamental obstacle to progress" to a multilateral transparency agreement in the field of government procurement. See Sue Arrowsmith, Transparency in Government Procurement: The Objectives of Regulation and the Boundaries of the WTO, 37 J. WORLD TRADE 283 (2003).

17. Mock, supra note 10, at 295; see also RIEMANN, supra note 5, at 18.

18. Mock, supra note 10, at 295.
organs of the regime as to matters relevant to treaty compliance and regime efficacy.\textsuperscript{19}

It is apparent, then, that transparency requires accessibility and clarity not only with regard to a legal regime’s treaty obligations but also to the actions of relevant parties which could impair benefits flowing from the provisions in question or otherwise impact the scope and operation of the system. The latter interpretation of transparency resembles the one widely applied in characterizations of financial markets, where “[t]ransparency refers to the ability of market participants fairly to observe current and recent levels of market activity.”\textsuperscript{20} In both cases, transparency guarantees that concerned parties can easily acquire the information they need in order to realistically estimate the effect of other parties’ actions on their own positions and planned undertakings.

In the context of government procurement, Steven Schooner defines transparency as “a system [that] employs procedures by which offerers and contractors (and even the public at large) ensure that government business is conducted in an impartial and open manner.”\textsuperscript{21} While this definition implies the accessibility of information regarding the activities of governments and thus is consistent with the definition developed above, its emphasis on impartiality blurs the distinction between transparency and the obligations of unbiased and non-discriminatory treatment in procurement proceedings. Considering its implicit link to legitimacy through public scrutiny, Schooner’s definition therefore seems—for the purpose of this Note—both too specific, as it embodies substantive non-discrimination obligations, and too broad, as it includes notions of openness \textit{vis-à-vis} the public at large.\textsuperscript{22} With regard to procurement, it suffices to demand that the applicable rules and information regarding planned procurement activities, policies, and opportunities are clearly known to affected parties.\textsuperscript{23} Accordingly, transparency does not itself specify what these policies should be or whether national treatment or other rules and principles apply unless there is a direct impact on access to information.\textsuperscript{24} It is important to note, however, that substantial

\begin{enumerate}
\item[19.] Chayes & Chayes, \textit{supra} note 3, at 135.
\item[20.] See, \textit{e.g.}, John Board \textit{et al.}, \textit{Transparency and Fragmentation} 25 (2002).
\item[22.] For another approach that links transparency to non-discrimination, see Khurshid Hyder, \textit{Equality of Treatment and Trade Discrimination in International Law} 143–44 (1968).
\item[24.] This is also the position of the European Communities in the current negotiations on a multilateral procurement agreement. See the description of their position titled,
obligations formulated by such rules might very well demand such openness.\textsuperscript{25}

Hence, there is no set definition of transparency in international economic law. Beyond requiring that the relevant provisions of their internal legal regimes be readily understandable and accessible, however, the least the transparency principle conceptually demands from involved parties and systems is openness and the provision to other interested parties of critical information that could affect their positions.\textsuperscript{26} The underlying reason for this obligation is to enable interested parties to take business and legal actions with full knowledge of the relevant facts—including facts to which they would not have access without the cooperation of the party bound by obligations expressing the transparency principle.

It should be noted, however, that the way in which parties make this information available should generally remain within their discretion unless otherwise agreed upon in the relevant treaty. That is to say, if domestic legislation affects the position of foreign investors protected by international treaties, the easily accessible publication of the legislation in question might very well suffice; a compulsory request mechanism as envisioned in drafts of the Multilateral Agreement on Investments (MAI), by which contracting parties could demand information regarding laws and regulations from other contracting parties,\textsuperscript{27} seems too ambitious and beyond the current threshold for transparency in international law.

Thus, taking these considerations into account, the working definition of transparency adopted for the purpose of this Note draws mainly from the important insights of Chayes and Chayes. Their definition, however, is formulated so as to fit international regimes and systems in general, whereas this Note aims to analyze exclusively the field of international economic law. Hence, in addition to the criteria developed by Chayes and Chayes, this Note will consider the impact of increased knowledge and information on the decisions of economic players—be they states or private actors—when discussing the transparency of a law or system. Whereas the general concept of transparency aims at matters of compliance (enabling parties to exercise control over their activities in

\textsuperscript{“Transparency in Government Procurement,” http://trade-info.cec.eu.int/doclib/docs/2003/september/tradoc_113686.pdf.}

\textsuperscript{25. See infra Part II.C for a discussion about the interpretation of fair and equitable treatment clauses.}


\textsuperscript{27. See Teresa McGhie, Bilateral and Multilateral Investment Treaties, in LEGAL ASPECTS OF FOREIGN DIRECT INVESTMENT 107, 131 (Daniel D. Bradlow & Alfred Escher eds., 1999).}
acccordance with existing obligations), this Note strives to emphasize the *ex ante* effect of transparency—the ability of parties to take action with full, accurate, reliable, and complete information and knowledge of the relevant framework.\(^{28}\)

**B. Interdisciplinary Aspects of Transparency**

Transparency as a legal concept has many interdisciplinary implications which promise vast benefits for legal theory and practice if incorporated properly.\(^{29}\) Hence, even though it is beyond the scope of this Note to explore fully all of these possible linkages in detail, this Part shall briefly discuss the main interdisciplinary implications of transparency. This discussion aims to facilitate an understanding of the function and scope of the transparency provisions included in the agreements analyzed below.

1. Economics

Given this Note's focus on transparency in international *economic* law, a survey of the interdisciplinary connections to the field of economics is an obvious starting point for this discussion. Classical economic theory assumes man acts as *homo economicus*, trying to maximize his subjective utility by means of rational choice.\(^{30}\) The rationality of this choice, however, is a function of what is known to the individual economic actor at the time of his decision.\(^{31}\) Therefore, because the degree of a market's transparency determines the amount of information available to market participants, transparency also directly influences the outcome of rational choices.\(^{32}\)

More specifically, economic methods such as contract theory, principal-agent theory, and the economics of information can measure and describe the function of transparency.\(^{33}\) For instance, without going into

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28. In this way, transparency has a certain predictability component—i.e., transparency obliges states to disclose policy and regulatory information which enables economic actors to foresee with a certain degree of security how those states will respond to their actions and handle investment decisions.


more detailed economic analysis, the incentive effect of the level of transparency on a private investor’s decision to enter into a contract with a government is intuitive: “investors and lenders require a predictable framework of rules in which commercial activity and lending activity will be conducted, including accessible and comprehensive legal rules which are actually applied and the breach of which gives rise to sanctions.” If transparency—and its resulting predictability—is missing, market actors will most likely incur significant costs when trying to obtain and analyze relevant information. In particular, these costs might arise when potential investors are forced to hire expensive local agents to acquire regulatory information, “test” regulators with preliminary business moves, or, if unpredictable local officials hold significant discretion, engage in “grease payments” to secure a certain interpretation or application of the law. Thus, just as transparency facilitates efficiency within financial markets, a transparent legal framework also promotes efficiency in the allocation of global investment decisions by reducing unnecessary transaction costs. When weighing financial returns and costs connected with conducting business in or with a certain state, global businesspersons will consider a high level of transparency to be an economic incentive to invest.

2. Game Theory

Closely associated with these basic economic observations are the insights that game theory can provide to enrich the analysis of transparency. As James Morrow explains, “[g]ame theory provides a way to formalize social structures and examine the effects of structure on individual decisions.” Accordingly, game theory is not only helpful in identifying the conditions under which transparency facilitates coordination and cooperation between state parties to an economic agreement, but also in modeling the decision-making processes of individual private economic actors.

34. For a famous explanation of the effect incomplete information and information asymmetries can have on markets, see George Akerlof, The Market for Lemons, 84 Q.J. of Econ. 488–500 (1970).
35. ASIAN DEVELOPMENT BANK, GOVERNANCE: PROMOTING SOUND DEVELOPMENT MANAGEMENT 16 (1997).
36. Information acquisition costs can constitute a truly significant portion of the overall costs of reaching a decision. See Brian L. Dos Santos & Vijay S. Mookerjee, Expert System Design: Minimizing Information Acquisition Costs, 9 DECISION SUPPORT SYSTEMS 161, 162 (1993).
37. Mock, supra note 10, at 303.
38. See BOARD ET AL., supra note 20, at 179.
39. See Mock, supra note 10, at 303–04.
40. JAMES D. MORROW, GAME THEORY FOR POLITICAL SCIENTISTS 1 (1999).
41. Linarelli, supra note 33, at 257.
Central to an application of game theory is the distinction between games of "perfect" information and games of "imperfect" information. \(^2\) Whereas games of perfect information allow each player to act with full knowledge of the relevant facts, games of imperfect information demand that they analyze incomplete information in order to draw conclusions regarding unavailable facts. \(^3\) Not only does this lead to additional costs associated with the gathering, evaluating, and deducing of further information, it also creates the possibility for signaling—and, more importantly, for inverted signaling or bluffing as well. \(^4\)

Thus, an opaque system not only increases transaction costs but also carries the inherent danger that one party will use deceptive techniques to induce another party to engage in an investment, for instance. \(^5\) As a result, games of imperfect information will often produce distorted outcomes which do not adequately reflect genuine choices. Accordingly, transparency is an important factor in preventing these opportunities to deceive and the resultant distortions. Since legal systems provide for a defined set of actors, rules, and rewards, \(^6\) and can feature perfect or imperfect information, game theory analysis is perfectly applicable to them. \(^7\) Therefore, in sum, a transparent legal system or regulation allows individuals to assess the possible consequences and conditions of their actions without having to rely on signaling by politicians, bureaucrats, and judges. \(^8\)

This overview of transparency's implications for economics and game theory has shown that the principle's inherent notions of knowledge and information warrant an interdisciplinary approach when analyzing its relevance for individual decisionmakers. \(^9\) This fact shall

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\(^2\) Mock, supra note 10, at 298. Mock helpfully explains this distinction by contrasting bridge and chess. Whereas the identity of the remaining cards that the other players hold is unknown, making bridge a game of imperfect information, chess is a game of perfect information: no matter what the intentions of the opponent may be, "stronger players are aware of the fact that it is the potential risks and opportunities on the chessboard that matter, not any plans the opponent may make." Id. at 300.

\(^3\) MORROW, supra note 40, at 217.


\(^5\) In this respect, one can think of assurances from government officials to potential private investors that seem to clarify the legal framework—guaranteeing the granting of permits, for instance—but eventually do not hold true. See, e.g., Metalclad Corp. v. United Mexican States (U.S. v. Mex.), 5 ICSID (W. Bank) 209 (2001) [hereinafter Metalclad, Final Award], which will be discussed in further detail infra Part III.B.1.

\(^6\) Mock, supra note 10, at 300.

\(^7\) For numerous applications of game theory to the law, see DOUGLAS C. BAIRD, ROBERT H. GERTNER & RANDAL C. PICKER, GAME THEORY AND THE LAW (1994).

\(^8\) Mock, supra note 10, at 300.

\(^9\) In addition to the effects on individual economic actors which are the main concern of this Note, interdisciplinary study of economics and game theory credits transparency in
inform the following examination of the role of the transparency principle in international economic law.

