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# Transparency Evolution: More than the Right to Know

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## I. INTRODUCTION

The interaction between international trade and human rights in the context of economic globalization often raises questions as to whether international trade and investment treaties are a good mechanism to protect human rights and if so, what human rights should be protected and how. In the absence of explicit legal linkages between the two areas of international law, answers to these questions tend to focus on political dialogue between various international actors and institutions obliged to comply with both international trade and human rights laws in specific factual situations.<sup>1</sup> Two such situations, related to the investment of Chinese companies in Peru's extractive industry projects, are examined in this chapter: Shougang's operation of the Macrona mine and Chinalco's operation of the Toromocho mine.

Some scholars argue that trade obligations are constitutionalized in international trade treaties as human rights and that international trade treaties could therefore evolve to develop mechanisms for the protection of human rights other than economic rights.<sup>2</sup> Building on the 21<sup>st</sup> century concepts of the constitutionalism of international trade law and the evolution of human rights protection, some scholars believe that the doctrine of multilevel governance is the most suitable framework to systematically address the problems of fragmentation and coherence in different areas of international law, especially those problems arising out of, the relationship between human rights and international trade law.<sup>3</sup> That doctrine asserts that states, having already conceded some of their regulatory powers to international organizations, should act as intermediaries between different layers of governance, such as international, transnational, and national.<sup>4</sup> States should build the framework of interaction of governance institutions on the basis of a clearly defined constitutional process including the allocation of powers and the communication among the different layers of governance. Others argue that the two areas of law, international trade and human rights, should be kept separate because the use of international trade institutions to protect human rights is legitimizing a neoliberal and market focused

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<sup>1</sup> For further discussions see Frederick M. Abbott, Christine Breining-Kaufmann & Thomas Cottier, eds, *International Trade and Human Rights; Foundations and Conceptual Issues* (Ann Arbor: The University of Michigan Press, 2006) and Thomas Cottier, Joost Pauwelyn & Elisabeth Bürgi, eds, *Human Rights and International Trade* (Oxford: Oxford University Press, 2005).

<sup>2</sup> Ernst-Ulrich Petersmann, this volume, chapter 2.

<sup>3</sup> Thomas Cottier & Maya Hertig, "The Prospects of 21<sup>st</sup> Century Constitutionalism", (2003) 7:1 Max Planck YB UN L. 299. See also Michael Zürn, "Global Governance as Multi-Level Governance" in Henrik Ederlein, Sonja Wälti & Michael Zürn, eds, *Handbook on Multi-level Governance* (Cheltenham: Edward Elgar, 2010) 80.

<sup>4</sup> Cottier & Hertig, *ibid* at 313-317.

dimension of human rights that does not adequately address the obligations of states to protect individual non-economic rights under international human rights law and United Nations rules.<sup>5</sup> Scholars also argue that the requirement for states to respect of human rights, as a condition for the membership in international trade organizations and in order to be able to access international financial aid, raises for developing countries sensitive issues such as the scope of their remaining regulatory sovereignty and the relevance of human rights treaties in the light of developing countries commitment to the WTO regime.<sup>6</sup>

International trade and investment treaties are agreed upon primarily for the purpose of advancing trade in goods and services and for the promotion and protection of foreign investments. The treaties do not directly address the issue of the protection of human rights although they indirectly address human rights by creating their own rules of governance or by referring to rules of international human rights treaties<sup>7</sup>. Moreover, they create legal rules and institutions that form an integral part of a rule-based system of world trade built on principles of non-discrimination and transparency. Human rights law, too, is based on these principles. Therefore, international trade law and human rights law seem to interact through the principles of governance and the rule of law.<sup>8</sup> The transparency rules in those agreements are often cited as evidence of possible incorporation of human rights provisions into the international trade regime.<sup>9</sup> Hence, transparency is linked to the human right to information,<sup>10</sup> and to the corresponding correlated duty of states to facilitate individuals' access to information and to participation in public affairs.<sup>11</sup> In that context, transparency and the right to access information as captured in international treaties, including trade treaties, are seen as the basis for the enjoyment of all other human rights.

This chapter considers two aspects of the advancement of transparency rules in international law and national laws. The first aspect is referred to as the “transparency

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<sup>5</sup> Philip Alston, “Resisting Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann”, (2002) 13:4 EJIL 815. But see Emilie M. Hafner-Burton, *Forced to Be Good: Why Trade Agreements Boost Human Rights* (Ithaca: Cornell University Press, 2009).

<sup>6</sup> See, for example, Sisule Frederich Musungu, “International Trade and Human Rights in Africa: A Comment on Conceptual Linkages” in Abbott, Breining-Kaufmann & Cottier, eds, *supra* note 1, 321 at 322.

<sup>7</sup> See Thomas Cottier, “Governance, Trade and Human Rights”, in Abbott, Breining-Kaufmann & Cottier, eds, *supra* note 1, 93 at 104, and Susan Ariel Aaronson & Jean Pierre Chauffour, *The Wedding of Trade and Human Rights: Marriage of Convenience or Permanent Match?* WTO Research and Analysis, online: WTO <[https://www.wto.org/english/res\\_e/publications\\_e/wtr11\\_forum\\_e/wtr11\\_15feb11\\_e.htm](https://www.wto.org/english/res_e/publications_e/wtr11_forum_e/wtr11_15feb11_e.htm)>.

<sup>8</sup> See Thomas Cottier, “Governance, Trade and Human Rights” in Abbott, Breining-Kaufmann & Cottier, eds, *supra* note 1, 93 at 95. The World Bank Institute broadly defines governance as “the traditions and institutions by which authority in a country is exercised.” See World Bank Institute, *Governance Matters 2009, Worldwide Governance Indicators 1996-2008*, online: World Bank <<http://www.worldbank.org/en/news/press-release/2009/06/29/governance-matters-2009-release-of-worldwide-governance-indicators-1996-2008>>.

<sup>9</sup> Aaronson & Chauffour, *The Wedding of Trade and Human Rights*, *supra* note 7.

<sup>10</sup> Maeve McDonagh, “The Right to Information in International Human Rights Law” (2013) 13:1 HRL Rev 25 at 29.

<sup>11</sup> Mark Festner, “Seeing the State: Transparency as Metaphor” (2010) 62 Admin L Rev 617.

turn,”<sup>12</sup> and it concerns the proliferation of transparency rules in many areas of international law, including international economic law and human rights law. The second aspect relates to the evolution of transparency policy from the right to know to the duty imposed by government on private and public actors to disclose information to the public or targeted transparency, and, finally, towards the right of private parties to participate in designing transparency policies or collaborative transparency.<sup>13</sup> This evolution indicates that transparency as a human right is a part of the democratic principle in modern administrative states and that the right to access information is the pre-condition for citizens’ getting an opportunity to not only learn about government policies but also to participate in government’s decision making related to government policies.

This chapter examines domestic transparency rules of China and Peru and related domestic laws in the context of the countries’ implementation and enforcement of international transparency laws. Free trade agreements (FTAs) and bilateral investment treaties (BITs) are cornerstones of economic development of the two countries; in each they are important tools for the countries’ integration into the global market.<sup>14</sup> Not only has the mining industry been at the core of said economic cooperation<sup>15</sup> but it has also been the subject of global public scrutiny due to its long history of poor resource management, including a lack of transparency, its corruption, and its violation of the human rights of miners and members of local communities affected by the extractions (‘resource curse’<sup>16</sup>). In response to external and internal requests for increased transparency in the activities of their governments and for the broader participation of private actors in the governments’ decisions about economic development and the distribution of economic wealth China and Peru have engaged in domestic governance reforms. The case studies investigate whether

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<sup>12</sup> Anne Peters, “The Transparency Turn of International Law” (2015) 1 CJGG 3.

<sup>13</sup> Archon Fund, Mary Graham & David Weil, *Full Disclosure: The Perils and Promises of Transparency* (New York: Cambridge University Press, 2007) at 25-28.

<sup>14</sup> China has 13 FTAs in force and has been negotiating 8 new FTAs. China started entering into FTAs with other countries only after its accession to WTO in 2001, online:

<<http://fta.mofcom.gov.cn/english/>>. China has been actively negotiating bilateral investment treaties since the 1980s and has signed 145 BITs, 34 of which are either terminated or not yet in force, online: <<http://investmentpolicyhub.unctad.org/IIA/CountryBits/42>>. Peru has 16 FTAs in force and it is a member of a regional economic bloc (Andean Community). About 95% of all country’s export is regulated by those agreements. Peru is also a part of the Trans Pacific Partnership (TPP) negotiations, online: <<http://www.limaeasy.com/business-guide/free-trade-agreements-ftas-with-peru#signed-agreements>>. In addition, Peru has signed 32 BITs, 4 of which are terminated, online: <<http://investmentpolicyhub.unctad.org/IIA/CountryBits/165>> .

<sup>15</sup> More than 30 percent of all Peruvian mining investment portfolios is hold by Chinese companies. See Cynthia Sanborn & Victoria Chann, “Chinese Investment in Peru’s Mining Industry: Blessing or Curse?” (2015) Boston University Global Economic Governance Initiative Discussion Paper No 2015/8 at 2. See also Rebecca Ray, Kevin Gallagher, Andres Lopez & Cynthia Sanborn, “China in Latin America: Lessons for South-South Cooperation and Sustainable Development”, (2015) Boston University Global Economic Initiative, Working Group Final Report 04/2015, at 5, online: <<http://www.bu.edu/pardeeschool/files/2014/12/Working-Group-Final-Report.pdf>>.

