

General Definitions

Transparency:

“The degree to which information is available to outsiders that enables them to have informed voice in decisions and/or assess the decisions made by insiders (Florini 5).”

Source: Florini, Ann Ed. The Right to Know: Transparency for an Open World. Columbia University Press: New York, 2007.

More narrow definition:

“Transparency has many elements: open government, with access to official forums, and institutions that respond to the citizen; freedom of information laws; protection of public interest disclosure (whistleblowing); a free press practising investigative journalism; and a lively civil society sector campaigning for openness of all these kinds.”

Source: Sturges, Paul “Corruption, Transparency, and ICT’s.” International Journal of Information Ethics. Vol. 2 Nov. 2004.

Right to know:

“The people’s right to know is grounded in the people, and directed toward the right of people to know about the actions of their own government.”

Source: United States International Information Program
<http://usinfo.state.gov/products/pubs/democracy/dmpaper10.htm>

Freedom of Information Act (FOIA):

Legal provision that permits citizens to request information from the government.

“The right to information can only be effectively exercised and implemented on the basis of laws, regulating this right in accordance with international standards.”

Source: Freedom of Information Advocates Network <http://foiadvocates.net>

Access to Information (ATI):

“Access to information allows for informed participation by people who have a right to be involved in decisions that affect their lives. Access to information increases accountability and is recognized as a core principle of good governance. “

Source: IFI Transparency Resource: Bank Information Center, freedominfo.org in support of Global Transparency Initiative accessed via freedominfo.org

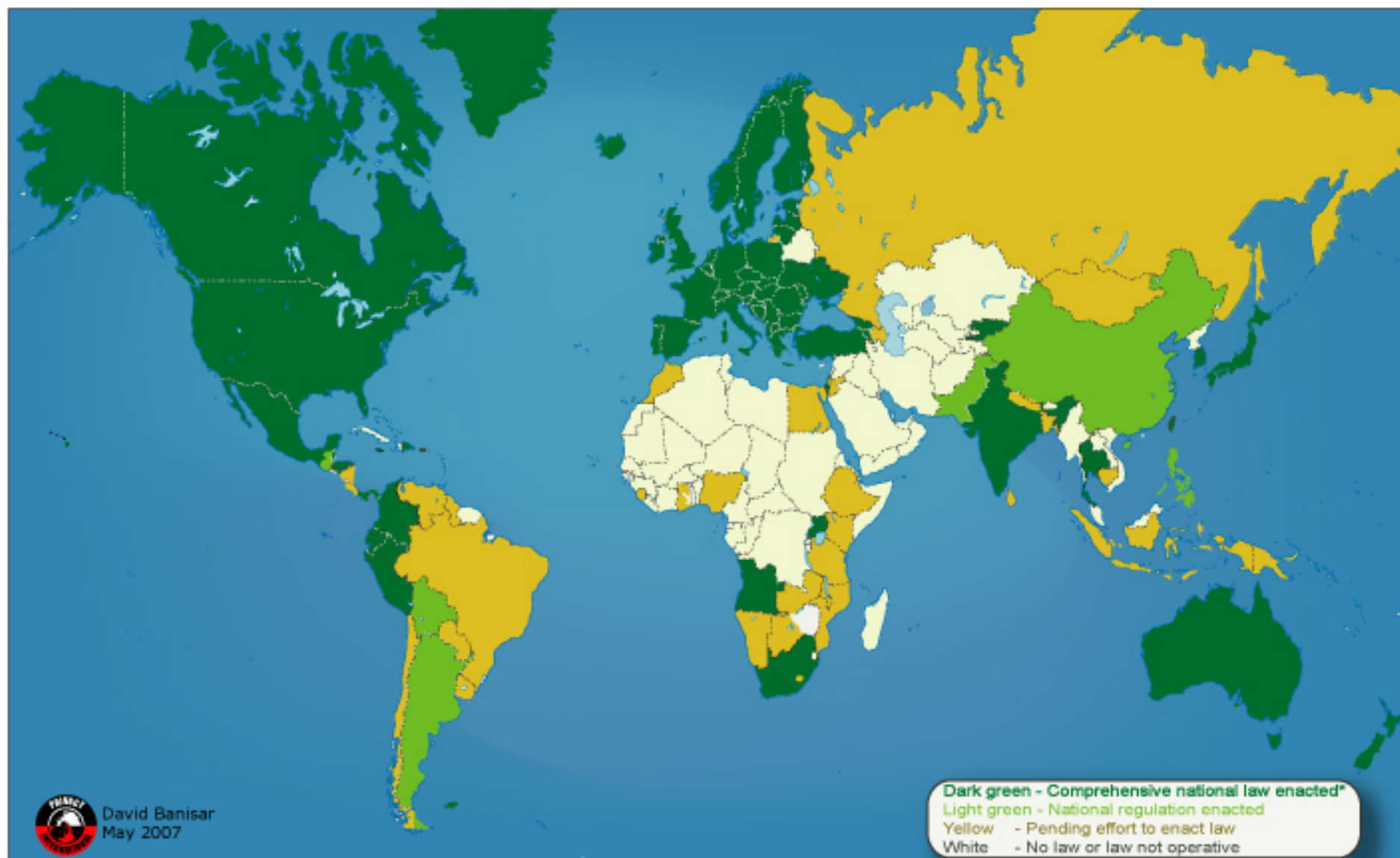
“ATI is the foundation that makes transparency in governance possible (Florini 283).”

Information Communications Technology (ICT):

“ICTs are democratic media with ease of access, comparative ease of use, great data capacity and the immediacy of swift updating.”

Source: Sturges, Paul “Corruption, Transparency, and ICT’s.” International Journal of Information Ethics. Vol. 2 Nov. 2004.

National Freedom of Information Laws 2007



*Not all national laws have been implemented or are effective. See www.privacyinternational.org/foi/survey for analysis and updates of the laws and practices

We Need Fewer Secrets: Jimmy Carter Washington Post Op-Ed

By Jimmy Carter

3 Jul 2006

This article was published in the July 3, 2006, edition of The Washington Post. The U.S. Freedom of Information Act (FOIA) turns 40 tomorrow, the day we celebrate our independence. But this anniversary will not be a day of celebration for the right to information in our country. Our government leaders have become increasingly obsessed with secrecy. Obstructionist policies and deficient practices have ensured that many important public documents and official actions remain hidden from our view.

The events in our nation today -- war, civil rights violations, spiraling energy costs, campaign finance and lobbyist scandals -- dictate the growing need and citizens' desire for access to public documents. A poll conducted last year found that 70 percent of Americans are either somewhat or very concerned about government secrecy. This is understandable when the U.S. government uses at least 50 designations to restrict unclassified information and created 81 percent more "secrets" in 2005 than in 2000, according to the watchdog coalition OpenTheGovernment.org.

Moreover, the response to FOIA requests often does not satisfy the transparency objectives or provisions of the law, which, for example, mandates an answer to information requests within 20 working days. According to the National Security Archives 2003 report, median response times may be as long as 905 working days at the Department of Agriculture and 1,113 working days at the Environmental Protection Agency. The only recourse for unsatisfied requesters is to appeal to the U.S. District Court, which is costly, timely and unavailable to most people. Policies that favor secrecy, implementation that does not satisfy the law, lack of a mandated oversight body and inaccessible enforcement mechanisms have put the United States behind much of the world in the right to information. Increasingly, developed and developing nations are recognizing that a free flow of information is fundamental for democracy. Whether it's government or private companies that provide public services, access to their records increases accountability and allows citizens to participate more fully in public life. It is a critical tool in fighting corruption, and people can use it to improve their own lives in the areas of health care, education, housing and other public services. Perhaps most important, access to information advances citizens' trust in their government, allowing people to understand policy decisions and monitor their implementation.

Nearly 70 countries have passed legislation to ensure the right to request and receive public documents, the vast majority in the past decade and many in middle- and low-income nations. While the United States retreats, the international trend toward transparency grows, with laws often more comprehensive and effective than our own. Unlike FOIA, which covers only the executive branch, modern legislation includes all branches of power and some private companies. Moreover, new access laws establish ways to monitor implementation and enforce the right, holding agencies accountable for providing information quickly and fully.

What difference do these laws make?

In South Africa, a country emerging from authoritarian rule under the apartheid system, the act

covering access to information gives individuals an opportunity to demand public documents and hold government accountable for its actions, an inconceivable notion just a decade ago. Requests have exposed inappropriate land-use practices, outdated HIV-AIDS policies and a scandalous billion-dollar arms deal. In the United Kingdom, the new law forced the government to reveal the factual basis for its decision to go to war in Iraq.

In Jamaica, one of the countries where the Carter Center has worked for the past four years to help establish an access-to-information regime, citizens have used their right to request documents concerning the protection of more than 2,500 children in public orphanages. Two years ago there were credible allegations of sexual and physical abuse. In the past year, a coalition of interested groups has made more than 40 information requests to determine whether new government recommendations were implemented to ensure the future safety and well-being of these vulnerable children.

Even in such unlikely places as Mali, India and Shanghai, efforts that allow access to information are ensuring greater transparency in decision making and a freer flow of information.

In the United States, we must seek amendments to FOIA to be more in line with emerging international standards, such as covering all branches of government; providing an oversight body to monitor compliance; including sanctions for failure to adhere to the law; and establishing an appeal mechanism that is easy to access, speedy and affordable. We cannot take freedom of information for granted. Our democracy depends on it.

The writer was the 39th president and is founder of the Carter Center.



The World's Right to Know

Thomas Blanton

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THE WORLD'S Right to Know

During the last decade, 26 countries have enacted new legislation giving their citizens access to government information. Why? Because the concept of freedom of information is evolving from a moral indictment of secrecy to a tool for market regulation, more efficient government, and economic and technological growth. | **By Thomas Blanton**

History may well remember the era that spanned the collapse of the Soviet Union and the collapse of the World Trade Center as the Decade of Openness. Social movements around the world seized on the demise of communism and the decay of dictatorships to demand more open, democratic, responsive governments. And those governments did respond. Former Russian President Boris Yeltsin partially opened the Soviet archives. Former U.S. President Bill Clinton declassified more government secrets than all his predecessors put together. Truth commissions on three continents exposed disappearances and genocide. Prosecutors hounded state terrorists, courts jailed generals, and the Internet subverted censorship and eroded the monopoly of state-run media.

Most striking of all, during that decade, 26 countries—from Japan to Bulgaria, Ireland to South Africa, and Thailand to Great Britain—enacted formal statutes guaranteeing their citizens' right of access to government information. In the first week after the Japanese access law went into effect in 2001, citizens filed more than 4,000 requests. More than half a million Thais utilized the Official Information Act in its first three years. The U.S. Freedom of Information Act (FOIA) ranks as the most heavily invoked access law in the world. In

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2000, the U.S. federal government received more than 2 million FOIA requests from citizens, corporations, and foreigners (the law is open to “any person”), and it spent about \$1 per U.S. citizen (\$253 million) to administer the law. Multilateral institutions are also trying to meet freedom-of-information challenges from their member states (as in the European Union (EU), where Sweden, Denmark, and Finland are criticizing the culture of secrecy favored by Germany and France) or from civil society (the World Bank is now fumbling with a half-hearted disclosure policy).