C. Transparency as a Principle of International Economic Law

Having sketched the theoretical foundations of the transparency principle in general, this Note will survey agreements and treaties in international economic law to determine the extent to which they feature expressions of this principle. This survey is limited to an overview of provisions and clauses that seem to incorporate aspects of transparency, leaving Part III to analyze whether those provisions as actually applied indeed justify a conclusion that the transparency principle exists as an independent legal principle in international economic law.

1. World Trading System

The first regulatory area to be surveyed is the world trading system, as primarily established by the GATT/WTO legal order. This Note has briefly discussed the impact economics can have on calculations and rational choices by economic actors and shown how opacity can cause significant additional costs. Accordingly, trade is a field where high transaction costs created by a lack of information or unclear regulations might render concessions virtually worthless. A lack of transparency could deter the influx of foreign products, thus making it functionally equivalent to a tariff—one could describe it as a non-tariff barrier. Hence, given this state of affairs, intuitively one would expect many provisions dealing with aspects of transparency in trade law.

50. While this Note opts to survey legal texts and then proceed separately to actual case law, some have argued that international economic law is a field of law where the inductive case analysis is particularly promising and could yield "a series of optional principles of considerable theoretical significance and practical importance." GEORG SCHWARZENBERGER, THE INDUCTIVE APPROACH TO INTERNATIONAL LAW 55 (1965).

51. See Part II.B.1. supra.

52. Regarding the main normative principles governing the treatment of non-tariff barriers in WTO law, see CHRISTIAN TIETJE, NORMATIVE GRUNDSTRUKTUREN DER BEHANDLUNG NICHT-TARIFÄRER HANDELSHEMMNISSE IN DER WTO/GATT-RECHTSORDNUNG: EINE UNTERSUCHUNG UNTER BESONDERER BERÜCKSICHTIGUNG DES COUNTERTRADES (1998).
a. Existing Legal Framework

Within the original General Agreement on Tariffs and Trade (GATT), there were a number of provisions that could be characterized as encompassing aspects of transparency as defined above. The most prominent of these provisions is article X, which in its pertinent part reads:

Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing, inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. Agreements affecting international trade policy which are in force between the government or a governmental agency of any contracting party and the government or governmental agency of any other contracting party shall also be published.

The requirement that measures affecting international trade and agreements affecting trade policy be published is reiterated in article X:2, which clarifies that new charges and other burdensome requirements must not be enforced until they have been published. Finally, article X:3(a) stipulates that all said measures be applied in a “uniform, impartial and reasonable manner.” The requirement to publish the measures in question is a clear expression of the transparency principle, for it not only aims at providing for compliance control but also enables economic actors to assess the impact these laws might have on their economic prospects. Moreover, while the obligation to administer the laws impartially could be considered a rule independent and distinct from transparency, the requirement of uniformity in application has a considerable predictability component and can thus also be viewed as another expression of the transparency principle.

54. Id. art. X:1 (emphasis added).
55. Id. art. X:2.
56. Id. art. X:3(a).
57. Too much discretion on the side of administrative officials may result in non-transparent application and can thus result in insecurity costs, even if one excludes the practice of “grease money.” See supra Part II.B.1.
In addition to the mainly procedural transparency requirements enshrined in article X, some substantive GATT provisions reflect the transparency principle as well. For example, the transparency principle motivates article XI:I, which stipulates that all non-tariff barriers be eliminated ("tariffs only maxim"); this requirement exists because the effect of tariff barriers on trade is more obvious and visible than non-tariff barriers.\(^{58}\) Just as the contracting parties will be able to adopt more principled negotiation positions and supervise compliance more effectively once they are aware of the true economic significance of the barriers, businesspeople pondering imports or exports and consumers eventually paying for the good can more easily evaluate the effects of a straightforward tariff barrier than the effects of countless—quite likely hidden or at least more subtle—non-tariff barriers.\(^{59}\)

This latter point is also well-reflected in GATT article VIII:1(b) and (c), in which the contracting parties "recognize the need for reducing the number and diversity of fees and charges"\(^{60}\) as well as for "minimizing the incidence and complexity of import and export formalities and for decreasing and simplifying import and export documentation requirements."\(^{61}\) In sum, these provisions are concerned with reducing non-tariff barriers and transaction costs associated with non-transparent or unnecessarily complex formalities.\(^{62}\)

As far as procedural transparency requirements are concerned, many of the more recent WTO agreements not only echo the publication requirements but also go beyond those found in the original GATT.\(^{63}\) For example, both the Agreement on Technical Barriers to Trade (TBT)\(^{64}\) and

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58. Mock, supra note 10, at 296.
59. Hansen, supra note 1, at 1059.
60. GATT, supra note 53, art. VIII:1(b).
61. Id. art. VIII:1(c).
62. In addition to these examples expressing general GATT rules, safeguard and exception clauses contain publication requirements regarding the respective measures as well. See, e.g., GATT art. XI:2(c) (exception for agricultural and fishery quotas); GATT art. XII:4(a) (balance-of-payments consultations); GATT art. XIII:3 (public notice requirement for fixed quotas).
63. The Uruguay Round (1994) established the World Trade Organization (WTO), and added several multi- and plurilateral agreements to and "legalized" the provisorium GATT. Thus, the broad spectrum of trade is now regulated in much more detail and is more legalized than in the GATT. See Jeffrey L. Dunoff, The WTO in Transition: of Constituents, Competence and Coherence, 33 GEO. WASH. INT'L L. REV. 979, 1010 (2001).
the Agreement on Sanitary and Phytosanitary Measures (SPS)\textsuperscript{65} require states not only to publish the ultimately adopted standards but also to provide for a reasoned explanation and \textit{a priori} opportunities for foreign governments to comment and discuss the proposed standards. These comments must then be taken into account during the decision-making process.\textsuperscript{66} Thus, these provisions ensure the standards are adopted in a transparent manner, allowing for interested parties to utilize their respective governments to submit comments and positions in order to influence the outcome. Even if they are unsuccessful, however, this framework guarantees that private economic actors—assuming their own governments transmit the relevant information to them—learn about the proposed standards as soon as possible and consequently can adjust features of their products (or their business plans in general) in a timely fashion without incurring unnecessary information costs. This significantly enhances the smooth functioning of the international trading regime. Accordingly, the agreements on Government Procurement (GPA), Antidumping Duties (AD), Subsidies and Countervailing Measures (SCM), Trade-Related Investment Measures (TRIMs), General Agreement on Trade in Services (GATS), Trade-Related Aspects of Intellectual Property (TRIPs), and Safeguards contain similar provisions.\textsuperscript{67}

The agreements concluded in the Uruguay Round add further substantive expressions of the transparency principle as well. For instance, article 2.8 of the TBT requires members to base their technical regulations on product performance rather than on product design. Informing foreign producers what performance outcome is expected from their product clarifies the relevant standard, in contrast to design regulations which do not necessarily reflect their true regulatory objectives in a clear manner.\textsuperscript{68} In a similar fashion, the SPS stipulates that standards should be “based on scientific principles” and must not be maintained without “sufficient scientific evidence.”\textsuperscript{69} The rationale for this obligation flows from the transparency principle: Even though it is indeed debatable whether science is always rational and objective,\textsuperscript{70} scientific standards

\begin{itemize}
\item \textsuperscript{65} Agreement on the Application of Sanitary and Phytosanitary Measures [hereinafter SPS], Apr. 15, 1994, WTO Agreement, \textit{supra} note 64, Annex I (A).
\item \textsuperscript{66} \textit{See, e.g.}, TBT, \textit{supra} note 64, art. 2.9.2; SPS, \textit{supra} note 65, arts. 2.2, 2.3, 5.8, 7, 12.4.
\item \textsuperscript{67} \textit{See the enumeration provided by Hansen, \textit{supra} note 1, at 1059 n.233.}
\item \textsuperscript{68} \textit{Id. at 1060.}
\item \textsuperscript{69} SPS, \textit{supra} note 65, art. 2.2.
\item \textsuperscript{70} In the context of risk assessment, the WTO Appellate Body acknowledged the problem of “objective science” by allowing Members to base their measures in good faith on a “divergent opinion coming from qualified and respected sources,” thereby clarifying that “mainstream” science was not the only acceptable scientific base. \textit{See Appellate Body Report, European Communities—Measures Affecting Meat and Meat Products “Hormones,” WT/DS26, 28/AB/R (Jan. 16, 1998), para. 194.}
nevertheless are subject to verification and thus transparent in what they demand from a product—and when their requirements are met. It is certainly easier for a producer of a good to adjust his line of production to a published scientific standard than to one that is based on political or other non-verifiable notions, where no matter how hard he tries to conform, there still remains a degree of uncertainty as to whether the competent authorities will acknowledge this conformity. Hence, the SPS requirement to base standards on scientific principles, accompanied by the obligations regarding prior risk assessment and the prohibition of arbitrary distinctions between comparable risks,\textsuperscript{71} functions as a guarantee that traders can predict and assess \textit{a priori} whether their good is in conformity with the standards or not. In other words, these requirements guarantee a considerable amount of transparency.

b. Transparency as a Controversial Issue on the Current Negotiation Agenda

Despite a number of provisions in existing WTO agreements tailored, \textit{inter alia}, to provide for transparency, the principle has recently been the subject of controversial discussion among members. At the December 1996 WTO Ministerial Conference in Singapore, the Working Group on Transparency in Government Procurement (Working Group) was created with the mandate to conduct "a study on transparency in government procurement practices, taking into account national policies, and, based on this study, to develop elements for inclusion in an appropriate agreement."\textsuperscript{72} Thus, even though there currently exists a plurilateral General Procurement Agreement (GPA),\textsuperscript{73} the Working Group aims to develop a multilateral treaty and expand the ideas already addressed in the present GPA, with an explicit focus on transparency issues.\textsuperscript{74} More specifically, there are twelve main issues on the Working Group’s agenda: (1) definition and scope of government procurement; (2) procurement methods; (3) publication and information on national regulations and procedures; (4) information on procurement opportunities, tendering, and qualification procedures; (5) time periods; (6) transparency

\footnotesize{71.} SPS, supra note 65, arts. 3.3, 5.1, 5.5.


