UNCITRAL WORKING GROUP II STANDARDS IN TREATY BASED INVESTOR STATE ARBITRATION: HOW DO THEY RELATE TO EXISTING INTERNATIONAL INVESTMENT TREATIES?

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I. INTRODUCTION

RECENT INVESTMENT TRIBUNALS HAVE ADOPTED A VARIETY OF transparency standards in investor-state arbitral practice. The requirements for openness in investment dispute settlement have included: considering amicus briefs, publishing memoranda, awards, and witness statements and allowing for access to parties' pleadings, transcripts and public hearings either digitally or physically. This practice leads actors to reconsider their positions on transparency as set out in international investment agreements (IIAs), annexes to arbitral rules or memoranda of state. Under pressure to keep further arbitration proceedings open to the public, some actors are now eager to create a new multilateral standard of transparency. The United Nations Commission on International Trade Law (UNCITRAL) Working Group II (WG) has proposed a standard (Standard) which, to some extent, may find consensus within the mandate of the WG and the arbitral community. However, it is uncertain how such a standard will interact with existing IIAs and contractual obligations of host-states and investors.

This paper examines the likely effects of applying the proposed Standard in investor-state disputes arising from existing IIAs and investigates how the proposed Standard should be implemented in order

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to overcome potential obstacles. It argues that a multilateral memorandum of understanding, including commitments from both investors and home- and host-states, is necessary to ensure participation from the maximum number of investors and states.

II. HISTORY OF THE DEBATE ON TRANSPARENCY IN INTERNATIONAL INVESTOR-STATE ARBITRATION

In general, international investor-state disputes, as a product of contracts, are confidential unless the parties agree otherwise.[1] In the 1990s however, disputes involving environmental concerns drove governments and international organisations towards transparency. In 1992, the *Rio Declaration on the Environment and Development*[2] enunciated the importance of public access to information dealing with issues of public interest as the key principle.[3] Moreover, the Aarhus Convention called on governments to grant public access,[4] in international and domestic proceedings[5] to cases involving environmental matters.[6] In response to these developments, the UN Economic Commission for Europe (UNECE) undertook a treaty to provide further clarification on transparency in domestic proceedings, i.e. environmental impact assessment, in cases involving cross-boundary impacts[7].

At the same time, the World Trade Organisation (WTO) changed its policy on investor-state disputes to encourage greater transparency. In particular, the WTO Appellate Body established procedural rules

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1 Gary B. Born, *International Commercial Arbitration* 3d ed (Netherlands: Wolters Kluwer, 2009) at 2273.

2 UNCED, 3d Sess, UN Doc A/CONF.151/26/ (Vol. I) (1992) online: UN <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>.

3 *Ibid*, Principle 10.

4 *Convention on Access to Information, Public Participation in Decision-Making and Public Access to Justice in Environmental Matters*, Aarhus Denmark, 25 June 1998, 2161 UNTS 447, online: United Nations Treaty Collection <http://treaties.un.org/doc/publication/UNTS/Volume%202161 /v2161.pdf>.

5 Nathalie Bernasconi-Osterwalder, "Transparency and Amicus Curiae in ICSID Arbitrations" in in Marie-Claire Cordonier Segger, Markus W. Gehring & Andrew Newcombe, eds, *Sustainable Development in World Investment Law* (The Netherlands: Kluwer Law International, 2011) 191 at 192-3.

6 *Ibid* at 193.

7 *Promoting the Application of the Principles of the Aarhus Convention in International Forums*, ESC Dec II/4, UNESCOR, 2005, ECE/MP.PP/2005/2/Add.5, online: UNECE <http://www.unece.org/env/pp/ppif.html>.

requiring transparency and public access.[8] To some extent, the appellate body allows transparency and public access during their proceedings.[9]

The arbitral tribunals, facing public pressure to allow access to tribunal proceedings, were influenced by WTOs proceedings on public awareness.[10] In the first decade of the 21st century, public pressure and policy concerns led to a change in arbitral practices under NAFTA tribunals.[11] The tribunal in *UPS v Canada* made a precedent-setting decision towards transparency by allowing the amicus briefs submitted by the Canadian Union of Postal Workers and others.[12] Thereafter, NAFTA tribunals continued to substantiate the right to transparency and to public access.[13] Hence, in October 2003 the government of Canada declared that it would take appropriate steps towards mandating transparency in

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8 See WTO, Appellate Body, *Working Procedures for Appellate Review* (16 August 2010), WTO Doc WT/AB/WP/6, online: WTO <http://docsonline.wto.org/> at arts 24(1), 27(3)(a).

9 See *United States-Import Prohibition of certain Shrimp and Shrimp Products (Complaint by India, Malaysia, Pakistan, Thailand)* (1998), WTO Doc WT/DS58/AB/R (Appellate Body Report), online: WTO <http://docsonline.wto.org/> (the appellate body allowed third party access); affirmed by *United States-Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom (United States v European Communities)*, (2000), WTO Doc WT/DS138/AB/R (Panel Report), online: WTO <http://docsonline.wto.org/>; *contra European Communities-Measures Affecting Asbestos and Asbestos-Containing Products* (2001), WTO Doc. WT/DS135/AB/R (Appellant Body Report), online: WTO <http://docsonline.wto.org/> (denied the amicus briefs due to practical reasons). However, the reasoning on which the Appellate Body accepts briefs varies case-by-case and is criticised for this. See e.g. Greenpeace International et al, Press Release, "A Court Without Friends: One Year After Seattle, the WTO Slams the Door on NGOs" (22 November 2000) online: FIELD <http://www.field.org.uk/library/archive>.

10 See e.g. *United Parcel Service of America Incorporated (UPS) v Canada* (2007), (International Centre for Settlement of Investment Disputes), online: NAFTA Claims <http://www.nafta law.org/Disputes/Canada/UPS/UPS-Canada-Final_Award_and_Dissent.pdf> at 45-63 [*UPS v Canada*].

11 *Settlement of commercial disputes: Transparency in treaty-based investor-State arbitration-Compilation of comments by Governments*, UNCITRAL, 53rd Sess, UN Doc A/CN.9/WG.II/WP.159/Add.1, (2010) at 8.

12 *UPS v Canada, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae (2001)*, online: NAFTA Claims <http://naftaclaims.com/Disputes/Canada/UPS/UPSDecision ReParticipationAmiciCuriae.pdf> [*UPS v Canada, Amicus Brief*].

13 *Chemtura Corporation v Canada, Award*, (2010) (Ad hoc NAFTA Arbitration under UNCITRAL Rules), online: Investment Treaty Arbitration <http://italaw.com/documents/ ChemturaAward.pdf> (this tribunal approved *UPS v Canada*, *supra* note 10); see also *Merrill Ring Forestry LP v Canada* (2010), (UNCITRAL, ICSID Administered Case (NAFTA), Award), online: Arbitration Law <http://arbitrationlaw.com/files/free_pdfs/Merrill%20%26%20Ring %20v%20Canada%20-%20Award.pdf>; *Gallo v Canada, Decision on the Challenge to an Arbitrator* (2009), (PCA–UNCITRAL Arbitration Rules), online: NAFTA Claims <http://www.naftalaw .org/Disputes/Canada/Gallo/Gallo-Canada-Thomas_Challenge-Decision.pdf>.

investor-state arbitration.[14] A similar development emerged in the USA in the 2005 landmark decision, *Methanex Corporation v United States*[15] where thes tribunal explicitly adopted WTO's practice.[16] In reaction to these cases, NAFTA States agreed on binding obligations of transparency and public access in dispute proceedings.[17]

Developments in South America were slightly different. In 2006, the Inter-American Court of Human Rights (IACHR) held that governments refusing to provide information of public interest violated the right of access to state-held information under its Human Rights' Charter.[18] At the same time, Argentina and Chile changed their policies from confidentiality towards transparency, a shift at odds with some of the tribunals before which those states appeared[19]. Argentina, for example, unilaterally enforced a decree allowing for the broadest possible access.[20]

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14 Government of Canada, *NAFTA–Chapter 11–Investment: Statement of Canada on Open Hearings in NAFTA Chapter Eleven Arbitrations in October 2003*, online: Foreign Affairs and International Trade Canada <http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/nafta-transparency-alena-transparence.aspx?lang=enview=d>.

