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A Partial Revolution: The Diplomatic Ethos and Transparency in Intergovernmental Organizations

The World Trade Organization and other intergovernmental organizations confront a crisis of legitimacy that is partly rooted in their perceived secretiveness. These organizations have attempted to address this crisis by promising "the maximum possible level of transparency," but in fact, the improvements have been modest. Policies regarding access to information about intergovernmental organizations' operations continue to accommodate conventions of diplomatic confidentiality. Such conventions are more likely to be breached in areas where disclosure of information is essential to economic liberalization. A true revolution in transparency would require more rigorous policies on disclosure of information held by intergovernmental organizations such as the World Trade Organization, and could be justified as a prerequisite for the exercise of basic human rights, such as the right to participate fully in the policy-making process.

The crisis of legitimacy that now confronts intergovernmental organizations such as the World Trade Organization (WTO) has a precedent.[1] In the decades following the Great Depression, the responsibilities of governments in the advanced capitalist democracies grew substantially. This involved a rapid expansion in the number, size, and influence of administrative agencies that exercised discretion given to them through statutes, or that applied regulations made under authority of law but without close review by legislatures. Power seemed to shift from legislators to bureaucrats, provoking complaints that presaged those now made against the restructured public sector. Bureaucrats, it was said, exercised extraordinary influence—but did so secretively and often capriciously. Administrative agencies, said U.S. Supreme Court justice Robert Jackson, had formed a strange "fourth branch" of government that deranged traditional ideas about the division and control of political power (Rosenbloom 2000). In Britain, Lord Gordon Hewart complained about the "new despotism" of bureaucratic government (Hewart 1929).

Throughout the postwar years, the Western democracies constructed a new regime to regulate and legitimize bureaucratic power. New laws compelled administrative agencies to adopt more open procedures for rulemaking and established mechanisms by which citizens could appeal adverse decisions. Courts became more liberal in providing citizens with judicial remedies for administrative malfeasance. The construction of this new regime required a revision of the long-held belief that the control of administrative behavior should be the sole responsibility of political executives and legislators. Citizens acquired a new set of rights that could be asserted directly against the new fourth branch of government. One of these was the right of access to information held by departments and agencies—established first, and narrowly, in laws such as the U.S. Administrative Procedure Act of 1946, and later, and more broadly, in laws such as the Freedom of Information Act of 1966. Comparable legislation was adopted in other countries. By the end of the century, it was roughly accurate to say that a right to information had been recognized as a prerequisite for the legitimate exercise of public authority—a "constitutive principle" of governance within the nation state (Picciotto 2000).

However, the effectiveness of this new regulatory regime in legitimizing the exercise of public power was soon diminished because of another and equally profound shift in the structure of governmental authority. Influence over the content of public policy has moved from domestic authorities to intergovernmental organizations such as the In-

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ternational Monetary Fund (IMF), the World Bank, and the World Trade Organization, which are not bound by the old regulatory regime and do not seem to respect the "constitutive principles" of legitimate government. This has provoked a revival of complaints about "new despotism"—this time aimed at intergovernmental organizations rather than the administrative arms of national and subnational governments.

The World Trade Organization has been the object of much of this criticism. In 1996, Ralph Nader complained that important decisions on trade policy were now made by "a group of unelected bureaucrats sitting behind closed doors in Geneva" (Nader and Wallach 1996). Shortly after the WTO's Seattle ministerial meeting, Oxfam UK argued the organization confronted "a crisis of legitimacy" created as a result of "shadowy processes [that] are more medieval than millennial" (Oxfam UK 2000, 4). "The WTO operates in a secretive, exclusionary manner," said a manifesto circulated at the same time by a broad coalition of nongovernmental organizations. "People must have the right to self-determination and the right to know and decide on international commercial commitments. Among other things, this requires that decision-making processes be democratic, transparent and inclusive" (Raghavan 2000b).

Intergovernmental organizations have attempted reforms to rebut these criticisms. In 1996, the WTO's member states promised "the maximum possible level of transparency" in the organization (WTO 1996b). Former Secretary General Michael Moore said in July 2002 that the WTO had become "more transparent and accountable in the way we do things and the way we take decisions" (WTO 2002a). Stanley Fischer, former chief economist of the International Monetary Fund, says there has been a "transparency revolution"—a profound "culture change"—within that organization as well (Fischer 2001). "We used to publish nothing," said another IMF official, "Now we publish everything" (Dawson 2003). The World Bank has also undertaken reforms that it recently said would bring "greater transparency and accountability" to its operations (World Bank 2001).

Such claims must be treated skeptically. In fact, reforms aimed at promoting transparency within organizations such as the WTO have had limited reach. Such reform challenges deeply entrenched conventions about the confidentiality of intergovernmental communications and the right of states to retain control over the dissemination of information. Most often, reforms have carefully worked around such norms of confidentiality. Where clear disclosure requirements have been imposed on governments, they typically aim at a narrow range of information the disclosure of which is thought to be essential to the projects of trade and financial liberalization.

A true revolution in transparency would require more substantial steps to affirm a right to information relating to the activities of intergovernmental organizations and greater candor on the part of advanced economies about the limitations of the transparency agenda that is transmitted to the administrative apparatuses of other states through the WTO and IMF. More radical steps in transparency with regard to the operations of these organizations might be justified to protect basic human rights, such as the right to participate actively in the policy-making process.

The "Vice of Publicity"

The effort to improve the transparency of intergovernmental organizations has not been easy because it challenges long-established norms of international relations. For centuries, executives have expected to conduct foreign relations with considerable autonomy. A strong code of secrecy about the conduct of intergovernmental affairs has been important in preserving this autonomy.

That there is a well-entrenched norm of diplomatic confidentiality is beyond dispute. G. R. Berridge (2002) suggests that secrecy is one of the main characteristics of the system of diplomacy constructed to manage relations among European states in the modern age. J. H. H. Weiler (2000) observes that the "ethos of confidentiality" continues to be a hallmark of modern diplomacy. In practice, the ethos of confidentiality is evidenced in two ways. The first is the unwillingness of executives to disclose their own views or plans relating to the conduct of intergovernmental relations. In the United States, for example, the right to keep such secrets is central to the doctrine of executive privilege (Rozell 1994). In Commonwealth countries, it is contained within the doctrine of crown privilege or public interest immunity.