<sup>16</sup> Moises Arce, *Resource Extraction and Protest in Peru* (Pittsburg: University of Pittsburgh Press, 2014), ch 3 at 45-65.

international transparency rules, in particular those embedded in international trade and investment agreements, have contributed to the two countries' protection of human rights.

## II. BACKGROUND

Transparency is a term frequently used by lawyers, politicians and civil society engaged in globalization-fuelled debates about the overarching impact of international trade laws on the domestic laws of states, and about good governance, the relationships between citizens and state institutions, and the problem of corruption. Transparency is viewed as a necessary component in the proper functioning of any democratic state or organization,<sup>17</sup> as the principle that underpins the rule of law, and as the key element of good governance as embedded in Western ideas of modern statehood founded on the concepts of democratic accountability and legitimacy of governance.<sup>18</sup> It has national and international dimensions, but it lacks a universally accepted definition.

In its national dimension, transparency transcends the realm of legal standards and embodies the fundamental moral values of society. It is 'a standard of judgment of people's conduct.'<sup>19</sup> In modern states transparency is accepted as an indispensable condition of democratic governance and as the primary tool employed in holding policy makers accountable to society.<sup>20</sup> Consequently, whenever states or their agencies are involved in economic activity, including entering into international trade and investment agreements, citizens call for transparency and 'publicity'<sup>21</sup> with respect to the government process and for information about the states' goals and about the outcome. Such requests for more information are associated in the literature on democratic governance with the "right to know" transparency policies, which guarantee public access to government information, and with "targeted transparency" policies which ensure that governments establish information services for their citizens and provide them with information otherwise unavailable.<sup>22</sup> These two generations of transparency policies in democratic states facilitate development of what is called "collaborative transparency" policies, the third generation

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<sup>17</sup> On theoretical foundations of transparency see Carl-Sebastian Zoellner, "Transparency; An Analysis of an Evolving Fundamental Principle in International Economic Law" (2005-2006) 27 Mich. J. Int'l L. 579 and Stephan Schill, "Transparency as a Global Norm in International Public Law" (15 September 2014), Kluwer Arbitration Blog, online:

<<http://kluwerarbitrationblog.com/2014/09/15/transparency-as-a-global-norm-in-international-investment-law/>>. Schill argues that "transparency promises more accountable more democratic and much more legitimate system of global governance." *Ibid.*

<sup>18</sup> Francis Fukuyama, *State-Building: Governance and World Order in the 21<sup>st</sup> Century* (Ithaca: Cornell University Press, 2004).

<sup>19</sup> Andrea Bianchi, "Introduction" in Andrea Bianchi & Anne Peters, eds, *Transparency in International Law* (Cambridge: Cambridge University Press, 2013) at 2.

<sup>20</sup> Anne Peters, "The Transparency of Global Governance", in Photini Pazartzis & Maria Gavouneli, *Reconceptualising the Rule of Law in Global Governance, Resources, Investment & Trade* (Oxford: Hart Publishing, 2015) 3 at 6.

<sup>21</sup> Anne Peters, *ibid.* Peters argues that transparency is often used as a synonym for "publicity", a traditional political theory term whose origins could be found in the ancient Greek philosophy that linked 'publicness' and democracy.

<sup>22</sup> Archon Fund, Mary Graham & David Weil, *Full Disclosure: The Perils and Promises of Transparency* (New York: Cambridge University Press, 2007) at 24-28.

of transparency policy. Collaborative transparency has been made by an unprecedented development in information and communications technology, that allows members of the public to be both users of information and initiators of transparency systems, transforming them into actors who share and monitor information.<sup>23</sup> According to Archon Fund, Mary Graham and David Weil, governments operate in the most efficient and democratic manner when all three generations of transparency policies are working together.<sup>24</sup>

The international dimension of transparency, often related to the legitimacy and quality of governance in global institutions,<sup>25</sup> is equally complex and it is controversial. On one hand, transparency plays an instrumental role in the proper functioning of international organizations by increasing their effectiveness, their accountability, and the legitimacy of their rules and procedures.<sup>26</sup> On the other hand, international transparency has an impact on the domestic laws of a state by influencing the transparency of these laws, the administrative decisions, and procedures that facilitate competition, trade and foreign investment. Thus, the transparency principle is central to the full functioning of the world trade system.<sup>27</sup> Despite the positive impact of the principle on the functioning of the global trade regime, there is considerable criticism of the impact that the international rules of transparency have on the regulatory governance of individual states when they are imposed

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<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

<sup>25</sup> Peters, *supra* note 20. The term “quality of governance” is broadly determined as ‘the process by which governments are selected, monitored and replaced, the capacity of the government to effectively formulate and implement sound policies, and the respect of citizens and the state for the institutions that govern economic and social interactions among them.’ See Daniel Kaufmann, Aart Kraay & Massimo Mastruzzi, “Governance Matters III: Governance Indicators for 1996–2002,” (2004) World Bank Policy Research Working Paper No. 3106 at 3. According to the authors, determination of the quality of governance involves examination of activities of governments and institutions with respect to their adherence to the rule of law, their accountability, efficiency, and transparency.

<sup>26</sup> See for example, Robert Wolfe, “Letting the Sun Shine in at the WTO: How Transparency Brings the Trading System to Life”, (2013) Staff Working Paper ERSD-2013/03, Gregory Shaffer, “How the World Trade Organization Shapes Regulatory Governance” (2015) 9 Regulation & Governance 1, Megan Donaldson & Benedict Kingsbury, “The Adoption of Transparency Policies in International Governance Institutions: Justifications, Effects and Implications” (2013) 9 Annual Review of Law and Social Science 119, Allen Buchanan & Robert O. Keohane, “The Legitimacy of Global Governance Institutions” (2006) 20 Ethics & International Affairs 405, Aarti Gupta, “Transparency under Scrutiny: Information Disclosure in Global Environmental Governance” (2008) 8 Global Environmental Politics 1.

<sup>27</sup> Article X of the GATT 1994 is the central transparency related provision that imposes an obligation on all members to the WTO to publish all applicable laws and regulations and to administer them properly. The Asia Pacific Economic Cooperation (APEC) in the *2002 Statement to Implement APEC Transparency Standards* states: ‘[Transparency] is a basic principle underlying trade liberalization and facilitation, where the removal of barriers to trade is in large part only meaningful to the extent that the members of the public know what laws, regulations, procedures and administrative rulings affect their interests, can participate in their development, can participate in administrative proceedings applying them and can request review of their application under domestic law.’ See online: UNCTAD

<[http://unctad.org/en/PublicationsLibrary/unctaddiaeia2011d6\\_en.pdf](http://unctad.org/en/PublicationsLibrary/unctaddiaeia2011d6_en.pdf)>.

as a condition of membership in international organizations.<sup>28</sup> Such criticism is frequently made of the WTO and other systems of international economic law, such as international investment law and the law governing international finance.

Recently, it has been argued that there is a genuine “transparency turn” in international law and governance as all major areas of international law, particularly human rights laws and international economic law, impose numerous transparency-related requirements on the functioning of international institutions (the so-called transparency OF governance) and states (the so-called transparency FOR governance).<sup>29</sup>

## **A. International Trade and Investment Treaties**

The transparency turn in international law suggests that multiple international treaties impose a variety of transparency obligations on the states that entered into these treaties. For example, at the multilateral level, the General Agreement on Tariffs and Trade (GATT),<sup>30</sup> without defining transparency, imposed on states mandatory transparency-related obligations.<sup>31</sup> Those GATT obligations required the contracting states to publish domestic trade-related laws and regulations, to administer their laws and regulations in an impartial manner, and to publish the agreements affecting international trade policy that were in force between their government or government agencies and the governments or government agencies of any other contracting parties (GATT Article X). GATT also imposed several transparency-related obligations in order to eliminate or reduce non-tariff barriers to trade (GATT Articles XI:1 and XVII:1). The World Trade Organization (WTO) agreements that succeeded the GATT trade regime imposed additional transparency-related provisions but, like GATT, did not include a definition of transparency. The WTO agreements provided institutional support for: monitoring the compliance of states with their WTO obligations and for the enforcement mechanism and remedies available to states in case of other states’ violation of the obligations.

Both the GATT and the WTO transparency rules apply to trade related issues and do not directly relate to individual human rights. Binding WTO transparency rules address states as both obligors and obligees but they are only enforceable through claims brought by one state against another and before the WTO Dispute Settlement Body. Remedies for violations are available to states in the form of retaliatory trade sanctions until the measure violating the WTO rule is repealed or amended. These binding rules affect the WTO members’ domestic regulatory quality, particularly their transparency laws and policies, benefiting private parties, (foreign and domestic) —suppliers of goods and services, consumers, and investors. Thus, the WTO transparency rules do have a cascading or a

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<sup>28</sup> Shaffer, *supra* note 26.