15 *Final Award on Jurisdiction and Merits* (2005), (Ad hoc—UNCITRAL Arbitration Rules) online: NAFTA Claims <http://naftaclaims.com/Disputes/USA/Methanex/Methanex_Final_Award .pdf>.

16 Methanex Corp. v USA, 1st Partial Award (2002) online: NAFTA Claims <http://naftaclaims.com/Disputes/USA/Methanex/MethanexPreliminaryAwardJurisdiction.pdf>; see also *Glamis Gold, Ltd. v United States of America, Award* (8 Jun 2009), (International Centre for Settlement of Investment Disputes), online: NAFTA Claims <http://www.naftalaw.org/Disputes/USA/Glamis/Glamis-USA-Award.pdf>.

17 NAFTA Free Trade Commission, Press Release and Statement, "NAFTA Commission Announces New Transparency Measures" (October 2003), online: Office of the United States Trade Representative <http://www.ustr.gov/about-us/press-office/press-releases/archives/2003/october/nafta-commission-announces-new-transparen> [NAFTA Free Trade Commission].

18 *Claude Reyes et al. Case (Chile)* (2006), Merits, reparations and costs, Inter-Am Ct HR (Ser C) No 151, online: Inter-Am Ct HR <http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.pdf> at 57(13), 48, 99, 87–102 (Reyes and others requested information from public officials concerning the social aspect and environmental impact of a project. The public officials denied the request. Thereafter, Reyes and others sued successfully Ecuador for *inter alias* having violated the right to information.).

19 *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A v Argentine Republic*, (2006), ICSID case No Arb/3/19, online: ICSID <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRHactionVal=showDocdocId=DC518_EncaseId=C19>; *Order in Response to a Petition by Five Non-Governmental Organizations for Permission to make an Amicus Curiae Submission* (12 February 2007) ICSID case No Arb/3/19, online: ICSID <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRHactionVal=showDocdocId=DC519_EncaseId=C19> at 12-25 (the tribunal responded to an amicus brief of five non-governmental organizations for permission to make a submission. Although the tribunal denied the briefs, it outlined the procedure and requirement to accept briefs outside NAFTA-jurisdiction.); *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v The Argentine Republic* (2006), ICSID case No. Arb/3/17, online: ICSID

Under current and widely accepted tenets of international investment law, the transparency of proceedings largely depends on the language of the IIAs, the agreement of the parties and on rules governing the arbitral proceedings themselves. ICSID[21] and UNCITRAL[22] rules account for transparency to some limited extent.[23] Other tribunals continue to require the explicit consent of disputing parties.[24]

Since 2000, it has become increasingly common to include explicit provisions regarding transparency in IIAs.[25] Recent IIAs, mainly of

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https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRHactionVal=showDocdocId=DC514_EncaseId=C18 at 14-15 (amicus briefs were considered).

20 See *Settlement of commercial disputes: Transparency in treaty-based investor-State arbitration-Compilation of comments by Governments*, UNCITRAL, 53rd Sess, UN Doc. A/CN.9/WG.II/WP.159 (2010) 4-6 (Argentina provides by Decree No. 1172/2003 fullest possible access).

21 International Centre for Settlement of Investment Disputes, *Additional Facility Rules* (2006), ICSID/11, art 39(2), online: ICSID <https://icsid.worldbank.org/ICSID/ICSID/AdditionalFacilityRules.jsp> [Additional Facility Rules]; ICSID Convention, Regulations, and Rules: Rules of Procedure for Arbitration Proceedings (Arbitration Rules) (2006), art 32(2), online: ICSID <https://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp> [ICSID Arbitration Rules] (grant veto power to the parties); see also *Additional Facility Rules*, art 41.3 and *ICSID Arbitration Rules*, art 37.2 (grants some power to accept amicus briefs by considering a non-exclusive list); ICSID *Arbitration Rules*, art 48.4 and *Additional Facility Rules*, art 53.3 (allows the publication of excerpts of the legal reasoning in absence of the disputing parties consent to publish the award).

22 UNCITRAL, *Arbitration Rules* (as revised in 2010), (New York: UN, 2011), art 28(3), online: UNCITRAL http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf (parties have a veto against in camera proceedings).

23 *Phoenix Action, Ltd. v Czech Republic, Award* (2009), (International Centre for Settlement of Investment Disputes), online: ICSID <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRHactionVal=showDocdocId=DC1033_EncaseId=C74>; see Mariel Dimsey, "Foreign direct investment and the alleviation of poverty: is investment arbitration falling short of its goals?" in *Poverty and International Law: Setting out the Framework* (K. Nadakavukaren, forthcoming 2013); K. Nadakavukaren, *Dispute Settlement, in International Investment Law* (Cambridge University Press, forthcoming 2013); see also Lise Johnson & Nathalie Bernasconi-Osterwalder, *Transparency in Dispute Settlement Process: Countries best practices* (Winnipeg: IISD Publication Center, 2011), online: IISD <www.iisd.org/publications/pub.aspx?id=1529> 5-8 [Johnson & Bernasconi].

24 See London Court of International Arbitration, *LCIA Arbitration Rules*, (1 January 1998), online: LCIA <http://www.lcia.org/> (the LCIA states explicit provisions relating to confidentiality at art 30.1); Arbitration Institute of the Stockholm Chamber of Commerce, *Arbitration Rules*, (1 January 2010) (the SCC states similar requirements at art 46); see also Permanent Court of Arbitration (PCA), *Rules of Procedure*, online: PCA-CPA <http://www.pca-cpa.org/showpage.asp?pag_id=363>; American Association of Arbitration (AAA), *Rules & Procedures*, online: AAA <http://www.adr.org>.

25 See Andrew Paul Newcombe & Lluís Paradell, *Law and Practice of Investment Treaties: standards of treatment* (New York: Wolters Kluwer, 2009) 8.28–8.30 [Newcombe & Paradell]; Johnson & Bernasconi, *supra* note 23 (the authors describe the trend going slowly in the direction of

countries in the Americas, include transparency provisions.[26] Furthermore, public pressure has led to an attempt by UNCITRAL to capture current practice in the Standard.[27] Such efforts notwithstanding, a great majority of countries still deny the right of public access to proceedings in treaty-based investor-state arbitration.[28]

The UN commissioner for human rights' guiding principles on business and human rights stated the importance of transparency in non-judicial grievance mechanism between different actors.[29] However, most European countries generally do not provide provisions requiring transparency in their IIAs. Accordingly, the proposed Standard is likely to have an impact on the reservation of states towards transparency. Within the WG, disagreement exits upon major topics. Is the Standard a mandatory provision? Are states and investors free to ignore it? Will it push disputes away from UNCITRAL and towards other resolution formats? These questions have to be resolved in the next,final round October 2012 in Vienna.

III. HOW THE STANDARD INTERFERES WITH EXISTING IIAS AND HOW ARBITRAL TRIBUNALS COULD INTERPRET THIS

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transparency at 2).

26 See *Dominican Republic-Central America FTA (CAFTA-DR)*, 5 August 2004, online: USTR <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta> (the Dominican Republic, USA and Central American Sates agreed on explicit transparency and third party access in investor-state arbitration, arts 10.14 & 10.21); *Agreement Establishing the ASEAN-Australian New Zealand Free Trade Area*, 27 February 2009, c 11 art 26, online: <ASEAN, http://www.asean.fta.govt.nz/> (Australia, New Zealand, and other countries agreed on similar rules); see also *United States-Singapore Free Trade Agreement*, 6 May 2003, art 15.20, online: USTR http://www.ustr.gov/trade-agreements/free-trade-agreements/singapore-fta; *Australia-Chile Free Trade Agreement*, 6 March 2009, art 10.21 & 10.22, online: Australian Government www.dfat.gov.au/fta/aclfta; *US-Morocco Free Trade Agreement*, 15 June 2004 (entered into force 1 January 2006) art 10.20, online: USTR http://www.ustr.gov/trade-agreements/free-trade-agreements/morocco-fta; *Investment Agreement for the Common Market for Eastern and Southern Africa (COMESA) Common Investment Area*, 23 May 2007, art 27(3), online: TRALAC <http://www.tralac.org/wp-content/blogs.dir/12/files/2011/uploads/Investment_agreement_for_the_CCIA.pdf>.