The ethos of confidentiality is also manifest in the categorical refusal of governments to release information provided in confidence by other governments, even if the information is completely innocuous.[2] This is sometimes described as the rule of "originator control": The government that produced a document is given absolute discretion about its distribution.

The ethos of confidentiality is typically defended on realist grounds. The capacity of diplomats to resolve conflict is thought to hinge on their ability to manage the number and type of parties to the conflict (Schattschneider 1960; Elster 1995; Weiler 2000, 243). More open discussion of interstate conflicts may also increase pressure on government leaders to articulate basic principles or emphasize doctrinal differences, which may complicate the process of conflict resolution (Watson 1983, 136). Hans Morgenthau warned against the "vice of publicity" in diplomacy, observing, "It takes only common sense derived

from daily experience to realize that it is impossible to negotiate in public on anything in which parties other than the negotiators are interested.… The degeneration of diplomatic intercourse into a propaganda match is … the inevitable concomitant of the publicity of the new diplomacy" (1954, 519–21). Realists also suggest the mass public is too shortsighted and ill informed to make sound decisions on foreign policy (Alterman 1998, 1–19). Furthermore, the costs of poor decision making in the field of international relations could be extraordinary, bearing as they do on matters of war and peace. The institutions and conventions of diplomacy emerged at a time when the state system was fragile, and "the risk of resort to force of arms was inevitably and always present" (Watson 1983, 104).

In the last half-century, profound social changes have challenged executive prerogatives in a range of policy fields. The franchise has broadened, and electorates have become better educated and more conscious of their political participation rights. Trust in government has declined precipitously. One result has been the adoption of several institutional innovations—stronger rules on administrative procedures, broader opportunities for judicial review, more extensive consultative procedures, funding for nongovernmental advocacy groups, rules on disclosure of information—intended to restrict the autonomy of political executives. However, the field of international relations is, to some degree, protected from efforts to check executive prerogatives. In the United States, Eric Alterman complains that foreign policy is still "deliberately shielded from the effects of democratic debate, with virtually no institutionalized democratic participation" (Alterman 1998, 4). Other commentators have suggested the preservation of executive prerogatives in this field has produced a form of bifurcated government.[3]

This incongruity in the treatment of executive power is evident in the drafting of national right-to-information laws. Many Western democracies have adopted such laws as electorates reacted against executive authority. However, these laws rarely impinge on executive prerogatives in the field of international relations. For example, Canada's Access to Information Act denies access to information when its disclosure could reasonably be expected to be injurious to international affairs,[4] and Canadian courts have made clear their reluctance to question the judgment of officials regarding the risk of injury. In the 1997 *Do-Ky* decision, the Federal Court of Canada suggested that fear of harm to Canada's reputation caused by breaching diplomatic norms of confidentiality would itself justify withholding information.[5]

A similar approach is taken in other established democracies. When the post-Watergate Congress attempted to strengthen the United States's Freedom of Information Act, it conceded the executive branch should continue to have broad authority to withhold information about foreign policy based on its "unique insights into what adverse effects might occur as a result of public disclosure."[6] In *United States v. Nixon* (418 U.S. 683 [1974]), the U.S. Supreme Court made clear that a president's decision to refuse access to "diplomatic secrets" should be treated with "utmost deference."

National right-to-information laws are even more careful in their treatment of information received in confidence from other governments. The rule of originator control is preserved: Final authority over the release of a document remains with the state that originally produced the document.[7] As the Canadian government observed during the debate over adoption of the Access to Information Act, domestic law acts on "the principle that the information is the other country's, not Canada's, to dispose of" (Fox 1980). This is a more severe rule than is applied to information provided to governments by domestic nonstate actors: Government institutions are more likely to have discretion to release personal information provided by individuals, or information provided in confidence by businesses, if disclosure is determined to be in the public interest.[8] In the *Do-Ky* case, Canadian diplomats made clear their reluctance to challenge the ethos of confidentiality: "Canada cannot afford to get too far in front of the expectations of those with whom we conduct business. We are not a great power. When we do not conform, or are seen not to conform, to their expectations of us, other countries do not change their practices to accommodate us. They simply adjust their expectations of us and react accordingly."[9]

Intergovernmental organizations such as the WTO, as products of diplomacy, are also imbued with this deeply rooted ethos of confidentiality (Weiler 2000). And yet the expanding role of such organizations has seemed, to many domestic observers, to create new reasons for questioning the ethos. In many cases, the disputes being resolved through intergovernmental processes do not relate directly to national security or the stability of the state system. On the contrary, they address problems of economic organization or social welfare that might otherwise have been addressed under the more liberal rules governing the "domestic" half of our bifurcated governments. The reallocation of these responsibilities to the sphere of intergovernmental relations has produced strong challenges to the more constrictive norms on transparency and participation that have traditionally prevailed in that sphere.

Access to Information within Intergovernmental Organizations

The fight for greater transparency in the WTO and other intergovernmental organizations challenges this conven-

tion of confidentiality, and the modest accomplishments of the last decade are evidence of this convention's durability. The WTO and other intergovernmental organizations may promise "the maximum possible level of transparency," but in practice improvements in policies on access to information have been cautious, and they have never directly challenged the convention of confidentiality in intergovernmental affairs. A brief review of the disclosure policies of the major intergovernmental organizations illustrates this point.

World Trade Organization

The WTO's policy on access to documents was laid down in a decision of its General Council six months before its 1996 Singapore conference. The 1996 decision modified the general rule that any document circulated to WTO members should be treated as restricted and not distributed publicly. In fact, the decision appeared to reverse this presumption entirely by proposing that WTO documents should generally circulate on an unrestricted basis (WTO 1996a).