In the aftermath of September 11, as control of information emerged as a crucial weapon in the war against terror, troubling signs emerged that governments might be shutting the door on the Decade of Openness. But worldwide, new security measures and censorship laws have been few and far between. Canada contemplated but then backed away from giving its justice minister the power to waive its long-standing access law on an emergency, terrorism-related basis. India passed the Prevention of Terrorism Ordinance, which threatened jail terms for journalists who didn't cooperate with law enforcement, but no such actions have yet occurred. Great Britain delayed implementing its new information access law until 2005 but said the delay had nothing to do with September 11.

Ironically, secrecy has made the most dramatic comeback in the country that purports to be the most democratic. Even before the al Qaeda attacks, the Bush administration claimed executive privilege in



several high-profile requests for information, fighting off congressional calls for the names of private-sector advisors on energy policy and stalling the release of Reagan-era documents under the Presidential Records Act. But September 11 turned this tendency into a habit, sometimes justifiably (as in details of special operations in Afghanistan) but more often reflexively: In recent months, White House officials granted former presidents veto power over release of their administrations' records, ordered agencies to use the most restrictive and legalistic response possible for FOIA requests, and denounced leaks even as mayors and local law enforcement complained about the federal government's failure to share information.

The Bush administration's secrecy obsession will likely prove self-defeating, because like markets, governments don't work well in secret. The most effective opponents of the president's yen for secret military tribunals were not civil libertarians but career government prosecutors and military lawyers, who insisted on more open trials and more due process on legal and constitutional grounds, as well as for reasons of efficiency. The prosecutors know what President Bush does not—that openness fights terrorism by empowering citizens, weeding out the worst policies, and holding officials accountable (not least the foreign despots who are now temporary U.S. allies in the war against terrorism). More broadly, the motivations behind the freedom-of-information movement in countries outside the United States generally remain unchanged by the war on terrorism. Openness advocates are successfully challenging entrenched state and bureaucratic power by arguing that the public's right to know is not just a moral imperative; it is also an indispensable tool for thwarting corruption, waste, and poor governance.

TRANSPARENCY'S SCANDALOUS PAST

Most of the freedom-of-information laws in the world today came about because of competition for political power between parliaments and administrations, ruling and opposition parties, and present and prior regimes. In fact, the first freedom-of-information law—Sweden's 1766 Freedom of the Press Act—was driven by party politics, as the new majority in parliament sought to see documents that the previous government had kept secret.

Likewise, the U.S. FOIA, which has emerged as a model for reformers worldwide, was not the product of democratic enlightenment, but rather Democratic partisanship. The legislation emerged from 10 years of congressional hearings (1955–65) as the Democratic majority sought access to deliberations of the Republican executive branch under former President Dwight D. Eisenhower. The U.S.

FOIA as it exists today—with broad cover-

age, narrow exemptions, and powerful court review of government decisions to withhold information—is actually an amended version of the 1966 act, revised in 1974 by a Democratic Congress over a veto by then Republican President Gerald Ford.

The U.S. FOIA would not be as far-reaching had it not been for Watergate. Indeed, scandals have remained a catalyst for freedom-of-information movements worldwide. Canada passed its freedom-of-information statute in 1982 following scandals over police surveillance and government regulation of industry. Public outcry over conditions in the meat-packing industry and the administration of a public blood bank prompted Ireland to pass a similar law in 1997. Japan's 1999 national access law followed two decades of scandals, from the Lockheed bribery case in the 1970s to the bureaucracy's cover-up of HIV contamination of the blood supply in the early 1990s.



Eat, Drink, Be Corrupt

Some 20 years of press attention and local activism by Japan's relatively small population of private attorneys produced more than 400 freedom-of-information ordinances at the local and prefecture levels. The attorneys, or "citizen ombudsmen," achieved particular success using local access regulations to expose national scandals, such as the billions of yen spent by government officials on food and beverages while entertaining each other. In one famous 1993 case, city records in Sendai revealed that

a party of six officials had consumed 30 bottles of beer, 26 decanters of sake, and 4 bottles of chilled sake, for what one commentator called "a rollicking good time"—at taxpayers' expense. As a result of such revelations, between 1995 and 1997, Japan's 47 prefectures cut their food-and-beverage budgets by more than half, saving 12 billion yen (about \$100 million at the time).

Even more important, the information disclosure movement helped create a new political culture in Japan. Not only

did Japanese citizens line up by the thousands to file information requests at government offices on April 2, 2001, when the new national law went into effect, but political candidates also vied to outdo each other in pledges of openness. In fact, the newly elected governor of Nagano prefecture moved his office from the third floor to the first, encasing it with windows and adopting an open-door policy—the personification of the new politics of openness in Japan.

—T.B.

Japan's information disclosure movement started 20 years ago as local access ordinances unearthed systematic falsifications of government accounts and exposed widespread corruption within the Japanese public works and construction industries—a political bribery system that bulwarked 40 years of one-party rule in Japan [see sidebar above].

While the eruption of scandals has been a catalyst for reform in countries with a long democratic tradition, the collapse of totalitarian regimes helped drive the freedom-of-information movement elsewhere in the world. In Europe, where administrative reform in most former communist countries bogged down in the early 1990s (due to frequent changes in governments and a corrosive debate about banning former Communist Party officials from public office), Hungary took the initiative and passed a freedom-of-information act in 1992. The Hungarian law was, in part, the new regime's revenge against its communist predecessors, opening their files and making them accountable for previous misdeeds. Reassured by the successful model in Hungary, pressured by "open society" nongovernmental organizations (NGOs) such as those funded by billionaire philanthropist George Soros, and eager to integrate into the EU and NATO, other former communist countries engaged in the freedom-of-information debate in the late 1990s. New freedom-of-information legislation was enacted in Estonia, Lithuania,

Latvia, the Czech Republic, Slovakia, and Bulgaria between 1998 and 2000—and even in Bosnia and Herzegovina in 2001, at the behest of the Organization for Security and Co-operation in Europe.

Thailand's 1997 Official Information Act was the culmination of a political reform process that began in 1992 with mass demonstrations against a military regime and became even more urgent with Thailand's economic crisis in 1997. One request filed by a disgruntled mother changed the country's entire primary- and secondary-education system [see sidebar on page 57]. In post-apartheid South Africa, the 1994 constitution under which Nelson Mandela came to power included a specific provision that guarantees citizens' access to state-held information, and South Africa's implementation law, passed in 2000, is probably the strongest in the world.

SETTING A NEW STANDARD

Today, as a consequence of globalization, the very concept of freedom of information is expanding from the purely moral stance of an indictment of secrecy to include a more value-neutral meaning—as another form of market regulation, of more efficient administration of government, and as a contributor to economic growth and the development of information industries. Hungary's adoption of a freedom-of-information statute, for example, signaled a rejec-

Open for Business

Scoring and ranking countries by various governance indicators has become big business. The World Bank alone recently tabulated 17 different polls and surveys covering as many as 190 countries. But the business focus of most of these indexes makes freedom-of-information advocates suspicious of them. Most of the surveys emphasize risk for investors (the largest consumers of such assessments) rather than the experience of citizens. Some rating firms even give a positive score for the coercive capacity of government agencies (such as Russia's Federal Security Service) to enforce contracts and uphold the rule of law.

Consider Singapore. Even though the Corruption Percep-

tions Index published by the anticorruption group Transparency International (TI) gives Singapore a high score, the Singaporean government routinely restricts basic press freedoms. A key reason for this disconnect is that this index does not actually measure transparency but rather the perceptions of corruption among business people, academics, and risk analysts. Another irony for openness advocates is that the consulting firm PricewaterhouseCoopers's Opacity Index—which attempts to measure the amount of foreign capital investment lost due to poor governance—actually uses Singapore as its benchmark for “least opaque” country.

Fortunately, a group of Southeast Asian journalists, led

by the Philippine Center for Investigative Journalism (PCIJ), has developed a more defensible approach to comparative openness. Last year, the PCIJ compiled a list of 45 key government records (including socioeconomic indicators, election campaign contributions, public officials' financial disclosure forms, and audit reports on government agencies), asked eight Southeast Asian governments for these records, and tabulated the responses [see below]. (A “yes” response indicates that access was granted.) Using this methodology, Singapore loses some of its luster, with fewer “yes” answers than Thailand or the Philippines.

—T.B.

When Journalists Ask Governments vs. When Pollsters Ask Business People

Philippine Center for Investigative Journalism Ranking

Measuring openness by tabulating how governments responded to requests for access to official documents

Country	Requests Granted (%)
Philippines	56
Thailand	51
Cambodia	42
Singapore	42
Malaysia	33
Indonesia	18
Vietnam	18
Myanmar (Burma)	4

Transparency International (TI) Rankings (Corruption Perceptions Index 2001)

Measuring government corruption based on the surveyed opinions of business people, academics, and country analysts (on a zero-to-ten scale with zero as highly corrupt and ten as highly clean)

Country	CPI Score
Singapore	9.2
Malaysia	5.0
Thailand	3.2
Philippines	2.9
Vietnam	2.6
Indonesia	1.9

Note: Neither Cambodia nor Myanmar (Burma) was covered because TI found fewer than three reliable survey sources for each of these countries.



tion of its communist past. But perhaps even more important, the law combined new access rights to government records with strong data protection provisions for business, in an attempt to attract German corporate investment by conforming to European—and particularly German—standards that guard trade secrets and personal information.

Financial transparency measures do not necessarily help the cause of political reform, but agile advocates have harnessed the language of transparency to push for political liberalization at the local level. In fact, legal reformers in China, as well as the Communist Party's anticorruption activists, are using this argument to help open the decision-making process in local and provincial governments. Their argument, which acquires greater weight as China enters the World

Trade Organization (WTO), is that regulating governments and corporations (especially global ones) may be done more efficiently by promoting full disclosure of their activities, rather than by relying on multiple bureaucracies in multiple countries that provide multiple opportunities for corruption. Such efforts to promote local transparency are more likely to succeed than would any attempt to implement a national freedom-of-information statute—especially one that would apply to law enforcement or national security or Communist Party deliberations.

Membership in a supranational organization, such as the WTO, does not always encourage transparency—as when NATO refuses to release files without a consensus among all NATO members or requires Poland to adopt a new law on state secrets. But

more often than not, supranational organizations create a demand for greater access to information, both between and within countries. These global or regional governance institutions set up multiple information flows among national governments, multinational organizations, the media, and private citizens' groups, who use each party's information to leverage the others, often with significant domestic impact. For example, the Slovakian press reported EU criticism of misleading economic statistics under the

government of former Prime Minister Vladimir Meciar. This negative publicity led to the revamping of the state statistical office and contributed to both Meciar's political decline and Slovakia's formal adoption of a freedom-of-information law.