27 See UNCITRAL, *Report of the Working Group on Arbitration and Conciliation on the work of its forty-eighth session*, 41 Sess, UN Doc. A/CN.9/646 (2008) at 57.

28 Johnson & Bernasconi, *supra* note 23 at 2.

29 See John Ruggie, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises: Guiding Principles on Business and Human Rights*, HRC, 17th Sess, UN Doc. A/HRC/17/31 (March 2011), art 31 lit d & e, online: United Nations Human Rights <http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf> [Ruggie].

Interference in Case of a Dispute Arising from an Existing IIAs

A. The Potential Standard of Transparency under UNCITRAL Rules

The Standard provides rules with regard to the publication of information at the commencement of the proceeding, access to information during the proceeding and finally the publication of awards at the end of the proceeding. Additionally, the Standard sets forth rules concerning the openness of the hearing and access of a non-disputing party or third person.

At commencement, the Standard potentially requires disclosure of the notice of arbitration either immediately after receipt by the other party or within a period of e.g. 30 days. The burden lies on the parties to redact information in a manner that does not disclose confidential information as defined under the Standard.[30]

Under the Standard, any person "having an interest"[31] in the dispute is granted access to the following documents:

> [T]he notice of arbitration, the response to the notice of arbitration; the statement of claim, the statement of defence and; any further written statements or written submissions by any disputing party [...]; witness statements and expert reports; any written submissions by the non-disputing Party(ies) [...]; transcripts of hearings, where available; and orders and decisions of the arbitral tribunal.[32]

The arbitral tribunal may have some discretion on allowing or prohibiting access, depending on the proposed options. While the parties are not required to disclose confidential information in accordance with the Standard[33] the final award, including reasoning, must be published.[34]

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30 UNCITRAL, *Settlement of commercial disputes: preparation of a legal standard on transparency in treaty-based investor-State arbitration*, 56th Session, UN Doc. A/CN.9/WG.II/WP.169 (2011) at 25 (referring to the preamble of the potential standard) [UNCITRAL, *Settlement of commercial disputes*].

31 The question of how an interest is defined remains to be interpreted by arbitral tribunals if it is not resolved by the WG in the next meeting.

32 UNCITRAL, *Settlement of commercial disputes*, *supra* note 30 at 29

33 *Ibid* at 45-46.

34 *Ibid* at 33-34.

Unless otherwise decided by the arbitral tribunal, the Standard sets a default in favour of public hearings. For logistical or other practical reasons, the tribunal may use means of broadcasting or hold hearings in camera.[35]

Furthermore, the standard defines types of third party submissions. Firstly, the arbitral tribunal has discretion to allow or disallow submissions by third parties.[36] The Standard allows for submissions by "non-disputing states" to the tribunal. [37] Here the home-state government of the investor and other member states to multilateral IIAs qualify as non-disputing state party. Third party submissions may refer to legal arguments, factual interpretations, or both. The impact on the final award of a third party's submissions outside the scope of the disputing parties' submissions remains unclear.

In any case, an arbitral tribunal may refuse access to or the publication of information. The Standard provides an extensive catalogue of confidential information. Information qualifies as confidential whenever business and industrial secrecy, protected under the particular procedure, protected by the disputing party's law, or protected by any other rule or law determined applicable by the tribunal, is involved.[38]

B. Application of the Standard under Existing IIAs

The potential Standard applies to disputes arising out of investments.[39] A further requirement is that the dispute be treaty-based;[40] eventually, the Standard will apply stand-alone to investor-state disputes as well.[41]

With regard to the temporal scope of the application of the Standard, member states agreed that its application on any investor-state arbitration goes beyond the mandate of UNCITRAL.[42] The WG considered the

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35 *Ibid* at 41–44.

36 *Ibid* at 35.

37 *Ibid* at 37.

38 *Ibid* at 45–51.

39 *Ibid* at 7-8.

40 *Ibid* at 7.

41 *Ibid* at 15–16. See also UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-fifth session*, UNCITRAL WG II Paper, 45th Sess, UN Doc. A/CN.9/736 (2011) at 18-37 [UNCITRAL, *Report of Working Group II (Arbitration and Conciliation)*] (the question of temporal scope of the application of the Standard was widely discussed within the WG. States argued over disputes arising from both existing and future IIAs. Resolved disputes are not covered).

42 *Establishment of United Nations Commission on International Trade Law*, GA Res 2205(XXI),

following alternatives: to not apply the Standard to existing treaties, apply it to certain existing treaties unless the treaty expresses otherwise (opt-out variant); or apply the Standard to investor-state arbitration if the treaty expressly refers to the application of the Standard (opt-in variant).[43] The latter two options were extensively debated. However, the sub-variant of both options, in which any state or investors unilaterally selects the application, was not considered.

States in favour of the opt-out option argue that the Standard will merely reflect general, existing transparency practices under international investment law.[44] Although the Standard is common for NAFTA tribunals, for some European countries the Standard goes beyond court practice under domestic law. For example, the minimal standard of transparency in Germany and Switzerland is determined by Article 6 of the *European Convention of Human Rights*, which merely requires for public hearings and publication of the judgement in proceedings involving an economical dispute.[45] Other countries express their concern and have a different understanding of transparency. State parties to CAFTA-DR, NAFTA and other states using ICSID, by observers like the International Institute for Sustainable Development (IISD) and by the Centre for International Environmental Law (CIEL), support this solution.[46] However, the majority of UNCITRAL states are in favour of opting in[47] but remain sceptical of the Standard. As a result, states opposed to transparency favour opt-in and states in favour of transparency opt-out.

UNGAOR, 21st Sess, Annex, Agenda Item 88, UN Doc A/6396 and Add.1 and 2 (1966).

43 *Settlement of commercial disputes: preparation of a legal standard on transparency in treaty-based investor-State arbitration*, UNCITRAL, 55th Sess, UN Doc A/CN.9/WG.II/WP.166 (Oct 2011) at 10, online: UNCITRAL <http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html> [UNCITRAL, *Settlement of Commercial Disputes*, October 2011].

44 *Ibid* at 30.

45 Council of Europe, *Convention for Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 4 November 1950, Eur TS 5, Art 6(1).

46 See Nathalie Bernasconi-Osterwalder & Lise Johnson et al, *Comments on Draft Rules on Transparency in Investor-State Arbitration* (2011), online: IISD <www.iisd.org>.

47 UNCITRAL, *Report of Working Group II (Arbitration and Conciliation)*, *supra* note 41, at 26-29.

IV. VIOLATION OF THE EXISTING IIA DUE TO THE IMPLEMENTATION OF THE STANDARD

A. The Implementation of the Standard May Violate the Stabilization Clause in Investment Contracts

The adoption of the Standard either as a unilateral declaration or as a ratification of a convention may fall within the scope of a stabilization clause, found in investment contracts. As discussed below, the implementation of the Standard could thereby violate such a stabilization clause if it obliged the investor to disclose information to any third person or to the public.

Three main types of stabilization clauses exist: freezing clauses, economic equilibrium clauses and hybrid clauses. All three aim to make investments immune to states' subsequent legislation. If host-states legislated within the scope of the stabilization clause, the investor may either ignore the new rules or receive compensation from the host-state for its efforts to comply with the clause. Thus, stabilization clauses increase investment protection by lowering the bar of the IIA under which a host-state has to pay compensation to an investor.[48] Although the wording of these clauses differs, they generally lead to the same result: compensation.[49] In this regard, tribunals use all type of clauses to deduce the amount of compensation in the dispute.