As critics have pointed out,[10] the decision suffered from two substantial flaws. The first was the extensive list of documents that were exempted from the new presumption of immediate derestriction. Most documents were only to be considered for derestriction six months after circulation. These included timetables of meetings of WTO bodies and committees, draft agendas, Secretariat background notes, and other working documents that are essential for following the day-to-day operations of the WTO (Oxfam UK 2000, 27). Minutes of the meetings of all WTO bodies were also to be withheld for six months, as were some documents relating to overall reviews of national trade policies and the international trading environment. Furthermore, governments retained a general discretion to exempt from automatic disclosure any other documents submitted to the WTO Secretariat.

The second flaw of the 1996 decision related to the treatment of exempted documents. The policy stipulated they should be considered for derestriction six months after circulation. However, decision making within the WTO is based on consensus; as a result, derestriction could be blocked if only one government—for instance, the government that first circulated the document—objected. An articulation of reasons was not required. In 1999, for example, Mexico single-handedly blocked the derestriction of background papers relating to agricultural trade, despite arguments by the WTO Secretariat and many other nations that derestriction would enhance transparency (WTO, Agriculture Committee 1999, 9–10).

There were many proposals to reform the 1996 decision. In 1997, a major nongovernmental organization suggested the WTO should adopt a policy roughly comparable to that contained in national right-to-information laws, in which WTO documents would be accessible unless a denial of access could be shown to be essential to protect specified interests (Weiner and Van Dyke 1997). Canada and the United States made less radical proposals aimed at widening the class of documents that were automatically derestricted and shortening the period for which other documents could be withheld (United States and Canada 1998). In December 2001, the WTO Secretariat itself produced an ambitious proposal that would automatically derestrict almost all working documents and check the ability of governments to restrict their own documents (WTO 2001a). However, the need for consensus again stymied reform. Secretary General Michael Moore conceded in January 2002 that a formal review of the derestriction policy begun four years earlier has produced "little movement" on the subject (WTO 2002c).

A compromise reform of the 1996 policy was finally adopted by the WTO General Council in May 2002 (WTO 2002d). On two key points, the new policy retreated from the WTO Secretariat's proposal of December 2001. Member states preserved the right to block public access to documents produced by the Secretariat for WTO bodies for up to three months. This limited the power of individual states to block access indefinitely, as they could under the 1996 policy, but it also retreated from the Secretariat's bolder plan to eliminate this power entirely. With regard to documents actually provided by member states, the retreat was more substantial: Here, governments retained their power to block access indefinitely.

The European Community complained the 2001 proposals had been "considerably watered down"—a sentiment shared by the United States and Canada—but acceded to the proposed compromise. "If Members sought perfection on every point," said the General Council's chairman, "consultation would likely continue for another four years" (WTO 2002b, 5–8).

The debate over reform of the derestriction policy has been shaped by two considerations. Attempts to limit the circulation of restricted documents are acknowledged to be futile: The WTO has 142 members with sharply divergent interests, and it is inevitable that information will leak to well-connected nongovernmental organizations (WTO, General Council 2001, 19). However, there is an important distinction between discrete leaking to trusted allies and the automatic publication of documents on the WTO Web site. Some less influential states worry that automatic publication will discourage candor or lead to last-minute submissions designed to thwart publication requirements, undermining their ability to monitor activity within the WTO. "Radical derestriction," Bulgaria said in July 2001, could lead to a proliferation of "unofficial material which were of limited availability, did not remain in the records,

[and] would never be derestricted" (WTO, General Council 2001, 19–20).

Whether the Bulgarian concern is reasonable is a matter of debate even among less advantaged states. However, it does highlight another significant limitation of WTO policy on access to documents. The policy does not provide access to "unofficial" documents such as the internal or administrative papers of the Secretariat itself, or other draft or working documents that are circulated to WTO members.[11] Neither does WTO policy provide a right of access to communications from one state to a limited number of other states outside WTO channels. (Indeed, it would be impossible for a WTO policy to establish a right to these documents. In such cases, access would be governed by national right-to-information laws, subject to the broad protection provided in those laws for intergovernmental communications.) As a consequence, the WTO derestriction policy is not in any way comparable to a national right-to-information law. On the contrary, it is what is known in the United Kingdom as a "publication scheme"[12]—a negotiated plan for the dissemination of certain kinds of official documents.

World Bank

The disclosure policies of other intergovernmental organizations have developed in a similarly cautious way. The World Bank first came under pressure to improve disclosure in the 1980s, when it was criticized by nongovernmental organizations for its support of dam-building projects whose social and environmental impacts had been ignored. The U.S. Congress played a key role in shaping Bank policy. The 1989 Pelosi Amendment led to disclosure of environmental assessments on Bank-financed projects (GAO 1998), and the Bank made further commitments to disclosure in anticipation of Congress's approval in 2000 of payments to the International Development Association, an arm of the Bank that provides assistance to the poorest countries (Chamberlain 1999). The Bank released an overhauled information disclosure policy in September 2001.

The new policy purports to establish a "presumption in favor of disclosure" of World Bank documents (World Bank 2002, 2). In fact, this is very far from the case. The policy is in fact another publication scheme, which specifies the conditions under which certain documents will be released and assumes confidentiality for the rest (Bank Information Center 2001). These excluded documents include all internal deliberative papers, communications with other intergovernmental organizations, draft documents not yet approved by the Bank's board, and minutes of board meetings. Some governments were reportedly worried that disclosure of further information about the Board's work "would invite external actors to become involved in the issues discussed by the board" (Bank Information Center 2001).

The Bank's 2001 policy expanded the list of documents that are routinely published. These include environmental assessments, still affected by the Pelosi Amendment, and documents relating to financing of projects or programs for the poorest countries, typically funded out of the International Development Association. In other circumstances, the Bank has simply moved from a categorical refusal of access to a policy of disclosure unless the affected government makes an objection. In other words, the convention of diplomatic confidentiality is wholly preserved. In addition, the policy preserves the right of governments to request the withholding of sensitive information contained in documents that are to be published, and the communication of sensitive material in separate and inaccessible memoranda (Bank Information Center 2001; World Bank 2002, 14–15).