\footnotesize{73.} Agreement on Government Procurement [hereinafter GPA], WTO Agreement, supra note 64, Annex 4(b). Those WTO agreements which are not signed by all Members are called "plurilateral," as opposed to the multilateral \textit{acquis} contained in the single undertaking package and consequently signed by all Members.

of decisions on qualifications; (7) transparency of decisions on contract awards; (8) domestic review procedures; (9) other matters related to transparency, such as, inter alia, language, the fight against bribery and corruption, and maintenance of record proceedings; (10) notification procedures; (11) WTO settlement procedures; and (12) technical cooperation with and special and differential treatment of developing states.75 The Doha Declaration has also explicitly reiterated the commitment to increased transparency in this field,76 although there is still considerable disagreement among members regarding many issues.77

One disagreement among members concerns what constitutes "government procurement" for the purposes of the agreement and, closely connected with this question, whether transparency disciplines should apply to the whole scope of procurement, be subject to a de minimis rule, or only apply in fields determined by individual governments.78 Thus, the discussion arising in this context centers around four considerations: (1) who is doing the procurement; (2) whether goods or services are procured; (3) what types of transactions are covered; and (4) whether the Agreement should introduce threshold values for procurement contracts.79 Throughout the discussion, one can identify a group of members (India, Pakistan, Malaysia, and Egypt) who are generally skeptical of the agreement and consequently argue in favor of narrow interpretations and scope, high thresholds, and no obligations regarding the publication of national legislation.80 In contrast, members with domestic laws guaranteeing transparency, such as the states of the European Community and the United States, by and large try to include similar provisions in the multilateral procurement agreement. The draft text submitted by Hungary, Korea, Singapore, and the United States is one example of this pro-transparency approach.81 Underlying the conflict between the two groups is the suspicion of many developing states that the transparency agreement really aims at securing market access for industrialized states.82

77. See the issue-by-issue account delivered by Kinsey, supra note 26, at 162–70.
81. See Report on the Meeting of 7 June 2000, supra note 78, para. 34.
82. See Kinsey, supra note 26, at 170–72. This debate touches on the question of whether transparency is a principle that merely guides the interpretation of existing obliga-
Consequently, the agreement shared the fate of the other Singapore issues—competition, trade facilitation, and investment—and assumed the role of a deal-breaker during the Cancun Ministerial Meeting.\(^8\) It thus remains to be seen how future negotiations on this agreement will fare. In any event, the creation of the Working Group and the ongoing debate demonstrate that transparency is an important issue for discussion in the multilateral framework of international trade regulation.

2. International Investment Law

We have seen that transparency has a major impact on the business decisions of potential investors.\(^9\) Given this reality, it is not surprising that in the context of international investment law, expressions of the transparency principle can be found in the North American Free Trade Agreement (NAFTA),\(^5\) the Energy Charter Treaty (ECT),\(^8\) and countless bilateral investment treaties (BITs).\(^7\)

NAFTA contains a number of provisions in line with the definition of transparency developed in this Note.\(^8\) The preamble of NAFTA emphasizes the rationale of transparency—which is, \textit{inter alia}, to ensure predictability. In it, the state parties resolve to “\textit{ESTABLISH clear and mutually advantageous rules governing their trade; [and] ENSURE a predictable commercial framework for business planning and investment . . .}”\(^8\)

Accordingly, this general embrace of the transparency principle continues in further detail in the body of the treaty. While generally not establishing parameters for substantive domestic laws, NAFTA contains
many procedural obligations which seek to enable governments of other
parties and foreign investors to understand the domestic rule-making
process and possibly provide input.\textsuperscript{90} Thus, even though the specific con-
tent of laws remains largely at the discretion of the parties, the formation
and application of those laws and regulations must be transparent.\textsuperscript{91} In the
same vein, article 102(1) explicitly mentions transparency as one of the
"principles and rules" of the agreement, placing the transparency principle
on the same level as national and most-favored-nation treatment.\textsuperscript{92} These
principles and rules "elaborate" the objectives of NAFTA,\textsuperscript{93} thereby explicit-
ly functioning as interpretative devices.\textsuperscript{94} While this interpretative
function of transparency arguably underlies all of NAFTA, most of the
obligations clearly connected to transparency are in chapter 18.\textsuperscript{95}

Specifically, article 1802 contains the duty to ensure prompt and ad-
vance publication of laws, regulations, procedures, and administrative
rulings of general nature,\textsuperscript{96} and article 1801 spells out the obligation to
establish contact points to facilitate communication between parties.\textsuperscript{97}
The most striking notification requirement, however, is in article 1803.
Under the heading "Notification and Provision of Information," this arti-
cle stipulates:

1. To the maximum extent possible, each Party shall notify any
other Party with an interest in the matter of any proposed or ac-
tual measure that the Party considers might materially affect
the operation of this Agreement or otherwise substantially af-
flect that other Party's interests under this Agreement.

2. On request of another Party, a Party shall promptly provide in-
formation and respond to questions pertaining to any actual or
proposed measure, whether or not that other Party has been
previously notified of that measure.

3. Any notification or information provided under this Article
shall be without prejudice as to whether the measure is con-
sistent with this Agreement.\textsuperscript{98}

\textsuperscript{90} OMALU, supra note 49, at 176.
\textsuperscript{91} Id.
\textsuperscript{92} NAFTA, supra note 85, art. 102(1).
\textsuperscript{93} Id.
\textsuperscript{94} Id. art 102(2); see also Weiler, supra note 11, at 46–47.
\textsuperscript{95} The debate regarding whether transparency is limited to the provisions contained in
chapter 18 became virulent in the Metalclad appeal before Canadian courts. See Metalclad,
Final Award, supra note 45, which will be analyzed in further detail infra Part II.C.1.
\textsuperscript{96} NAFTA, supra note 85, art. 1802.
\textsuperscript{97} Id. art. 1801.
\textsuperscript{98} Id. art. 1803.
This provision is noteworthy in at least two respects. For one, the notification requirement encompasses "proposed" measures without clarifying the concept. For example, it does not specify how far in the legislative process the measure must be to qualify as a "proposed" measure. In addition, with a view to article 1803(2), which enshrines a right to request information from other parties even in the absence of prior notification, it seems that, depending on how narrowly or broadly one construes the definition of "proposed measure," domestic policy discussion of potential measures could be severely restricted by the obligation to notify "to the maximum extent possible" any party whose interests might be substantially affected.\footnote{See id.}

It would thus be valuable to determine in which cases parties have actually "considered" the interests of other substantially affected parties and thus notified them on their own initiative rather than responding to a request for information under article 1803(2).

In addition to these procedural transparency provisions, it should be noted that tribunals have interpreted substantive provisions of NAFTA, such as article 1105(1) (containing the obligation to fair and equitable treatment), in light of the transparency principle.\footnote{Metalclad, Final Award, supra note 45. While the Metalclad award is the most famous, it is not the only case where a tribunal has subscribed to this interpretation. See the case survey infra Part II.C.}

In the same vein, this Note argues that, due to its overarching purpose of creating predictability and facilitating trade and investment, NAFTA has created a multilateral framework in which the teleological interpretation of substantive obligations should regularly consider the transparency principle, given its positive impact on predictability and trade and investment decisions.\footnote{Note, however, that the NAFTA Free Trade Commission reacted to the awards granted in the Metalclad Case and others by issuing Notes of Interpretation of Certain Chapter 11 Provisions (July 31, 2001), available at http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-en.asp. This interpretative note holds that the concepts of "fair and equitable treatment" and "full protection and security" as used in chapter 11 of NAFTA "do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens." Moreover, a breach of another NAFTA provision should not as such establish a breach of NAFTA article 1105 (1). The validity and impact of this will be discussed in further detail in Part II.C. infra, in a section that addresses the actual case law.}

The considerations that generally inform investors' need for a transparent legal framework when making investment decisions specifically apply with regard to the transition states of Eastern Europe, which historically have produced rapidly changing and non-transparent legislation.\footnote{OMALU, supra note 49, at 178.} Accordingly, the ECT contains extensive expressions of the transparency principle, including its article 20, labeled "Transparency."
The first paragraph of this provision brings laws, regulations, and other measures of general application under the transparency disciplines of GATT; the second paragraph then stipulates that these measures be published promptly "to enable the Contracting Parties and Investors to become acquainted with them." While article 20 limits the class of measures subject to this transparency requirement to those "made effective," thus not reaching as far as the "proposed measures" under NAFTA norms, it is noteworthy that the article explicitly mentions investors as beneficiaries of transparency. Finally, the third paragraph of article 20 closely resembles the corresponding NAFTA provisions by creating an obligation to establish enquiry points to which requests for information about pertinent laws, regulations, judicial decisions, and administrative rulings may be addressed.

In addition to the concentrated obligations contained in article 20 of the ECT, a number of other provisions also reflect the transparency principle. Article 10, paragraph 1 spells out the rationale for the general obligations of the ECT, stating that "[e]ach Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area." Moreover, article 18, paragraph 4 links facilitation of investment to transparency by requiring parties to "undertake to facilitate access to energy resources, inter alia, by allocating in a non-discriminatory manner on the basis of published criteria authorizations, licences, concessions and contracts to prospect and explore for or to exploit or extract energy resources." The numerous BITs concluded between states also regularly include transparency guarantees. To name but one, article II(7) of the U.S. Model BIT used until the end of 2004 contained the obligation to "make public all laws, regulations, administrative practices and procedures, and adjudicatory decisions that pertain to or affect investments," while the new 2004 U.S. Model BIT goes further by basically incorporating the complete investment chapter provisions of free trade agreements concluded by the United States since 2002. Thus, not surprisingly, the United Nations Conference on Trade and Development (UNCTAD) survey on bilateral

103. ECT, supra note 86, art. 20 para. 2.
104. Id. art. 20 para. 3.
105. Id. art. 10 para. 1 (emphasis added).
106. Id. art. 18 para. 4 (emphasis added).
107. Art. II (7) of the "old" version is reprinted in BISHOP, CRAWFORD & REISMAN, supra note 87, at 1166. The new U.S. Model BIT not only includes a similar provision in article 10; article 11, labeled "Transparency," explicitly introduces a detailed obligation for parties to set up "contact points" and provide for transparency and participation throughout all proceedings that could impact the investment. See 2004 Model Bilateral Investment Treaty, available at http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf.
investment treaties in the mid-1990s reported a widespread proliferation of comparable BIT clauses and explicitly recognized the economic incentives connected with transparency and predictability: "foreign investors are more likely to invest in a country if they believe that they can ascertain accurately the laws that will govern their investments."

3. International Financial Law

To conclude its survey of textual evidence of the transparency principle, this Note briefly turns to international financial law. Principle 27 of the Principles of Securities Regulation by the International Organization of Securities Commissioners holds that "[r]egulation should promote transparency in trading." In contrast to the trade and investment framework analyzed above, however, this sector of international law does not feature binding international agreements between states but rather non-binding and aspirational best governance agreements between security regulators. Given this state of affairs, it is even more remarkable that despite their nonbinding nature, transparency principles shape the vast majority of domestic financial markets. This demonstrates the widespread acceptance of the values of transparency with regard to the facilitation of economic transactions.

III. THE TRANSPARENCY PRINCIPLE IN THE JURISPRUDENCE OF INTERNATIONAL PANELS AND TRIBUNALS

Having sketched the theoretical and textual framework of the transparency principle in international economic law, the question remains: to what extent have tribunals applied this principle when interpreting obligations—or even when formulating substantive

109. Id.
111. See id. at 4:
IOSCO members through their endorsement of this document express their commitment to the objectives and principles it sets out. Insofar as it is within their authority, they intend to use their best endeavours within their jurisdiction to ensure adherence to these principles. To the extent that current legislation, policy or regulatory arrangements may impede adherence to these principles, they intend that changes should be sought.
112. See the latest report on the implementation of the IOSCO principles in the annual report of the organization, available at http://www.iosco.org/annual_report/docs/index1.html.
obligations? The following Part considers this question through the lens of case law.