<sup>29</sup> Peters, *supra* note 12 at 4-5. See also Anne Peters, “Towards Transparency as a Global Norm” in Bianchi & Peters, eds, *supra* note 19, at 534. See also Megan Donaldson & Benedict Kingsbury, “The Adoption of Transparency Policies in Global Governance Institutions: Justifications, Effects, and Implications” (2013) 9 Annual Review of Law and Social Science 119, and Rachel M. Gisselquist, “Good Governance as a Concept, and why This Matters for Development Policy” (2012) United Nations University WIDER Working Paper No 2012/30.

<sup>30</sup> *General Agreement on Tariffs and Trade*, October 30, 1947, 55 UNTS 194.

<sup>31</sup> Zoellner, *supra* note 17 at 591.

spillover effect on individual rights enabling them to make better-informed decisions not only about their economic but also about political, social and cultural rights.

The Trade Policy Review Mechanism (TPRM) provides a form of an assessment of each WTO member's trade policies and practices through periodical WTO Secretariat reports and the review meetings of the Trade Policy Review Body. The assessments thus provided are not utilized in the enforcement of specific transparency related WTO obligations nor do they impose any additional obligations on non-complying member states. Therefore, the assessment process is not a substitute for domestic governance institutions and domestic transparency reforms. What it does do is to provide a collective evaluation of members' trade policies and practices and valuable feedback to the reviewed members as to the impact of their policies on the functioning of the multilateral trade system. The greater a member's weight in the multilateral trading system, the more frequent is its TPRB review. China's trade policies and practices have been reviewed once every four years<sup>32</sup> while Peru's have been reviewed every six years.<sup>33</sup> There have been five TPRM reports on China since that country's accession to the WTO in 2001. These Reports have revealed increased transparency in the country's trade policies and practices, but they have highlighted areas of concern, such as insufficient transparency in government procurement, in competition policy, and in government support for state owned enterprises<sup>34</sup>. There have been four reviews of Peru's trade policies and practices, the most recent in 2013, indicating that Peru has improved transparency in government trade policies and practices.<sup>35</sup>

FTAs often extend the WTO transparency rules by requiring their signatories to comply with more comprehensive transparency provisions, especially if they address regulatory cooperation of the parties.<sup>36</sup> Research conducted for the Organization for Economic Cooperation and Development (OECD) found that countries with good governance and institutions firmly based on democratic ideals include provisions requiring

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<sup>32</sup> Other three major trading powers reviewed every two years are the European Union, The United States, and Japan.

<sup>33</sup> Most of the member states, that is, developing countries and economies in transition, are reviewed every six years.

<sup>34</sup> See China's TPR 2014, WT/TPR/S300/China.

<sup>35</sup> See Peru's TPR 2013, WT/TPR/S/289.

<sup>36</sup> See, Bernard Hoekman & Petros C. Mavroidis, "Regulatory Spillovers and the Trading System: From Coherence to Cooperation" (2015) E15 Task Force on Regulatory Systems Coherence, ICTSD, World Economic Forum & the EUI, Overview Paper, online:

<<http://e15initiative.org/wp-content/uploads/2015/04/E15-Regulatory-OP-Hoekman-and-Mavroidis-FINAL.pdf>>. See also Jacques Bourgeois, Kamala Dawar & Simon J. Evenett, "A Comparative Analysis of Selected Provisions in Free Trade Agreements" (October 2007) The Study Commissioned by the DG Trade of the European Commission, online:

<[http://trade.ec.europa.eu/doclib/docs/2008/march/tradoc\\_138103.pdf](http://trade.ec.europa.eu/doclib/docs/2008/march/tradoc_138103.pdf)>. The FTAs negotiated by the EU and the US with developing countries often impose requirements for a higher level of transparency with respect to policy areas such as IP protection and competition policy. See Henrik Horn, Petros Mavroidis & Andre Sapit, "Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements" (2009) Breugel Blueprint Series, Volume II, online:

<[http://bruegel.org/wp-content/uploads/imported/publications/bp\\_trade\\_jan09.pdf](http://bruegel.org/wp-content/uploads/imported/publications/bp_trade_jan09.pdf)>.



greater transparency in their trade agreements with developing countries.<sup>37</sup> Consequently, North-South agreements are ‘more transparency-intensive than North-North or South-South agreements.’<sup>38</sup> China, in particular, states that it does not include good governance provisions and promotes economic cooperation with other developing countries with no interference in their domestic politics (“no-strings-attached”<sup>39</sup>). The agreements between OECD countries and non-OECD countries are particularly strict in their transparency requirements<sup>40</sup> because OECD countries use FTAs as ‘a vehicle for disseminating best practices in transparency, particularly to countries where administrative systems may be less mature.’<sup>41</sup>

Transparency rules in international investment law tend to develop on the basis of models and practices of those states that are strongest economically and thus have more clout in negotiating the BITs.<sup>42</sup> Since the late 1980s and the formulation of the Washington Consensus, international investment agreements (IIAs), including BITs, have contained provisions for good governance and transparency-related duties for the regulatory agencies of the developing countries that are hosting investments from developed countries.<sup>43</sup> BITs often provide for the establishment of international arbitration tribunals as dispute settlement institutions \in lieu of the host state’s administrative or judicial institution. Foreign investors benefit directly from BITs by being able to make claims related to state violations of treaty obligations, including transparency, directly before these arbitral tribunals, circumventing the state’s domestic judicial and administrative tribunals. The investors can seek monetary compensation from these tribunals for state violations of transparency. In that context, BITs seem to serve as substitutes for, rather than as incentives for, governance reform in developing countries.

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<sup>37</sup> Iza Lejaraga & Ben Shepherd, *Quantitative Evidence on Transparency in Regional Trade Agreements*, (2013) OECD Trade Policy Papers No. 153, TAD/TC/WP (2012) 20/FINAL, at 4.

<sup>38</sup> *Ibid.*

<sup>39</sup> Chinese President Xi Jinping’s speech during a plenary session at the Asian African Summit in Jakarta, Indonesia on April 22, 2015 emphasized that China supports South-South Cooperation based on ‘mutual respect and equality’ and that it will ‘continue to offer assistance to developing countries with no political strings attached,’ Online: <<http://www.voanews.com/content/xi-rich-nations-should-offer-aid-with-no-strings-attached/2729832.html>>. That means that China will not link economic cooperation with human rights protection.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

<sup>42</sup> UNCTAD *Series on Issues in International Investment Agreements II: Transparency*, New York and Geneva, 2012, UNCTAD/DIAE/IA/2011/6 [2012 Transparency Sequel].

<sup>43</sup> On the Washington Consensus and the World Bank macroeconomic policies see John Williamson, *A Short History of the Washington Consensus*, a paper commissioned by Fundación CIDOB for a conference “From the Washington Consensus towards a new Global Governance,” Barcelona, 24-25 September 2004, online: Peterson Institute for International Economics <<https://piie.com/publications/papers/williamson0904-2.pdf>>. See also Jose Alvarez, “What are Investment Treaties For?” in Jose Alvarez, *The Public International Law Regime Governing International Investment* (The Hague: All-Pocket, 2011) at 95-177. The US BIT model of 1987 is an example of the US practice of using the investment treaty provisions to impose a minimum standard of protection of US foreign direct investment by promoting the “fair and equitable treatment” of investments and to ensure a stable, predicable and secure legal framework for investments. *Ibid.*, at 100.

## B. International Guidelines and Best Practices

There are very many international treaties that stipulate transparency—the “hard law” on governance. Similarly, there are very many international guidelines promoting and regulating transparency—the “soft law on governance that regulates the obligations of private economic actors, namely multinational corporations and foreign investors, vis-à-vis host governments and local communities<sup>44</sup>.

The 2004 OECD *Principles of Corporate Governance* and the 2005 OECD *Guidelines on Corporate Governance of State Owned Enterprises*<sup>45</sup> included the principle of transparency and disclosure in their framework of corporate governance.<sup>46</sup> Initially, the 2005 *Guidelines* were intended to guide regulatory reforms in developed countries but the documents have since been accepted as an international standard of good corporate governance for all countries where SOEs are significant market actors.<sup>47</sup> Since 2004, China, which owes its rapid economic development to its numerous SOEs, has been involved with OECD in a dialogue on corporate governance,<sup>48</sup> and it has been participating in the OECD Corporate Governance Committee meetings since 2010. China has also participated in the OECD Working Party on State Ownership and Privatization Practices and has actively discussed the 2015 revision of *the Guidelines* with other members of that group.<sup>49</sup>

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<sup>44</sup> See Kenneth W. Abbot & Duncan Snidal, “Hard and Soft Law in International Governance” (2000) 54:3 *International Organization* 421. The authors define hard law as “legally binding obligations that are precise... and that delegate authority for interpreting and implementing law”, *ibid.*, 421. They define soft law as obligation or an agreement not formally binding, or it is vague with respect to the discretion of implementation, or if it does not delegate authority for interpreting and implementing law to the third party. See *ibid.*, 422. See also Gregory Shaffer & Mark Pollack, “Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance” (2010) 94 *Minn. L. Rev.* 706 and Andrew Guzman & Timothy L. Meyer, “International Soft Law” (2010) 2 *J. Legal Analysis* 171.