1. Freezing Clauses

The freezing clause aims to freeze the law for the particular investor and investment at a particular point in time so that following legislation is inapplicable on the investment. An example of a full freezing clause follows below.

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48 Lorenzo Cotula, "Regulatory Takings in Stabilisation Clauses and Sustainable Development" (2009) in OECD, *OECD Investment Policy Perspectives 2008* (France: OECD, 2009) 69 at 75 [Cotula].

49 See *American Independant Oil Company (Aminoil) v The Government of the State of Kuwait* (1982), 21 ILM 976 at 115 [*Aminoil v Kuwait*] (Kuwait had to compensate Aminoil for the nationalisation of an oil field. Aminoil stated that the full freezing stabilization clause prevents Kuwait from nationalise the project. The tribunal decided to the contrary, it left open if this clause may prevent a state from confiscating the project.); see also *Texaco Overseas Petroleum Company and California Asiatic Oil Company v The Government of the Libyan Arab Republic* (1977) 53 ILR 389 [*Texaco v Libya*]; *AGIP Company v Popular Republic of the Congo* (1982) 21 ILM 726 [*AGIP v Congo*].

> The [host-state] government [...] will take all the steps necessary to ensure that the [investor] enjoys all the rights conferred by the [investment contract]. The contractual rights expressly created by [the investment contract] shall not be altered except by the mutual consent of the parties.[50]

A literal interpretation of such a clause leads to the conclusion that the host-state is not allowed to enact legislation that effects the investment. However, the purpose of the clause is fulfilled if the host-state merely excludes the particular investor from the application of the new law. In any case, the host-state has to compensate the investor fully if it forces such an investor to comply with the new law. The potential standard obliges investors and host-states to disclose information about the dispute at the commencement and during the proceeding. This obligation falls within the scope of a full freezing clause as shown in the given example above. Therefore, the investor may either ignore this obligation or get full compensation if forced to disclose information.

2. Economic Equilibrium Clauses

The economic equilibrium clause on the other hand obliges the host-state to compensate the investor for costs that arose in order to comply with law enacted after the date of agreement. It is the most common clause and can be found in various forms in investment contracts.[51] An example of a full economic equilibrium clause follows.

> Change in Law": shall mean (a) the adoption, promulgation, change, repeal or modification after the date of this Agreement of any Legal Requirement [...] that in either case (i) establishes requirements for the construction, financing, ownership, operation or maintenance of the [Project] that are materially more restrictive than the most restrictive requirements in effect as of the Effective Date or (ii) has a material adverse effect on the [investor's company], the [Project] or the return [...] to the [investor's company];
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> [...]
>
> In the event of the occurrence of a Change in Law [...] the Company will be entitled to receive Recovery Allowance payments [...] to recover fully the costs of

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50 *Texaco v Libya*, *ibid* at 394.

51 See Andrea Shemberg, *Stabilization Clauses and Human Rights* (11 March 2008), online: IFC <http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/p_StabilizationClausesandHumanRights/$FILE/Stabilization+Paper.pdf> at 29 [Shemberg].

> complying with the Change in Law [...]. The amount of any Recovery Allowance due under this Article shall be determined pursuant to Article [...].[52]

The scope of an economic equilibrium clause may be limited to certain legislation, e.g. tax and customs.[53] Hereto follows an example of a limited economic equilibrium clause used in a contract between an investor of power plants and the government:

> "Change in Law" shall mean any change in the Applicable Laws [...], but only to the extent that such change (a) relates to (i) fiscal matters, (ii) customs matters, (iii) environmental matters, (iv) labor or job safety matters, (v) water consumption of the Power Plant, (vi) changes to the [...] Procedures or related with the electric power regulation [...] (b) affects the foreign [investor] and the domestic [subsidiary] in a different manner [...].[54]

A literal interpretation of both economic equilibrium clauses leads to the conclusion that, if any legislation adopted after the agreed point in time falls within its scope, the clause obliges the investor to comply with this legislation. Additionally, the clause obliges the host-state to bear the investor's costs arising in order to comply with the new legislation. Therefore, if host-states introduce the Standard to their set of rules related to investor-state arbitration and the adoption falls within the scope of an economic equilibrium clause between the investor and the host-state government, the investor needs to be compensated if disclosure of information leads to an adverse effect of the value of the investment or reduces the value of its company.

3. Hybrid Clauses

Hybrid clauses are a combination of economic equilibrium and fixed stabilization clauses. It is primarily up to the host-state to decide to either exclude the investment from the application of the new legislation or to compensate the investor for its effort to comply with the new legislation. The clause aims to require host-states to put the investor into the position as it was prior to the triggering legislation.[55]

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52 *Ibid*.

53 See Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment*, 3rd ed, (New York: Cambridge University Press, 2010) at 282 [Sornarajah, *International Law*]; Cotula, *supra* note 48, 73-76.

54 Shemberg, *supra* note 51 at 30.

55 *Ibid* at 22, 29-31; Audley Sheppard & Antony Crockett, "Are Stabilization Clauses a Threat to Sustainable Development?' in Marie-Claire Cordonier Segger, Markus W. Gehring &

> [...] if any existing Laws of [the host-state government] [...] or any other applicable or existing law of any other Government, is changed or repealed, or if new laws are introduced [...], which bears unfavourably on the financial status of the [project] or the Parties, then the Parties will apply all efforts that are necessary to completely or partially release the [project] or the Parties from the above-mentioned changes, or the Parties will undertake all other necessary steps to alleviate the unfavourable impact of these changes.[56]

If the adoption of the Standard falls within the scope of a hybrid clause, the host-state either follows the consequences of a fixed stabilization clause or of an economic equilibrium clause.

An investor should carefully consider drafting stabilization clauses in connection with the legal framework. A violation of the rights of the investor may fall outside the scope due to different interpretations. Thence, investors may not claim compensation. To reduce any risks of not being compensated as required by the contract and the IIAs, investors in addition should include a choice of law clause in the investment contract which favours international principles of law, agree to arbitration in an arbitration friendly country in addition to the stabilization clause regardless of the existence of an IIA. As a result, the contract is governed by international principles. Therefore, a host-state may not modify any obligation towards an investor by decree whatsoever. Thus, the legal framework of the investment is stabilized.[57]

B. Interpretation of Stabalization Clauses

The law of the seat of the arbitral tribunal determines the interpretation of a contract.[58] Tribunals may limit the application of a stabilization clause. Due to a faulty party the contract and its inherent stabilization clause is invalid. E.g. the clause forms not part of the investment contract between the disputing parties. Furthermore, the clause may be invalid if the government acted neither directly nor

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Newcombe, eds, *Sustainable Development in World Investment Law* (The Netherlands: Kluwer Law International, 2011) 329 at 337-338 [Sheppard & Crockett].

56 Shemberg, *supra* note 51 at 31.

57 See *AGIP v Congo*, *supra* note 49; *Texaco v Libya*, *ibid*; *Aminoil v Kuwait*, *ibid*; see also Amnesty International UK, *Human Rights on the line-The Baku-Tbilisi-Ceyhan pipeline project* (May 2003), online: Amnesty International <www.amnesty.org.uk/content.asp?CategoryID=11587> at 4 & 14 [Amnesty International, *BTC*].

58 See Markus Burgstaller & Charles B. Rosenberg, "Challenging International Arbitral Awards: To ICSID or not to ICSID?" (2011) 27 Arbitration International 91 at 92.

indirectly in its power as sovereign, beyond its power as a sovereign or if the contract was tainted by corruption or other defects.[59] The clause may be limited by differing methods of interpretation. An unlimited clause[60] may entail an implied limitation. From a systematic point of view, a strict interpretation of a stabilization clause in an investment contract, that binds the party for more than 20 years, depends on how other provisions of the contract anticipate legal changes of the host-state. Despite clear wording of the stabilization clause, some tribunals may limit the effect of a stabilization clause due to missing provisions dealing with legal changes after the conclusion of the contract.