THE ABCs OF OPENNESS

Making good use of both moral and efficiency claims, the international freedom-of-information movement stands on the verge of changing the definition of democratic governance. The movement is creating a new norm, a new expectation, and a new threshold requirement for any government to be considered a democracy. Yet at the same time, the disclosure movement does not even know it is a movement; its members are constantly reinventing the wheel and searching for relevant models. Moreover, entrenched state interests continue to launch vigorous counterattacks in the United States and abroad, citing national security and the need for privacy in the deliberative process as counterweights to freedom-of-information arguments. The ideal openness regime would have governments publishing so much that the formal request for specific information (and the resulting administrative and legal process) would become almost unnecessary. Until that time, openness advocates have reached consensus on the five fundamentals of effective freedom-of-information statutes:



First, such statutes should begin with the presumption of openness. In other words, the state does not own the information; it belongs to the citizens. Traditionally, of course, "*L'état, c'est moi*," as France's King Louis XIV declared. Reversing this legal claim and its legacy in official secrecy acts (which turn a blind eye to the public's "right to know") remains the top priority for freedom-of-information movements.

Second, any exceptions to the presumption of openness should be as narrow as possible and written in statute, not sub-

ject to bureaucratic variation and the change of administrations. Reformers in Japan point to overbroad privacy exemptions as a huge obstacle, since they allow bureaucrats to withhold any personal identifier whatsoever, whether or not releasing it would invade the privacy of the person. Consequently, released documents look like Swiss cheese, with every official's name deleted, even the prime minister's.

Third, any exceptions to release should be based on identifiable harm to specific state interests, although many statutes just recite general categories like "national security" or "foreign relations." Most of this is common sense: It's easy to see the harm from releasing data like the design of chemical warheads, identities of spies who could be killed if exposed, bottom-line positions in upcoming treaty negotiations, and the like. But most government secrets are far more subjective and merely time-sensitive. Former U.S. Secretary of State Lawrence Eagleburger has said most of the secrets he saw in his government career could easily be released within 10 years of their creation.

Fourth, even where there is identifiable harm, the harm must outweigh the public interests served by releasing the information. No public interest is served by releasing the design of a nuclear weapon, but the policies that govern the use of nuclear weapons are at the heart of governance and public debate. The United States has even released specifics on the recruitment and payment of spies when that information was nec-

essary in a legal prosecution (another form of public interest), such as in the trial of former Panamanian strongman Manuel Noriega.

Fifth, a court, an information commissioner, an ombudsman, or other authority that is independent of the original bureaucracy holding the information should resolve any dispute over access. In New Zealand, the ombudsman can overrule agency withholdings. In Japan, a three-judge panel decides appeals. And in the United States, a federal judge recently ordered release under FOIA of energy policy records that Vice President Dick Cheney had refused to give to Congress.

In seeking to implement these fundamental principles, the freedom-of-information movement may be focusing too much on statutes and legal language. Free media and active civil society may be more important than laws: In the Philippines, for example, without a formal access law, the media and NGOs have opened government records and even brought down former

President Joseph Estrada. The habits of dissent and resistance may also hurt the movement, since activists have to learn to work with as well as against governments to achieve real openness. Bureaucracies will always confound citizens unless reformers find ways to change bureaucratic incentives (rewarding and promoting officials who are responsive) and to develop some appreciation for administrators'

Membership in a supranational organization, such as the WTO, does not always encourage transparency.

resource constraints and political pressures.

Perhaps the ultimate challenge for the freedom-of-information movement will be the need for governments and citizens alike to adapt to a new cultural and psychological climate. In colloquial Japanese, for

Head of the Class

In early 1998, an elite school in Thailand picked on the wrong mother. Sumalee Limpaovart refused to believe that her brilliant daughter, Nattanich, had failed the entrance exam for an elementary school at the state-run Kasetsart University, so she filed a request at the school for copies of the test sheets and grades for everyone who took the exam.

When the school refused, Sumalee turned to the new Thai access law administered by the Office of the Official Information Commission (OIC). At first, the OIC declared that Sumalee could see only her own daughter's answer sheet. However, an appeals tribunal ruled that the tests and scores were government data, not personal infor-

mation, and could be released. The school refused to comply, and the parents of the other children even sued Sumalee and the appeals tribunal. (One parent tried to get the attorney general to prosecute Sumalee for "misconduct.") Ultimately, the Thai Supreme Court upheld the decision of the appeals tribunal, and the Kasetsart school reluctantly showed Sumalee the grades and test sheets. The documents revealed that a child with the same score as Nattanich—a supposedly failing score—had been admitted to the school, but the school refused to explain exactly how it had picked between the two.

Since the other child came from a prominent family, Sumalee had a pretty good idea

what had happened. She thus filed a complaint with the State Council (which serves as the Constitutional Court) that the school had violated Article 30 of the Thai Constitution, which bans discrimination on the basis of race, nationality, place of birth, age, and social or economic status. The council not only agreed with Sumalee, but also ordered the abolition in all state schools of special admissions criteria based on financial contributions, sponsorships, and kinship arrangements. As a result, test scores are now public, privileged admissions are now prohibited, and Sumalee's case has dramatically raised Thais' awareness of their access rights.

—T.B.

example, the term *okami* (god) is commonly used to refer to government officials. “You can’t complain against the gods,” one Japanese activist told a newspaper, summarizing the difficulty felt by ordinary

people confronting the government. Or in the words of the Bulgarian activist Gergana Jouleva, “Democracy is not an easy task neither for the authorities nor for the citizens.” **FP**

Want to Know More?

Most public discussion on freedom-of-information issues now takes place on the World Wide Web, where a new Soros-funded network called **freedominfo.org** provides country studies and the most comprehensive survey of access statutes worldwide, compiled by David Banisar, author of “**Freedom of Information Around the World**” (London: Privacy International, 2002). The site also has links to national and regional campaign sites, including those of the **Campaign for Freedom of Information** (United Kingdom), the **Access to Information Programme** (Bulgaria), and the **Commonwealth Human Rights Initiative** (India). The freedominfo.org approach builds on the Philippine Center for Investigative Journalism’s (PCIJ) pioneering work, *The Right to Know: Access to Information in Southeast Asia* (Manila: PCIJ and the Southeast Asian Press Alliance, 2001), edited by Sheila Coronel.

On the campaign for openness in the European Union, see the Web site of **Statewatch**, especially the “**Essays for an Open Europe**.” The **Bank Information Center** Web site includes details on the campaign for openness in the multilateral financial institutions. The London-based nongovernmental organization **Article 19**—referring to the 19th article of the Universal Declaration of Human Rights—features useful freedom-of-information legal analysis and advice on its site, including Toby Mendel’s “**The Public’s Right to Know: Principles on Freedom of Information Legislation**” (London: Article 19, 1999). **Privacy International**’s site was the first to feature annual reports on new freedom-of-information developments worldwide, and **Transparency International**’s site includes links to a number of international anticorruption campaigns. **Freedom House**’s most recent global study of media censorship, “**Annual Survey of Press Freedom**” (New York: Freedom House, 2002), reports that the war on terrorism did not seriously impinge on press freedom in 2001.

On the U.S. Freedom of Information Act, see Allan R. Adler’s, ed., *Litigation Under the Federal Open Government Laws* (Washington: American Civil Liberties Union Foundation, 1997) and Herbert N. Foerstel’s interview-based history, *Freedom of Information and the Right to Know: The Origins and Applications of the Freedom of Information Act* (Westport: Greenwood Press, 1999). Norman S. Marsh’s, ed., *Public Access to Government-Held Information* (London: Stevens, 1987) is the only book-length comparative treatment of international freedom-of-information statutes. For a more recent work that focuses on national-security secrecy, see *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information* (The Hague: Martinus Nijhoff Publishers, 1999), edited by Sandra Coliver, Paul Hoffman, Joan Fitzpatrick, and Stephen Bowen. For the best study of an individual country’s freedom-of-information experience, see Lawrence Repeta’s “**Local Government Disclosure Systems in Japan**” (Seattle: National Bureau of Asian Research, 1999).

In “**The End of Secrecy?**” (*FOREIGN POLICY*, Summer 1998), Ann Florini argues that globalization compels governments and private corporations to deliberately divulge their secrets and create a de facto system of “regulation by revelation.” The first iteration of the A.T. Kearney/*FOREIGN POLICY* Magazine Globalization Index, “**Measuring Globalization**” (*FOREIGN POLICY*, January/February 2001), found that the most globalized countries tend to be the least corrupt, as measured by Transparency International.

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International Organizations and Government Transparency: Linking the International and Domestic Realms

ALEXANDRU GRIGORESCU

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In recent years there has been an increased interest in political science in the concept of “transparency.” The literature has emphasized the effects that government transparency can have, especially on democratic consolidation. Yet there has been very little research focusing on the causes of transparency. This study discusses some of the possible factors affecting government transparency and offers several aggregate tests of their relevance. It emphasizes the mechanisms through which governments adopt institutions supporting transparency in order to signal to their societies and to external actors that the information they offer is indeed credible. It argues that such signals are more likely to be offered as the public receives increasing amounts of alternative information from international organizations. The discussion thus links processes taking place at the international level with those in the domestic realm.

The Relevance of Transparency

Political scientists appear to have recently become more aware of the concept of “transparency” and its potential explanatory power. Because of the varied interests in phenomena involving the flow of information, the concept does not appear to be monopolized by any one area of study. Discussions of transparency can be found in studies of international conflict, international organization, environmental politics, monetary policy, trade, corruption, and democratic theory.

In most studies at the international level, government transparency is seen as a factor that enhances cooperation among states and allows for solutions to collective action problems (e.g., Florini, 1997; Stein, 1999; Finel and Lord, 2000:341). In fact, one of the recent explanations offered for the democratic peace finding (i.e., democracies do not fight wars against each other) is based on the transparency of democracies. This is so because negotiations between countries that have “complete information” about each other’s intentions and capabilities are less likely to break down and lead to war. In other words, transparency alleviates the security dilemma and prevents conflict spirals (Finel and Lord, 1999; Ritter, 2000).

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In international trade, the GATT's Trade Policy Review Mechanism was designed as an "exercise in transparency" that encourages more liberal trade policies (Qureshi, 1990:59). In the environmental realm, transparency is also a useful tool that encourages signatories of environmental conventions to comply with the rules of the regime (Mitchell, 1998). This happens, in part, because mechanisms of transparency, such as the OECD's Pollutant Release and Transfer Register, shame polluters to reduce levels of pollution (Florini, 2000).

The globalization of financial markets has brought about discussions of the relevance of transparency in dealing with issues such as international money laundering (Tanzi, 1996). More recently, after the Asian financial crisis, the IMF has emphasized transparency as a common solution to many of the global economic and financial problems (IMF, 1998).

In the domestic realm, government transparency has been discussed as a factor that affects the degree of corruption, as well as economic performance (Kaufmann and Siegelbaum, 1997; Kopits and Craig, 1998; Manzetti, 1999). A recent study of 78 democratizing states over the past 20 years, testing a variety of independent variables, has found that information access is the individual feature that is most reliably significant in explaining economic growth (Siegle, 2001:200).