<sup>45</sup> OECD, *Guidelines on Corporate Governance of State-Owned Enterprises* (Paris: OECD Publishing, 2005). OECD published *Accountability and Transparency: A Guide for State Ownership* (OECD Publishing, 2010) as a supplementary set of best practices for governments working on implementation of the 2005 Guidelines. In 2015, *The Guidelines* were revised by OECD countries in cooperation with a number of partners and stakeholders, including non-OECD countries. See the revised 2015 Guidelines at <<http://www.oecd.org/daf/ca/OECD-Guidelines-Corporate-Governance-SOEs-2015.pdf>>.

<sup>46</sup> Other principles are: ensuring the basis for an effective corporate governance framework, rights of shareholders and key ownership functions, equitable treatment of shareholders, role of stakeholders, and responsibilities of the board.

<sup>47</sup> Daniel Ho and Angus Young argue that China adopted most of the principles of 2005 *Guidelines* on SOEs corporate governance. See Daniel Ho & Angus Young, “China’s Experience in Reforming its State Owned Enterprises; Something New, Something Old and Something Chinese?” (2013) 2:4 *Int’l J. Economy, Management and Social Science* 84 at 84.

<sup>48</sup> On the activities of the 2004 China-OECD Corporate Governance Policy Dialogue see online: <<https://www.oecd.org/daf/ca/ChinaOECDCorpGovfinal.pdf>> .

<sup>49</sup> See the revised 2015 *Guidelines* online: <<http://www.oecd.org/daf/ca/OECD-Guidelines-Corporate-Governance-SOEs-2015.pdf>>.

The 2011 *UN Guiding Principles on Business and Human Rights*,<sup>50</sup> another example of the relevant soft law, addresses transparency by recognizing states' duties to respect, protect, and fulfill human rights and fundamental freedoms<sup>51</sup>. Although not binding on states, the *Principles* set expectations for states to enforce domestic human rights standards on all businesses operating within their jurisdiction. This includes the possibility of the states enforcing domestic measures with extraterritorial implications.<sup>52</sup> The commentary of the *Principles* makes it clear that one requirement of states' and businesses' responsibility to respect and protect human rights is that they must have in place transparency policies and measures<sup>53</sup> and that they must share relevant information. The *Principles* recognizes that the obligations of states and businesses to protect individuals against business-related abuse must be matched with appropriate and effective remedies available in case of violations.<sup>54</sup> Next, grievance mechanisms, including a range of remedies, should be available to individuals and groups through efficient state and non-state grievance institutions such as state judicial, administrative and legislative mechanisms.<sup>55</sup> The *Principles* also proposes the establishment of grievance mechanisms administered by business actors, industry, or, collaboratively, by multiple stakeholders on the basis of their codes of conduct and performance standards.<sup>56</sup> It specifically points to the transparency of the grievance mechanisms as a determinant factor in their effectiveness.<sup>57</sup> Generally, China has responded more positively to the UN Guiding Principles than to the OECD initiatives. For example, the China Chamber of Commerce of Metals, Minerals, and Chemicals Importers & Exporters has referred to the *Principles* in its *Guidelines for Social Responsibility in Outbound Mining Investment*, calling for its member companies to comply with the UN proposed initiative in their mining operations abroad.<sup>58</sup>

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<sup>50</sup> Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, OHCHR, 17<sup>th</sup> Sess, A/HRC/17/31 (2011). The Human Rights Council endorsed the *Guiding Principles* in its resolution 17/4 of 16 June, 2011.

<sup>51</sup> The 2011 *Guiding Principles*, I. The State Duty to Protect Human Rights, A. Foundational Principles, at 3-4. Those fundamental rights and freedoms include the protection of the rule of law, accountability, legal certainty and procedural and legal transparency. *Ibid.*

<sup>52</sup> The 2011 *Guiding Principles*, I. The State Duty to Protect Human Rights, B. Operational Principles; General State Regulatory and Policy Functions, at 4-6.

<sup>53</sup> The 2011 *Guiding Principles* at 3, 24, and 35.

<sup>54</sup> The 2011 *Guiding Principles*, III Access to Remedy, at 27.

<sup>55</sup> *Ibid.* The suggested remedies may include apologies, restitution, rehabilitation, monetary or non-monetary compensation, punitive sanctions (criminal or administrative), injunctions, financial or non-financial compensation and punitive sanctions.

<sup>56</sup> The 2011 *Guiding Principles*, III Access to Remedy, Non-State-Based Grievance Mechanisms, *ibid.*, at 31-33.

<sup>57</sup> *Ibid.*, at 33.

<sup>58</sup> See OECE Insights, *Corporate Respect for Human Rights in the Chinese Context*, 18 June 2015, online: <<http://oecdinsights.org/2015/06/18/corporate-respect-for-human-rights-in-the-chinese-context/>>.

The Extractive Industries Transparency Initiative (EITI)<sup>59</sup> is a voluntary initiative launched in 2002 by governments, industry, investors, and civil society in the attempt to create a global transparency standard for the gas, oil and mining sectors around the world.<sup>60</sup> A multi-stakeholder group consisting of representatives of the government, mining companies and civil society performs monitoring and reporting tasks as set out by the EITI Standard of implementation.<sup>61</sup> An EITI country report can provide the basis for transparency reforms. It can ensure in particular that governments work towards the development of all three generations of transparency by fulfilling, first, their own duty to inform all stakeholders of their own rules and policies, then by imposing on mining companies a duty to disclose information about their money matters (targeted transparency), and, finally, by ensuring that civil society is able not only to voice its concerns about government policies and business practices but influence them (collaborative transparency).<sup>62</sup> The EITI Standard also covers all stages of the value chain, contract transparency, government expenditures, revenue transfer to local governments, social expenditure and infrastructure investments. It sets out the requirements that the participating countries must meet in order to become EITI compliant.<sup>63</sup> While China is not one of the participating countries, Peru was the first Latin American country to join the initiative in 2007 and is considered to be a compliant country.<sup>64</sup> At first, the Chinese firms in Peru declined to participate in the initiative, but the two cases below indicate that they have changed their position on the matter.<sup>65</sup>

### **III. TRANSPARENCY TESTED BY PERU AND CHINGA: LAWS, POLITICS AND PRACTICE**

The analysis of the evolution of transparency rules and practices with respect to the China-Peru economic cooperation in the extractive industry is organized below as an examination of the impact of the mandatory international transparency rules and voluntary guidelines relevant to the two countries' governance laws and practices. The case study illustrates the impact of China's 'win-win,' 'no strings attached' policy on the development of South-South agreements and the resulting weak transparency provisions in these agreements. It reveals difficulties in managing the implementation of numerous transparency rules

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<sup>59</sup> Ruben Gonzalez-Vincente, "Mapping Chinese Mining Investment in Latin America: Politics of Market" (2012) 209 *The China Quarterly* 35 at 40.

<sup>60</sup> See <<https://eiti.org/eiti>>.

<sup>61</sup> The EITI Standard 2016 is the most recent edition launched at the EITI Global Conference held in Lima in February 2016, online: <[https://eiti.org/files/english-eiti-standard\\_0.pdf](https://eiti.org/files/english-eiti-standard_0.pdf)>. For more information on the EITI see online: <<https://beta.eiti.org/about/how-we-work>>.

<sup>62</sup> Online: <<https://beta.eiti.org/oversight>>.

<sup>63</sup> Currently, there are 51 countries implementing the EITI but 31 are compliant with the EITI requirements. The EITI Fact Sheet 2016 online: <[https://eiti.org/files/document/eiti\\_factsheet\\_en.pdf](https://eiti.org/files/document/eiti_factsheet_en.pdf)>.

<sup>64</sup> *Ibid.*

<sup>65</sup> See also Jill Shankleman, *Going Global: Chinese Oil and Mining Companies and the Governance of Resource Wealth* (Washington, DC: Woodrow Wilson International Center for Scholars, 2009) at 4.

imposed by different regulatory bodies through several layers of governance. For several decades both Peru and China have engaged with international and regional organization for which transparency is a condition of membership. This engagement has involved building institutions, processes and means of communication between different layers of governance and developing the three generations of transparency. It is not surprising that transparency has evolved differently in these two vastly different political and social contexts and that the role of state and non-state institutions in monitoring and enforcing the implementation of transparency-related reforms, and in mediating communications and the division of power among the different layers of governance, has been framed differently in these two countries.

Laws regulating foreign investment evolved through interaction among different layers of governance and different sources of law. Therefore, in an analysis of the Chinese investments in Peru consideration must be given to international as well as to law. That includes rules of international economic law such as that of the WTO and the relevant FTAs, all of which may directly address the rights and duties of states signatories of these agreements, and more specific international law related to the protection of foreign investments (such as the *ICSID Convention*<sup>66</sup> and BITs) which also provide remedies to foreign investors against states' violation of their treaty rights. Finally, the analysis of the FDI legal regime must include the relevant domestic law, not only commercial, antitrust, tax but also constitutional, administrative, and labour, to name a few related areas, which provides procedures and remedies for both foreign investors and domestic private parties seeking protection of their rights against actions of states and foreign investors.