An evolutionary approach of interpretation may lead to a limitation of the stabilization clause. Under this approach, a stabilization clause is interpreted in the light of social and environmental standards.[61] Albeit the wording of a stabilization clause is unambiguously clear, shifting social and environmental concerns may shape an investment contract and its legal framework in a different light that may have a limiting effect on a stabilization clause. To conclude, tribunals are free to use other methods of interpretation that may lead to an implied limitation. If the proposed Standard is adopted and it falls within the scope of the stabilization clause from a literal perspective, interpretations as aforementioned may limit the extent of the clause.

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59 See Muthucumaraswamy Sornarajah, *The Settlement of Foreign Investment Disputes* (Kluwer Law International, 2000) at 50; Sornarajah, *International Law*, *supra* note 53 at 283; see also Stephan Wilske & Willa Obel, "The 'Corruption Objection' to Jurisdiction in Investment Arbitration: Does it really protect the Poor?" in K. Nadakavukaren, ed, *Poverty and International Law: Setting out the Framework*, [Cambridge University Press, forthcoming 2013].

60 See e.g. Amnesty International, *BTC*, *supra* note 57 (in this project the contract goes even further in stating that, "in connection with [...] any action or inaction by the relevant Host Government that is reasonably required to fulfil the obligation of the Host Government under any international treaty on human rights (including the European Convention on Human Rights) [...]"); see also *National Petroleum Institute, Mozambique 3rd Licencing Round-Model EPC (Eng): Exploration and Production Concession Contract* (December 2007), online: Mozambique http://www.inpmz.com/DownLoads/App_Docs/Schedules/Schedule_3_EPC/EPC_English/Model_EPCC_English.pdf ("measures taken for the protection of health, safety, labour or the environment are in accordance with standards that are reasonable and generally accepted in the international petroleum industry" at Art. 27.13).

61 *Hungary v Slovakia* (Gabcíkovo-Nagymaros Project, 25 September 1997) (1997), ICJ Rep 92 („Rien n'indique non plus que les parties entendaient admettre la possibilité de dénoncer le traité ou de s'en retirer. Au contraire, le traité établit un système durable d'investissement conjoint et d'exploitation conjointe. Par conséquent, les parties n'en ayant pas convenu autrement, le traité ne pouvait prendre fin que pour les motifs énumérés limitativement dans la convention de Vienne"); see also Shemberg, *supra* note 51 at 84 & 115.

In any case, stabilization clauses form an obstacle in adopting rules.[62] Notwithstanding an investor's potential favour for new legislation, (e.g. conventions containing environmental law or human rights), a host-state may use such rules as an excuse for not adopting international conventions. However, there are scholars that state that stabilization clauses are no obstacle because an investor has no international personality compared to a government or an international organisation. An internationalisation of a contract requires possession of international legal personality of all parties under international law.[63] The *opinio iuris* is that investors lack international personality[64] so that they may not conclude contracts beyond domestic law.[65] Thereafter, international standards may be implemented without breach of obligations arising from an investment contract. Following this, the implementation of the proposed Standard is unlikely to lead to compensation although it falls within the scope of a stabilization clause.

V. Implementation of the Standard May Amount to a Violation of IIA

The implementation of the Standard may violate provisions of a treaty such as expropriation, arbitrariness, fair and equitable treatment (FET) [66] or international principles of law such as estoppels, *venire contra factum proprium* and due process. In the following section, I focus on the probable violation of the FET or the umbrella clause itself in connection with a stabilization clause.

FET is a concept found in almost every IIA. The German Model Treaty states a very typical clause for IIAs.

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62 See Amnesty International UK, *Contracting Out of Human Right-The Chad-Cameroon Pipeline Project* (September 2005) online: Amnesty International UK <www.amnesty.org.uk/content.asp?CategoryID=11587> at 28 [Amnesty International, *Chad-Cameroon*]; Amnesty International BTC, supra note 57 at 13.

63 Sornarajah, *International Law*, *supra* note 53 at 284.

64 See Anne Peters, Völkerrecht: Allgemeiner Teil 272 (Zürich: Schulthess Verlag, 2. Auflage 2008).

65 *Ibid* at 274; Sornarajah, *International Law*, *supra* note 53 at 283.

66 Shemberg, *supra* note 51 at 139.

> Each Contracting State shall in its territory in every case accord investments by investors of the other Contracting State fair and equitable treatment [...] under this Treaty.[67]

The FET clause above is very general and numerous cases exist that attempt to interpret it. There are also various decisions that tend to form FET in accordance with customary international law. The majority of cases endorse the view that FET encompasses different sub-standards, which may interfere with the implementation of the Standard. The sub-standards articulated thus far include: transparency, stability and protection of the investor's legitimate expectation;[68] compliance with contractual obligations;[69] and, procedural propriety and due process.[70]

In *Técnicas Medioambientales Tecmed, SA v United Mexican States, Award* [*Tecmed*], the tribunal adopts an international definition for FET that other tribunals acknowledge in later cases.[71] The tribunal in *Occidental*

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67 German 2008 Model BIT, online: Investment Treaty Arbitration <http://www.italaw.com/investment-treaties>, art 2 (2) [German Model BIT]; see also The Energy Charter Treaty, December 1994, online: Energy Charter <http://www.encharter.org/> ("[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. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment," art 10(1)) [*Energy Charter Treaty*]; *Norway 2007 Draft Model BIT (191207)*, online: Investment Treaty Arbitration <http://www.italaw.com/investment-treaties> ("[e]ach Party shall accord to investors of the other Party, and their investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security," art 5) [*Norway Model BIT*]; *IISD Model International Agreement on Investment for Sustainable Development*, online: Investment Treaty Arbitration <http://www.italaw.com/investment-treaties> ("[e]ach Party shall accord to investors or their investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security. This obligation shall be understood to be consistent with the obligation of host-states, in particular under Article 19 of this Agreement," art 7A) [*IISD Model Agreement*]; *Canada 2004 Model BIT*, online: Investment Treaty Arbitration <http://www.italaw.com/investment-treaties> ("[e]ach Party shall accord to covered investments treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security," art 5(1)) [*Canada Model BIT*].

68 See Rudolf Dolzer & Christoph Schreuer, Principles of International Investment Law ((New York: Oxford University Press, 2008) at 133 [Dolzer & Schreuer].

69 *Ibid* at 140.

70 *Ibid* at 142; Sheppard & Crockett, *supra* note 55 at 343; see also K. Nadakavukaren, *Standards of Host State Behavior, in International Investment Law, Cases and Materials* (Cambridge University Press, forthcoming 2013).

71 (2003), Case No ARB(AF)/00/2, online: International Centre for Settlement of Investment Disputes <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRHactionVal =showDocdocId=DC602_EncaseId=C186> ("[t]he Arbitral Tribunal [...] requires the

Exploration and Production Company v The Republic of Ecuador clarified that an investor legitimately expects "[t]he stability of the legal and business framework ... [as] an essential element of fair and equitable treatment."[72] FET protects the investor's expectation "that the overall business framework in which the investment was made shall remain constant".[73] In further reliance on *Tecmed*, the *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Kazakhstan* tribunal delineated that the protection of procedural propriety and due process is part of FET.[74] Nevertheless, bona fide legislation enacted of the host-state would not likely violate this provision.[75] Therefore, the implementation of the Standard in bona fide fails to violate FET itself.

The implementation of the Standard on the other hand may violate FET in accordance with a contract provision. A party may invoke a contract provision such as a stabilization clause, as evidence to interpret the legitimate expectation of the investor covered under the FET.

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. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations. The foreign investor also expects the host-state to act consistently, i.e. without arbitrarily revoking any pre-existing decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation" at 154).

72 *Occidental Exploration and Production Company v The Republic of Ecuador* (2004), LCIA Case No UN3467, online: Arbitration Law <http://arbitrationlaw.com/files/free_pdfs/Occidental%20v%20Ecuador%20-%20Award.pdf> at 183.