While economic and political transparency has been touted as especially significant for liberalizing economies and for new democracies, recent events in some of the most democratic and liberal systems have suggested that the issue is relevant for all states. From the refusals of the Bush administration to offer Congress the names of private-sector advisers on energy policy and the stalling of Reagan-era documents under the Presidential Records Act (Blanton, 2002) to the decision of the British government to postpone for another four years the implementation of the Freedom of Information Law (which had already taken decades to pass) (Frankel, 2001), events have shown that the issue of public access to official information has not been entirely solved even in traditional democracies.

In the domestic realm, perhaps most significant, domestic government transparency has been considered to be an important factor contributing to the accountability of democratic government and, implicitly, to democratic consolidation. Democratic theory has long considered that "a key characteristic of democracy is the continued responsiveness of the government to the preferences of its citizens" (Dahl, 1971). Such responsiveness should exist not simply at times of elections, but between elections. Governments need to inform the public of their actions and intentions and offer mechanisms through which officials can be punished for not being representative. Even the most minimal understandings of what democracy entails include the ability of citizens to "complain" (Mueller, 1992) and assume that one should have access to government information in order to know about what to complain.

Thus, transparency of governments toward their societies is seen as a necessary factor of government accountability and responsiveness and, implicitly, of a truly democratic polity (see, e.g., March and Olsen, 1994:162-65). Also, increased transparency leads to greater public trust in government and in the democratic system and, implicitly, to greater likelihood of survival of new democracies.¹ While this study is interested in all aspects of government transparency, it will emphasize the concept as pertaining to democracy and democratic consolidation.

¹ Discussions of this assumption can be found as far back as 1963 when Gabriel Almond and Sidney Verba argued that the survival of democratic institutions is affected by attitudes such as citizens' belief in their ability to influence political decisions. Different facets of this argument can be found in more recent works (e.g., Sartori, 1991; Rose and Haerpfer, 1995:439; Linz and Stepan, 1997).

If transparency is indeed beneficial for democratic governance (as well as for other purposes) how can we have more of it? More specifically, when and how do countries become more transparent?

Surprisingly, there has been little work done to answer this question. The political science literature has tended to focus on the *effects* of government transparency; there have been few studies on the *causes* of transparency. Because most authors view transparency as an intrinsic element of democracy, they often assume the correlation between the two to be perfect. Indeed, most attempts to measure transparency have used measures of democracy as surrogates for transparency (see, e.g., Broz, 1999; Schultz, 1999). While the two are indeed related, the correlation is not perfect. This is true whether one focuses on freedom of the press as a reflection of government transparency (Van Belle, 2000:50) or on freedom of information (FOI).² The lack of perfect correlation is especially relevant for the period of democratic consolidation. During this time, the sequence and speed with which democratic institutions (including those of transparency) emerge may affect a new democracy's likelihood for survival.

The few discussions of causes of transparency are generally found in the literature focusing on corruption and press freedom and point to some domestic factors such as political structure (e.g., Geddes and Neto, 1992) or economic determinants (e.g., Nixon, 1965; Kaufmann and Siegelbaum, 1997; Hellman and Kaufmann, 2001).³ While taking such domestic elements into account, I will focus primarily on an alternative factor affecting government transparency: interaction with international organizations (IOs).

I argue that one of the principal causes of change in domestic transparency (although not the only one) is currently⁴ related to the role of international organizations as alternative sources of information. This role has become increasingly relevant as states have become more "transparent externally" (i.e., they have been offering greater amounts of information to international organizations) and as IOs have themselves become more transparent, offering more information directly to the public. Sometimes, the information made public by IOs differs from that released by governments to their own societies. In order to maintain public support, governments adopt institutions of domestic transparency (such as laws on access to information) as signals intended to boost the credibility of the information they offer to their own public.

The following section discusses the concept of transparency as used in this study and differentiates between it and other similar concepts that are often used interchangeably in the literature. I then focus on the role of IOs in increasing domestic government transparency and offer a set of hypotheses related to the link

² Austria, Luxembourg, and Germany (at the federal level)—all countries considered to be consolidated democracies—have not adopted FOI laws even now, while the U.K. just adopted one in 2000. In contrast, countries like Brazil, Moldova, Slovakia, and Thailand, which are still consolidating their democratic systems, have already adopted such laws (see Florini, 2000; also see European Commission, 2000; Privacy International, 2001).

³ With the exception of the works on press freedom (e.g., Nixon, 1965), these studies tend to discuss the impact of domestic factors on corruption, and not directly on transparency. At the same time, though, this literature emphasizes that government transparency is a powerful (if not the most powerful) remedy to corruption—an assumption reflected in the fact that the main international nongovernmental organization fighting corruption is Transparency International. This implies that the domestic factors that allow for a greater degree of corruption also create incentives to hide information that would reveal corrupt practices.

⁴ The mechanism of "export of transparency" from IOs to new democracies has only recently become relevant. IOs did not have as strong a role of "alternative sources of information" in the 1950s or 1960s as they do today because of the lack of transparency of IOs at that time. I argue that the transparency of second-wave democracies was not truly affected by such organizations. It is thus relevant that most of the democracies of the second wave adopted institutions of transparency very late. Italy and Japan adopted their freedom of information laws in 1990 and 1999, respectively, many decades after they became democracies. Germany has still not adopted such a law at the federal level. It is thus only with the third wave of democracy and the increased transparency of IOs that we see such external impact on domestic transparency.

between domestic and external flows of information. I go on to discuss the operationalization of variables and then use the measurements to test the hypotheses across 49 consolidating democracies, over a period of seven years.

I conclude by briefly discussing the relevance of the findings for the design and reform of international organizations. The main argument is that, if increased domestic transparency indeed leads to increased likelihood of survival of new democracies, less inter-state conflict, greater international cooperation, and improved economic performance, it is important to understand which IOs may affect domestic transparency and how they may do this.

The Concept of Transparency

Although the concept of transparency is increasingly found in the political science literature, its meaning is often left murky.⁵ In part, this is due to the fact that it is used when referring to different aspects related to information flow. For example, in the literature on inter-state conflict, a state is “transparent” if other states can acquire information about societal preferences and support for government actions (e.g., Finel and Lord, 1999; Schultz, 1999). In the international regimes literature, transparency usually refers to the information that governments offer IOs. In studies of corruption, it can refer to the lack of corrupt practices in a country. While these three understandings of transparency are related, and many countries are indeed transparent in all three understandings, there are also many important differences among such countries with regard to the flows of information.

The literature making use of the concept of transparency is expanding to incorporate an ever-increasing number of issue areas. It has become sufficiently diverse to warrant distinguishing among different types of information flows and their characteristics. I therefore begin by discussing how I will be using the concept of transparency. The emphasis in the present research is on the domestic flow of information as a factor affecting democratic consolidation, but the conceptualization of transparency is applicable to other research issues.

First, in the political science literature, the concept of transparency is used to describe information released by governments to external and domestic actors alike. The current study will distinguish between external government transparency (referring to information released by a government to international organizations) and domestic government transparency (referring to information released by a government to its society). This distinction is relevant because there are governments that may be willing to offer large amounts of information—including sensitive information—to IOs,⁶ but are less inclined to offer such information domestically. Conversely, some of the most democratic and domestically transparent political systems are often less inclined to release information to IOs (Mitchell, 1998).

Second, one must distinguish between *practices* of offering information, on the one hand, and *institutions* supporting such practices, on the other. This is especially important if we are discussing developments in consolidating democracies, because for many new democracies the two do not necessarily go hand in hand (Kaldor and

⁵ The increase in interest in the concept of transparency has led to its use in different subfields of political science based on different understandings and definitions. The author has found 12 different definitions of transparency in the Political Science literature. The main differences derive from the area on which the writings focus: corruption, democracy, security, etc. A broader definition of transparency of actor A toward actor B, which would subsume other existing definitions, could be “the ability of B to receive information from A.”

⁶ East and Central European countries have offered enormous amounts of often very sensitive information to the EU, Council of Europe, and NATO before and after their accession to these organizations. They have done so even when they were less forthcoming with such information to their societies (Grigorescu, 2002). Also, countries that are bailed out by the IMF from financial crises offer much information to the IO, which they do not offer to their own public (e.g., *Bangkok Post* Editorial, 1997).

Vejvoda, 1997). In some cases, governments may adopt democratic institutions only for purposes of “window-dressing” to formally please external or domestic actors. Such institutions are often badly designed and ineffectively put in practice. Eventually though, even poorly designed institutions can become relevant as democratic forces use them as tools for slowly changing nondemocratic practices.⁷ In other words, in the short term, the emergence of democratic institutions is important because it empowers groups supporting further democratic changes against those who want to slow down or even reverse the furthering of democracy (e.g., Huntington, 1991a; Mainwaring, 1992). In the medium and long term, such institutions lead to the strengthening of democratic practices.

This study will join others that focus primarily on domestic institutions supporting the free flow of information. It will do so because it argues that government practices of offering information can be deceiving. During a period of strong economic performance, a government may not have to hide economic information. It may offer much information to the public about policies, their implementation, and their results because it has nothing to fear and everything to gain. But once economic conditions worsen, governments can choose not to disclose information if the free flow of information has not been institutionalized. The same can be said about other issue areas. Such governments are not considered transparent for the purposes of this study even though they may operate as such at particular times. In a transparent system, a politician or bureaucrat acts knowing that his or her actions may someday be discovered by the public because permanent processes allow for it. It is more likely that such an individual will act for “the good of the people” (rather than for him- or herself) than one in a non-transparent system. It is this deterrent effect of institutions that allows governments to truly act as “agents” of the principals (i.e., societies) and that makes the free flow of information relevant to democratic processes.

The interest in information flows as related to processes of democratic consolidation also implies that the study should emphasize the ability of societal actors to *acquire* information, rather than the government’s *offering* of information. If “information is power,” and the relationship we are investigating is one in which governments relinquish some of their power to societies as part of the larger process of democratic consolidation, we need to emphasize the institutions that bind governments in releasing information even (or especially) when they would prefer not to (Martin and Feldman, 1998:5).

Last, but not least, we should distinguish between two types of institutions that reduce a government’s domestic control over information. The first refers to legislation pertaining to the obligation of official institutions to *release* information to the public. The second refers to legislation supporting press freedom—i.e., *dissemination* of information that has been obtained from the government, as well as from other domestic and external actors. For lack of better terms, the two types of government control over information will be referred to as government “transparency” and “openness,” respectively.⁸

The transparency of governments and the openness of domestic systems are both essential for the free flow of information, for assuring government accountability, and, implicitly, for the process of democratic consolidation. Legislation on access to

⁷ In many of the countries where I conducted in-depth studies of the processes of increased transparency (Bulgaria, Czech Republic, Moldova, Romania, and Slovakia), the initial laws on press freedom and access to information were initially ineffective. Yet NGOs (sometimes led by former members of parliament who were instrumental in the adoption of the laws) began running training programs for those who needed to use the laws. They also led campaigns to publicize the new laws and the process through which the public could access government-held information. They even went to court in cases in which governmental institutions did not comply with the provisions of the laws. Overall, they worked to create the precedents for the use of the institutions and, more broadly, to make the institutions more effective.