## **A. China-Peru Economic Cooperation**

Since the 1990s, Peru's economic development has rested primarily on resource extraction and trade and investment liberalization.<sup>67</sup> China's investments in developing countries in general, and in Latin American countries in particular, have focused on extractive industry projects.<sup>68</sup> Since 2010, China has replaced the US as Peru's largest trading partner and as the principal investor in the country's mining sector.<sup>69</sup> The important aspect of the China-Peru economic cooperation is China's financial aid to several development projects in Peru. These projects form part of the broader Chinese strategy of investment in Latin American natural resource industries. China's loans to Latin America and the Caribbean exceeded US \$ 22.1 billion in 2014, surpassing the combined financing from traditional sources—

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<sup>66</sup> *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, (1965), 575 UNTS 159, 4 ILM 532.

<sup>67</sup> Moises, *supra* note 16.

<sup>68</sup> Gas and oil sector accounts for 69% of Chinese M&A investment in Latin America from 2009-2013. See Rebecca Ray & Kevin Gallagher, *China-Latin America Economic Bulletin 2015 Edition*, (2015) Boston University Global Economic Governance Initiative, Discussion Paper 2015/9, at 2; online: <<https://www.bu.edu/pardeeschool/files/2015/02/Economic-Bulletin-2015.pdf>>. The report finds that China's policy banks have become the largest creditors to Latin American governments. *Ibid* at 1.

<sup>69</sup> Michael J. McGuinness, "Beijing the Matchmaker" (2013) 32:6 *International Financial Law Review* 41 at 42.

World Bank and the Inter-American Development Bank.<sup>70</sup> Since 2008 China EXIM Bank and the China Development Bank (CDB) have invested more than US \$ 2 billion in Peru.<sup>71</sup> Most of China's lending has been for energy and infrastructure projects, and half of the financing has been in the form of commodity-backed loans.<sup>72</sup>

The two countries' economic cooperation was initially governed by a rather lean 10-year BIT concluded in 1994.<sup>73</sup> When China entered into its first BITs in the early 1980s in keeping with its economic strategy to attract FDIs it was also trying to enforce regulatory restrictions on foreign investors while supporting domestic SOEs.<sup>74</sup> The 1994 China-Peru BIT was more reflective of China's cautious approach to investing outside of Asia than it was of Peru's interests, which included finding investors for its mining industry projects and securing external financial resources needed for economic development. The 1994 BIT was consistent with the Five Principles of Peaceful Co-Existence of Chinese foreign policy.<sup>75</sup> It included no transparency provisions and made no reference to good governance.

The 2010 China-Peru FTA<sup>76</sup> reflects Peru's experience in negotiating its 2006 FTA with the US and China's new foreign trade practice of modeling its FTAs on NAFTA and on the US FTAs that combine the regulation of trade in goods and services with detailed rules on foreign direct investments.<sup>77</sup> Since 2007, China's regulatory priority has shifted from the regulation of FDIs in China to the protection of Chinese investors abroad. China

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<sup>70</sup> Ray & Gallagher, *supra* note 68 at 1.

<sup>71</sup> China-Latin America Finance Database 2013, online: <<https://www.thedialogue.org/mapList/inted.html#.U4jkyFxtexX0>>.

<sup>72</sup> *Ibid.* See also Jon Brandt et al., *Chinese Engagement in Latin America and the Caribbean: Implications for US Foreign Policy*, American University School of International Service, December 2012, at 7.

<sup>73</sup> *Agreement Between the Government of the Republic of Peru and the Government of the People's Republic of China Concerning the Encouragement and Reciprocal Protection of Investments (China-Peru BIT)*, 9 June 1994, online: Investment Policy Hub UNCTAD <<http://investmentpolicyhub.unctad.org/IIA/country/165/treaty/954>>.

<sup>74</sup> The first generation of Chinese BITs provided for *ad hoc* arbitration, with the scope of arbitrability limited to determining the amount of compensation payable for expropriation. It also provided for what was, at best, very limited national treatment for foreign investors. See Alex Berger, *Is China Following the Global Trend Towards Comprehensive Agreements?* (Bonn: DIE Discussion Paper, 2013) at 7-8. Berger argues that China uses a restrictive, European model of BITs.

<sup>75</sup> The five principles are: mutual respect for each other's sovereignty and territorial integrity, mutual non-aggression, non-interference in each other's internal affairs, equality and mutual benefit, and peaceful co-existence. See Ministry of Foreign Affairs of the People's Republic of China, China's Initiation of the Five Principles of Peaceful Co-existence online: <[http://www.fmprc.gov.cn/mfa\\_eng/ziliao\\_665539/3602\\_665543/3604\\_665547/t18053.shtml](http://www.fmprc.gov.cn/mfa_eng/ziliao_665539/3602_665543/3604_665547/t18053.shtml)>.

<sup>76</sup> *Free Trade Agreement Between the Government of the People's Republic of China and the Government of the Republic of Peru* (China-Peru FTA), signed and in effect on March 1, 2010, online: <<http://fta.mofcom.gov.cn/topic/enperu.shtml>> and <[http://www.sice.oas.org/TPD/PER\\_CHN/Texts\\_28042009\\_e/index\\_e.asp](http://www.sice.oas.org/TPD/PER_CHN/Texts_28042009_e/index_e.asp)>.

<sup>77</sup> Berger, *supra* note 74.

has become the world's third largest outward investor,<sup>78</sup> and it has focused on concluding IIAs that support its SOE investments in natural resource projects overseas.<sup>79</sup> Thus, the 2010 FTA provisions reflect the fact that China's acquisition of minerals from Peru was the primary motivation on its part for the establishment of the free trade area between the two countries.<sup>80</sup>

The general transparency provisions of the 2010 China-Peru FTA are included in Chapter 13 and they refer only to the obligation of each country to publish the relevant laws and regulations that have already been enacted. There is no requirement for the disclosure of information on new laws.<sup>81</sup> Chapter 13 stipulates that each Party shall respond to specific information requests from the other Party but not from individual businesses regarding any laws and regulations that it has already enacted.<sup>82</sup> These provisions protect the right to know and impose a limited duty to disclose on the Parties and their governments. In contrast, GATT Article X and the subsequent WTO Marrakesh Agreements, such as the WTO *Agreement on Technical Barriers to Trade* (TBT Agreement)<sup>83</sup> impose, in addition to the obligation for states to publish all laws and regulations already in force the further obligation for their non-discriminatory, open and predictable administration of trade policies, including the right to appeal all government decisions related to trade policy.<sup>84</sup>

There are no specific transparency provisions in the China-Peru FTA Chapter 10 on investment. Article 139 on investor-state dispute settlement<sup>85</sup> implies that "any dispute between an investor of one Party and the other Party in connection with an investment in the territory of the other Party," including disputes related to violations of transparency obligations by the other Party government, may be submitted to an *ad hoc* arbitral tribunal for a final and binding resolution. The arbitral tribunal may award to an investor monetary damages as a remedy for a loss caused by the action of a government of the Party that violates the FTA provisions.<sup>86</sup> There are no provisions mandating that states or foreign investors must address claims by local communities that their fundamental human rights to health of a safe environment, or their labour rights may have had been negatively affected by the Chinese investments or decisions made by Peruvian government. These last mentioned rights and duties are clearly left to be determined by Peruvian and Chinese domestic legislation related to foreign investments, including rules on transparency and good governance.

## **B. Evolution of Transparency in Peru**

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<sup>78</sup> Karl P. Sauvart & Victor Zitian Chen, "China's Regulatory Framework for Outward Foreign Direct Investment" (2014) 7:1; China Ec. J. 141 at 141. China is only behind the US and Japan as an outward investor.

<sup>79</sup> *Ibid.*

<sup>80</sup> Shankleman, *supra* note 65.

<sup>81</sup> China-Peru 2010 FTA, Article 167 (1).

<sup>82</sup> *Ibid* Article 167(2).

<sup>83</sup> *Agreement on Technical Barriers to Trade* (TBT Agreement), 1868 U.N.T.S. 120, Article 2.

<sup>84</sup> GATT, Article X(3).

<sup>85</sup> China Peru 2010 FTA, Article 139(1).

<sup>86</sup> *Ibid* Article 139(7).

Peru's governance reforms were triggered by its binding international obligations undertaken in the 1990s (such as the WTO Agreements) and by political changes on the domestic front over the same period. First, the right of public access to information (the first generation of transparency) was embedded in the 1993 Constitution in order to bring legitimacy to the controversial, autocratic government of Alberto Fujimori.<sup>87</sup> However, this right was not incorporated in legislation until 2003, when the Ministry Council approved the Transparency and Access to Public Information Law [the Transparency Law]<sup>88</sup> in response to the political instability that peaked upon President Fujimori's resignation in November 2000 amidst corruption scandals and allegations of the misuse of public office. The Transparency Law is part of a new targeted transparency policy aimed at democratization. These changes have coincided with the development of the country's new economic policy based on Peru's commitment to the WTO trade rules and the liberalization of rules governing foreign investment.