73 Sheppard & Crockett, *supra* note 55 at 344.

74 Dolzer & Schreuer, *supra* note 68 at 142; see *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Kazakhstan (Award)* (2008), ICSID Case No ARB/05/16 at 583, <http://www.investmentclaims.com/ViewPdf/ic/Awards/law-iic-344-2008.pdf>; see also *Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v Kazakhstan, Decision of the ad hoc Committee on the Application for Annulment* (2010), ICSID Case No ARB/05/16, online: Investment Claims <http://www.investmentclaims.com/ViewPdf/ic/Awards/law-iic-420-2010.pdf>.

75 Sheppard & Crockett, *supra* note 55 at 347.

Accordingly, a tribunal may see a violation of FET in connection with a stabilization clause.

Alternatively, the implementation of the Standard may violate an IIA's umbrella clause. The effect of umbrella clauses extends jurisdiction of the investment tribunal beyond breaches of an IIA to breaches of additional obligations between the investor and the host-state, e.g. investment contract. A minority argues, (e.g. the council for *SGS v Pakistan and Philippines*), that umbrella clauses aim to lift obligations on international level uncoupled of whatsoever domestic law. An umbrella clause in itself stabilizes the legal framework at the time of concluding the investment contract.[76] Therefore, the implementation of the Standard is unlikely to violate the umbrella clause itself. However, it most likely violates a stabilization clause in connection with an umbrella clause. In line with the aforementioned cases, this paragraph assumes that umbrella clauses merely extend jurisdiction.

Most European IIAs have umbrella clauses similar to the German Model Treaty.

> Each Contracting State shall fulfil any other obligations it may have with regard to investments in its territory by investors of the other Contracting State.[77]

The extent to which an umbrella clause may cover a host-state's obligations towards an investor is contentious.[78] This may be why some countries prefer to not integrate an umbrella clause and avoid creating legal uncertainty.[79] ICSID tribunals have clarified this question in *SGS*

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[76] Dolzer & Schreuer, *supra* note 68 ("One may no longer speak of an umbrella clause in the case of a provision that addresses the future legal order [...]" at 154).

[77] *German Model BIT*, *supra* note 67, art 7(2). See also *Energy Charter Treaty*, *ibid* ("Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party," art 10(1)).

[78] Dolzer & Schreuer, *supra* note 68 at 153; Sornarajah, *International Law*, *supra* note 53 (against an wide interpretation of the umbrella clause at 304).

[79] See e.g. *IISD Model Agreement*, *supra* note 67, which lacks an umbrella clause but entails extensive obligations and duties of investors in Part 3 and of the host state in Part 4. ("[i]nvestors and investments shall not manage or operate the investments in a manner that circumvents international environmental, labour and human rights obligations to which the host-state and/or home-state are Parties," art 14 D); *Norway Model BIT*, *ibid*, ("[n]othing in this Agreement shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment activity is undertaken in a manner sensitive to health, safety or environmental concerns," art 12, "Right to Regulate"); *Canada Model BIT*, *ibid*, (has a very narrow scope of the minimal standard, lists additionally performance requirements in art 7 subject to the rules of 9, 10 and 11, and contains no umbrella clause).

Société Générale de Surveillance SA v Pakistan, Procedural Order No 2[80] and its sister case, SGS *Société Générale de Surveillance SA v. Philippines, Decision on Objections to Jurisdiction and Separate Declaration*[81]. Both came to differing conclusions due to tiny differences in the wording of the umbrella clause. The umbrella clause "[e]ither Contracting Party shall constantly guarantee the observance of the commitments it has entered into" in SGS *v. Pakistan* is not extending the jurisdiction to decide upon contract breaches.[82] However, sufficiently defined was the clause "shall observe any obligation it has assumed" in SGS *v. Philippines*.[83] Finally, both tribunals decided that in the absence of additional evidence the contract provisions are governed by host-state law. [84] In both decisions, the umbrella clause lacked clarity to freeze the law by elevating contractual obligations to an international level at the time of conclusion of the agreement.

The umbrella clause together with the stabilization clause extends jurisdiction of the tribunal and transfers contractual obligations on to the level of the IIA.[85]Hence, depending on the contract between an investor and a home state in connection with the IIA's, the implementation of the Standard leads to compensation. Disclosure of information may lead to reputation damage of the investor. E.g. after a host-state government

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80 (2002), ICSID Case No ARB/01/13, at 161 & 165, online: Investment Claims <http://www.investmentclaims.com/ViewPdf/ic/Awards/law-iic-222-2002.pdf> [SGS *v Pakistan*] (the ICSID decided that the tribunal in this case lacked jurisdiction to resolve contractual disputes since the parties agreed on arbitration in Islamabad).

81 (2004), ICSID Case No ARB/02/6 [SGS *v Philippines*] (the tribunal accepted jurisdiction to decide upon disputes arising out of the treaty, but contrary to SGS *v Pakistan*, ordered proceedings for claims arising out of contractual obligations under the forum of choice clause).

82 See Accord du 11 juillet 1995 entre la Confédération suisse et la République islamique du Pakistan concernant la promotion et la protection réciproque des investissements, RO 1998 2601, (RS 0.975.262.3), art 11 online: <http://www.admin.ch/ch/f/rs/c0_975_262_3.html> in connection with SGS *v Pakistan*, *supra* note 80 at 53 ("[r]espect des engagements Chacune des Parties Contractantes assure à tout moment le respect des engagements assumés par elle à l'égard des investissements des investisseurs de l'autre Partie Contractante" was not considered sufficient).

83 See also Accord du 31 mars 1997 entre la Confédération suisse et la République des Philippines concernant la promotion et la protection réciproque des investissements, RO 2001 438 (RS 0.975.264.5), art X(2), online: <http://www.admin.ch/ch/f/rs/c0_975_264_5.html> in connection with SGS *v Philippines*, *supra* note 83 ¶¶117-128 & 177 (the wording in art X(2) was considered clear enough "[c]hacune des Parties contractantes se conformera à toutes ses obligations à l'égard d'un investissement effectué sur son territoire par un investisseur de l'autre Partie contractante").

84 See SGS *v Pakistan*, *supra* note 80 at 173; see also SGS *v Philippines*, *supra* note 81 at 128.

85 Newcombe & Paradell, *supra* note 25 at 476; Sornarajah, *International Law*, *supra* note 53 at 289.

change, the new government limits concession contracts by decree. Thereafter a foreign investor sues the host-state under an investor-state tribunal for its changes. In addition, the investor is required by law to disclose information. This obligation was implemented by the home and host-state after the investment was made. In less severe cases, the disclosure may lead to a change in consumer taste and in more severe cases to protest against the investment or boycott of the investors products i.e. boycott of an oil company's garage, furniture shopping mall, or chain stores of a shoe company. In this hypothetical case, a stabilization clause requires the host-state not to alter the legal framework. If the host-state changes the framework, the implementation is a breach of the investment contract, in particular the stabilization clause. Therefore, this breach of stabilization clause leads to compensation in addition to any purported expropriation claim whatsoever.

To conclude, the enactment of the Standard after the investment has been made is likely to amount to a violation of the IIA under either FET or umbrella clause protections[86] if the implementation falls within the scope of a stabilization clause in the treaty.

VI. HOW A NEW UNCITRAL TRANSPARENCY STANDARD COULD BE IMPLEMENTED TO EXISTING IIAS

A. Different Instruments for Establishing the new Standard of Transparency under International Investment Law

The means of implementation of the Standard lead to compensation depending by and large on the commitment of the investor. The Standard may be implemented using model clauses, joint interpretative declarations, guidelines, conventions and Memorandum of Understanding (MoU).[87] The choice of instruments affects the binding effect of the Standard. Some instruments bind states and investors together, while others bind only

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86 Cotula, *supra* note 48 at 77.