⁸ I would like to thank an anonymous reviewer for suggesting this differentiation.

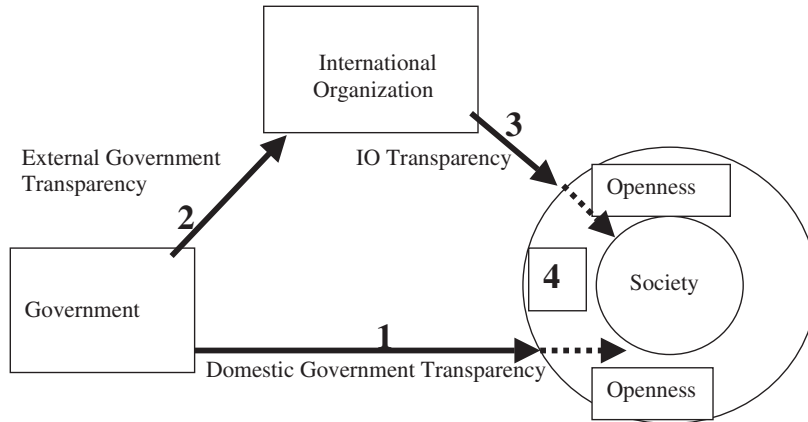


FIG. 1. “Transparency” and “Openness” of Political Systems

information has little impact on accountability of governments if the information accessed by one individual cannot be disseminated throughout society. Conversely, a “free press” with no direct access to government information needs to base its stories on back channels and anonymous sources. This often leads to mistakes or distortions in reporting and potentially to citizens’ lack of faith in the press, which, in turn, affects the ability of the media to play an effective role in monitoring government actions and holding government accountable (Freedom House, 2000).

This study will focus primarily on government transparency and will only discuss openness as it relates to the processes that affect such transparency. There are two main reasons for this choice. First, while the consequences and, to some extent, even the causes of press freedom have been discussed in somewhat greater depth in the literature (e.g., Nixon, 1965; Van Belle, 1998), access to information has been given far less attention. Second, this study emphasizes government reaction to stimuli from the international realm (i.e., alternative information coming from IOs). By focusing on laws of access to information, one can more easily identify such reactions in consolidating democracies. This is because there is greater variance across such countries with regard to their government transparency and to the moments in which they choose to adopt legislation on access to information than with regard to press freedom.

Figure 1 offers a brief representation of information flows from government to society and to IOs. It illustrates the difference between domestic and external government transparency and between domestic government transparency and openness.⁹

Hypotheses of the Increases in Domestic Government Transparency

Most of the literature discussing domestic government transparency appears to imply that its growth is an expected consequence of the broader process of democratic consolidation. In other words, as democratic institutions and norms develop, there is some form of “spillover” that leads to the adoption of other institutions, including those supporting transparency. Societal actors become more powerful vis-à-vis the government and eventually are able to break the

⁹ The system of information flows among actors is, of course, more complex than this figure might suggest. There are a multitude of international and domestic actors that can also be taken into account and information between actors usually flows in both directions. But, for sake of clarity, the figure only includes the three main actors discussed here and the flows of information that are relevant for this study.

government's monopoly over information. This is especially true for democratic institutions and practices supporting press freedom. This is so because, as the press becomes more adept at acquiring sensitive government information, elites realize that it is more difficult to hide such information from the press and, implicitly, from the public. They see diminishing returns from their efforts to block the institutionalization of transparency and, therefore, at some point they "give up," allowing the adoption of access to information laws. This logic leads us to a "baseline" hypothesis regarding the adoption of laws supporting government transparency.

H₀: *Legislation supporting government transparency is more likely to be adopted in countries where other domestic institutions, especially those supporting press freedom, have been adopted.*

In addition to the role of other domestic institutions, this study will discuss the possible role that IOs can have in a government's domestic transparency. The hypothesized role of IOs in increasing government transparency is not one of the traditional ones often attributed to IOs: such as "condition-setters" (e.g., Schmitter, 1996:29–31) (emphasized by realists) or "norms exporters" (e.g., Finnemore and Sikkink, 1998; Checkel, 2000) (on which the constructivist literature generally focuses). Such mechanisms are not yet in place. IOs have set down only very weak conditions with regard to transparency for their members or prospective members. When they have requested greater government transparency, they have focused on narrow issue areas such as the defense budget (in the case of NATO), the environmental realm (in the case of the EU or UN Economic Commission for Europe), or some economic data (in the case of the IMF).¹⁰ Moreover, the mechanism of exporting norms of transparency from IOs to states is a weak one. The main reason for the lack of a direct IO role in increasing government transparency is that some of the traditional democracies (generally seen as the driving forces behind condition-setting and norm export) have not themselves adopted institutions and practices of transparency (Grigorescu, 2002).

Yet international organizations allow for an indirect process that leads to greater domestic transparency. This process involves IOs as generators and providers of information. Although this emphasis on information flow through IOs and its relevance for alleviating problems of "cheating" and encouraging cooperation was initially considered as characteristic of the Neoliberal Institutional approach (e.g., Keohane, 1984, 1989:2), it has come to be accepted even by those who disagree with other tenets of this approach (see, e.g., Grieco, 1988).

The increasingly complex tasks IOs need to accomplish have led them to collect an ever-greater amount of information from member states and prospective members. In order to achieve the objectives for which they created IOs or for which they join existing ones, governments sacrifice some sovereignty by surrendering control over certain information they hold. The literature suggests that the amount of information flowing from governments to IOs has increased over the years (Florini, 1998; Mitchell, 1998; Stein, 1999).

Recently though, another important trend has emerged at the IO level: the increased transparency of IOs themselves toward societal actors. This has been the result of their changing role. In the past, it has been argued that the opaqueness of IOs allowed them to develop and become more powerful, i.e., affect people's lives to a greater degree (Keohane and Nye, 2002). This success has drawn greater public attention to their roles and has spurred interest in applying democratic principles to IOs and not just to states (see, e.g., Dahl, 1999; Woods, 1999). One

¹⁰ It has been argued that such demands have led to information disclosure mechanisms dealing with only very narrow issue areas and that such transparency has not "spilled over" into other realms (Rodan, 2000).

argument has been that, if IOs affect our lives so much, they need to become more accountable and transparent directly to societies. The demands for their greater accountability are reflected in such diverse events as the Maastricht Treaty's defeat in a Danish referendum in 1992 (as well as its near defeat in other member states) and public demonstrations in Seattle, Washington, DC, Prague, and Nice against the WTO, World Bank, IMF, and the EU.

IOs have slowly begun to respond to such demands. The European Union (Deckmyn and Thomson, 1998; Bunyan, 1999), the Council of Europe (Council of Europe, 2000), the U.N. Security Council (Kenna, 2000), the World Bank (Udall, 1998), IMF (IMF, 2002), and regional development banks (Nelson, 2001) have all begun changing their policies on disclosure of information to the public. Due to the greater openness of IOs, the media now picks up much information about countries directly from IOs rather than from domestic sources.¹¹ The fact that the foreign press corps in Brussels, where two of the most important and complex organizations (the EU and NATO) have their headquarters, is the largest in the world has been interpreted as a reflection of the increased relevance of such IOs for the public (Davis, 1998).

The practice of using IO information by the press is spurred by the fact that IOs often hold (and release) comparable information about different countries. Journalists find such information especially appealing because it puts their own government's achievements and failures in a broader context.

I argue that this role of alternative source of information that international organizations have assumed has increased the pressure on governments to become more transparent. They are in a sense caught in a "two-level information game." The more information they offer to IOs, the more information about government action and intentions is likely to be passed on to societal actors. This poses the dilemma sketched in Figure 2. The opening of a previously insignificant channel of communication between IOs and societies has intimately linked domestic (arrow 1 in Figure 2) and external (arrow 2 in Figure 2) flows of information from governments. Governments need to decide how transparent they will or need be domestically given their external transparency and, conversely, how externally transparent they should be, given the domestic implications.

I hypothesize that the growing flow of information from IOs increases the likelihood that governments will allow for (or even push for) the adoption of legislation supporting transparency. This can happen in two ways. On the one hand, political elites may allow for the passage of laws increasing transparency in a particular year because they recognize that they do not have a monopoly over information anymore and that their societies can now receive information directly from international organizations. There may thus be a threshold for each country at which a majority of political elites recognize that it is not worth maintaining opaqueness because their societies "find out anyway."¹² I therefore hypothesize that

H₁: *Countries with greater levels of information flows from IOs to societal actors are more likely to adopt laws supporting domestic government transparency than those with low levels of flows.*

¹¹ The press also uses other external sources of information. Thus, international NGOs and the foreign media are often cited by the domestic press. While the amount of information reaching societal actors and originating from NGOs and the foreign media depends solely on the openness of the political system, the information arriving from IOs is of particular interest because it also is a function of the relationship between the government and the IOs of which it is or aspires to be a member. It is for this reason that I focus on flows of information from IOs.

¹² The presence of this logic was confirmed by some of the members of parliament, government officials, and NGO representatives I interviewed in 2000 and 2001 in Bulgaria, Czech Republic, Moldova, Romania, and Slovakia. These countries have adopted legislation on access to information in the past two to three years.

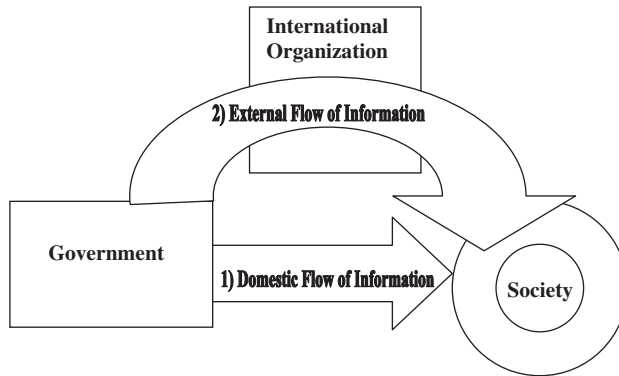


FIG. 2. Flows of Information from Government to Society

A second mechanism, conducive to the adoption of institutions supporting transparency, emphasizes the sudden *increase* in the amount of information flowing from IOs to societal actors rather than its *level*. If the process through which more information is made available to the public is gradual, elites may slowly become accustomed and adapt to the “new realities” of losing control over information and might not perceive the need to change legislation pertaining to information flow. It may in fact be certain “shocks” (i.e., rapid increase in the flow of information from IOs) that draw the attention of political elites and change their cost-benefit calculations. Elites in new democracies, with relatively brief reputations for truthfulness, might, for example, want to adopt instruments of transparency to signal both domestic and external actors that they do not fear the release of information because “they always tell the truth.” I argue that many of the recent laws on access to information were adopted for such signaling purposes. Several examples offer useful illustrations of this process.