The difficulties with the 2001 policy were illustrated by the controversy surrounding the World Bank's 2002 agreement to provide structural adjustment loans to the government of Uruguay. The Bank's disclosure policy states a "presumption" that Letters of Development Policy that are provided by borrowing governments to the Bank will be publicly disclosed. However, the Uruguayan government exercised its prerogative to block release of the letter relating to the 2002 loans. The letter was later leaked, and it showed the government had assured the Bank it had undertaken extensive consultations with nongovernmental organizations about its plans to cut public-sector salaries and social assistance payments. Critics complained the government's assurances were "completely untrue" (McIntosh 2002).

International Monetary Fund

The IMF has also responded to demands for improved transparency. Critics charged that secretiveness led to errors in the Fund's handling of the Asian financial crisis (Stiglitz 2000), and in October 1998, the U.S. Congress made the provision of $18 billion in support contingent on reform of the Fund's information disclosure policy.[13]

Despite such pressure, the reformed policy—adopted by the IMF in January 2001—has again been drafted as a publication scheme, designed to accommodate the principle of originator control (IMF 2001b). Like the WTO and World Bank policies, it does not establish a general right of access to documents held by the institution. The list of records covered by the policy excludes critical documents, such as the agendas and minutes of meetings of the IMF's Executive Board (Bretton Woods Project 2003). Furthermore, public access to almost all major documents relating to member states is contingent on the consent of their governments (IMF 2001b, table 1). A recent IMF study

found that developing countries withhold consent to one of the most important of these documents—the so-called Article IV staff report on monetary, economic, and structural policies—about half the time (IMF 2003, table 3). The policy *presumes* that "policy intentions documents"[14] provided by governments receiving assistance from the Fund will be made public, but this still implies that nations reserve the right to block disclosure. Governments may also negotiate about the content of documents that are publicly released (Van Houtven 2002, 60).

While the IMF clearly discloses more information than it did a decade ago, it has also been candid about the limits of reform. Former managing director Michel Camdessus observed in 1998, "In these matters, the pace of change is largely in the hands of the IMF's members.… [W]e must recognize that the calls for more IMF transparency are, in many respects, calls on the member countries; after all, it is their policies that will be opened to scrutiny when documents are published. Once consensus is established, we will be enthusiastic to proceed with the necessary adaptation of procedures and policies."

In none of these three cases—the WTO, World Bank, or IMF—has there been a revolution in transparency that has overthrown conventions about diplomatic confidentiality. The notion that nonstate actors have a right to information held by these bodies is far from established. On the contrary, we are at a stage where reforms are halting and still required to conform to the principles that states must consent to the disclosure of information relating to their activities, and that changes in policy on transparency require consensus on the part of all participating states.

There are, furthermore, other policy domains where the ethos of diplomatic confidentiality is actually being reinforced. One of the little-noticed consequences of defense and intelligence integration among states following the end of the cold war has been an increase in the number of bilateral agreements that bind governments to respect the rule of originator control, use all available methods to resist disclosure of information received from other governments, and avoid the resolution of citizen complaints about denial of information by independent tribunals. These commitments wholly contradict the principles that underlie national right-to-information laws.[15] The Canadian government has recently signed such agreements with South Korea and Australia,[16] while the United States is now party to more than 50 such agreements.[17] Whether the consolidation of norms in this sector will affect other sectors remains an open question. It is conceivable that we are witnessing an elaboration of diplomatic conventions, with norms of confidentiality being reinforced in one policy field and loosened in another.

Transparency in the WTO's Dispute Settlement Process

The WTO undertakes functions unlike those performed by the IMF or World Bank. It has also established processes for resolving interstate conflicts on trade matters. The creation of this new dispute settlement mechanism has led once again to calls for increased transparency. However, disagreement about transparency within the WTO's dispute settlement mechanism has proved even more intractable than the debate over access to documents.

Rules governing the dispute settlement mechanism are imbued with the ethos of diplomatic confidentiality and designed to limit the capacity of nongovernmental actors to monitor the process by which disputes are resolved. Expert panels appointed to resolve disputes meet in closed sessions. Only governments have the right to appear before a panel or have their submissions considered by it. All submissions are to be kept confidential, and so are the interim reports that are distributed by each panel for comment by interested governments. Comparable rules are used to preserve confidentiality for the appellate body that may be asked to take up complaints about a panel report.[18]

After their adoption in 1995, these confidentiality rules quickly became the object of protest by American nongovernmental organizations. In 1998, environmental groups complained about their inability to observe or submit briefs to the panel that was appointed to consider challenges to an American law mandating the use of turtle exclusion devices by foreign shrimp fishers. The U.S. government attempted to circumvent the ban on nongovernmental organization's briefs by including them in its own submission, a move that was unsuccessfully resisted by the four developing countries—Thailand, Pakistan, Malaysia, and India—that had initiated the case (WTO 1998). U.S. environmental groups also leaked a restricted copy of the panel's draft report upholding the complaint. Other American groups—such as steel producers threatened by a European challenge to U.S. antidumping laws—also called for a right to participate in the WTO's dispute settlement processes (Coalition for Open Trade 2000).

Nongovernmental organizations in other advanced economies also complained about the secretiveness of dispute settlement procedures,[19] but the impact on government policy was perhaps most obvious in the United States. Concern that the WTO's perceived secretiveness would undermine voters' willingness to accept further liberalization led the Clinton administration to make transparency in the dispute settlement mechanism a "priority issue" for the United States (USTR 1998, 37). The Clinton administration's proposals—open hearings, a right to submit nongovernmental organization briefs, and rapid release of draft decisions (Barshefsky 1999; United States 2000)—

were said to be "critical … in ensuring the long-term credibility of the multilateral system" (U.S. Mission 1999). The proposals have been adopted by the Bush administration (United States 2002). Senator Max Baucus, chair of the U.S. Senate Finance Committee, said in April 2002 that these modifications and other reforms to the Dispute Settlement Understanding were essential to "defuse public mistrust" of the WTO and should be "the single most important goal for U.S. negotiators" in Geneva (Baucus 2002).