A. GATT

This Part first analyzes the relevant case law under GATT, focusing on three cases in particular: one from the old GATT era and two decided by the Appellate Body under the WTO legal order.

1. Japan—Restrictions on Imports of Certain Agricultural Products

In this case, the United States challenged a complex Japanese system of import licenses for certain agricultural products.\(^\text{113}\) While primarily alleging the absence of a justification for Japan's quantitative restrictions, the United States also, as a subordinate point, argued that "the failure of Japan to publish adequate and timely information on quota volume or value was inconsistent with articles X and XIII, and that the import quotas were not administered in a reasonable manner as required by article X:3."\(^\text{114}\) The United States developed its claim with regard to transparency in detail, arguing that the lack of information in general and the resulting inability of companies to understand, much less to predict, the allocation of quotas and to adjust their business plans accordingly amounted to unreasonable quota administration in violation of GATT article X:3.\(^\text{115}\) With regard to this claim, however, the United States became a victim of its own success: The Panel found that the Japanese restrictions indeed lacked justification and thus declined to further rule on their reasonable administration and the publication requirements.\(^\text{116}\)

Nevertheless, in accordance with the argument made above in favor of more transparent tariffs over nontransparent and difficult to calculate quotas, the Panel took note that "the import restrictions maintained by Japan had been in place for decades and there was, therefore, no previous period free of restrictions in which the shares of imports and domestic supplies could reasonably be assumed to resemble those which would prevail today."\(^\text{117}\) In other words, the Panel at least recognized that the level of protection quotas awarded was virtually impossible to calculate, a difficulty which in itself impedes trade and contradicts the aim of

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114. Id. para. 3.1.1.
115. Id. paras. 3.5.1, 3.5.4.
116. Id. para. 5.4.2.
117. Id. para. 5.1.3.7.
a transparent trading system. The Panel did not, however, determine whether a lack of transparency could be reconciled with the reasonable administration of quotas.

2. United States—Import Prohibition of Certain Shrimp and Shrimp Products

Due to its implications for the "Trade and Environment" and "Trade and Development" debates, the Turtle/Shrimp case has probably gained more attention than any other WTO case, leaving the realm of international trade law experts and entering public debate in civil society. Yet while commentators have universally recognized the importance of this case with respect to the relationship between free trade and regulatory measures under article XX of the GATT, the main focus of their scholarship has rarely been on the ruling's transparency component.

In Turtle/Shrimp, India, Malaysia, Pakistan, and Thailand challenged U.S. regulations and interpretation guidelines issued pursuant to the Endangered Species Act, which not only mandated the use of turtle excluder devices (TEDs) for U.S. fishers but also established an import ban on shrimp that had been harvested without the use of TEDs. Unless the United States could justify the measure under article XX of the GATT, the import ban would violate article XI:1. As far as transparency is concerned, it is important to at least sketch the Appellate Body's analysis with regard to the chapeau of article XX—i.e., the manner in which article XX is to be applied. The chapeau requires that all measures taken with a view to article XX must "not [be] applied in a manner which would constitute a means of arbitrary or unjustifiable

118. See Hansen, supra note 1, at 1059.
120. See, e.g., Editorial, Messages for the W.T.O., N.Y. Times, Dec. 2, 1999 at A34 (linking the violent protests during the WTO Ministerial Meeting 1998 in Seattle in part to public concern raised by the Turtle/Shrimp decision).
121. See Arthur Appleton, Shrimp/Turtle: Untangling the Nets, 2 J. INT'L ECON. L. 477 (1999); Robert H. Howse, The Turtles Panel: Another Environmental Disaster in Geneva, 32 J. WORLD TRADE 73 (1998). See also this Note's proposal infra Part III.D.
122. But see Charnovitz, supra note 11, at 935; and Weiler, supra note 11, at 78, for notable exceptions in this regard.
124. Id. paras. 7, 111–24, 188.
discrimination between countries where the same conditions prevail, or [be] a disguised restriction on international trade . . . "125

The Appellate Body scrutinized the U.S. requirements which made import of shrimp products conditional on certification. In order to receive the certification in question, all states interested in exporting their shrimp products to the United States had to adopt a comprehensive domestic regulatory regime virtually identical to the U.S. model.126 In addition to other problematic aspects of the U.S. requirements, the Appellate Body specifically found they did not establish a "transparent, predictable certification process" and lacked any "formal opportunity for an applicant country to be heard, or to respond to any argument that has been made against it . . . "127 Moreover, the U.S. regime rendered no formal decisions nor provided any specific notice to the applicant state.128 Generally, the Appellate Body characterized the proceedings as "singularly informal and casual," with applicants unable to estimate whether the U.S. applied guidelines in a fair and just manner.129 These procedural shortcomings thus amounted to a denial of basic fairness and due process within the certification procedure.130

The Appellate Body, however, did not restrict its criticism of the nontransparent and unpredictable certification process to abstract notions of due process and basic fairness; noting that the U.S. requirements were of general application and thus fell under article X:1 of the GATT, it elaborated on the necessity to administer them in a "uniform, impartial and reasonable manner" as mandated by article X:3.131 In this respect, the Appellate Body held that:

It is also clear to us that Article X:3 of the GATT 1994 establishes certain minimum standards for transparency and procedural fairness in the administration of trade regulations which, in our view, are not met here. The non-transparent and ex parte nature of the internal governmental procedures . . . throughout the certification processes under Section 609, as well as the fact that countries whose applications are denied do not receive formal notice of such denial, nor of the reasons for the denial, and the fact, too, that there is no formal legal procedure for review of, or appeal from, a denial of an application, are all contrary to the spirit, if not the letter, of Article X:3 of the GATT
1994. We find, accordingly, that the United States measure is applied in a manner which amounts to a means not just of "unjustifiable discrimination", but also of "arbitrary discrimination" between countries where the same conditions prevail, contrary to the requirements of the chapeau of [GATT] Article XX.\textsuperscript{132}

This reasoning demonstrates that the Appellate Body views transparency as directly related to the fundamental international law principle of due process.\textsuperscript{133} Depending on how the latter is defined, one could also argue transparency is inherent in the broader notion of reasonable, non-arbitrary administration of measures. In any event, the fact that in \textit{Turtle/Shrimp} the Appellate Body explicitly mentioned transparency when interpreting the obligations established by the chapeau of article XX and article X:3 is an important indicator of the principle's recognized importance in international economic law.

3. United States—Restrictions on Imports of Cotton and Man-made Fibre Underwear\textsuperscript{134}

The final decision under consideration here is the Appellate Body Report in the \textit{U.S.—Underwear} case. The dispute arose when the United States enacted transitional safeguard measures against imports of underwear from Costa Rica under the Agreement on Textiles and Clothing (ATC),\textsuperscript{135} claiming its domestic industry would otherwise incur serious damage. Before the panel, Costa Rica not only challenged the safeguard measures with a view to the material conditions the ATC imposes on safeguards but also invoked article X:2 of the GATT. Because its claims were only successful in part, Costa Rica then appealed the panel's ruling. The Appellate Body's ruling neatly demonstrates how article X:2 embodies the principle of transparency and thus calls for elaboration.\textsuperscript{136}

Having answered the question of applicability of article X:2 to measures adopted under the ATC regime at least \textit{in concreto} in the affirmative, the Appellate Body continued by emphasizing the underlying rationale—or "policy principle"—of the publication requirements contained in the article:

\textit{Article X:2, General Agreement, may be seen to embody a principle of fundamental importance—that of promoting full

\textsuperscript{132} Id. paras. 183–84 (emphasis added).

\textsuperscript{133} Weiler, supra note 11, at 78.


\textsuperscript{135} Agreement on Textiles andClothing (ATC), WTO Agreement, supra note 64, Annex 1A.

\textsuperscript{136} See Weiler, supra note 11, at 77.
disclosure of governmental acts affecting Members and private persons and enterprises, whether of domestic or foreign nationality. The relevant policy principle is widely known as the principle of transparency and has obviously due process dimensions. The essential implication is that Members and other persons affected, or likely to be affected, by governmental measures imposing restraints, requirements and other burdens, should have a reasonable opportunity to acquire authentic information about such measures and accordingly to protect and adjust their activities or alternatively to seek modification of such measures.\textsuperscript{137}

As this paragraph demonstrates, the Appellate Body not only generally affirmed the due process dimension of transparency but also specifically recognized predictability as an essential aspect of the principle. One need not conclude that the legal regime established by the WTO agreements confers individual rights to traders\textsuperscript{138} to understand how the welfare-maximizing effects of the international trade regime depend on transparency and the predictability it establishes.\textsuperscript{139} A lack of opportunity to "acquire authentic information . . . to protect and adjust . . . activities or alternatively to seek modifications" will burden and distort traders' import and export decisions and make true competitive advantage in the marketplace impossible to calculate. More importantly, however, the Appellate Body made it clear in \textit{U.S.—Underwear} that the transparency principle is also legally important in the WTO context, as it is enshrined in and forms part of the \textit{telos} of article X of the GATT.

\textbf{B. International Investment Law}

There are also a number of cases which bear on the notion of transparency in the area of international investment law. The most prominent treatment of the transparency principle is found in the dispute between

\begin{footnotesize}
\begin{enumerate}
\item[137.] U.S.—Underwear, \textit{supra} note 134, at 21 (emphasis added).
\item[138.] For a good overview of substantive and procedural individual rights aspects in the different agreements, see Steve Charnovitz, \textit{The WTO and the Rights of the Individual}, 36 \textit{INTERECONOMICS} 98 (2001).
\end{enumerate}
\end{footnotesize}
Mexico and the Metalclad Corporation, a U.S. investor. Accordingly, the following section will focus on the Metalclad case.