In Romania, a cyanide spill near the town of Baia Mare in January 2000 led to a severe environmental crisis. As the spill affected neighboring Hungary and Yugoslavia, the incident picked up international dimensions and an inter-IO team was dispatched to study the event. The EU-led task force for the appraisal of the accident offered a less than flattering report on the Romanian official response to this event (Baia Mare Task Force, 2000). More important though, it quickly launched a program for “Public Information and Participation” through which it made the information on the ecological disaster directly available to Romanian NGOs and the general public (Savulescu, 2000). As some of the information released by the task force differed from the little information released by the local and national authorities, the Romanian government realized that it had a credibility problem and decided to signal that its information will be credible and verifiable, at least in the future. It did so domestically by quickly adopting legislation on access to information in the environmental realm. It also sent a signal to external actors by ratifying the Aarhus Convention (dealing with public participation and access to information in the environmental realm) in July 2000 (UNECE, 2001). Moreover, a few months later (and just before the general elections), authorities quickly put together a working group made up of members of parliament, government officials, and NGO representatives in order to discuss the adoption of a broader law on access to information.

In Thailand, at the beginning of the financial crisis of 1997, the government continued its long-held practices of “opaqueness” toward the public. Its lack of credibility, especially after the seriousness of the crisis became apparent, led one journalist to welcome IMF intervention, not so much because the IO could solve the financial woes of Thailand, but rather because it would finally offer the Thai public

relevant information on the extent of the crisis and on the government's actions.¹³ By July 1997, the lack of credibility of official government information led to the adoption of a freedom of information law in Thailand. This law was not the direct result of IMF demands for transparency (which focused only on the economic realm). Rather the law can be interpreted as a "signal" by the Thai government that future information it offered would be "verifiable" and at least as credible as alternative information emerging from IOs.

In the late 1990s there were multiple reports of South Africa's powerful arms' industry selling weapons to countries under UN embargo. The press appeared to be more skeptical about initial accusations when they were based on information coming from foreign press sources or from international NGOs. In such cases, the South African government simply denied any of its own wrongdoings and did not appear to take actions to boost its own credibility because it probably did not perceive it had truly lost any. It was only after several UN Security Council reports in the 1997–1999 period showed that South African companies had sold arms to Angola and that official restraints on these actions had not been adequate¹⁴ that the government began sending signals intended to boost its credibility both domestically and internationally. For example, in November 1998, South Africa introduced a resolution in the UN General Assembly on the improvement of coordination of international effort against illicit trafficking of small arms (Selebi, 1998), thus signaling its support for transparency in arms sales. In October 1999, it boasted that it was the first country to post details on its arms sales on its Department of Defense website (Streek, 1999). By the summer of 2000 (soon after an additional UNSC report mentioned, once more, South African arms sales to Angola), South Africa adopted a comprehensive freedom of information law.

It is not suggested here that the FOI law in South Africa was the direct result of a crisis of trust generated by the aforementioned UNSC information. In fact, the information did not even appear to reach the level of a full-blown scandal. But sudden increases in alternative (and condemning) information offered by IOs added to existing problems of the government's credibility (Paton, 1999) and to the perceptions that it needed to regain public trust.

The preceding examples show that governments often feel the need to prove to their societies, as well as to external actors, that the information they provide is credible. In order to boost the credibility of the information, they may decide to adopt "signals of transparency." These signals are more convincing if they involve the adoption of institutions and not simply the ad-hoc offering of information. The latter is not as effective in signaling commitment to transparency and does not offer governments the necessary credibility they are seeking.

Crises of trust can certainly emerge without the existence of alternative information received from IOs. Many scandals that spurred the adoption of laws on access to information were based on domestic sources of information. The U.S. example, where the Freedom of Information legislation appeared during the Vietnam War, and was then strengthened after the Watergate scandal, is relevant in this respect. This study suggests, though, that the increased flows of information from IOs to society are an additional potential cause of crises of trust, and,

¹³ The editorial argued: "If in the course of their mission in Thailand, the executives of the International Monetary Fund establish what is going on here, we would appreciate if they spread the word. ... The increasing frequency with which organizations and institutions of foreign origin are showing that they have an idea about what is happening in Thailand indicates that political leaders are being less than free with the flow of information on the domestic front" (*Bangkok Post* Editorial, 1997:8).

¹⁴ While the reports indeed blamed individual businessmen for the infringements of the embargo, they also criticized the lax South African government controls at airports and "selective applications on travel bans for Unita officials" (see, e.g., SAPA Editorial, 2000) and expressed UNSC expectations to clamp down on illegal arms sales. (See, e.g., Fabricius, 1997.)

therefore, there is an increased likelihood that laws on access to information are passed in order to regain public trust.

The mechanism, described above, implies that the *increase* in the flow of information from IOs to societies (arrow 2 in Figure 2) explains the adoption of institutions supporting domestic government transparency. Thus the third hypothesis to be tested is

H₂: *Countries with greater increases in information flows from IOs to societal actors are more likely to adopt legislation supporting domestic government transparency than other countries.*

The Dependent Variable: Domestic Government Transparency

The lack of a common understanding of the concept of transparency (as well as the problems involved in measuring information flows) has led to problems in its operationalization. Indeed, there have been very few actual attempts to measure transparency. A study by Finel and Lord (1999) testing the impact of “state transparency” on inter-state conflict (defined as the ability of state B to determine the intentions of state A) offers one of the few such measures.¹⁵ Another measure of transparency that has been made available through the impressive efforts of the NGO “Transparency International” is, in fact, a measure of corruption.¹⁶ The two measures are intended to help assess the likelihood of inter-state conflict and corruption, respectively. But they do not adequately reflect information flows in terms of democratic consolidation—the main concern of this study.

As mentioned earlier, the emphasis here on transparency as a factor affecting democratic consolidation determines its measurement. Domestic government transparency has been defined as the existence of institutions that allow any citizen to gain access to information held by government. It is therefore operationalized using an ordinal measure that can take three possible values reflecting the status of access to information legislation in a country, at a certain moment in time. Domestic government transparency was coded “0” when there was no specific law allowing for access to government information. Countries in which comprehensive laws on access to information were in place were coded “2.” In order to score a “2,” the laws on access to information needed to meet five specific conditions:

1. laws make clear that access to information is the norm and exemptions are to be resorted to only in exceptional cases.
2. laws protect the right to access information held by local *and* national government institutions.
3. laws include a precise definition of the exemptions to the right of access.
4. laws include provisions for an independent review of denials of access to information.
5. laws provide for minimal (or no) fees for the requested information.

¹⁵ The measure used by Finel and Lord is useful for the purposes of that study, for which domestic transparency was relevant as long as it reflected the ability of external actors to access information about internal debates. According to this measure, a state is considered transparent if it met at least two of six conditions in three categories: debate, control, and disclosure. For the purpose of the present study, the operationalization employed by Finel and Lord is not very helpful because it does not allow one to differentiate among new democracies that have very similar levels of government transparency according to this measurement.

¹⁶ This measure is one solely of “practices” and not of institutions. It is based on surveys that reflect the perceptions of businesspeople, academics, and country analysts. Countries like Singapore, with very low democracy scores, are considered to be very “transparent” (or, at least, to have little corruption) according to this measure. Moreover, one can argue that the measure of corruption that is offered by TI is largely a reflection of transparency in the economic realm and not in others (e.g., in the environmental or political one) (Transparency International, 2001).

The five conditions were identified in legal scholarship as the main elements that are considered relevant to laws on public access to information (Martin and Feldman, 1998; Mendel, 1999; Mock, 2000). If at least one of these conditions was not met (but the country nevertheless had a law on access to information), the case was coded “1.” This intermediate score was considered necessary because it reflects a common stage through which many new democracies pass before reaching a fully functional system of access to information. For example, in Argentina or India laws on access to information emerged initially at the local level while, in other countries, they first applied only to national institutions and only afterwards to local institutions (Article 19, 2001). In Brazil, it took several years to make an existing freedom of information law fully functional by adding a precise list of exceptions to the law. In the Czech Republic, it also took several years for the cost of information retrieval to be fully regulated. Before that, the exorbitant fees requested by official institutions when offering information made the law difficult to use by the general public.

In all of these “intermediate” cases, one can argue that, although the systems were not as transparent as those coded “2,” they were more transparent than those coded “0.” More important, the intermediate systems can be viewed as a step toward greater transparency because they have at least a partial effect on the flow of domestic information. Thus, even though government officials feel they can get away with refusing to offer information to the public by using the loopholes left by the legislation, they realize that, in the not-so-distant future, the laws supporting transparency may be refined and their present acts may be under greater public scrutiny. The deterrent effect of transparency may thus still have an impact on their behavior. For this reason, the operationalization of transparency across three possible values was preferred to a simpler dichotomous operationalization.

The Independent Variable: Information Flow from IOs to the Public

The main argument of this study is that the external flow of information (i.e., from governments to international organizations and then from IOs to society—arrow 2 in Figure 2) affects government incentives to adopt institutions of domestic transparency. This flow of information is a function of the information that IOs hold (collected directly from member states—i.e., external transparency—but also from NGOs and other sources) and the rules and regulations governing public access to information (i.e., IO transparency). Moreover, the information actually received by societal actors depends on the ability of the press to disseminate information to the domestic public (i.e., on the openness of the domestic system). The main independent variable of this study needs therefore to reflect the amount of IO-released information that the press can use to criticize the government.

An initial operationalization of the flow of information from IOs to society was developed by measuring the proportion of news (published in a country) that uses information originating from an international organization and that is critical of the government. This measure taps into the main effect that is being hypothesized to lead to greater domestic transparency: As international organizations release more information directly to societal actors, the domestic press often uses the incoming information as a basis for its criticism of the government. It is due to such criticism that governmental elites might decide that they need to send signals of increased transparency to regain their lost credibility.

Unfortunately, existing sources did not allow for the collection of comparable cross-national data for all countries of interest and for a longer period of time. Instead, I structured a set of “plausibility probes” examining all four regions of the world where the “third wave of democratization” has spread: Africa, Asia, East Europe, and Latin America. At least two countries were chosen from each area: one in which domestic transparency had increased substantially in the past five years

and one in which domestic transparency had remained about the same. The countries selected were: Namibia and South Africa, Philippines and Thailand, Bolivia and Brazil, Bulgaria, Czech Republic, Moldova, Poland, Romania, and Slovakia.¹⁷ It is noteworthy that almost all of these countries had similar “democracy scores” in the Polity and Freedom House dataset. Thus, the differences in their domestic transparency are not fully explainable by differences in their general domestic structures as reflected in the two datasets. To count the number of news articles that use IOs as the source of their critiques of government across all countries in the study, I used the World News Connection.¹⁸

In all countries in the study, at some point during the five years under scrutiny, information received from IOs led to heated domestic debates. The “plausibility probe” was helpful in identifying some of the most important press stories that may have affected the debates and the calculations of elites involved in the adoption or nonadoption of institutions supporting transparency. These issues were later pursued in interviews in some of these countries to assess in detail their relevance to the mechanisms that may have led to greater transparency.