According to the Transparency Law, all government information is presumed to be public and all people (including non-Peruvian citizens) have the right to request and obtain any information from the state.<sup>89</sup> All public bodies and government agencies are required to establish websites with a transparency section.<sup>90</sup> The statute has imposed an obligation on government agents to respond to information requests from all parties and to provide consultations where necessary.<sup>91</sup> Peru has enacted several subsequent pieces of legislation to complement the 2003 Transparency Law,<sup>92</sup> to define the government's obligation to self-report and to determine what information is subject to this obligation. However, the 2003 Transparency Law has not been particularly effective because the government has not yet worked out a clear strategy for its implementation.<sup>93</sup> Since the country has lacked both political will and technical expertise in public service matters, it has failed to establish effective implementation and monitoring of compliance at all levels of government.<sup>94</sup>

The Standard Transparency Portal, designed in 2008 by the central government in Lima to facilitate user-friendly public access to information on investment projects undertaken by government bodies, provides what is essentially a one-way flow of information. It is not a forum for the participation of broader society in economic decision-making. The site is technologically difficult to maintain, and it is administratively difficult to coordinate among 13 ministries, 32 decentralized public agencies, 9 regional and 8 local governments. The time needed to train personnel and

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<sup>87</sup> World Bank, *Implementing Right to Information; A Case Study of Peru* (Washington, 2012) at 1, online:

<<http://siteresources.worldbank.org/PUBLICSECTORANDGOVERNANCE/Resources/285741-1343934891414/8787489-1344020463266/RTI-CS-Peru-final.pdf>>.

<sup>88</sup> Law no. 27806; *Ley de Transparencia y Acceso a la Información Pública*. *Ibid* at 144.

<sup>89</sup> *Ibid* at 144.

<sup>90</sup> *Ibid*.

<sup>91</sup> World Bank, *supra* note 87 at 14.

<sup>92</sup> These include Law No. 27444 (the 2007 *Law on General Administrative Procedure*) and the 2008 *Legislative Decree No. 1031* which "aims to improve the efficiency of government business activities. See World Bank, *supra* note 87 at 10.

<sup>93</sup> World Bank, *supra* note 87 at 43.

<sup>94</sup> *Ibid*.



secure the technical assistance needed to maintain the portal adds yet another level of difficulty.

Despite the above problems in improving governance and transparency, the 2013 EITI Report for Peru<sup>95</sup> shows that the level of trust between the central government and local authorities and communities has improved. In 2011, Peru became Latin America's first fully EITI compliant country and the first one to enact domestic legislation implementing ILO Convention 169 (Lei 29785), which provides the indigenous population with the right to prior consultation regarding extractive industry projects within their traditional territories.<sup>96</sup> Yet, there is still work to be done. The Report finds that although half of the taxes paid by the extractive industries have been transferred to the regions, tensions remain between the central and local governments with respect to the lack of transparency and the distribution of extractive wealth.<sup>97</sup>

In sum, Peru's transition from first generation of transparency to targeted and collaborative transparency has been slow and its local governments' level of noncompliance with the Transparency Law remains significant. The transition is driven both by external (international and regional laws) and internal pressure. Legitimacy, accountability and efficiency are necessary attributes for the domestic monitoring and enforcement institutions and processes, including remedies to protect the rights of all stakeholders. Without these attributes in place the right to know and access to information has very little impact on the improvement of human rights.

### C. Evolution of Transparency in China

Prior to its accession to the WTO China's regulatory culture of "patrimonial sovereignty" favoured governance under the political authority of the Communist Party and denounced legal accountability and transparency with respect to the actions of state regulators as tools of capitalist states that were inapplicable to Chinese circumstances.<sup>98</sup> The 1997, the WTO Working Party's Draft Protocol of Accession was the first document that raised the question of China's commitment to the regulatory standards of governance, the liberal principles of government accountability, the rule of law and transparency. The Draft

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<sup>95</sup> Online: <<https://eiti.org/files/Peru-2013-EITI-Report.pdf>>. The Report was published in 2015.

<sup>96</sup> Note that Peru ratified ILO Convention 169 in 1994 but until 2011 never introduced domestic legislation to facilitate its implementation (2011 *Ley del Derecho a la Consulta Previa a los Pueblos Indígenas u Originarios, Reconocido en el Convenio 169 de la Organización Internacional del Trabajo*). See more in Rebecca Ray, Kevin Gallagher, Andres Lopez & Cynthia Sanborn, *China in Latin America: Lessons for South-South Cooperation and Sustainable Development*, Boston University's Global Economic Initiative, April 2015, at 11.

<sup>97</sup> See the summary of the 2013 Peru EITI Report online: <<https://eiti.org/news/peru-ten-years-transparency-oil-gas-and-mining>>. Similar comments regarding slow decentralization are provided in 2014 *Chinese Investment in the Peru's Mining Sector: Corporate Social and Environmental Responsibility*, American University, at 14, online: <[https://www.american.edu/sis/gep/upload/Chinese-Mining-in-Peru-Practicum-Final-Report\\_5\\_22\\_14-1.pdf](https://www.american.edu/sis/gep/upload/Chinese-Mining-in-Peru-Practicum-Final-Report_5_22_14-1.pdf)>.

<sup>98</sup> Pitman B. Potter, *Assessing Treaty Performance in China; Trade and Human Rights* (Vancouver: UBC Press, 2014) at 25. The basis of patrimonial sovereignty is that 'political leaders and administrative agencies may be responsible for society but not to it.' *Ibid*.

Protocol required not only legislative changes but also transformation of China's regulatory culture and practice. The 2001 Protocol of the Accession of the People's Republic of China to the Marrakesh Agreement Establishing the WTO<sup>99</sup> imposed on that country greater obligations related to the transparency principle than have had to be met by any other members.<sup>100</sup> In order to achieve competence and accountability at the central, provincial, and municipal government levels and to ensure transparent, simplified and consistent procedures by which individuals and companies can challenge its administrative laws and decisions,<sup>101</sup> a series of administrative law reforms was required. Since 2006, all central, provincial and local government agencies have been required to inform the Ministry of Commerce (MOFCOM) of all changes to trade laws and of the implementation of any trade-related measures. Those new measures are then published in the China Foreign Trade and Economic Co-operation Gazette.

The general duty of public disclosure imposed by the WTO on all levels of government (central and local) does not apply to Party committees. That is unfortunate since it is these committees that make the decisions with important legal ramifications.<sup>102</sup> The new regulations have also failed to address adequately the right of a private party to a remedy for a loss caused by unlawful administrative acts. Instead, they focus on determining the precise role that local authorities are to play in making administrative decisions.<sup>103</sup> Thus, in China, although the shift in perception on transparency might not be what is needed in order to achieve transparency as interpreted by the WTO, it is possible to say that the central government has succeeded in combining its stated goal of implementing its WTO transparency obligations with other goals such as ensuring political stability in the country.

In addition to the incorporation of transparency mechanisms into its legislative processes, during the mid-2000s, China began developing corporate social responsibility (CSR) rules, including a duty of disclosure regarding the performance of private companies and SOEs.<sup>104</sup> However, legal scholars cannot agree as to the nature and the scope of these CSR duties. Some authors indicate that they are not mandatory and that Chinese companies that are involved in FDIs follow them more closely than do companies that are involved in the domestic market. Chinese SOEs have little experience in engaging with local civil society and labour unions and they still see the CSR as an

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<sup>99</sup> WT/LI/100 2, November 10, 2001.

<sup>100</sup> See Sylvia Ostry, "China and the WTO: Transparency Issue" 3 UCLA J. Int'l L. & Foreign Aff. 1, Julia Ya Qin, "'WTO-Plus' Obligations and Their Implications for the World Trade Organization Legal System" (2003) 37 J. World Trade 483, and Karen Halverson Cross, "China's WTO Accession; Economic, Legal, and Political Implications" (2004) 27 Boston College Int'l & Comp. L. Rev. 319.

<sup>101</sup> Ljiljana Biukovic, "Selective Adaptation of WTO Transparency Norms and Local Practices in China and Japan" (2008) 11:4 J. Int'l Econ. L. 803 at 819-821.

<sup>102</sup> On 2007 *Regulations on Government Disclosure of Information* see Biukovic, *ibid*, at 820.

<sup>103</sup> *Ibid* at 821.

<sup>104</sup> 2006 *Company Law* and 2009 *Guide Opinion on the Social Responsibility in Implementation for the State-Owned Enterprises Controlled by the Central Government*. See also 3<sup>rd</sup> Plenary Session of the 18<sup>th</sup> Central Committee of China Communist Party, November 2013, online: <<http://www.xinhuanet.com/english/special/cpcplenum2013/documents.htm>>.

additional business cost that eats into their profits.<sup>105</sup> Chinese state banks have modified their codes of conduct to include environmental and sustainable development guidelines but have not developed specific guidelines for transparency.<sup>106</sup> However, neither the Chinese government nor the state banks financing the SOEs that have been investing in Peru's mining sector provide sufficient oversight with respect to the Chinese companies' impact on the social, labour, health, and environmental rights of local Peruvian communities.<sup>107</sup> Therefore, Chinese companies operating abroad do comply with local standards and laws if local institutions properly monitor their compliance and enforce those laws and standards.<sup>108</sup>

Despite these changes in China's legislation aimed at providing public access to information and implementing its WTO transparency related obligations, in a 2009 survey, 55 per cent of the participating firms from OECD countries reported "medium to serious" problems in the transparency and predictability of Chinese laws and policies.<sup>109</sup> Furthermore, 59 percent of the firms reported medium to serious problems with the dissemination of information on changes in regulations.<sup>110</sup> The 2013 OECD Report reveals that 96 percent of the central government institutions and most of the local governments have launched official websites but the level of detail varies significantly from site to site.<sup>111</sup> China has also created a special website to provide foreign investors with information related to its laws and regulations on FDIs.<sup>112</sup> A set of updated investment regulations is compiled annually and is posted on this website.<sup>113</sup>

China's WTO accession has strengthened its "right to access" or first generation of transparency policies. This created pre-conditions for developing targeted transparency and achieving a higher quality of public services in that country. Despite the significant administrative law reforms undertaken, however, problems dealing with remedies available to private parties remain unresolved. The 2014 Communiqué of the Fourth

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<sup>105</sup> Embassy of Sweden in Beijing, *A Study on Corporate Social Responsibility Development and Trends in China*, 2014 at 22, online <<http://www.csr-asia.com/report/CSR-development-and-trends-in-China-FINAL-hires.pdf>>.