1. The Metalclad Case

The Metalclad case is important not only with regard to the transparency principle but also because it is one of the most noted cases litigated under the state-investor process of NAFTA to date. Because the final NAFTA award was subject to judicial review by a Canadian court and arguably one of the main reasons behind the NAFTA Free Trade Commission issuing an "interpretative note" on the scope of article 1105 of NAFTA, the following discussion is split in three subsections, dealing with the award, the review, and the interpretative note, respectively.

a. The Tribunal Award

It is not only its outcome but its very distinct and peculiar set of facts which make the Metalclad case not just another "garden variety" expropriation case. Therefore, and with a view to the importance of its facts for the transparency issue at hand, the following sections will elaborate the "history of constant turmoil" underlying the Metalclad case in more detail than the facts of other cases so far considered.

i. The Facts

Initially owned by Mexican nationals, Confinamiento Tecnico de Residuos Industriales, S.A. de C.V. (COTERIN) built and operated a hazardous waste transfer station in La Pedrera, a valley within the municipality of Guadalcazar (the Municipality) in the State of San Luis Potosi (the State). It is particularly notable that COTERIN initially operated under authority granted by the federal government, while the Municipality did not require any license for the construction or operation

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143. Given the facts and developments after the award, this division is intuitive. See Todd Weiler, Metalclad v. Mexico: A Play in Three Parts, 2 J. of World Investment 685 (2001).
144. Id. at 686.
146. Metalclad, Final Award, supra note 45, paras. 28–29.
of the waste transfer station.\textsuperscript{147} The federal government, however, ordered the closure of the site in 1991 when COTERIN, without prior treatment or separation, deposited 20,000 tons of waste on the site rather than transferring it.\textsuperscript{148} Soon thereafter, the company unsuccessfully applied to the Municipality for a permit to build a hazardous landfill at the site.\textsuperscript{149} Eventually, a newly elected municipal government came into office in 1992 and confirmed the original permit refusal.\textsuperscript{150}

In 1993, however, COTERIN received three permits to build the landfill: The State issued a land use permit for a landfill, and the National Institute of Ecology, a federal environmental agency entrusted with the issuance of environmental impact authorizations, granted two permits for the construction and operation of a hazardous waste landfill at the site.\textsuperscript{151}

Waste treatment and disposal was one of Mexico’s most pressing development needs at the time, but it also promised huge potential for increased economic growth, capital, and revenue. As a result, international investors were keen to enter the Mexican waste disposal industry.\textsuperscript{152} Accordingly, by means of the Eco-Metalclad Corporation (ECO), one of its wholly-owned U.S. subsidiaries, Metalclad entered into a purchase option agreement with COTERIN.\textsuperscript{153} This agreement made the purchase contingent on either the issuance of a municipal permit to COTERIN or on a definitive judgment by a Mexican court stating that such a permit was not necessary.\textsuperscript{154} While there is disagreement as to whether the governor of the State had promised his support for the venture,\textsuperscript{155} it is undisputed that federal officials assured Metalclad that with one single exception—a permit that would be acquired within a year—all necessary permits had already been issued.\textsuperscript{156} Relying on these promises and believing the rationale for the conditions was fulfilled, Metalclad proceeded to complete the purchase and began building the landfill, even though neither of the two initial conditions was formally met.\textsuperscript{157} It should be noted that in the course of construction, both federal

\begin{thebibliography}{157}
\bibitem{147} Id.
\bibitem{148} Metalclad, Appeal, \textit{supra} note 141, paras. 5–6.
\bibitem{149} Id.
\bibitem{150} Id.
\bibitem{151} Metalclad, Final Award, \textit{supra} note 45, paras. 29, 31, 35.
\bibitem{152} Seymour, \textit{supra} note 145, at 189–90.
\bibitem{153} Metalclad, Final Award, \textit{supra} note 45, paras. 2, 30.
\bibitem{154} Metalclad, Appeal, \textit{supra} note 141, para. 8.
\bibitem{155} Metalclad, Final Award, \textit{supra} note 45, para. 32.
\bibitem{156} Id. para. 33.
\bibitem{157} Metalclad, Appeal, \textit{supra} note 141, para. 8.
\end{thebibliography}
and state officials inspected the site and received progress reports from Metalclad.\textsuperscript{158}

Late in 1994, after significant construction progress, the Municipality issued a stop order due to the lack of a municipal permit.\textsuperscript{159} While the federal government assured the company that "the Municipality lacked any basis for denying the construction permit" and that the federal government "would issue the permit as a matter of course,"\textsuperscript{160} it suggested Metalclad nevertheless apply for a local permit "as a matter of courtesy to local officials."\textsuperscript{161} Accordingly, Metalclad immediately applied for a local permit "to facilitate an amicable relationship with the Municipality."\textsuperscript{162} Moreover, both an environmental impact study conducted by the Autonomous University of San Luis Potosi as well as an audit by the Mexican Federal Attorney’s Office for the Protection of the Environment confirmed that with proper engineering, the site Metalclad had chosen for the hazardous waste landfill project was indeed suitable.\textsuperscript{163}

Metalclad continued and eventually finished construction of the landfill in March of 1995. The governor of the State cancelled his participation in the planned opening ceremony only one week before the event; the State Coordinator for Ecology followed three days later.\textsuperscript{164} Allegedly, one day before the official opening of the landfill the State Coordinator for Ecology also met with the mayor of the Municipality to urge him to organize protests against the site to disturb the ceremony.\textsuperscript{165} Indeed, one hundred paid protestors significantly disrupted the planned opening party, causing serious upheaval and hindering invited dignitaries from entering the facilities for hours.\textsuperscript{166} As a result, the landfill did not open and never has opened.\textsuperscript{167} Metalclad did, however, engage in further months of negotiations, had the prior environmental impact audit reviewed and upheld by independent experts, and continued to receive federal permits and public statements of compliance with all relevant regulations.\textsuperscript{168} Yet the Municipality did not change its position; instead,

\begin{flushright}
158. Metalclad, Final Award, supra note 45, para. 39.
159. Id. para. 40.
160. Id. para. 41.
161. See Weiler, supra note 143, at 687.
162. Metalclad, Final Award, supra note 45, para. 41.
163. Id. para. 44.
164. See Weiler, supra note 143, at 688.
165. Id.; see also Metalclad, Final Award, supra note 45, para. 46.
166. Metalclad, Final Award, supra note 45, para. 46.
167. Metalclad, Appeal, supra note 141, para. 11.
\end{flushright}
thirteen months after the original request, in December 1995, it officially
denied Metalclad’s application for a permit.\textsuperscript{169}

This denial is remarkable for a number of reasons.\textsuperscript{170} Not only did
the federal authorities never even consider a local permit necessary—and
on the contrary constantly assured Metalclad that it had obtained all nec-
essary authorizations—but “there was [also] no evidence that the
Municipality ever required or issued a municipal construction permit for
any other construction project in Guadalcazar . . . .”\textsuperscript{171} Furthermore, and
not surprisingly, “there was no evidence [of] an established administra-
tive process with respect to municipal construction permits in the
Municipality . . . .”\textsuperscript{172} While this absence of a regular administrative
process alone strongly suggests the Municipality had no power to regu-
late construction for environmental purposes, it is certainly an
insufficient explanation for its year-long delay in rejecting the applica-
tion.\textsuperscript{173} Nor does this finding mitigate the fact that the Municipality
neither invited nor notified Metalclad of the Town Council meeting dur-
ing which its application was discussed and ultimately rejected.\textsuperscript{174}

In order to get additional backing for its refusal to issue a permit
Metalclad arguably did not need in the first place, the Municipality tried
to obtain a court order preventing the operation of the landfill.\textsuperscript{175} Metal-
clad, for its part, on January 2, 1997, finally initiated arbitral proceedings
against the Mexican government under chapter 11 of NAFTA.\textsuperscript{176} The last
nail in the coffin of Metalclad’s plan to operate the waste landfill was an
Ecological Decree issued in September 1997 by the outgoing governor,
who—three days before his term of office expired—declared the area of
the site an ecological reserve for the protection of rare cacti.\textsuperscript{177}

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\textsuperscript{169} Metalclad, Final Award, supra note 45, paras. 47–50.
\textsuperscript{170} See Seymour, supra note 145, at 192–93.
\textsuperscript{171} Metalclad, Final Award, supra note 45, para. 52.
\textsuperscript{172} Id.
\textsuperscript{173} Id., para. 50; see also Seymour, supra note 145, at 193.
\textsuperscript{174} Metalclad, Final Award, supra note 45, para. 54.
\textsuperscript{175} Id. para. 56.
\textsuperscript{176} Id. para. 58. In the arbitration the federal government had to defend the actions of
federal subunits that it opposed from the very beginning, making Metalclad an interesting case
to study the influence of international investment treaties on federal systems. See Matthew C.
(2004). The international responsibility of the central government for actions of subunits,
however, is generally recognized in international law. See ILC Articles on State Responsibility
\textsuperscript{177} Metalclad, Final Award, supra note 45, para. 59.
\end{flushleft}
ii. The Award

With regard to the obligation to provide fair and equitable treatment enshrined in article 1105(1), the NAFTA tribunal clarified from the very outset that predictability and, accordingly, transparency are relevant when interpreting and applying this provision:

An underlying objective of NAFTA is to promote and increase cross-border investment opportunities and ensure the successful implementation of investment initiatives . . . [p]rominent 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. There should be no room for doubt or uncertainty on such matters. Once the authorities of the central government of any Party . . . become aware of any scope for misunderstanding or confusion in this connection, it is their duty to ensure that the correct position is promptly determined and clearly stated so that investors can proceed with all appropriate expedition in the confident belief that they are acting in accordance with all relevant laws. 178

The tribunal emphasized that Metalclad acquired COTERIN for the sole purpose of creating the waste landfill after having inquired with the federal authorities regarding the necessity of a municipal permit. 179 Then, "[r]elying on the representations of the federal government," as the tribunal noted, Metalclad began the construction of the landfill "openly and continuously." 180 Metalclad was entitled to rely on the government’s representations and continue construction in good faith. 181 With a view to the history of contradictory government statements regarding the necessity of a local permit, the tribunal further held that "[t]he absence of a clear rule as to the requirement or not of a municipal construction permit, as well as the absence of any established practice or procedure as to the manner of handling applications for a municipal construction permit, amounts to a failure on the part of Mexico to ensure the transparency required by NAFTA." 182 Moreover, the tribunal criticized the lack of opportunity for

178. Id. paras. 75–76 (emphasis added).
179. Id. paras. 77, 80.
180. Id. para. 87.
181. Id. para. 89.
182. Id. para. 88.
representatives of Metalclad to speak at the Town Hall meeting, as well as the irrelevant factors behind the decision to deny the permit.  

Taken together, these numerous substantive and procedural shortcomings made the insistence on, then the denial of, the municipal license "improper." Therefore, the tribunal concluded that

_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._

Thus, the _Metalclad_ tribunal gave transparency a very prominent role in interpreting the relevant standard of "fair and equitable treatment" and accordingly based at least part of its holding on the lack of predictability and clarity regarding the necessity of, and procedure for, obtaining an additional permit. In sum, the tribunal found that Mexico had violated its obligation flowing from article 1105(1) of NAFTA to provide fair and equitable treatment in accordance with international law. Accordingly, the tribunal awarded almost $16.7 million in damages plus legal interest to Metalclad.

b. Judicial Review—International Economic Law in National Courts

The tribunal's award constituted the first victory for an investor in NAFTA chapter 11 investor-state arbitration, and thus the legal community closely monitored the Mexican reaction to see how, and whether, Mexico would accept the award. While NAFTA does not contain any express provisions for appealing chapter 11 arbitrations, article

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183. _Id._ paras. 91–93.
184. _Id._ para. 97.
185. _Id._ para. 99 (emphasis added).
186. _Id._ para. 101.
187. _Id._ para. 131. In its award, the tribunal also ruled that Mexico had violated NAFTA article 1110 by allowing the “indirect expropriation” of Metalclad’s investment through the Municipality’s actions and held that the environmental decree issued by the Governor was an “act tantamount to expropriation.” See _id._ paras. 104–12. These aspects of the award, however, are—while posing fascinating questions of legitimate regulatory diversity, indirect expropriation, and sovereignty—of minor relevance in an analysis of the transparency principle, and thus this Note will not elaborate further upon them.
188. Weiler, _supra_ note 143, at 697.
1136(3)(b) does indicate the possibility of an appeal in national courts. Asking the Supreme Court of British Columbia to set aside the award, Mexico decided to appeal. Because of the international commercial nature of the dispute and Canada's status as a UNCITRAL Model Law state, the court treated the provisions of the British Columbia International Commercial Arbitration Act as the applicable law. Hence, the only three grounds for appeal were improper constitution of the panel, violation of British Columbia public policy, and excess of jurisdiction. In addition to this obviously limited scope of review, it should also be noted that in the leading Canadian precedent dealing with review of arbitral awards, the British Columbia Court of Appeals expressly recognized that deference should be accorded to the arbitrators and judicial intervention should be minimized. Indeed, before further scrutinizing the Metalclad award, the Vancouver Judge, Justice Tysoe, himself quoted this precedent and acknowledged that “even if it can be shown that the arbitration panel has erred in interpreting the contract,” the appeal proceedings could not set aside the award if the tribunal’s “interpretation is one which the words of the contract can reasonably bear.”