87 See *Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-fourth session*, UNCITRAL, 44th Sess, UN Doc A/CN.9/717 (Feb 2011) at 42-46. [UNCITRAL, *Report of Working Group II* (Feb 2011)] online: UNCITRAL <http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html>; See also *Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-third session*, UNCITRAL, (Oct 2010) 53rd Sess, UN Doc A/CN.9/712 at 22-29; UNCITRAL, *Report of Working Group II* (Oct 2010)]; UNCITRAL, *Settlement of Commercial Disputes*, October 2011, *supra* note 43 at 12-16.
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states or only investors. Not all instruments express the consensus of all parties. To bind all parties, a consensus has to be reached between the states as well as between the investors and the host-state.[88]

B. Implementation of a new Transparency Standard under International Investment Law

1. Instruments to Implement the Standard on Existing IIAs

The commitment to apply the Standard varies depending on how the standard is implemented. Two types of consensus must be reached: one at the level of states and one at the level of the host-state and the investor. Implementation tools, in descending order of effectiveness, include: Multilateral Memoranda of Understanding (MMoU); convention and joint interpretation; unilateral declaration; and Corporate Social Responsibility (CSR). The choice of instrument for implementation expresses a party's commitment to the Standard.

Regarding the debate under UNCITRAL, the WG intensely discussed two forms of instruments: either adopt the Standard as an additional guideline as an annex to the UNCITRAL Arbitration Rules, or adopt the Standard as a standalone convention.[89]

MMoUs are a very elegant form of expressing consensus for all market participants.[90] Pursuant to a MMoU, the investor, the host-state and the home state agree on the application of the Standard. They express consensus on all levels. MMoUs are widely used in international financial law in connection with frameworks.[91] This means to express consent reflects, to some extent, the Ruggie principles that international law is primarily a state duty; still, business enterprises may contribute to the

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88 UNCITRAL, *Report of Working Group II* (Oct 2010), *ibid*, at 23; see also UNCITRAL, *Report of Working Group II* (Feb 2011), *supra* note 87 at 47.

89 A/CN.9/736, *supra* note 42, at 13, 134-135.

90 Chris Brummer, "How International Financial Law Works (and How it Doesn't)" 99 Geo LJ 257 at 281-283, online: Georgetown Law Journal <http://georgetownlawjournal.org/files/pdf/99-2/Brummer.pdf> [Brummer] (refers to the administrative nature of the international financial law that allows all market participants to consent. However, they unfold validity even in absence of some actors. Herein the author of the paper sees the elegant form.).

91 *Ibid* at 301 (for example, under International Organization of Securities Commissions (IOSCO), states, securities supervisors and other market participants commit to a standard in form of a MMOU. Depending on the circumstances, this establishes a binding obligation on signatories either to comply or to pressure a state to comply with the guidelines).

implementation of the Standard.[92] Transferred to UNCITRAL or another framework in international law, the MMoU outlines opportunities to express commitment among investors, host-states and other states to comply with the Standard on all levels of consensus. MMoU may lead to a consensus among participants in absence of costly negotiations. The text is drafted first, and potential parties thereafter agree to the implementation rather than, negotiating the draft of a convention and thence potential members agreeing to it. Depending on the case, even if not all market participants agree to the Standard, it binds disputing parties and the arbitral tribunal.

Some WG states in favour of transparency proposed to implement the Standard in form of a convention.[93] Some proposed joint interpretation of states in connection with the guidelines like NAFTA-states[94] However, all means lack consensus on the level of host-state and investor. On this level, host-states either offer or require investors to comply with the Standard.

Further, the WG discussed other instruments with non-binding effect. These instruments require states in favour of the Standard to take additional steps to implement it. E.g., the preparation of a model clause referring to the Standard can simplify implementation from non-binding law to hard law. If a state decides afterwards to implement the Standard mandatorily or optionally, it has to implement it by either unilateral declaration or inclusion in domestic law. Hereby consensus is on neither level expressed; it may however suffice to establish a binding effect on the investor but leads to compensation depending on the investor-state contract and the underlying IIA.[95] These instruments could offer or require an investor to comply with the Standard.[96]

Furthermore, an instrument not considered by the WG is Corporate Social Responsibility (CSR) guidelines; an investor may unilaterally

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92 Ruggie, *supra* note 29 at 6, Preamble, Principle I, II III (guiding principles on business and human rights are based on three pillars: first the state has a duty to protect, second CSR of transnational corporations shall respect, and third, a greater access by victims to remedies ensures compliance).

93 UNCITRAL, *Settlement of Commercial Disputes*, October 2011, *supra* note 43 at 16; see also *Working Group II (Arbitration and Conciliation), Settlement of commercial disputes: Preparation of a legal standard on transparency in treaty-based investor-State arbitration*, UNCITRAL, 54th Sess, U.N. Doc. A/CN.9/WG.II/WP.162 (February 2011) at 7-21 [UNCITRAL, *Settlement of Commercial Disputes*, February 2011]

94 See e.g. NAFTA Free Trade Commission, *supra* note 17 (NAFTA states declare to apply rules of transparency in NAFTA investment disputes).

95 See Chapter 3 above.

96 UNCITRAL, *Settlement of Commercial Disputes*, February 2011, *supra* note 93 at 11-12.

express commitment in order to comply with the Standard in CSR[97]. In the absence of a state's commitment, CSR may have an impact on an investor. Even if CSR lacks consensus on both levels it may suffice to bind an investor to the Standard depending on the circumstances. Thus, the arbitral tribunal has to construe the normative effect of the Standard case-by-case[98]. However, although most multi- and transnational corporation have CSR-guidelines, there is in general not a lot of binding wording in it. It is unlikely that the investor will be bound on the grounds of general principles of law such as venire contra factum proprium, estoppel or waiver in connection with its CSR.

Additionally, an investment contract may oblige an investor to comply with rules even if the host-state has not implemented those rules as a convention or in another form having similar effect. [99] The investor will be contractually bound to comply with the obligations.

As for the adaption of the Standard in a non-binding form, it is interesting as challenging norms are more easily reached in this form. Without additional steps, "soft law" remains located "in the twilight between law and politics,"[100] non-binding to anyone. Therefore, depending on the instrument, it requires additional steps to transfer the Standard into "hard law." However, even without such steps, "soft law" contributes to international law since guidelines are drafted with great care,[101] expresses commitment on common standards[102] and thereto, contributes to resolve unclear situations between states.[103] Thus, guidelines may be seen as a precondition for the regulation of public interest.[104]

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97 Ruggie, *supra* note 29, Principle 21.

98 UNICITRAL, *Report of Working Group II* (Oct 2010), *supra* note 87 at 24; see also Brummer, *supra* note 90 at 302.

99 Amnesty International *BTC*, *supra* note 57 at 4.

100 See Jon Birger Skjærseth, Olav Shram Stokke & Jørgen Wettestad, "Soft Law, Hard Law, and Effective Implementation of International Environmental Norms" (2006) 6:3 Global Environmental Politics 104 at 104, online: Fridtjof Nansen Institute <http://www.fni.no/docpdf/JBS-OSS-JW-GEP-2006-3.pdf>.

101 Brummer, *supra* note 90 at 306.

102 *Ibid*.

103 See e.g. Rainer J. Schweizer, Der Rechtstaat und die EMRK im Fall der Kunden der UBS AG, AJP 1007, at 1008-1009 (2011) (This author outlines the dispute between USA and Switzerland concerning bank costumer data. USA applies domestic standards on banks in Switzerland to force them into compliance with the law of USA. They use monitoring, reporting and additionally, domestic criminal law. OECD Model Tax Convention helped to resolve the dispute in favour of USA.).

104 Lars Markert, "The Crucial Questions of Future Investment Treaties: Balancing Investors' Rights

To conclude, only an instrument that contains consensus of all market participants leads to an implementation of the Standard without the risk of violating any state obligation towards an investor. However, not all instruments express consensus of all parties affected by the implementation of the Standard.