The United States has argued that its proposed reforms will help developing countries, who will be able to observe proceedings and "gain practical knowledge" about the dispute settlement system (USTR 2000). Nevertheless, many developing countries have strongly resisted the American proposals. In 1998, Mexico expressed the view of several governments that premature disclosure of draft panel reports encouraged "external pressures of a non-legal kind... [from] certain vested interests" (WTO, General Council 1998). Several developing countries have worried that transparency measures would be exploited by first-world nongovernmental organizations, to the detriment of their own national interests (Oxfam UK 2000, 25).

As a consequence of this profound "conceptual divide" (Raghavan 2000a) on the question of transparency, attempts to reform the Dispute Settlement Understanding have foundered. The WTO missed a deadline, set at the end of the Uruguay Round negotiations, to complete a review of the understanding by 1999. In current negotiations, developing countries have continued to resist measures that would open the dispute settlement mechanism to nongovernmental groups (ICSTD 2002b). In the fall of 2002, it was reported that a group of developing countries had protested that American proposals would result in "trials by media" that could cause "miscarriages of justice" (ICSTD 2002a).

The dimensions of this controversy were illustrated after a decision of the WTO's Appellate Body taken in November 2000. While preparing to hear the appeal of a dispute over restrictions the European Community had imposed on the importation of asbestos products, the Appellate Body announced it would exercise its discretion to accept briefs from nongovernmental groups or individuals (WTO 2001b, 18–23). The United States lauded the decision, but many developing countries protested strongly. In a special session of the General Council, Egypt complained that "the likely beneficiaries of such a decision were those individuals and NGOs who had the capacity in terms of resources and time. Those were entities which had more access to WTO work and documents, and were operating mainly in the developed world with few in developing countries" (WTO 2000, 5). India agreed the decision would "have the implication of putting the developing countries at an even greater disadvantage in view of the relative unpreparedness of their NGOs" (WTO 2000, 10), while Brazil worried that "the dispute settlement mechanism could soon be contaminated by political issues that did not belong to the WTO" (WTO 2000, 12). The Appellate Body subsequently finessed the dispute by rejecting every application to submit a brief it had received from nongovernmental actors (Mavroidis 2001).

The Canadian position in this debate appears to have been equivocal. As in the United States, concern about Canadians' support for liberalization has led the Canadian government to call for improved transparency of dispute settlement procedures (Clark and Morrison 1998, 34; Marchi 1998; Canada 2003). However, it has taken the view that "briefs [are] not a transparency issue" (WTO 2000, 19) and avoided a clear statement of the circumstances under which briefs should be permitted.

The premise underlying the Canadian position is at first plausible: The right to know about the state of discussions in dispute settlement procedures seems distinct from the right to participate directly in those discussions. On the other hand, improved transparency—in the narrow sense—is still likely to foster more extensive public discussion about disputes and more accountability of governments to nonstate actors for statements made in the context of dispute resolution. As a consequence, the risk that dispute settlement will be "contaminated by political issues" and that first-world nongovernmental organizations will garner disproportionate influence is still significant.

"Transmission Belts" for Transparency?

Norms of confidentiality have not been overturned with respect to the internal operations of intergovernmental organizations and the communications conducted through those organizations. However, there is another way in which these organizations, and the agreements upon which they are founded, may shape transparency: by influencing the domestic policies of member states on access to information. In a sense, intergovernmental organizations serve as "transmission belts" for the transfer of understandings about transparency that are already well established in the major trading nations.

In this area, progress toward transparency has been much more rapid. However, it is a distinctive kind of transparency that is being promoted, compelling the release of information that is immediately beneficial to commercial and financial interests and their home states. It is an open question as to whether the program of transparency reforms advocated by organizations such as the WTO and IMF will encourage other kinds of transparency that benefit domestic constituencies more directly.

In fact, information disclosure by member states is one of the main policy instruments relied upon by the IMF and WTO. In 1977, the IMF began a practice of completing

regular reviews of the domestic policies of each member state that might affect exchange rates. Authorized by Article IV of the IMF's Articles of Agreement, the scope of these "surveillance" exercises (the IMF's own phrase) has broadened substantially in the past decade to include "much more detailed examination" of each country's financial sector, patterns of capital investment, and microeconomic policies (Pauly 1997, 42; IMF 2001c). Although some member states have resisted calls for public disclosure of surveillance reports produced by IMF staff, they have for some time been available on an informal basis to rating agencies, lenders, and investors (Group of Independent Experts 1999, 75–76). For small states in particular, the surveillance routine has become an important constraint on domestic policy (Group of Independent Experts 1999, 49), the principal aim of which is to create an international financial architecture that is "conducive to expanding world trade and investment" (Pauly 1997, 112).

The practice of surveillance begun by the IMF has been extended by the trade policy review mechanism that is now incorporated into the WTO agreement.[20] The mechanism's aim is to promote "greater transparency" in national trade policies, and thereby "contribute to improved adherence … to rules, disciplines and commitments" contained in trade agreements.[21] The mechanism is, as Asif Qureshi has noted, "an instrument of enforcement," intended to promote compliance with "a certain normative framework" (1995, 493–94). The reviews often provide other countries with evidence that can be used in later negotiations or disputes (Keesing 1998). The reviews may also be used to "boost investor confidence" by demonstrating that governments are honoring commitments made in trade agreements (Francois 1999, 6).

