

TRANSPARENCY IN INTERNATIONAL LAW

While its importance in domestic law has long been acknowledged, transparency has until now remained largely unexplored in international law. This study of transparency issues in key areas such as international economic law, environmental law, human rights law and humanitarian law brings together new and important insights on this pressing issue. Contributors explore the framing and content of transparency in their respective fields with regard to proceedings, institutions, law-making processes and legal culture, and a selection of cross-cutting essays completes the study by examining transparency in international law-making and adjudication.

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ANDREA BIANCHI
and
ANNE PETERS



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PREFACE

Some joint academic projects originate from, and thrive on, long-established professional partnerships and scientific affinities. Others are far more casual and spontaneous. Happenstance definitely plays a role in the latter. The idea of doing a research project together came to us while walking to a restaurant in the streets of Washington DC on a mild evening in January 2008. The Joint Leadership Retreat (what a pompous name in retrospect!) between the American and the European Societies of International Law provided both the setting and the occasion for the conversation and the walk. Anne put the topic of transparency forward, and she had a doctoral student working on the topic. To strike a deal on a scientific project in a few minutes must be fairly rare in the profession! And yet this is precisely what happened that evening in Washington DC.

Upon our return to Switzerland, we set out to apply for a research grant. I suppose it was at this stage, when we had to prepare the research project, that we realized the complexity of the task. Transparency is not a distinctly legal concept and its contours are rather blurred. It means different things to different people and it is used in highly heterogeneous contexts. Most of the time it is mentioned in relation to legitimacy, accountability and democratic governance. We decided to give the contributors a wide measure of discretion as regards the way in which they would use transparency. Rather than coercing their thoughts and analytical frame by providing a definition, we preferred to wait for the result of their inductive analysis. The way in which the contributors deal with transparency – we thought – might shed light on the understanding of transparency in the profession.

Along similar lines of reasoning, we decided to structure the book on the basis of subject areas. We thought that exploring what role transparency plays in the different domains of international law might better contribute to the understanding of its potential as a general concept or norm, and of its current relevance to the international legal system. The realization, early on in the project, that transparency could accomplish

very different functions, depending on the area in which it applies or is invoked, recomfirmed us in our initial choice. After all, as Pierre Bourdieu used to say, it is one of the most serious epistemological errors to ‘put the scholar inside the machine’ by interpreting the conduct of social agents in conformity with the scholar’s predetermined beliefs and intellectual constructions.

We tried to be eclectic in selecting the research team. We sought a blend of senior and less senior colleagues, of expertise and sensitivity to this particular strand of research. It never is an easy job to get colleagues to work on an edited volume, let alone on such a difficult and relatively new (to international lawyers) topic. In January 2012 we gathered all the contributors in Thun, a picturesque village on the lake bearing the same name, embedded within the northern periphery of the Swiss Alps. The two-day book authors’ retreat proved to be an invaluable intellectual challenge and a most pleasant human experience. Everyone seemed to be well at ease in the informal and cosy setting that the hotel facilities provided, and I trust that the fruitful exchanges we had there greatly contributed to shaping up the final versions of the papers eventually submitted by the authors. It may seem odd to the outsider, but academic conferences and workshops are not necessarily conducive to intellectual exchanges. We take pride in saying that ours definitely was.

Many thanks also to the various persons who were involved in the research project at different stages and in different capacities. In particular we are grateful to Lilian Buchmann, Delphine Hayim, Claudia Jeker, Adil Hasan Khan, Julie Maupin, Lukas Musumeci, Thore Neumann, Julia Otten, Melanie Wahl and Fouad Zarbiev. It is only fair to specify that among all these friends and collaborators to whom we are grateful, Lukas Musumeci and Julia Otten – who have been our respective assistants for most of this research project – deserve special mention. It is Lukas and Julia who ensured the organization and smooth functioning of the retreat and carefully attended to all the other academic and administrative duties that a big project such as this inevitably entails.

