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**The Transparency Rule in International
Investment Law and China's Commitments**

By

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ABSTRACT

The transparency rule has long been applied to guarantee the accessibility, certainty, and predictability of laws. Although it is such a fundamental principle, in international legal regime and in particularly the emerging international investment law regime, it is rarely challenged. Exceptionally, in line with the boom of state-investor arbitration for the resolution of international investment disputes, private parties, especially legal persons or enterprises, are entitled to directly challenge states in accordance with their respective investment laws. The transparency rule in international investment law hence became increasingly useful for private parties in order to protect their interests from being violated by the state.

Considering its increasing relevance, the flows of foreign direct investment (FDI) have become an essential element in the stimulation/growth of the global economy for the past half century. As a result, international investment law has attracted more and more attention and has undergone a rapid development to become vital legal regime in the present international community. By comparison to investment law, international trade law has achieved considerable degree of integration, especially by virtue of the contribution of the World Trade Organization (WTO). However, this was not the case in the international investment law, which still presents a less-developed and largely fragmented landscape. There is no single comprehensive multilateral investment agreement or an international organization competent in the field of international investment. Nevertheless there was a plan for an OECD MAI, which failed in 1998

Taking into account such fragmentation and with the absence of an international investment agreement, the transparency rule has not been harmonized at the international level and instead differs in the many (bilateral) investment instruments. More than merely constituting a simple procedural requirement, the transparency rule has been expanded to be more widely applied and include more requirements, such as its addressees, modalities and intrusiveness (required items of information).

Based on the study of the legal text and arbitration cases, it appears that the nature of the transparency is to promote good governance in the individual states concerned.

From a legal perspective and notably the rule of law, the transparency rule thus determines the degree of the openness of the legal environment and the conduct of the government of the host state for foreign direct investment. Taking into account that the investor-state arbitration has become more and more often adopted as a forum of the resolution of investment disputes, it becomes possible that the non-transparent conducts of the host state might be legally challenged. In that case, the measures taken non-transparently by the host state have been held to be in violation of their international legal obligation by the arbitral tribunals and correspondently compensations shall be paid to the damaged investors. Additionally, the transparency rule is intimately connected with of the issue of fair and equitable treatment (FET). The fair and equitable treatment is one of the basic treatments that shall be entitled to the foreign investors by the host state. The majority of the current international investment treaties involve the fair and equitable treatment clause. Though it is not always the case, usually the transparency rule is included in the fair and equitable treatment standard under different bilateral investment treaties (BITs).

China, as a country that has not frequently been challenged in investor-state arbitration, is therefore not well- experienced in developing its international investment law. However, China has in only two decades incorporated a number of bilateral investment treaties (BITs) or other kinds of investment related treaties which involve either provision related to transparency or to FET. In other words, China has undertaken various commitments with regard to transparency on the basis of considerable number of international agreements. Although some progress in fulfilling its transparency commitments has been made, China is still in the process of dealing with the existing deficiencies of its domestic legal situation and faces challenges brought about by the transparency commitments under its investment related international agreements. In the final part of the thesis, a conclusion is drafted to summarize the preceding parts. To reduce the legal risks, it would be suggested that China be more careful in incorporating the transparency provision and the fair and equitable clause as well as to further improve its implementation of transparency commitments at the provincial and local level.

KEY WORDS: transparency rule, the international investment law, the fair and equitable treatment, China's transparency commitment

**THE TRANSPARENCY RULE IN
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