Other disclosure requirements are also imposed in WTO agreements. Disclosure rules were integral to the oldest component of the WTO agreements, the 1947 General Agreement on Tariffs and Trade. This agreement includes what is now a familiar provision in WTO agreements: a general obligation to publish laws, regulations, judicial decisions, and administrative rulings that would affect matters covered by the agreement—in this case, trade in goods. Intergovernmental agreements that affect trade policy must also be made available. As in domestic right-to-information laws, there are limitations: A government may withhold information if it would impede law enforcement, prejudice legitimate commercial interests, or otherwise harm the public interest.[22]

New right-to-information features were added in the more recent General Agreement on Trade in Services. The obligation to publish relevant documents is replicated; however, governments are also obligated to respond to requests from other governments for "specific information" about their policies affecting trade in services. Each government must designate "enquiry points" that are responsible for replying to such requests.[23]

The obligation to respond to governmental enquiries is contained in several other WTO agreements. The Agreement on the Application of Sanitary and Phytosanitary Measures—commonly known as the SPS Agreement—states that each government must respond to "all reasonable questions" from other governments about its SPS policies and practices.[24] Under the Agreement on Trade-Related Aspects of Intellectual Property Rights, governments must "be prepared to supply, in response to a written request" from another government, information about their policies and practices on intellectual property.[25] The Agreement on Trade-Related Investment Measures requires governments to "accord sympathetic consideration to requests for information" from other governments on matters relating to the agreement.[26] The European Union has proposed that a more strongly worded obligation to respond should be included in a proposed agreement on foreign direct investment (European Community 2002). Under the Agreement on Government Procurement, the government of an unsuccessful foreign supplier may also request information to determine whether a procurement decision has been made fairly and impartially.[27]

The Agreement on Government Procurement includes another innovation: It extends the right of information to nonstate actors. Under the agreement, governments must "promptly provide" foreign suppliers with an explanation of their procurement practices and procedures, as well as reasons for unfavorable decisions. Similarly, the 1997 Agreement on Basic Telecommunication Services is founded on the principle that foreign suppliers have a right to request information about unfavorable licensing decisions.[28] Under the Agreement on Technical Barriers to Trade, governments have an obligation to make information available to foreign producers—and other interested parties in other nations—about proposed changes to technical regulations. Governments must also answer "all reasonable questions" from foreign producers about the application of their technical regulations. This access-to-information code even includes rules about the price that may be charged for information and the language in which it must be provided.[29] The government of Japan has called this "an ideal model" for the proposed agreement on investment (Japan 2002).

The IMF has also become more active in encouraging disclosure of information by national governments. In 1999, the Fund began producing Reports on the Observance of Standards and Codes (ROSCs) that assess governments' compliance with principles of good practice in the design of economic and financial systems. These include principles on transparency in fiscal, monetary, and financial policy, as well as standards on securities regulation and corporate governance (IMF 2001a). It is hoped the disclo-

sure of such information will reduce instability in international capital markets and avoid a reprise of the volatility in investment flows that precipitated the Asian financial crisis of 1997–98 (Kuttner 2001, 150). In this context, transparency is a tool for facilitating the liberalization of capital flows, which the IMF's Interim Committee endorsed in 1997 as one of the central purposes of the Fund (Blustein 2001, 49).

Although participation in IMF reviews of compliance with standards and codes is voluntary, there are powerful pressures on weaker economies to conform. The IMF itself observed that ROSCs are increasingly being used to guide investment decisions in the private sector. In February 2002, one of the largest American pension funds said it relied on ROSCs to select countries in which they were prepared to invest (IMF 2002). Governments will find themselves under increasing pressure to conform these expectations to establish their credibility to foreign investors. Indeed, IMF officials have characterized the new emphasis on standards and policies as "a new kind of *réglementation*—a framework of rules for the conduct of policies and to guide financial policies … [that will] reduce the risk of abrupt changes in market sentiment through greater transparency" (Larsen 2002).

Such measures are intended to improve the transparency of national governments—but it is a certain kind of transparency, aimed at promoting the projects of trade and financial liberalization. Most immediately, it serves the states and corporations in a position to exploit the opportunities presented by such liberalization. As Ann Florini has observed,

> To date, most of the demands for transparency are coming from intergovernmental organizations in the form of new financial and macroeconomic disclosure standards. Their primary purposes are to improve global economic efficiency and to reduce the volatility of international capital flows.… [T]hey are aimed at improving efficiency and safeguarding international investors (although an additional benefit is said to be that citizens will more easily be able to assess the quality of their governments' macroeconomic policies). So far, calls for transparency are not aimed directly at improving equity and promoting the welfare of the poor. (1999, 2)

Similarly, Stephen Gill suggests the main aim of intergovernmental organizations is to pursue a project of "disciplinary neoliberalism"—"a world in which the discipline of capital … would operate along rationalist principles based on full access to relevant public and private information" (2000, 11).

It is a program for improving transparency that is distinct from that typically promoted by domestic advocates of open government, particularly in the developing world. These domestic advocates usually hope to improve access to information about the conduct of police or military forces; personal files collected by intelligence forces; information about the disbursement of public money for schools or local public works; information about decisions of government officials on entitlements to healthcare or education; or information about financial contributions to political parties (UNDP 2002, 82). For example, Kate Doyle writes that Mexico's new freedom of information law could improve access "to the most fundamental government information affecting their daily life," such as local school budgets, crime statistics, antipollution controls, and salaries of public officials (Doyle 2002). Many of these advocates also hope to improve access to information about the internal deliberations of public bodies about policy decisions. Overall, this is a program of reform that aims to improve access to information that is essential to protect an array of basic human rights, including the right to political participation.

Do these two transparency programs—one tied to the project of liberalization, the other tied to the protection of citizens' rights—complement one another, or are they essentially antithetical? To put it another way, does the active promotion of the liberalization-based transparency help or hinder the promotion of rights-based transparency?

Two arguments could be made in favor of the complementarity of the two transparency agendas: one diffuse, and the other more specific. The diffuse argument suggests the emphasis put on transparency by powerful states and intergovernmental organizations helps to build a zeitgeist of governmental openness, which may advantage domestic activists in unexpected ways. It is true, for example, that the last 10 years have witnessed an extraordinary diffusion of national right-to-information laws, establishing broader entitlements to government documents. Almost 30 countries, most of them outside the club of industrialized democracies, have adopted such laws in the last decade (Blanton 2002). On the other hand, this phenomenon may be more directly attributable to the emphasis on democratization following the end of the cold war.