More important for the purposes of measuring the information flow from IOs to society was the discovery that not all IOs were equally relevant for the domestic press. Although the initial analysis took into account more than 50 international organizations, the data showed that, in fact, only 17 were reported as the source of almost all negative information about governments. The 17 that were considered relevant each provided information that generated at least .5% of the total “negative” articles for all 12 countries or at least 1% of total “negative” articles from one region (i.e., continent). Together, these international organizations served as the source for 98.3% of the total number of negative news stories based on information coming from IOs for the 12 countries across all years. Among the best known international organizations that offered very little (or no) information used by the press to critique governments were the International Atomic Energy Agency, Interpol, the World Trade Organization, APEC, Mercosur, and the Organization of African Unity.

Using the number of international organizations that “matter,” a second measure of information flow from international organizations was constructed. This measure was based on the total number of news releases and communiqués issued about a country by the 17 IOs. The list of organizations considered for this measure is offered in Appendix I.

These organizations offer press releases in different formats. Some organizations offer complex studies of a country, some release much of their information through speeches of the main officials leading the organization, others offer Public Information Notices (IMF), and some offer declarations (e.g., ASEAN), while others issue reports (like the EU) or assessments (as the World Bank). In most cases, though, the publication of such documents is accompanied by press releases. When

¹⁷ Most countries were chosen because they recently adopted laws supporting transparency or because they had not, even when there were indications of domestic debates on the adoption of such laws (e.g., the Philippines). The selection was also based on the availability of news sources through the World News Connection (see below). The emphasis on cases from East Europe is due to possible impact of the high complexity and large number of IOs in the area.

¹⁸ For more information on the sources used by WNC and the types of articles that are translated, see <http://wnc.fedworld.gov/home.html>. The WNC offers translations into English from the major newspapers, transcripts from Radio and Television programs, and newswire reports from more than 100 countries around the world. For the selected countries, the articles translated were available (without any major interruptions) beginning with 1996. There are obvious differences in the number of articles reported by the WNC for the different years and countries. Countries like Bolivia or the Czech Republic have barely 300–500 articles translated for 1996 while for Thailand and Poland in 2000 there are more than 2,000 articles/year. Overall, though, I assumed that, for any given country, throughout an entire year, the proportion of negative articles based on IO information found in the WNC should not be affected by cross-country collection biases and should accurately reflect the impact of “external information” on domestic debates.

they are not (as in the case of some World Bank or OECD reports), such documents were added to the total number of press releases referring to a country.

This measure is preferable to the previous one because it allows for collection of comparable data for all countries in this study. On the other hand, it too has several shortcomings. Some press releases, for example, are more relevant for domestic audiences than others. Moreover, most of the press releases are not critical of governments and therefore might not be considered to have an impact on the cost-benefit calculations of elites deciding to open up domestically. Nevertheless, it is assumed that the total amount of information released by IOs is a relatively good gauge of the amount of potentially critical information that is released by them.

The independent variable (information flow from IO to society) was constructed by multiplying the total number of press releases offered by the seventeen IOs with a measure of openness of the systems. The openness of the system was operationalized using scores from the annual press freedom surveys of Freedom House.¹⁹ The interaction effect of the two components—represented by the full arrow (#3) and the dotted arrow (#4) from Figure 1—is relevant because both components are necessary in order for information held by IOs to reach the public. The two main independent variables of this study are thus the *level* of such information flow (IOINFO) and the relative *growth* rate of the flow of information (i.e., “shocks” resulting from increases in press releases about their country at a given time—IOINFOGROW).

Other Variables

The two independent variables of the model testing the “baseline hypothesis” (i.e., the level of democracy and press freedom) were operationalized using already constructed measures and datasets. Two of the most often used measures of democracy are available from the Polity data (which tends to emphasize the existence of democratic institutions) and from the Freedom House data (which emphasizes “political rights and civil liberties”). The latter was chosen for the measure of democracy because it includes data for all seven years in this study (while Polity does not include data for the most recent years). In order to evaluate the robustness of the findings, the hypotheses were also tested using the Polity data for the years for which data were available (1995–1998). As mentioned earlier, freedom of the press was operationalized using the measures and data from the NGO Freedom House.

Another domestic factor considered here is the degree of privatization. In the 1990s, we witnessed a worldwide spread and intensification of the processes of privatization. The literature focusing on these processes notes that political elites who perceive that their control over certain levers in the economy is diminishing are more likely to take advantage of the period of flux and engage in corrupt practices (Hellman, 1998). One can expect that such practices are more likely to encourage lack of transparency because the elites will want to maintain their ability to profit from the process of privatization. Thus, greedy elites adopt a “get it while you can” attitude (Geddes and Neto, 1992:657) and attempt to profit as much and as long as possible from the process of privatization. Conversely, during privatization processes, it can be hypothesized that NGOs fighting corruption will perceive that the stakes are higher and increase their efforts for the adoption of institutions of transparency.

Under both assumptions, it is expected that, in periods in which countries are undergoing intense processes of privatization, the incentives to adopt institutions supporting transparency are altered. The measure used to operationalize the

¹⁹ The scores reflecting press freedom can take values from “0” (most free) to “100” least free. For a description of the methodology used to develop these measures see Freedom House (2001).

degree of privatization (PRIVATIZATION) was the absolute value of funds (in billions of dollars) that a government received as a consequence of selling state property. The data on privatization were taken from the World Bank annual reports. The measure does not control for the magnitude of economies. Thus, a country like Argentina would score very high, even in a year in which the government is not privatizing a large *proportion* of state property, while a country like Latvia will have low scores even during an extremely active year. Such a measure is preferable for this study because, for a government official from Argentina or Latvia who can potentially gain from his position—and thus from less transparency—it is the sheer amount of money that is passing through his hands during the process (rather than its relative value in terms of the country's GDP) that may make the difference.

Domestic political structure, especially the institutionalized relationship between the executive and the legislative branches of government, is also considered relevant for the level of government transparency in a country and for the adoption of legislation supporting government transparency. One can expect that in systems in which the legislative branch of government is often controlled by a different party than the executive branch (like the U.S.), it is likely that the legislative branch will adopt laws supporting the transparency of the government (Blanton, 2002). It is in their interest to have more information about the actions of their political opponents. In the Westminster-type system, where the legislative and executive branches of government are controlled by the same political party, it is less likely that the legislature will have incentives to adopt laws supporting government transparency. One should expect that, in such a system, the party would offer the legislative branch the opportunity to receive relevant government information even without laws supporting transparency. There will be fewer incentives for a parliament to adopt laws that make information available to other parties or to the public.²⁰ On the other hand, some observers have argued that even in Westminster-type systems there can be instances in which legislators will have incentives to adopt laws on transparency. For instance, this may happen when the governing party perceives it will soon lose the elections and consequently its power and wants to weaken the next government by making its actions more visible.²¹

The variable EXECLEG, reflecting the control that the governing party has over the legislature, was operationalized as follows: political systems in which the same party controls, during a specific year, both the legislative and the executive branches were coded "0." Systems in which the legislative and the executive branches of government are controlled by opposing parties were coded "2." Many systems, though (the majority in fact), are "mixed" ones, in which the government is formed by a coalition of parties. In these cases no party has complete control either of the legislature or of the executive. This last type of system was coded "1."²²

The variable WEALTH was also introduced as a control variable. As in the case of freedom of the press (Nixon, 1965), it is argued here that wealthier countries are less inclined to worry about the relatively high costs involved in gathering, processing, and offering information and are therefore more likely to adopt laws on access to information. In poorer countries, the costs involved in government agencies offering information to the public may discourage the adoption of such

²⁰ An illustration of this is that two of the oldest democracies, the U.S. and the U.K., are at the extremes of the timeline in adopting freedom of information laws. While the U.S. (in which the executive and legislative are often controlled by different parties) was among the first to pass such a law (in the 1960s), the U.K. (where the executive and legislative are always controlled by the same party) was one of the last "first-wave democracies" to do so (in December 2000).

²¹ This view was offered by some of the members of parliament that I interviewed in Moldova and Slovakia—two countries that have recently adopted institutions supporting transparency.

²² The data were based on two sources: "Elections around the world," at <http://www.electionworld.org>, and the sections of "Election Watch" in the *Journal of Democracy*.

laws. Also, it may be that in poorer countries, the public has a greater incentive to request information about government and policies because the level of satisfaction with government actions is lower than in richer countries. Moreover, in poor countries the role of IOs in spurring domestic transparency may be diminished because the press has a more difficult time acquiring information released by IOs.²³ WEALTH was operationalized by using the data for GDP/capita from the World Bank annual reports.

Testing the Hypotheses

The Models

Several models were employed to evaluate the likelihood of adoption of laws on access to information. The first model is intended to test the “baseline hypothesis,” i.e., that countries are likely to adopt institutions supporting transparency when they have high levels and high increases in their democracy and press freedom scores. (**H₀**)

$$\begin{aligned} \text{Model 1: ADOPTFOI} = & \text{CONSTANT} + B_3 * \text{DEMOCGROW} + B_4 * \text{DEMOC} \\ & + B_5 * \text{FREEPRESSGROW} + B_6 * \text{FREEPRESS} \\ & + B_7 * \text{PRIVATIZATION} + B_8 * \text{EXECLEG} \\ & + B_9 * \text{WEALTH} + B_{10} * \text{LAGADOPTION} \end{aligned}$$

ADOPTFOI is a measure reflecting the adoption of legislation on access to information from year $T - 1$ to year T ; DEMOCGROW is a measure of the growth in the democracy score from year $T - 1$ to T ; DEMOC is the measure of level of democracy in year T ; FREEPRESSGROW is a measure of the increase in press freedom from year $T - 1$ to T ; FREEPRESS is a measure of press freedom for year T ; PRIVATIZATION is a measure of the rate of privatization from year $T - 1$ to year T ; EXECLEG is the measure of control by one party over both the legislative and the executive branches of government in year T ; WEALTH is the measure of GDP/capita of the country in year T ; LAGADOPTION, the lagged dependent variable, was introduced to correct for serial autocorrelation.