We are indebted to a number of institutions that have funded the project. First, and foremost, our gratitude goes to the Swiss National Fund for Research (SNF, *Fonds national Suisse de la recherche scientifique*) that sponsored the research project over two and a half years. It is on this basis of generous funding that we have been able to carry out the project. Thanks to all the officers of the SNF who have dealt with the project. The SNF also contributed to the book authors’ retreat in Thun, together with the *Freiwillige Akademische Gesellschaft Basel* and the

Stiftung zur Förderung der rechtlichen und wirtschaftlichen Forschung an der Universität Basel. However, our seminar in Thun would not have been possible without the financial support of the Swiss Confederation Ministry of Foreign Affairs. Our heartfelt thanks to Ambassador Valentin Zellweger and to Ambassador Jürg Lindenmann, respectively Director and Deputy Director of the International Law Directorate at the Ministry. We also had the pleasure of having Jürg Lindenmann open the workshop in Thun. He did so with his usual elegance and wit, setting the tune for the ensuing debate. We are both impressed at the way in which the Swiss Foreign Ministry's staff are always willing to collaborate with academia. It is very enriching for us and we hope that this is mutual. As non-Swiss nationals we are even more grateful for such an open-minded attitude. Many thanks also to the only real 'intruder' in the Thun meeting: our colleague and friend Andrew Clapham, who kindly agreed to preside over two sessions and joined us in the concluding round table. He brought to the meeting his scholarship, his expertise and his friendship, as he agreed to celebrate his birthday with us in Thun. Our gratitude goes also to the *Wissenschaftskolleg zu Berlin*, a wonderful, intellectually stimulating institution that hosted Anne as a fellow and inspired her concluding chapter.

Finally, thanks to the anonymous referees of Cambridge University Press. The referees unconditionally praised the project and encouraged publication. This certainly was a great boost to our morale and it soothed, at least partly, the anxiety that always accompanies the researcher engaged in a project.

It is always the reader that has the final word on a book, even when the book is addressed to an academic and professional audience. We can only say that we found researching and writing on transparency incredibly stimulating and we hope that readers will find the insights provided in this collection of essays useful for what they do. Most importantly, we hope that this book will provide an opportunity for thinking productively and creatively about the role of transparency in international law.

ABBREVIATIONS

ACCC	Aarhus Convention Compliance Committee
ACP	African, Caribbean and Pacific Group of States
ACTA	Anti-Counterfeiting Agreement
ADB	Asian Development Bank
AfDB	African Development Bank
AIC	Access to Information Committee (World Bank context)
AID	Access to Information Decision (World Bank context)
All ER	All England Law Reports
API	Additional Protocol I to the Geneva Conventions
ASEAN	Association of Southeast Asian Nations
BIT(s)	Bilateral Investment Treaty(-ies)
BMJ	British Medical Journal
BP	British Petroleum
BTWC	Biological and Toxin Weapons Convention
Caricom	Caribbean Community
CBD	Convention on Biological Diversity
CCD	Convention to Combat Desertification
CCPR	International Covenant on Civil and Political Rights
CDC	Centers for Disease Control
CEO	Chief Executive Officer
CETS	Council of Europe Treaty Series
CFI	Court of First Instance
CIA	Central Intelligence Agency
Cir.	Circuit
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CoE	Council of Europe
COP	Conferences of the Parties
CSCE	Conference on Security and Co-operation in Europe
CSR	Corporate Social Responsibility
CWC	Chemical Weapons Convention
DG Trade	Directorate-General Trade

LIST OF ABBREVIATIONS xvii

DSB	dispute settlement body
DSU	Dispute Settlement Understanding
EB	Executive Board
EBRD	European Bank for Reconstruction and Development
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
ECR	European Court Reports
ED	Executive Director
EPO	European Patent Organization
ETA	Euskadi Ta Askatasuna
EU	European Union
FAO	Food and Agriculture Organization
FCTC	Framework Convention on Tobacco Control
FLA	Fair Labor Association
FSB	Financial Stability Board
G-20	Group of Twenty
G-7	Group of Seven
GATT	General Agreement on Tariffs and Trade
GEF	Global Environment Facility
GRI	Global Reporting Initiative
GTI	Global Transparency Initiative
HSVAR	High Seas Vessel Authorization Record
IACtHR	Inter-American Court of Human Rights
IAEA	International Atomic Energy Agency
IBRD	International Bank for Reconstruction and Development
ICANN	Internet Corporation for Assigned Names and Numbers
ICAO	International Civil Aviation Organization
ICC	International Criminal Court, International Chamber of Commerce
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICSID	International Centre for Settlement of Investment Disputes
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDA	International Development Association
IDB	Inter-American Development Bank
IEI(s)	International Environmental Institution(s)
IEO	Independent Evaluation Office
IFAD	International Fund for Agricultural Development
IFC	International Finance Corporation
IGO	Intergovernmental Organization