The second argument in favor of complementarity is similar but more specific. It suggests there is a parallel with the history of transparency policies within some industrialized democracies. In the United States and Canada, contemporary right-to-information laws were preceded by administrative procedure laws, which confirmed the obligation of government bodies to publish regulations and internal administrative guidelines and to provide reasons for adverse administrative decisions. These earlier administrative procedure laws have been described as tools used by conservative business interests to constrain the growing power of regulators in the middle decades of the last century (Horwitz 1992). These

early laws provided a precedent for the adoption of broader right-to-information laws, which were again most heavily used by commercial interests. However, it is argued that the tools created by commercial interests also became available to other domestic actors, who used them for more progressive purposes (Arthurs 1997). Recently, for example, social activists have used disclosure laws to promote accountability of national security agencies and to obstruct efforts by conservative governments to dismantle the welfare state.

However, the historical analogy is imperfect. Although earlier reforms in the United States and Canada may have been intended as tools for constraining certain kinds of state activism, they were introduced as universal requirements, affecting all of the administrative activities of government. This quality of universality meant that rules introduced by conservative interests for one purpose could easily be adopted by other interests to control other components of the administrative apparatus of government. By contrast, the transparency rules now being imposed through intergovernmental organizations are limited to specific functions, such as sanitary and phytosanitary regulation or procurement. A general principle regarding transparency could be inferred, but universally applicable tools for achieving transparency have not been created.

In fact, there are reasons to doubt the complementarity of these two transparency programs. In many developing countries, the resources available for the administration of governmental services are highly limited. It is possible the transparency program that is imposed through WTO agreements will compel governments to divert these scarce resources into administrative agencies whose work is most directly related to trade obligations. Several developing countries have recently balked at the burden that might be created by transparency arrangements proposed for a new agreement on investment (ICSTD 2002c). The European Union concedes the difficulty:

> It is objectively difficult for any country to identify and list all the domestic laws and regulations that may be relevant to the operation of foreign investors.… These laws and regulations are usually scattered in different legislative and regulatory texts (even where some of them are collected in an "investment code") and are the responsibility of different branches of government or, in many countries, of independent agencies or sub-national governments. A developing country could need help in financing and training the human resources to comb through such domestic laws and regulations, and to devise suitable, effective and non-cumbersome ways to disseminate the relevant information on its investment regime and to promote investment opportunities in its territory. (European Community 2002)

The European Union insists that such measures are essential to promote "the principle of fairness as well as economic efficiency and legal security" (European Community 2002). But it is obvious the immediate beneficiaries of such reforms are the states or investors who acquire rights to information under the proposed agreement. The effect may be to produce, within developing nations, administrative structures that are relatively robust in areas that are immediately relevant to WTO agreements but otherwise weak.

This tendency may be reinforced by the mechanisms available for enforcement of transparency requirements. States that are dissatisfied with compliance with transparency requirements under WTO obligations can pursue their complaints through the dispute settlement procedures established under WTO agreements. Domestic actors who are dissatisfied with their government's disclosure practices may have fewer resources with which to pursue their complaints, and less effective methods of recourse.

Conclusion

There has been no revolution in transparency in the WTO and other intergovernmental organizations. Although there have been advances in disclosure practices, the ethos of diplomatic confidentiality continues to be respected and remains a significant barrier to greater transparency. Where disclosure obligations are recognized by member states, they are typically tied to a narrow program of reform aimed at promoting trade and financial liberalization.

It is possible to imagine more demanding disclosure regimes for the WTO and IMF. Other intergovernmental organizations, such as the European Union and the United Nations Development Program, have adopted disclosure policies that begin to approximate the right-to-information laws regulating national governments (UNDP 1997; EU 2001). These include a general recognition of a right to information held by the organization, the specification of substantive reasons for nondisclosure, and some mechanism for independent enforcement of the right. This would be a revolution in practice—but would such a revolution be justified?

Arguably, yes. The material question is whether the denial of a right to information would damage the fundamental interests that undergird our conception of basic human rights (Roberts 2001). A strong case can be made that the political participation rights of citizens—such as their right to deliberate on and participate in policy choices that affect them in important ways—are constrained if a high level of transparency is not maintained. The countervailing considerations that have typically been used to justify secrecy—such as imminent threats to public order or the survival of the state—are not present.

The argument that national governments alone should be responsible for attending to these fundamental interests is not compelling. The right to information held by these intergovernmental organizations is inferred directly from basic human rights. The question of whether and how an individual should be informed about the work of an intergovernmental organization cannot be left entirely to national governments unless we have good reason to believe that governments will honor the right fully. In practice, of course, we know this is not the case. Governments do not have incentives to share information and influence, and they regard themselves as bound by norms that preclude the release of information they have received from other governments.

The more difficult argument against increased transparency is grounded in equity—that the right to information is more likely to be exploited by certain groups, and may actually diminish the influence of weaker groups. This is not a novel problem; the same predicament arises within states as well. In that situation, however, we would be leery about remedying the inequity by denying a right to the whole population. The more appropriate logic, equally applicable in the international context, would be to find methods of allowing weaker groups to exploit the opportunities created by the recognition of the right to information.

Equity can also be used to construct a case for a stronger disclosure policy. It is clear that in many cases, information relating to the work of intergovernmental organizations, although ostensibly restricted, is routinely circulated within a small elite of nonstate actors, including important financial and commercial interests and better-connected nongovernmental organizations. Even if inequities exist after a stronger disclosure policy is put into place, they may not be so severe as the inequities that persist under the status quo.

A revolution in transparency would also oblige us to be more candid about the pressures that are put upon smaller and weaker states by arrangements such as the WTO and IMF. It is fashionable for advanced economies to present their policies as the expression of universally acknowledged norms, such as transparency, nondiscrimination, and due process (Zoellick 2001). In reality, we are discriminate about the circumstances in which those norms should be applied. We care particularly about the application of such norms in those parts of the administrative apparatus of other states whose work most directly affects our economic interests.