2. Surveillance of Implementation and Compliance with the Standard

The difficulty in bringing a large number of states in compliance with the Standard presupposes some characteristics of a state in favour of enforcement of the international standard. Decisive factors have included: the existence of an adequate draft, the negotiating power of a state, policy concerns and political pressure.[105] Only states with negotiation power bring other states to compliance with an international standard. This presupposes that public concern exists in connection with pressure of society and thereupon, the state acts in response to the public. Thence, government restructures foreign policy. In this case, the existence of a suitable document to agree upon in favour of the state supports the process. Otherwise, the states have to agree on the draft first and then change to the level of adaption. Such process is costly and time consuming. Thus, the draft has to express litigable obligations. States in favour of the draft have to destroy any doubts concerning the non-binding nature. In addition, other states need to show the extent to which they intend to be bound.[106]

In international law, examples exist in which states in favour of a standard successfully brought other states to comply with non-binding standards.[107] In this regard, some WG member states in favour of

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and Regulatory Interest of Host-states" in Marc Bungenberg, Joern Griebel & Steffen Hindelang, eds, *International Investment Law and EU Law* (Berlin, Heidelberg: Springer-Verlag, 2011) at 167.

105 Skjærseth, Stokke & Wettestad, *supra* note 100 at 107, 115-116 (example of INSC and example concerning Marine Algea Explosion back in 1980s that led in WTO to a dispute subsidies in fisheries).

106 See Ulrich Ehricke, „Soft law" Aspekte einer neuen Rechtsquelle, NJW 1906, at 1908 (1989).

107 See Angelo Colombini, *Les délits fiscaux et la loi sur le blanchiment d'argent (LBA),* TREX-Der Treuhandexperte 336, at 338 (2011) and *supra* note 104, 1009 (Colombini and Schweizer describe how FATF, an intergovernmental body under OECD, very successfully sets recommendations concerning organised crimes with regards to money laundering and financing terrorism. Some countries pushed others for compliance with these recommendations. In Switzerland this rules were successfully transferred into hard law; similarly in Austria. The same mechanism is used to combating fiscal fraud although some OECD countries see this beyond the mandate. E.g. Austria complied with it.). See also Giovanni Molo, Die neue Trennungslinie

transparency have the aforementioned characteristic to bring other states to compliance with the Standard.

States in favour of an international standard may monitor non-complying states to accelerate the process of implementation. In international environmental, international economic and financial law, this manner of implementation is very common. National authorities meet periodically in global fora[108] to draft new non-binding standards.[109] These standards should be implemented into hard law.[110] International organisations monitor the implementation[111] and report non-compliance to the public.[112] Non-compliance has an unpredictable effect. It is a pathway sufficient in most cases to make such states compliant with a standard.

Similar mechanisms worked in projects of oil consortiums in investment law.[113] Human rights organisations scrutinized the investment contracts in context of the legal framework in an early stage. Thereupon, they gave recommendations to the states and the companies.[114] Such recommendations had an impact on the investment contracts. For

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bei der Amtshilfe in *Steuersachen: Das Verbot der fishing expeditions und die formellen Anforderungen an das Gesuch*, 161, ASA 143 (He describes how Switzerland transfers the OECD soft law standard into binding national law. Switzerland had reservation on art 26 of OECD's double taxation standard. In the turmoil of the worldwide financial crises, Germany, the USA, France, and Italy in concert took the day and pushed Switzerland towards application of what these countries claimed to be the standard. As means of pressure they used a list on which they coupled possible disadvantage in case of none compliance. On 13 March 2009 Switzerland capitulated. However, the compliance proceedings will be observed by OECD, a system of monitoring and peer-review is used under the framework of OECD. According to Schweizer, at 338, the OECD standard in connection with the treaty of administrative assistance between Switzerland and the USA leads to violations of international and national law, principle of the rule of law, various guaranties assumed under ECHR 6, and violation of ban of retrospective application.).

108 Examples in this field are: Basel's Committee for Banking Supervision (BCBS), Financial Action Task Force (FATF), and International Organization of Securities Commission (IOSCO).

109 Brummer, *supra* note 90 at 263-268, 274-275.

110 *Ibid* ("[t]hese bodies generally implement their broad regulatory agendas through more granular standard setting by national regulators and the so-called standard-setting organizations" at 277).

111 *Ibid* at 280.

112 *Ibid* at 281.

113 See e.g. *Agreement between Baku-Tiblisi-Ceyhan (BTC) Company and the Government of Georgia on the Establishment of a Grant Program for Georgia* (19 October 2004), art 3, online: BP in Georgia <http://subsites.bp.com/caspian/BTC/Eng/Geo_Grant_Prog_Agre/Georgia%20Grant%20Programme%20Agreement%20(En).pdf>.

114 See e.g. Amnesty International, *BTC*, *supra* note 57; Amnesty International, *Chad-Cameroon*, *supra* note 62.

example, in the BTC-Project the parties renegotiated the stabilization clause thereupon. In this project, originally only the investment contract obliged the investor to comply with international law and other standards in exchange for a stabilization clause. The NGO alleged it an obstacle for the host-state to advance its human rights in domestic law. Therefore, the parties to the investment released the stabilization clause in a manner that the host-state may comply with international standards without violating the contract and risking having to pay compensation to the investor.[115]

Following these examples, despite the fact that not every country commits to the implementation of the Standard, the binding nature of the Standard will increase through surveillance and recommendations. Canada, Argentina, Australia, Chile, Japan, and the USA do have the required characteristics to increase the binding effect of the Standard. If UNCITRAL adopts it in a non-binding instrument, and a framework supervises the implementation and compliance with the Standard and the result is published, this might be sufficient to make recalcitrant states change their policy towards compliance.

VII. CONCLUSION

In the first decade of the 21st century tribunals slowly accepted transparency and public access in treaty-based investor-state arbitration due to public pressure and the public interest in these disputes. Thereafter, WG decided to prepare a Standard in treaty-based investor-state arbitration. The standard contains rules regarding disclosure of information at the commencement of, during and at the end of the proceeding. It additionally entails an obligation of public hearings and rules for third party submissions.

States may implement this Standard without the investor's commitment. Depending on the form of implementation, doing so may violate an IIA's umbrella clause and FET-provision in connection with full stabilization clauses in investor state contracts. Thus, host-states agreeing to such stabilization clauses may implement the Standard with caution, otherwise risking the payment of compensation to the investor.

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[115] Amnesty International, *BTC*, *supra* note 57 (recommendation to modify the economic equilibrium clause in a way that all parties to the contract may comply with international human rights without fear of paying for adverse effects to the other party at 15); Amnesty International, *Chad-Cameroon*, *supra* note 62 (impact was acknowledged, although the BTC contract included non-binding international standards at 11).

The Standard may be adopted using model clauses, joint interpretative declarations, guidelines, conventions, and Memoranda of Understanding (MoU). These different instruments have diversity of effects on the consensus of state parties to IIAs and parties to investment contracts. However, not all the instruments contain the consensus of parties affected by the implementation of the Standard. Only MMoUs extended to investors are likely to bind all market participants. Conventions contain the consensus of state parties and lack the commitment of an investor. Alternatively or additionally, a host-state may try to bind all market participants using a form of unilateral declaration. Similarly, investors are free to declare unilaterally their commitment using CSR. In case of a dispute concerning transparency, even if not all parties agree to the application of the Standard, the commitment expressed in the instruments may have a sufficient effect on the arbitral tribunal to bind the proceedings to the Standard.

To support the implementation of the Standard in an appropriate form a host-state may take steps towards compliance depending on the chosen instrument. To bring other states or investors to compliance a state may use means of surveillance and recommendation. It is likely that other states or investors will comply with the Standard if negotiation power, public pressure and policy concerns are united in one state in favour of the Standard.

Therefore, states supporting transparency in international investment arbitration should choose MMoU open to investors in connection with a surveillance mechanism in an international framework. Since these means allow the commitment of any market participant, and are not limited by definition as a convention among states, it has a binding effect on the level of states and the level of investor and host-state. Even if not every single investor or state agrees to the Standard, this instrument should sufficiently bind the arbitral tribunal to the Standard. Thus, largely reducing the risk of a host-state to pay compensation for the implementation.