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IHL	International Humanitarian Law
IHR	International Health Regulations
IISD	International Institute for Sustainable Development
ILO	International Labour Organization
IMF	International Monetary Fund
IMO	International Maritime Organization
INF	Treaty between the United States of America and the Union of Soviet Socialist Republics on the Elimination of Intermediate-range and Shorter-range Missiles
ICPO-Interpol	International Criminal Police Organization
IPCC	Intergovernmental Panel on Climate Change
IPRs	intellectual property rights
ISAF	International Security Assistance Force in Afghanistan
ISO	International Organization for Standardization
ITC	International Trade Centre
ITLOS	International Tribunal for the Law of the Sea
ITU	International Telecommunication Union
IWC	International Whaling Commission
LCIA	London Court of International Arbitration
LMOs	Living Modified Organisms
LMO-FFPs	Living Modified Organisms intended for direct use for Food, Feed, or Processing
MARPOL	International Convention for the Prevention of Pollution from Ships
MEAs	Multilateral Environmental Agreements
MIGA	Multilateral Investment Guarantee Agency
NAAEC	North American Agreement on Environmental Cooperation
NAFTA	North American Free Trade Agreement
NGO(s)	Non-Governmental Organization(s)
NHRI(s)	National Human Rights Institution(s)
NPT	Treaty on the Non-Proliferation of Nuclear Weapons
OAS	Organization of American States
ODAC	Open Democracy Advice Centre
OECD	Organization for Economic Co-operation and Development
OGEMID	Oil-gas-energy-mining-infrastructure Dispute Management
OHCHR	Office of the High Commissioner for Human Rights
OIG	Office of the Inspector-General (Global Fund to Fight AIDS, Tuberculosis and Malaria)
OPCW	Organization for the Prohibition of Chemical Weapons
OSCE	Organization for Security and Co-operation in Europe
PAHO	Pan American Health Organization
Paris MOU	Paris Memorandum of Understanding on Port State Control

LIST OF ABBREVIATIONS xix

PHEIC	Public Health Emergency of International Concern
PIC	Prior Informed Consent
R2P	Responsibility to Protect
RIAA	Reports of International Arbitral Awards
SARS	Severe Acute Respiratory Syndrome
SCC	Stockholm Chamber of Commerce
SOMO	Stichting Onderzoek Multinationale Ondernemingen
START	Strategic Arms Reduction Treaty
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TIEA(s)	Tax Information Exchange Agreement(s)
TRIPs	Agreement on Trade-Related Aspects of Intellectual Property Rights
UNCAC	United Nations Convention Against Corruption
UNCDF	United Nations Capital Development Fund
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNECE	United Nations Economic Commission of Europe
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNFCCC	United Nations Framework Convention on Climate Change
UNFPA	United Nations Population Fund
UNGC	United Nations Global Compact
UN-HABITAT	United Nations Human Settlements Programme
UNHCR	United Nations High Commissioner for Refugees
UNHRC	United Nations Human Rights Council
UNICEF	United Nations Children’s Fund
UNIDO	United Nations Industrial Development Organization
UNIFEM	United Nations Development Fund for Women
UNODC	United Nations Office on Drugs and Crime
UNOPS	United Nations Office for Project Services
UNRWA	United Nations Relief and Works Agency for Palestine Refugees in the Near East
UNSCOM	United Nations Special Commission for Iraq
UNV	United Nations Volunteers
UNWFP	United Nations World Food Programme
UNWTO	United Nations World Tourism Organization
UPU	Universal Postal Union
UPOV	International Union for the Protection of New Varieties of Plants
USC	United States Code
USPTO	United States Patent and Trademarks Office

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USTR	United States Trade Representative
VCLT	Vienna Convention on the Law of Treaties
WHA	World Health Assembly
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WMO	World Meteorological Organization
WTO	World Trade Organization