Given this acknowledged precedent arguing in favor of limited review, the decision of the British Columbia Supreme Court is surprising: Justice Tysoe ruled that a government's failure to act in a clear, predictable, and transparent manner did not constitute a breach of the “fair and equitable treatment” obligation enshrined in article 1105(1)

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190. This provision stipulates that awards may not be enforced until a three month period following rendering of the award has passed or all available appeals are exhausted. Thus, appeal is possible if the parties agree to arbitration under ICSID Additional Facility Rules or UNCITRAL Arbitration Rules. In cases brought under the ICSID Convention, internal review and annulment proceedings are the only available mechanisms.

191. Metalclad and Mexico had chosen Vancouver, British Columbia (Canada) as situs of the original NAFTA arbitration because it seemed to be an adequate, neutral location. See Weiler, supra note 143, at 697.


193. Id. at § 34. Mexico had unsuccessfully argued that the local British Columbia Commercial Arbitration Act should be applicable, which would have provided for a more extensive appeal on issues of law.


195. Metalclad, Appeal, supra note 141, paras. 51–52. Moreover, Todd Weiler draws attention to the fact that Justice Tysoe apparently is an insolvency and bankruptcy law specialist without any particular background in international law. See Weiler, supra note 143, at 697 n.39. This observation makes second-guessing by “ordinary judges” of the merits of an arbitration award rendered by international law experts all the more dubious.


197. See Seymour, supra note 145, at 198; see also Weiler, supra note 143, at 699.
of NAFTA and thus overturned the tribunal’s award in this respect. Commentators have argued that in doing so, he substituted his own interpretation of article 1105(1) for the unanimous interpretation of the expert Metalclad tribunal, thereby effectively violating his obligation, outlined above, to give deference to the arbitrators. It is indeed possible to demonstrate that Justice Tysoe did not limit himself to findings on improper constitution of the panel, violation of British Columbian public policy, and excess of jurisdiction. More importantly for this Note, however, his interpretation of the role transparency plays within the NAFTA framework in general and article 1105(1) in particular was not only rendered without jurisdictional authority but was also flawed.

With regard to the question of jurisdiction, the court based its judgment on the assertion that the Metalclad tribunal did not merely misinterpret the wording of article 1105(1) but instead “misstated the applicable law to include transparency obligations and . . . made its decision on the basis of the concept of transparency.” In order to reach this conclusion, however, Justice Tysoe extensively discussed the “correct” interpretation of the words “international law,” which describe the minimum standard of protection that is to be awarded to investors, criticizing not only the merits of the Metalclad tribunal but also the Final Merits Awards in the Pope & Talbot case and a separate opinion attached to the S.D. Myers award. He concluded that he was “unable to agree with the reasoning of the Pope & Talbot tribunal” and its “interpretation” of article 1105(1). The court’s interpretation and holding on the merits thus extended far beyond the limited authority for review provided for under the British Columbia International Arbitration Act. In sum, the court claimed to find “excess of jurisdiction” when in reality it inappropriately engaged in a detailed—and again, it is submitted, flawed—analysis of

198. Metalclad, Appeal, supra note 141, paras. 70–72. With a view to the other, non-transparency related findings under NAFTA article 1110(1), however, Metalclad prevailed, as Justice Tysoe did not consider the finding regarding the ecological decree “patently unreasonable.” Accordingly, he reduced the damages to reflect his judgment that there was no violation of NAFTA obligations before the decree and awarded Metalclad $15.6 million. See id. paras. 97, 105, 134–37.

199. Weiler also notes that the composition of the panel included well-renowned experts Professor Sir Eli Lauterpacht, former U.S. Attorney General Benjamin R. Civiletti, and President of the OAS Inter-American Judicial Committee Jose Luis Siqueiros. See Weiler, supra note 143, at 699 n.45.

200. Seymour, supra note 145, at 209.

201. See id.

202. Metalclad, Appeal, supra note 141, para. 70.


204. Metalclad, Appeal, supra note 141, para. 65.
the structure and meaning of article 1105, putting particular emphasis on the meaning and content of "international law" and substituting its own construction of the phrase for that of the tribunal. As will be demonstrated in turn, the tribunal's interpretation is not only one that the wording of article 1105(1) can "reasonably bear" but actually is more convincing than the British Columbian court's reading.

With regard to the status of the transparency principle in international economic law, the actual reasoning Justice Tysoe put forward to support his conclusion that there was no violation of article 1105(1) is even more important than the fact that he exceeded his judicial authority in doing so in the first place. First of all, his interpretation of article 102 is dubious at best. While acknowledging that article 102(1) refers to transparency, he emphasizes that "it is listed as one of the principles and rules contained in the NAFTA through which the objectives are elaborated." According to Justice Tysoe, because NAFTA only requires interpretation in the light of its objectives, it follows that not "all of the provisions of NAFTA are to be interpreted in light of the principles and rules mentioned in Article 102(1)." A close reading of article 102 of NAFTA, the agreement's key interpretative provision, however, demonstrates that the court's reasoning is not convincing. Article 102(1) enumerates "[t]he objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored nation treatment and transparency." As mentioned above, article 102(2) then stipulates that "[t]he Parties shall interpret and apply the provisions of this Agreement in the light of the objectives set out in paragraph 1." Given both the clear command to interpret the provisions in light of NAFTA's objectives and the fact that the transparency principle "elaborates" those objectives, it is hard to see how Justice Tysoe could deny the relevance of transparency in the interpretation of article 1105(1). His claim that chapter 18 of NAFTA exclusively codified the transparency principle does not logically follow from the wording, nor is it true; in fact, NAFTA is "positively riddled with transparency enhancing norms," many of which are not found in chapter 18.

What, then, would be a more reasonable construction and interpretation of the norm? Article 31(1) of the Vienna Convention on the Law of

205. This fact might, however, diminish the precedential and persuasive value of the case.
207. Id.
208. NAFTA, supra note 85, art. 102(1).
209. Id. art. 102(2).
210. Weiler, supra note 143, at 701.
211. See discussion supra Part III.B.2. Weiler, supra note 143, at 701 n.52, lists articles 509-10, 718-19, 909-10, 1008-16, 1306 and 1411.
Treaties (VCLT) stipulates that the ordinary meaning of words must be interpreted in the light of the context, object, and purpose of the agreement at issue.\textsuperscript{212} This Note has enumerated both the objective of inducing investment explicitly mentioned in the preamble of NAFTA and the undeniable positive effects transparent rules and procedures bear in this regard.\textsuperscript{213} The purpose of the agreement, therefore, clearly argues in favor of interpreting articles relevant to investment decisions with a view to transparency. The literal and contextual interpretation of the norm supports this teleological aspect as well: because article 102(1)(c) explicitly lists as one of NAFTA's objectives the substantial increase of "investment opportunities in the territories of the Parties," the interpretation of the corresponding investment chapter—including article 1105—must take into account this goal. Nothing less is expressed in the interplay between article 102(1), article 102(2), and the later implementing chapters.

Moreover, Justice Tysoe misread the tribunal award as stating that there was a causal relationship between a breach of the transparency norms of chapter 18 and the finding of a violation of article 1105 of NAFTA. This is, however, not the case; the tribunal simply followed the interpretative techniques enshrined in article 31 of the VCLT and looked at chapter 18, among other sources, when analyzing the context of chapter 11 in order to interpret the obligations found in NAFTA article 1105.\textsuperscript{214} Thus, the tribunal's approach is not only perfectly legitimate but reasonable and justified under international law. In short, the court's finding that there were no explicit transparency obligations in chapter 11 of NAFTA ignores the object and purpose of the treaty\textsuperscript{215} and, consequently, does not support the conclusion that the transparency principle was not relevant in interpreting NAFTA article 1105.

c. The Interpretative Note and Its Effects

With a view to the obvious shortcomings of the British Columbia Supreme Court's reasoning, one would hope that if the NAFTA parties decided to clarify the scope and meaning of article 1105, they would do so by supporting the existing tribunal precedent and rebuking Justice Tysoe's overly narrow misconstruction. That was not the case, however.

\textsuperscript{213} \textit{See} Parts II.B.1. and II.C.2. \textit{supra}.
\textsuperscript{214} Seymour, \textit{supra} note 145, at 217.
\textsuperscript{215} VCLT, \textit{supra} note 212, art. 31(1).
Apparently alarmed by the outcome in *Metalclad* and the subsequent *Pope & Talbot* and *S.D. Myers* cases,\(^{216}\) the trade ministers from each Party came together as the Free Trade Commission (FTC) and issued their Interpretation of Certain Chapter 11 Provisions on July 31, 2001, pursuant to article 1131(2) of NAFTA.\(^{217}\) To the extent that this interpretation touches on the present analysis of the status of transparency in international investment law, the FTC "clarified" the scope of article 1105 by proclaiming:

B. Minimum Standard of Treatment in Accordance with International Law

Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.

The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).\(^{218}\)

While some commentators have argued that this "interpretative note" amounted to a *de facto* amendment of the agreement, thereby bypassing the appropriate procedure and rendering itself void,\(^{219}\) the following analysis assumes for the sake of discussion that the interpretative note is not invalid for reasons of form. Nevertheless, if the interpretative note intended to change the outcome in cases like *Metalclad*, its last paragraph apparently repeats Justice Tysoe's mistake of linking the tribunal's mention of NAFTA chapter 18 to its finding of a violation. In fact, the tribunal never established such a causal relation—and the finding of an additional breach certainly cannot preclude the possibility of a violation.

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\(^{217}\) *See Notes of Interpretation of Certain Chapter 11 Provisions, supra* note 101.

\(^{218}\) *Id.*

of article 1105(1). Insofar as this paragraph could be understood to exclude the transparency principle found in article 102(1) from the interpretation of article 1105(1), it contradicts the explicit interpretative command enshrined in article 102(2) and thus cannot bind tribunals. Therefore, the third paragraph does not affect the present analysis of the status of transparency in international economic law.