<sup>106</sup> See Kevin Gallagher, Amos Irwin & Katherine Koleski, *The New Banks in Town: Chinese Finance in Latin America*, (Report to Inter-American Dialogue, February 2012), online: <<http://ase.tufts.edu/gdae/Pubs/rp/GallagherChineseFinanceLatinAmericaBrief.pdf>>.

<sup>107</sup> Yuan Wang & Simon Zadek, *IISD Report; Sustainability Impact of Chinese Outward Direct Investment: A review of the literature*, January 2016 at 60.

<sup>108</sup> *Ibid.*, at 41.

<sup>109</sup> OECD, *Globalization and Emerging Economies: Brazil, Russia, India, Indonesia, China and South Africa* (19 March, 2009) at 391; online: <[http://www.oecd-ilibrary.org/trade/globalisation-and-emerging-economies\\_9789264044814-en](http://www.oecd-ilibrary.org/trade/globalisation-and-emerging-economies_9789264044814-en)>.

<sup>110</sup> *Ibid.*

<sup>111</sup> OECD, *Globalization and Emerging Economies*, *supra* note 109 at 392.

<sup>112</sup> Online: <[www.fdi.gov.cn](http://www.fdi.gov.cn)>.

<sup>113</sup> Article 2 of the 1993 Constitution of Peru. See *2007 Peru-China Free Trade Agreement: Joint Feasibility Study* at 58, online: <<http://www.mincetur.gob.pe/newweb/portals/0/Peru-China%20JFS%20Final.pdf>>. Article 65 of the Constitution also recognized the right of consumers and users to access information on the goods and services available on the market.

Plenum of the 18<sup>th</sup> Chinese Communist Party Congress requested public participation in legislative process but these reforms have yet to be implemented<sup>114</sup>.

The 2015 Regulatory Transparency Scorecard of the US-China Business Council recognizes the areas of improvement of transparency policy but it also reveals the need for increased openness in government decision making. It shows the following two major challenges in measuring the country's progress towards transparency: (i) the lack of clarity about which regulations are subject to the commitment to make information available to the public, and (ii) the government's failure to solicit broad public feedback during the drafting of new laws and regulations.<sup>115</sup> The Scorecard confirms that there is an uneven commitment to government transparency among Chinese regulatory agencies.

On December 22, 2015, Chinese Premier Li Keqiang introduced a new guideline from the State Council mandating increased government transparency and increased public information about government affairs by 2020.<sup>116</sup> China's transparency challenges were discussed at the recent G20 meeting in Shanghai. The culture of secrecy under which the Chinese government operates (under the direct control of the State Council and Chinese Communist Party) was acknowledged.<sup>117</sup> Considerable concern was expressed over the involvement of the state in economic activity and the possibility of unfair treatment of non-state economic actors and foreign investors. Moreover, despite the fact that China has embraced the Internet and computer based technology, it is still far from committing to collaborative transparency.

As mentioned earlier, China's government is not participating in EITI. China has also been reluctant to accept any voluntary transparency initiatives promoted by the OECD, although it is more open to the UN programs related to the issues of economic development but not human rights in general. China has been promoting South-South cooperation on the basis of the principles of peaceful coexistence, such as the principle of non-interference in the political affairs of developing countries.

Most of China's outward FDIs come from SOEs that are financed by state banks such as China Development Bank (CDB) and China EXIM Bank.<sup>118</sup> The SOEs that make foreign investments are tightly controlled organizations that are subject to centralized

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<sup>114</sup> Communiqué of the Fourth Plenum of the 18<sup>th</sup> Chinese Communist Party Congress (23 October 2014) online: <[http://www.china.org.cn/china/fourth\\_plenary\\_session/2014-12/02/content\\_34208801.htm](http://www.china.org.cn/china/fourth_plenary_session/2014-12/02/content_34208801.htm)>.

<sup>115</sup> *USCBC 2015 Regulatory Transparency Scorecard*, US-China Business Council (March 2015) at 2-6, online: <<https://www.uschina.org/sites/default/files/USCBC%202015%20Regulatory%20Transparency%20Scorecard.pdf>>.

<sup>116</sup> Zhang Yi, *Guideline issued to increase government transparency*, China Daily, updated on 18 February 2016.

<sup>117</sup> Ben Bernanke & Peter Olson, "China's transparency challenge" (8 March 2016) *Brookings Institution* (blog), online: <<https://www.brookings.edu/2016/03/08/chinas-transparency-challenges/>>.

<sup>118</sup> For the role of China's policy banks in external trade relationships see Gallagher, Irwin & Koleski, *supra* note 106, and Deborah Brautigam, *The Dragon's Gift: The Real Story of China in Africa* (Oxford: Oxford University Press, 2009) at 142. For more information on China EXIM Bank see online: <<http://english.eximbank.gov.cn/en/>>.

state supervision.<sup>119</sup> The Communist Party of China controls the agency that supervises all SOEs, the Party Organization Department appoints the heads and management of all of the big SOEs,<sup>120</sup> and one third of all SOE employees are party members.<sup>121</sup> The Aluminum Corporation of China (Chinalco), one of the three SOEs that have made the largest investments in other developing countries, started out as an agency that was carved out of the central government structure in 1979. Since 2008, Chinalco's investments have been financed by China EXIM Bank.

#### **D. China's Involvement with Resource Extraction in Peru: Evolution of Transparency in Practice**

China's FDIs in extractive projects in developing countries are generally criticized for serious labour standard violations (including low wages, poor safety measures, and a lack of communication with local unions), for withholding information about their investment plans and revenue transfers, and for their failure to address the environmental and development concerns of the affected local communities. The Shougang and Chinalco investment projects in iron ore and copper mines in Peru are no exception.

In Peru, China's first investment in Latin America, the 1992 Shougang acquisition of Hierro Peru, particularly its Marcona mining operations, gained a bad reputation because of irregularities in the privatization process including a lack of transparency, Shougang's poor performance against local labour and environmental standards, and its failure to fulfill its promises to the local community.<sup>122</sup> The company was fined numerous times for violations of labour and environmental standards. In both Peru and China, domestic laws relevant to direct investments in were not well developed in the early 1990s. Peru's weak institutions were unequipped to the task of monitoring and enforcing the local laws, and the absence of a consultation process with local communities contributed to the crisis. At the time of the Hierro Peru acquisition, Peru was a party to GATT (since 1951), and a member of one regional trade agreement (the Andean Community, since 1969). It was a party to only two BITs<sup>123</sup> and had not yet entered into any FTAs.

Shougang was China's first state-owned investor in Peru and its first ever major direct investment overseas. At the time of the Hierro Peru acquisition, China was not a participant in the GATT trade system and had had very little experience with outward investments beyond Asia and Africa. In fact, China had not engaged in creation of free trade areas prior to its 2001 accession to the WTO. By 1992 China had signed about 30 investment treaties, primarily with European and Asian countries.<sup>124</sup>

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<sup>119</sup> Li-wen Lin & Curtis J. Milhaupt, "We are the (National) Champions: Understanding the Mechanisms of State Capitalism in China" (2013) 65 *Stanford L. Rev.* 697 at 699.

<sup>120</sup> *Ibid* at 726.

<sup>121</sup> *Ibid* at 727.

<sup>122</sup> *Ibid.* See also Amos Irwin & Kevin P. Gallagher, "Chinese Mining in Latin America: A Comparative Perspective" (2013) 22:2 *The Journal of Environment and Development* 207. The authors argue that other investors in the regions, especially from the US, had similar problems in Peru.

<sup>123</sup> In November 1991 Peru signed BITs with Thailand and Switzerland, online: <<http://investmentpolicyhub.unctad.org/IIA/CountryBits/165#iiaInnerMenu>>.

<sup>124</sup> See online: <<http://investmentpolicyhub.unctad.org/IIA/CountryBits/42>>.