Controversy over transparency in the WTO and other intergovernmental organizations illustrates a larger problem of contemporary governance. We are often said to be moving into an era of "network governance," in which goals are accomplished by the joint effort of many organizations who pool their resources or sovereignty. Collaborative efforts by states to coordinate economic activity could be construed as examples of network governance; there are many more examples of work that is undertaken by networks of subnational governments, or governmental and nongovernmental bodies.

The effectiveness of network governance appears to be contingent on a rich flow of information among constituents of the network. There is an understandable tendency to give a strong mutual assurance of confidentiality—such as that embodied in the rule of originator control—to promote the flow of information. The incentive to give strong assurances may actually increase with the size of network, as the risk of unauthorized disclosure increases, or it may diminish, as the realities of widespread unauthorized disclosure become apparent.

The tendency, at least in the early stages of network construction, to give strong assurances of confidentiality incurs inevitable costs. It undermines the capacity of actors who are not party to the network—such as legislators or domestic nonstate actors—to hold members of the network accountable for their conduct. The problem of accountability may be exacerbated as the flow of information within the network deepens, and the stock of information held by each member of the network is increasingly contaminated by information provided by other members and protected by the rule of originator control. The tendency over the last decade, at least, has been to give greater weight to the need for network effectiveness rather than external accountability. In the long run, this is an untenable position. A proper balancing of these two values will require an abandonment of the rule of absolute originator control.

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Notes

1. For a survey of the criteria that might be used to define the set of intergovernmental organizations, see Archer (2001, 30–34). Key attributes include a multilateral membership, a permanent and autonomous structure, and an avowed aim of advancing the common interests of members.
2. It is "longstanding custom and accepted practice in international relations," the U.S. Justice Department recently insisted, "to treat as confidential and not subject to public disclosure information and documents exchanged between governments and their officials" (DOJ 1999).
3. This is an amendment of Theodore Draper's notion of a "bifurcated presidency" (Draper 1991, 580–98). In a similar vein, Aaron Wildavsky wrote about the emergence of "two presidencies" (Wildavsky 1969, 230–45).
4. Section 15 of the Access to Information Act.
5. *Hien Do-Ky v. Minister of Foreign Affairs and International Trade*, Federal Court of Canada (T-2366-95, February 6, 1997). The decision was subsequently upheld by the Federal Court's Appeal Division.
6. Conference Committee Report of 1974, Amendments to the Freedom of Information Act, H. Rept. 93-1380, September 25, 1974; also published as S. Rept. 93-1200, October 1, 1974.
7. Section 13 of the Access to Information Act.
8. The rules on treatment of state-to-state communications are specified in section 13 of the Access to Information Act. For the comparable rules on treatment of personal information, see section 19(1)(c) of the Access to Information Act and section 8(2)(m)(i) of the Privacy Act. For business information, see section 20(6) of the Access to Information Act.
9. Statement of the Department of Foreign Affairs and International Trade, quoted in the *Do-Ky* case.
10. See the complaints of the International Centre for Sustainable Trade and Development (1999), ActionAid (2000), and Oxfam UK (2000).
11. Some internal or administrative papers of the Secretariat are contained in the OFFICE collection, and draft documents in the JOBS collection. Neither collection is affected by the derestriction policy.
12. The phrase is used in the United Kingdom's new Freedom of Information Act, 2000.
13. Omnibus Appropriations Bill, H.R. 4328 (PL105-277), section 601.
14. Such as letters of intent or memoranda of economic and financial policies, documents prepared by borrowers that describe the policies that a country intends to implement in the context of its request for financial support from the IMF.
15. For example, section 2(1) of Canada's Access to Information Act says that its purpose is "to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government."
16. The treaty with South Korea (Canada Treaty Series 1999/28) was signed in 1999, the treaty with Australia (Canada Treaty Series 1996/31), in 1996.
17. Response by the U.S. Department of Defense, Freedom of Information Directorate to Request 02-F-1850, September 30, 2002.
18. The operation of the dispute settlement mechanism is governed by the Dispute Settlement Understanding, Annex 2 to the WTO Agreement. See in particular Articles 10, 17.10, and 18 of the understanding and its Appendix 3.3. See also Article VII of the rules of conduct for the understanding on rules and procedures governing the settlement of disputes, December 11, 1996, WTO Document WT/DSB/RC/1. In addition, other documents—such as agendas for meetings of the Dispute Settlement Body and requests from governments to that body for establishment of a panel—are subject to the delayed derestriction rules contained in the derestriction policy (Debevoise 1998, 3).
19. For example, Oxfam UK observed the WTO's policy regarding the role of nongovernmental organizations was more restrictive than that of other intergovernmental organizations.
20. The trade policy review mechanism was actually begun on an interim basis in 1989 and later included in the 1995 agreement establishing the WTO.
21. Marrakesh Agreement Establishing the WTO, Annex III(A).
22. General Agreement on Tariffs and Trade, Article X.
23. General Agreement on Trade in Services, Articles III and III bis.
24. A general obligation to provide information on SPS measures is established in Article 7 of the SPS Agreement. Detailed provisions on access to information are contained in Articles 1, 3, and 5 of Annex B of the Agreement. The agreement is intended to ensure that domestic rules on food safety, and animal and plant health standards, are not used to discriminate against foreign producers.
25. Agreement on Trade-Related Aspects of Intellectual Property Rights, Article 63.
26. Agreement on Trade-Related Investment Measures, Article 6.
27. Agreement on Government Procurement, Articles XVIII and XIX. The agreement also contains the usual obligation to publish laws, regulations, and decisions relating to procurement practices, as well as an obligation to provide statistics on procurement.
28. Reference paper on principles on the regulatory framework for basic telecommunications services, April 1996, Article 4.
29. Agreement on Technical Barriers to Trade, Articles 2.9 and 10. The agreement is intended to ensure that technical regulations such as rules on packaging, marking, and labeling are not used to discriminate against foreign producers.

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