Regarding the explicit restriction of article 1105(1) to the "customary international law minimum standard" in the second paragraph, one could argue that due to the transparency enhancing provisions found in countless BITs, other multilateral investment treaties, and NAFTA itself, as well as with a view to the due process component of transparency, the principle has indeed gained relevance in interpreting the customary international law minimum standard guaranteed by fair and equitable treatment or expropriation provisions. Indeed, the law has evolved since the proclamation of the Neer standard:

[W]hat customary international law projects is not a static photograph of the minimum standard of treatment of aliens as it stood in 1927, when the Award in the Neer case was rendered. For both customary international law and the minimum standard of treatment of aliens it incorporates, are constantly in a process of development.

Thus, in contrast to the more expansive reading of the Pope & Talbot tribunal, which explicitly held that article 1105(1) included a certain "additive" compared to customary international law, it is unclear whether the Metalclad tribunal would have had to decide the case differently if the interpretative note had controlled its interpretation.

d. Conclusion

The Metalclad case was the first and most famous case to demonstrate that, at least in the opinion of the NAFTA tribunal, transparency is not exclusively concerned with procedures and due process obligations but also features prominently as an interpretative principle for other NAFTA obligations relevant to investment. Given the general framework and objective of investment treaties, this reading is convincing and potentially

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220. Seymour, supra note 145, at 220.
221. Weiler, supra note 143, at 706. This question therefore is closely related to the issue of whether the note should actually be considered an amendment, which would be the only way to change the relevance of NAFTA article 102(1) to interpret the agreement's obligations.
222. See Kirkman, supra note 219, at 386.
224. Seymour, supra note 145, at 220. In this regard, also see the approach adopted in Waste Management, infra Part III.B.2.
has significant implications for the understanding of fair and equitable treatment clauses, which can be found in many other instruments of international investment law as well. In contrast to the tribunal’s interpretation, the judgment by the British Columbia Supreme Court is flawed for several reasons and consequently should have minimal impact. Moreover, because national courts cannot bind international tribunals and their conclusions on matters of international law are therefore of limited value, the reasoning of the appeal should not function as a powerful precedent outside of British Columbia. The influence of the interpretative note is more difficult to assess. In light of the above analysis, however, this Note argues that the outcome could very well have been the same. A survey of additional jurisprudence will bolster this assumption.

2. Additional Jurisprudence: Tecmed, Maffezini, Waste Management, and Occidental

Even though the controversy surrounding the Metalclad decision and its resulting fame—or notoriety, depending on who tells the story—is unsurpassed, it is not the only judgment in international investment law to employ an analysis connecting a lack of transparency with a violation of the obligation to provide fair and equitable treatment. Hence, a number of additional cases are briefly discussed below.

a. Tecmed

The survey begins with Técnicas Medioambientales Tecmed S.A. v. United Mexican States (Tecmed). As in Metalclad, the dispute arose in the context of a hazardous waste site in Mexico, although Técnicas Medioambientales Tecmed, S.A. had operated the site for a year before the Mexican government declined to relicense it. Relying on various rights and protections set out in the BIT between Spain and Mexico, the Spanish investor filed a claim with the ICSID Additional Facility. The claimant suspected the refusal to relicense was not motivated by legal considerations but caused by the change of administration, following elections in 1997, in the Municipality of Hermosillo, where the landfill was located. In another parallel to Metalclad, local politicians and administrators encouraged protestors to block access to the landfill.

225. Seymour, supra note 145, at 220.
226. See Weiler, supra note 168, 701.
228. Id. para. 39.
229. Id. para. 42.
230. Id.
Issues of competence in the federal system arose as well: the Federal Environmental Protection Attorney's Office (PROFEPA) investigated certain breaches of the original permit; the federal agency, however, came to the conclusion that neither the environment nor the health of the population were threatened and thus refrained from revoking the license, imposing fines instead.231

The tribunal criticized the lack of predictability and transparency in the administrative municipal process that finally culminated in the de facto revocation of the license. Addressing the obligation within the BIT to provide fair and equitable treatment, it held that

this provision of the Agreement, in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.232

The tribunal then went on to state that in the present case, actions by the Mexican authorities lacked sufficient clarity and "an explicit, transparent and clear warning" that a necessary license would be revoked.233 Consequently, "contradictions and lack of transparency" hindered the investor from taking action against losing his permit.234 Even though this reasoning possibly demonstrates a stronger and more distinct connection to notions of due process and good faith than the Metalclad award,235 it nevertheless strongly resembles the Metalclad tribunal's approach to interpreting the fair and equitable treatment obligation, and it reiterates that the predictability component of transparency identified above is central to the effective protection of investments.

231. Id. para. 43.
232. Id. para. 154 (emphasis added).
233. Id. para. 160.
234. Id. para. 162.
b. Maffezini

The setting of the next case is slightly different from the previous contexts: not only do we (for now) leave the realm of hazardous waste sites in Mexico, but more importantly, the case was brought against an industrialized state—which is noteworthy, considering BITs are often viewed as one-sided agreements in favor of claimants from the industrialized parties. In *Maffezini (Argentine) v. Kingdom of Spain*, the claimant established a corporation named Emilio A. Maffezini S.A. (EAMSA) in the Spanish province of Galicia. A Spanish entity, Sociedad para el Desarrollo Industrial de Galicia (SODIGA), functioned as a minority shareholder and also granted a large loan at a preferential interest rate to the company. At the time, SODIGA was in the process of transforming from a state-oriented to a market-oriented entity, but it still evidenced features of a public entity whose actions could in part be attributed to the Spanish state. Early in its developmental stage, EAMSA experienced financial difficulties and consequently needed additional loans and subsidies. Among the measures taken to cope with the company's financial crisis was the transfer of 30 million Spanish peseta from the personal accounts of Emilio Maffezini to EAMSA, as ordered by a representative of SODIGA who had the abstract authority to do so but acted in the absence of a concrete loan contract between Maffezini and EAMSA. EAMSA's difficulties continued until Maffezini stopped all construction, dismissed all employees, and tried to sell EAMSA's assets to SODIGO. The deal was unsuccessful, and Maffezini instituted ICSID arbitration, claiming that the project failed due to wrong advice from SODIGO and that EAMSA irregularly transferred the 30 million Peseta without concrete consent to the transfer.

In its ruling on the merits, the tribunal roundly rejected Maffezini's main claim that Spain, acting via SODIGO, was responsible for EAMSA's demise, famously ruling that it was predominantly Maffezini's own poor business judgment that caused the business to fail. With regard to the

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238. Id. para. 39.
239. Id.
240. Id. para. 57.
241. Id. para. 75.
242. Id. para. 43.
243. Id. para. 64.
244. Id. para. 64.

In this connection, the Tribunal must emphasize that Bilateral Investment Treaties are not insurance policies against bad business judgments. While it is probably true that there were shortcomings in the policies and practices that SODIGA and its
unclear facts surrounding the transfer of money from Maffezini's personal account to EAMSA, however, the arbitrators found that "the lack of transparency with which this loan transaction was conducted is incompatible with Spain's commitment to ensure the investor a fair and equitable treatment in accordance with Article 4(i) of the [BIT]."

While it is regrettable that the tribunal did not further elaborate on what it precisely meant by "lack of transparency," the award at least serves as another indicator that the connection between a non-transparent action attributable to the state and the obligation to provide fair and equitable treatment is increasingly recognized in international investment law.

c. Occidental

Occidental Exploration and Production Company (OEPC), a U.S. investor, provided oil exploration services to Petroecuador, a state-owned corporation responsible for the planning, organization, and operation of oil explorations and exploitations in Ecuador. During the 1980s and 1990s OEPC regularly paid the value-added tax (VAT) on local acquisitions and received reimbursement from Petroecuador. The two companies, however, modified their contractual relations in 1999, transforming OEPC into an equity participant responsible for making VAT payments and then collecting applicable refunds itself. At the time of the negotiations for the new contract, however, Ecuador's tax laws were in flux. Therefore, OEPC tried to insure itself against unfavorable modifications by, inter alia, inquiring beforehand with Servicio de Rentas Internas (SRI), Ecuador's tax authority, as to whether the import of goods under the new contract would give rise to VAT liability and including a clause providing for new amendments to "reestablish the economy" of the original bargain. In response to this consulta, the SRI explained that OEPC was indeed required to pay VAT, but it did not explicitly mention the possibility of a refund. Nevertheless, following the signing of the new contract, OEPC applied for and initially received VAT

sister entities pursued in the here relevant period in Spain, they cannot be deemed to relieve investors of the business risks inherent in any investment. To that extent, it is clear that Spain cannot be held responsible for the losses Mr. Maffezini may have sustained any more than would any private entity under similar circumstances.

244. Id. para. 83.
245. See Fair and Equitable Treatment, supra note 235, at 37.
247. Id. para. 25.
248. Id. paras. 26–28, 30, 95–96.
249. Id. paras. 102–05.
refunds from SRI. \textsuperscript{250} Eventually, however, the tax authority changed its position and claimed OEPC already received reimbursement by means of its contractual equity participation with Petroecuador and was not eligible for further refunds under applicable Ecuadorian tax laws. \textsuperscript{251} OEPC resorted to arbitration under the U.S.-Ecuador BIT.

When discussing the question of whether OEPC's investment had been impaired, the tribunal, in an \textit{obiter dicta}, clearly voiced its discontent over the state of the Ecuadorian tax laws: "SRI was confronted with a variety of practices, regulations and rules dealing with the question of VAT . . . [T]his resulted in a confusing situation into which the SRI had the task of bringing some resemblance of order." \textsuperscript{252} The tribunal's analysis of the fair and equitable treatment claim first recalled the preamble of the BIT, which states that such treatment "is desirable in order to maintain a stable and maximum effective utilization of economic resources," and concluded that such "stability of the legal and business framework is thus an essential element of fair and equitable treatment" \textsuperscript{253} It proceeded to criticize the reply to OEPC's \textit{consulta} as "wholly unsatisfactory and thoroughly vague" and emphasized that the Ecuadorian tax law had been changed "without providing any clarity about its meaning and extent and the practice and regulations were also inconsistent with such changes." \textsuperscript{254} Citing the pertinent parts of \textit{Metalclad} and \textit{Tecmed}, discussed above, the tribunal concluded that SRI's non-transparent changes and application of tax laws did not provide the stability mandated by the obligation to provide fair and equitable treatment. Given that this was an "objective requirement that does not depend on whether the Respondent has proceeded in good faith or not," the tribunal found that Ecuador breached the fair and equitable treatment provision of the BIT. \textsuperscript{255} This case is not only noteworthy because it is the first non-NAFTA investment arbitration award concerning tax issues but also because of the award's "somewhat disconcerting" potential breadth. \textsuperscript{256} The main reason for this worry is that while a certain level of "regulatory uncertainty" as a product of governmental activity is generally considered

\textsuperscript{250} Id. paras. 103–08.

\textsuperscript{251} Id. paras. 32–34.

\textsuperscript{252} Id. para. 163. OEPC's claim of an impairment of the investment was ultimately denied, however, because OEPC continued to exercise all relevant rights to operate, maintain, use, enjoy, acquire, expand, and dispose of its investment. See id. para. 161.

\textsuperscript{253} Id. para. 183.

\textsuperscript{254} Id. para. 184.