Peru and China did not have a BIT or an FTA in place at the time of Shougang's acquisition of Hierro Peru. Therefore, the transparency rules applicable to this transaction were based on the relevant domestic laws of Peru and China and on general public international law, including customary international law. China did not develop any significant regulations for outward FDIs until the mid-2000s<sup>125</sup>. At the time of Hierro Peru's acquisition the Peruvian government was embroiled in a corruption scandal and had been accused of a lack of transparency. The whole matter of the acquisition of the Marcona mining concession from the government was so problematic that it caused major social conflict in the region. The local government had difficulties containing this unrest. Peruvian President Fujimori had initiated economic reforms by privatizing many state owned mining companies, including Hierro Peru, for which Shougang paid US\$188 million even though the asking price had been only US\$22 million. Shougang subsequently failed to live up to its commitments—it invested only \$38 million instead of the promised \$150 million, and it continued to operate the mine without modernizing the facilities, improving workers safety or protecting the environment.<sup>126</sup> Consequently, Hierro Peru had a very high accident rate, caused numerous labour strikes and gained a poor reputation in the local communities. In 2006, the regional government declared a state of “environmental emergency.”

Shougang's project in Peru lacked support from the Chinese government because Shougang was a part of an experimental profit-responsibility system devised in the 1980s.<sup>127</sup> As previously mentioned, there was no Chinese regulatory oversight over its overseas investments and CSR programs were absent in China during the 1990s. Shougang's lack of international experience, including, regrettably, its lack of an understanding of and a willingness to engage with the local communities, the company failed to act promptly to remedy consequences of its violation of Peruvian labour and environmental standards. According to some reports, after the acquisition, Shougang invested US \$39 million in local utilities. The company also claimed to have paid US \$74.75 million in taxes, arguing that half of that should have been given to the community in Marcona.<sup>128</sup> Shougang was fined an annual average of US\$21,000 for environmental standards violations, that was the largest amount ever levied against any Chinese firm in Peru.<sup>129</sup> In 2014, Shougang Hierro Peru even agreed to participate in the next EITI report on Peru.<sup>130</sup> In sum, Shougang has paid for their wrongs with respect to labour and the environment and they have presented the company as good corporate citizens on those two fronts but it still has work to do on transparency. Even after the company's website has been launched, information about its operations remain sketchy and it is still having difficulty in gaining the trust of the local communities.

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<sup>125</sup> Paulina Garzón, *Legal Manual on Chinese Environmental and Social Guidelines for Foreign Loans and Investments: A Guide for Local Communities*, March 2015, Centro De Derechos Económicos y Sociales, CDES at 11, online: <<https://www.wcl.american.edu/environment/documents/manualchino15.pdf>>.

<sup>126</sup> For more on the history of Hierro Peru's operations see Edwin Nieves, “Peru's Environment vs. China's Investment” (2015) 35:19 Washington Report on Hemisphere 4.

<sup>127</sup> Gonzalez-Vincente, *supra* note 59 at 51-52.

<sup>128</sup> Nieves, *supra* note 126 at 5.

<sup>129</sup> *Ibid.*

<sup>130</sup> *Ibid* at 4.

In 2007, fifteen years after Shougang acquired Hierro Peru, Chinalco purchased the Toromocho copper mine from Peru Copper. This has been more of a success story. The first investment contract was signed in 2009. It required expansion of the existing excavations and that involved hiring more workers and relocating an old mining city that had already been contaminated by waste water. The Peruvian government provided support for the project by granting Chinalco a long-term tax holiday.

Chinalco's management made significant efforts to improve relations with the labour unions. It paid its skilled workers wages that were above the market average for the region and has been investing in scholarships and training programs for the local population.<sup>131</sup> Despite its investment in workers safety, Chinalco had several industrial accidents.<sup>132</sup> It benefited from keeping not only Toromocho's advanced mining technology but also the existing management, comprised mainly of North-American and Peruvian staff. That strategy helped Chinalco to utilize local management practices and fit in with local business culture more easily.<sup>133</sup> Thus, although Chinalco did not directly adopt international governance standards, it is possible that its more efficient governance would be attributed to their indirect adoption through the hiring of pre-existing management and staff and its style of engagement with the local communities, and by its reliance on pre-existing local practices. In 2013, Chinalco agreed that it would in future participate in Peru's EITI.<sup>134</sup>

Chinalco worked very hard to improve transparency and to consult with the local communities. After acquisition of the mine, it stepped in to build a new town and to ensure voluntary community relocation, the first of its kind in Peruvian history. The process of consultation related to the expansion of the mine and the resettlement took the form of a Dialogue Table, which is a Peruvian form of governance and negotiations that involves all stakeholders, public and private, and also includes civil society. The resettlement negotiations were in compliance with Peru's domestic laws and its commitment to ILO 169. Despite these consultations, resettlement process of the 5,000 Morococha residents did not go smoothly, and even after it was completed in 2013, the local population complained that neither Chinalco nor the local government acted in good faith.<sup>135</sup>

Finally, it must be noted that Chinalco responded in a timely manner to environmental concerns related to a major leak of the contaminated water in the area. It reinforced the waste discharge facilities, built a 400-cubic-meter retention pond in 2013<sup>136</sup> and resumed operations at the mine in 2014.

Chinalco's investment grew out of political and legal circumstances different from those surrounding the Shougang project. Chinalco's operations were subject to multilayered international and domestic standards and laws related to FDIs. Both Peru and China have felt the impact of the "transparency turn" of the 21<sup>st</sup> century. They have participated in the in multilateral world trade system as WTO members and have immersed

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<sup>131</sup> Sanborn & Chann, *supra* note 15 at 29 and 31.

<sup>132</sup> Sanborn and Chann report one fatal accident in 2011 and two in 2013. *Ibid* at 30.

<sup>133</sup> Gonzales-Vicente, *supra* note 59 at 52-54.

<sup>134</sup> Nieves, *supra* note 126 at 6.

<sup>135</sup> McClatchy DC, *High in Peru's Andes, a Chinese Firm Paid to Build a New Town*, Editorial, November 2, 2015, online:<<http://www.mcclatchydc.com/news/nation-world/world/article42274056.html>>.

<sup>136</sup> Nieves, *supra* note 126 at 6.

themselves in regional economic integration by concluding many FTAs with other countries.<sup>137</sup> As previously mentioned, almost 95 percent of Peru's exports are covered by FTAs. China has concluded more than 100 BITs, many of them since the Shougang investment in Peru. Peru has also become Latin America's leader in good governance and transparency reforms. It underwent constitutional and administrative reforms in the late 1990s, joined EITI in 2007 and has made commitment to publish on line the extractive companies' revenue flows. It has also reaffirmed its commitment to honour its international human rights obligations (ILO 169) and those to protect the communities living close to extractive projects. The Chinese government, too, has also initiated numerous domestic policy reforms, aimed at improving transparency, increasing the accountability of public and private actors involved in trade and investments, and strengthening the provisions related to government agencies' duties of disclosure to and consultation with private parties in the law making process.

#### IV. CONCLUSIONS

This chapter has argued that the principle of transparency has been enshrined in international trade and investment treaties primarily to facilitate the implementation of trade policy goals and to ensure the functioning of transparent, accountable and impartial economic governance by states and that its impact on human rights, other than the right of individuals to market access, is difficult to assess. Even the anticipation of international treaty accession can spark domestic law reforms.<sup>138</sup> Moreover, implementation of international laws is a complex process that often takes several years and is affected by domestic legal, political, economic and social circumstances.<sup>139</sup> Therefore, the proliferation of international transparency laws can operate as one factor influencing reforms in domestic governance and can be a catalyst for a worldwide movement to protect all human rights, but it cannot be a substitute for domestic reforms. Similarly, global governance institutions built to monitor and enforce international transparency laws are not substitutes for domestic governance institutions and the remedies available in domestic legal systems. As this chapter reveals, developing countries such as China and Peru have been undergoing significant domestic governance reforms, partially in response to

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<sup>137</sup> For Peru's FTAs see online:

<[http://www.sice.oas.org/ctyindex/PER/PERAgreements\\_e.asp](http://www.sice.oas.org/ctyindex/PER/PERAgreements_e.asp)>. For China's FTA network see online: < [http://fta.mofcom.gov.cn/english/fta\\_qianshu.shtml](http://fta.mofcom.gov.cn/english/fta_qianshu.shtml)>.

<sup>138</sup> China amended wide range of its laws, including administrative laws, in anticipation of its accession to WTO. Canada amended *Investment Canada Act* and the related *Guidelines for investments by foreign state owned enterprises* (SOEs) in 2012 and 2013 (R.S.C. 1985, c. 28), prior to the ratification of *Canada-China Foreign Investment and Protection and Promotion Agreement* (but after signing it on September 8, 2012). Central and Eastern Europe amended their domestic laws during the process of negotiation of the accession to the European Union and their signing of the Treaty of Accession to European Union. See Frank Emmert & Sinisa Petrovic, "The Past, Present, and Future of EU Enlargement" (2014) 37:5 *Fordham Int'l L. J.* 1350.

<sup>139</sup> International treaty negotiations often take two to five years while international trade and investment treaty implementation may take ten to fifteen years.. See Leonardo Baccini & Johannes Urpelainen, "International Institutions and Domestic Politics: Can Preferential Trading Agreements Help Leaders Promote Economic Reform?" (2014) 76:1 *Journal of Politics* 195 at 201.



international challenges but also due to their political decisions to strengthen domestic transparency and improve the domestic decision-making process. Despite the fact that both countries have created policies to improve the first two generations of transparency, they are yet to create the processes and institutions needed for the functioning of collaborative transparency.