\textsuperscript{255} Id. paras. 185–87.

acceptable, scholars have interpreted the tribunal's language to suggest a change in regulatory framework during the life of an investment may infringe the guarantee of fair and equitable treatment regardless of the intention of the government. While the wording and structure of the award are indeed somewhat unfortunate and thus leave room for sweeping interpretations, given the tribunal's emphasis on clarity and the precedents, there is no reason to fear that the obligation to provide fair and equitable treatment demands a completely "static" legal environment and prohibits modifications. Rather, the concept of stability denotes the absence of arbitrariness and utterly unforeseeable change.

The tribunal itself has expressed its belief that "in the instant case the treaty standard is not different from that required under international law concerning both the stability and predictability of the legal and business framework of the investment." Hence, by linking stability to predictability, it becomes clear that a legal and business framework that remains transparent—and thus predictable as far as the proper application of the respective rules in force is concerned—does not become "unstable" through an amendment of the relevant norms. In a similar vein, the tribunal's observation that "there is certainly an obligation not to alter the legal and business environment in which the investment has been made" should not be understood as prohibiting changes to all laws affecting investment per se but should be construed as requiring that a transparent and predictable business environment keep those characteristics, no matter how the applicable rules in concreto evolve. Taking everything into account, the Occidental award thus stands as additional support for the proposition that obligations of fair and equitable treatment should be interpreted with a view to transparency.

d. Waste Management

The last case for discussion in this section returns the focus to waste landfills in Mexico and chapter 11 of NAFTA. In the case of Waste...
Management, Inc. v. Mexico (Waste Management), the Mexican city of Acapulco, in the state of Guerrero, entered into a contract for the provision of waste disposal services with Acaverde, a Mexican company indirectly owned by Waste Management, a U.S. company. The city not only granted Acaverde exclusive rights to service a particular area but also entitled it to develop a base of paying customers and receive monthly payments from the municipal government, guaranteed by a local development bank in a separate line-of-credit arrangement. Finally, the contract foresaw that Acaverde would construct a permanent solid waste landfill on a piece of land the city was to transfer as a "gratuitous loan."

On August 15, 1995, Acaverde began operating under the agreement, but the city fulfilled virtually none of its contractual obligations: The land for the landfill was not available, Acaverde received hardly any regular payments from the city, and the city did not properly enforce the exclusivity arrangements for the concession area. Furthermore, Acaverde encountered substantial problems with "trash pirates" (piratas) who used unauthorized pick-up trucks to look for and dump waste, barrow-men (carretilleros) who would do small jobs, including waste disposal, for a tip, and pig-farmers (porcicultores) who took waste food from restaurants as food for their animals. When Acaverde finally ended its operations in November 1997, about 80 percent of its invoices to the city were still unpaid.

The NAFTA panel ruling on Waste Management's claim under chapter 11 decided the city had not violated article 1105 of NAFTA. Even though the city government failed in numerous ways to fulfill its contractual obligations, the panel did not find that Acapulco acted "in a wholly arbitrary way or in a way that was grossly unfair." Instead, the city had actually attempted to take steps to fulfill its obligations, and the main problem with Acaverde's operations could be traced back to the business plan, which did not anticipate the resistance by the local populace and the Mexican financial crisis.

262. Waste Mgmt., Inc. v. Mex., ICSID Case No. ARB(AF)/00/3 (Apr. 30, 2004).
263. Id. para. 40. The indirect and complex ownership structure—at the time Waste Management owned a Cayman Island holding company, which in turn owned Acaverde—prompted Mexico to raise a procedural defense, asserting that Waste Management lacked a direct interest in an investment in Mexico and thus did not have the status of an "investor" under NAFTA Chapter 11. This defense, however, was not successful. See id. paras. 77–85.
264. Id. paras. 42–44, 48–50.
265. Id. para. 45.
266. Id. paras. 54–58.
267. Id. para. 54.
268. Id. para. 69.
269. Id. para. 115.
270. Id. paras. 108–15.
The inclusion of *Waste Management* in the present survey of transparency-related cases in international investment law, however, is due to the standard the tribunal introduced with regard to article 1105. Having discussed a number of precedents, the tribunal noted:

*[Despite certain differences of emphasis a general standard for Article 1105 is emerging.* Taken together, the S.D. Myers, Mondev, ADF and Loewen cases suggest that the minimum standard of treatment of fair and equitable treatment [sic] is infringed by conduct attributable to the State and harmful to the claimant if the conduct . . . involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant. Evidently the standard is to some extent a flexible one which must be adapted to the circumstances of each case.271

This formulation of the relevant minimum standard for fair and equitable treatment verifies that even after the FTC's interpretative note, the transparency-related criteria developed in the *Metalclad* case—i.e., a complete lack of transparency and *bona fide* reliance on corresponding representations of the host state—can suffice to trigger liability, at least under certain circumstances. *Waste Management* is therefore another example and a sound and current summary of the relevance of the transparency principle when interpreting the substantive obligation to provide fair and equitable treatment in international investment law.

**IV. PERSPECTIVES OF TRANSPARENCY**

Given the relevance of transparency in the legal interpretations discussed above, this Part briefly discusses a proposal to further utilize transparency. This proposal draws on and further develops Hansen's suggestion that WTO panels adjudicating the legality of environmental protection measures under article XX b) of the GATT require transparency as a balancing device.272

Hansen's idea has significant merits and could certainly be transferred to the other exceptions contained in article XX. The Appellate Body has interpreted the chapeau of article XX, which requires that

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271. Id. para. 98 (emphasis added).
272. See Hansen, supra note 1, at 1058 et seq.
measures adopted under the provision do not result in arbitrary or unjustifiable discrimination, as introducing a proportionality test.\textsuperscript{273} This test opens the door for factoring in the transparency of a member state's domestic legal process when balancing the respective competing interests to decide the legality of a measure adopted under article XX. If the imposing state failed to \textit{transparently} balance the impact of regulatory measures on the import of goods with the protected interest at stake, there could be a \textit{prima facie} assumption that the regulation in question is a disproportionate, protectionist aberration and not a legitimate public policy choice.

Given that proportionality tests play an important role in other areas of the WTO legal order,\textsuperscript{274} a certain degree of transparency in the domestic decision-making process could be considered a minimum requirement for every member state relying on exceptions to general obligations in the WTO agreements. This balancing approach would not only guarantee that member states do not exploit exception clauses for other purposes; it also would provide a valuable link between members of civil society and the panels adjudicating cases, equipping the latter with a solid record of the discourse between competing interests on the national level.\textsuperscript{275} A similar interpretation could apply to other sectors of international economic law containing comparable exceptions, where transparency would facilitate compliance with international economic law regimes and foster the legitimacy and democratic acceptance of such regimes in member states.

Within the context of these proportionality tests, the Appellate Body has also incorporated general principles of public international law.\textsuperscript{276} While it is clear that the GATT "is not to be read in clinical isolation from public international law,"\textsuperscript{277} the influence of general public international law and its coordination with the WTO legal order remain problematic.\textsuperscript{278} Building on the balancing role proposed for transparency above, tribunals might mitigate possible conflicts between WTO

\textsuperscript{273} Turtle/Shrimp (Appellate Body Report), \textit{supra} note 119, paras. 156–60.

\textsuperscript{274} For a good overview, see Axel Desmedt, \textit{Proportionality in WTO Law}, 4 J. INT'L ECON. L. 441 (2001).

\textsuperscript{275} Hansen, \textit{supra} note 1, at 1065.

\textsuperscript{276} See Appellate Body Report, Turtle/Shrimp, \textit{supra} note 119, para. 168.


obligations, on the one hand, and provisions stemming from multilateral agreements not all WTO member states have undertaken, on the other, by assigning significant weight to the transparent and bona fide fulfillment of the latter when judging the conformity of a measure with relevant WTO agreements.

Finally, transparency could also prove very beneficial in the context of a problem peculiar to international investment law. Here, the question of how to distinguish between legitimate public policy choices and indirect or "regulatory" expropriations typically presents difficulties. While transparency cannot fully resolve this issue, it can certainly provide valuable indications: If a state ponders and eventually enacts regulatory measures rendering an investment worthless, the process should at least be transparent and predictable so as to enable the investor to participate, safeguard his rights, and consider consequent business decisions ahead of time. If the state conforms to this standard and fulfills other criteria concerning the impact and duration of the regulation, its non-discriminatory application, and its non-interference with distinct, investment-backed expectations, the tribunal should find there has not been an indirect expropriation and should consequently deny the investor's compensation claims. This requirement imposes no disproportionate burden on the host state but rather functions to prove the regulation at issue is a regulatory measure adopted in good faith.

V. CONCLUSION

Weiler reminds us that according to Schwarzenberger, one should not rush too quickly to announce new principles of international economic law "based merely on a grouping of similar treaty provisions." This caveat is generally well-founded, and accordingly, further interdisciplinary academic treatment of this issue is warranted. This Note's brief survey of relevant legal texts, however, shows that countless provisions of different sectors of international economic law—trade, investment,
and finance—either reflect or even explicitly express the transparency principle. This holds true for bilateral as well as for multilateral instruments. While many of these provisions stipulate procedural obligations to publish information of vital importance to market participants and investors, there are a growing number of more substantive obligations that either require interpretation with a view to the transparency principle or directly mirror the economic functions of transparency. Increasingly, mere publication of relevant laws is insufficient. Instead, international agreements are mandating opportunities to comment and the active delivery of relevant information—complementing “passive” transparency with “active” transparency.\(^2\)

In the same vein, the jurisprudence discussed above demonstrates how tribunals have recognized transparency as the underlying rationale of international economic provisions and a vital component of the success and functioning of the WTO and NAFTA legal orders, to name only the most prominent multilateral examples. Notwithstanding remaining controversies and open questions as to the exact relationship between the different chapters of NAFTA, for instance, it appears certain that transparency will continue to play an important role as an interpretative device in international economic law. Hence, it does not seem premature to refer to it as an interpretative principle of international economic law.

This result is all the more acceptable if one remembers the underlying rationales of international trade and investment law: to create predictability and foster trade and investment. Both of these goals are greatly enhanced by applying transparency disciplines to the fields’ substantive provisions. This is not to say, of course, that there are no potential costs associated with transparency. There are quantifiable administrative costs in addition to intangible, but equally serious, cultural barriers to increased transparency.\(^3\) Given transparency’s vast economic benefits, however, it is in the self-interest of states seeking foreign direct investment to overcome these obstacles—with technical assistance, if necessary—and install transparent and predictable procedures even in

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282. Regarding the distinction between the active and passive obligation to provide information and its implications for democratic legitimacy generally, see Anne Peters, Elemente einer Theorie der Verfassung Europas 694 et seq. (2001).

areas where international economic law might still leave them discretion.\footnote{284} Finally, the transparency principle offers a great analytical tool to distinguish legitimate state regulatory action from protectionist or indirectly expropriatory conduct. Properly viewed, transparency not only functions to protect the investor or market participant; it also offers a greater degree of certainty to the state that must decide on available policy objectives. By allowing international judicial bodies and tribunals to consider a state’s domestic decision-making process, transparency thus guarantees a role for civil society’s input on the international level.