Model 2 tested the impact of the levels of information flows from IOs to societies and of the increases in such flows. (**H₁** and **H₂**) The model controlled for all domestic variables used in model 1. This allows us to evaluate the impact that IO information has on domestic transparency, in *addition* to the impact that domestic variables already have.²⁴

$$\begin{aligned} \text{Model 2: ADOPTFOI} = & \text{CONSTANT} + B_1 * \text{IOINFOGROW} + B_2 * \text{IOINFO} \\ & + B_3 * \text{DEMOCGROW} + B_4 * \text{DEMOC} \\ & + B_5 * \text{FREEPRESSGROW} + B_6 * \text{FREEPRESS} \\ & + B_7 * \text{PRIVATIZATION} + B_8 * \text{EXECLEG} \\ & + B_9 * \text{WEALTH} + B_{10} * \text{LAGADOPTION} \end{aligned}$$

IOINFO measures the flow of information from international organizations to the public in year T . It represents an interaction effect between the total amount of information publicly released by IOs (TOTAL) in year T and the likelihood that the press will use such information to criticize the government (FREEPRESS) in that year. Thus, $\text{IOINFO} = \text{FREEPRESS} * \text{TOTAL}$. IOINFOGROW reflects the growth in information about a specific country that is made public by IOs from year $T - 1$

²³ For example, the press from the Republic of Moldova, one of the poorest countries of East and Central Europe, cannot afford to send correspondents to the headquarters of the main IOs as other countries in the region do. Also, due to lack of funds and a poor telecommunications infrastructure the press in this country even has difficulties accessing IO information available on the Internet. These factors may lead to a smaller impact of IO information on national debates as in the relatively wealthier countries in the region. This argument was suggested by NGO representatives and members of parliament from Moldova interviewed in May 2001.

²⁴ Model 2 was also tested with controls for country and year fixed effects.

to T. Models 1 and 2 were evaluated by employing ordered probit estimates with robust standard errors adjusted for clustering on countries. These two models test if the growth and level of the independent variables throughout one year can account for the growth in domestic transparency for the same year. The hypothesized mechanisms leading to the growth of domestic transparency must obviously be fast-acting if such a relationship would find support when testing the two models. Indeed, I argue that many adoptions of laws on access to information are quick reactions to the crises of government trust triggered by information received from IOs. This is possible because in most cases the draft laws on access to information are available for long periods of time. In the United Kingdom and the United States, for example, the efforts to pass a FOI law took several decades (Foerstel, 1999; Frankel, 2001). Similarly, in new democracies such as Thailand and South Africa, the process that led to the passage of FOI legislation had begun years before the crises of trust emerged. Therefore, officials who wanted to signal their credibility had draft laws on access to information already available and only needed to quickly pass them through their parliament—a process only necessitating several months.

But there are also instances in which no such ready-made laws were available. In such cases we should expect the effect of the information released by IOs to trigger a growth in domestic transparency only after a longer period of time, necessary for the completion of the legislative process. Therefore, an additional test of hypotheses 1 and 2 introduced a one-year lag of the independent variables.

This test is also useful because it can offer additional confidence that the causal arrow goes in the hypothesized direction (i.e., growth of external information flow *leads* to growth in domestic transparency). This is important because one can also expect that the growth in domestic transparency can *lead* to growth in the amount of information flowing from IOs to society. This is because more domestically transparent governments may have less to hide from IOs given that external actors can already easily access information from such countries, and thus, such governments are prepared to offer more information to IOs in the first place. This eventually leads to a greater amount of information released by IOs about these countries. This leads us to an alternative hypothesis:

H₃: *Countries with increases in domestic transparency will experience increases in the flows of information from IOs to their societies.*

Model 3 was used to test this alternative hypothesis. Also, similar to the test of model 1, an additional model introduced a one-year lag in model 3 because it was expected that, in many cases, the effect of domestic transparency on external information flows was not simultaneous.

$$\begin{aligned} \text{Model 3: } \text{TOTALGROW} = & \text{CONSTANT} + B_1 * \text{DEMOCGROW} \\ & + B_2 * \text{DEMOC} + B_3 * \text{FOIADOPT} \\ & + B_4 * \text{FOI} + B_5 * \text{FREEPRESSGROW} \\ & + B_6 * \text{FREEPRESS} + B_7 * \text{PRIVATIZATION} \\ & + B_8 * \text{EXECLEG} + B_9 * \text{WEALTH} \\ & + B_{10} * \text{LAGTOTALGROW} \end{aligned}$$

TOTAL is a measure of the amount of information about a specific country made public by IOs in year T. TOTALGROW is the growth in the total amount of information released by IOs about a specific country from year T – 1 to year T. FOI reflects the existence of access to information legislation. LAGTOTALGROW is the lagged dependent variable, introduced to control for serial autocorrelation. All other variables are the same as those used in model 2.

Model 3 was tested by using pooled time-series cross-sectional analyses using panel-corrected standard errors. The technique was used even though it is recognized that the number of years available for the analysis (six) is smaller than the minimum of ten years suggested as being necessary in the literature (Beck,

2001:115). In order to attenuate the possible misinterpretations of this lack of data, the model was also evaluated using ordinary least square regression with robust standard errors.

Case Selection

As mentioned above, the focus of this study is on transparency as related to the process of democratic consolidation. Therefore the cases were chosen to be “all consolidating democracies” across the seven-year time span, 1995–2001.

The specific temporal domain for the study derives from both theoretical and practical²⁵ considerations. Theoretically, the main mechanism hypothesized in this study to alter domestic transparency—the growth in the transparency of such international organizations as the EU, the IMF, and the World Bank—becomes a recognizable trend in the early to mid-1990s.²⁶

With regard to the selection of states, three conditions must be met for an entity to be considered a consolidating democracy and be included in this study. It must be (1) a state, (2) democratic, and (3) consolidating its democracy during the period under study.

As to the first condition, only political entities recognized as states by IOs have been chosen. Because the study is ultimately about the impact of international organizations on government transparency, it cannot take into account entities incapable of relations with IOs. The only consolidating democracy excluded by this condition is Taiwan.

The condition of being a democracy is operationalized using Ted Gurr’s and Keith Jagers’s Polity IV dataset. Studies using the Polity data have employed various thresholds to identify democracies. For current purposes, I adopt two of the more commonly used. In the literature, researchers have tended to identify states with democracy scores greater or equal to six or seven in the Polity dataset as democracies (e.g., Jagers and Gurr, 1995; Schultz, 1999:251). To assess the robustness of my findings, I employ both thresholds.

The third condition for inclusion—that states be new or consolidating democracies as opposed to consolidated ones—is operationalized as follows: First, traditional democracies from the first and second waves of democratization are screened out by excluding all countries with a democracy score of six or higher in 1973 (the last year before what is considered the beginning of the “third wave of democratization”). Second, all countries with scores of nine or ten continuously for the period 1986–1995 (the decade preceding the temporal domain for this study) are excluded.²⁷ This eliminates four countries²⁸ that were frontrunners in the third wave of democracy. Overall, based on the above conditions, 49 countries were included in the study.²⁹ A list of the countries is offered in Appendix II.

²⁵ From a practical perspective, the 1995–2001 time frame allows one to more easily collect data necessary for hypotheses testing. The IO press releases (necessary for the measure of external information flow) are generally available from the IOs’ websites in readily searchable forms beginning in 1994 or 1995. Also, beginning about 1995, data on privatization in these countries and on freedom of the press are more complete.

²⁶ In fact, aggregate tests indicated that the total number of IO press releases pertaining to the 49 countries more than doubled from 1995 to 2001 (from 986 to 2122).

²⁷ The ten-year period was chosen to allow for two electoral cycles. Some analysts consider democratic consolidation to have been achieved once two free and fair elections have taken place or after a government loses an election or gives up power in a peaceful manner (see, e.g., Przeworski et al., 1996:50–51). The ten-year period is intended to cover such developments.

²⁸ These were Greece, Papua New Guinea, Portugal, and Spain; all of which began to democratize in the mid-1970s.

²⁹ A “test” of the face validity of this operationalization is that almost all the countries chosen by this method are identified by Samuel Huntington (1991b) as “third-wave democracies.” Several countries that became democratic after the publication of Huntington’s book and that meet the criteria for this study have also been included.

TABLE 1. Adoption of Legislation on Freedom of Information

<i>Variable</i>	<i>Model 1</i>	<i>Model 1'</i>	<i>Model 1''</i>	<i>Model 2</i>	<i>Model 2' (one-year lag)</i>
Growth in information released by IOs (IOINFOGROW)	—	—	—	1.90e-4** (7.13e-5)	3.69e-4* (1.62e-5)
Information released by IOs (IOINFO)	—	—	—	1.95e-4** (6.16e-5)	9.93e-5 (6.60e-5)
Level of democracy (DEMOC)	.313* (.140)	—	—	.188 (.191)	.015 (.199)
Press freedom (FREEPRESS)	.012 (.025)	.0413** (.0148)	—	9.90e-3 (.027)	.023 (.028)
Change in democracy score (DEMOCGROW)	.252 (.238)	.319 (.201)	.309 (.168)	.404 (.246)	.360 (.242)
Growth in press freedom (FREEPRESSGROW)	.026 (.035)	.034 (.027)	7.38e-3 (.020)	.028 (.037)	.044 (.022)
Degree of privatization (PRIVATIZATION)	7.07 e-5* (3.35e-5)	3.4 e-5 (2.77e-5)	3.14 e-5 (2.91e-5)	5.91e-5 (3.48e-5)	1.44 e-5 (2.75e-5)
GDP per capita (WEALTH)	2.64e-5 (5.9e-5)	4.81e-6 (5.08e-5)	5.31e-5 (4.36e-5)	2.99e-5 (6.19e-5)	1.66e-5 (5.15e-5)
Control over executive and legislative (EXECLEG)	.433 (.276)	.416 (.285)	.279 (.253)	.530 (.302)	.738 (.467)
Lagged dependent variable (LAGADOPTION)	.420 (.410)	.374 (.399)	.188 (.396)	.644 (.438)	.814* (.319)
Cut 1	1.13 (2.53)	4.60 (1.10)	1.94 (0.25)	2.20 (2.82)	4.23 (2.88)
Cut 2	1.61 (2.54)	5.07 (1.13)	2.37 (0.30)	2.72 (2.83)	4.76 (2.93)
Pseudo R square	.157	.130	.046	.224	.242
N	245	245	245	245	196

Ordered probit with robust standard errors adjusted for clustering on country in parentheses; the dependent variable is coded as follows: 0 = no FOI law; 1 = incomplete FOI law; 2 = complete FOI law.

**Significant at .01 level or better; *significant at .05 level.

Results and Implications

The results of the tests for models 1 and 2, focusing on the adoption of access to information legislation, are offered in Table 1. It is interesting to note that while the *levels* of democracy and press freedom (which were tested together as well as separately because of the high correlation between the two) are indeed significant indicators of the increase in domestic transparency, the *increase* in democracy and in press freedom were not. DEMOCGROW and FREEPRESSGROW were not significant even when testing model 1'', which excludes the levels of democracy and press freedom (considering that the levels of the two variables are strongly correlated with the increases in the variables). They were also not significant predictors of the growth in domestic transparency when introducing a one-year lag.³⁰ H_0 , stating that the adoption of access to information laws is simultaneous with increases in democracy and press freedom does not appear therefore to be supported by the statistical tests. This suggests that, if indeed there is a “spillover” from other democratic institutions, from press freedom to domestic transparency, such a process is a slow one.

Nevertheless, it is interesting to note the significance of the level of democracy and press freedom. They suggest that the mechanisms that lead to the adoption of access to information legislation are more likely to take place in more democratic countries and with higher degrees of press freedom. In other words, the level of

³⁰ These results are not offered in Table 1. For full results please contact the author.

democracy and press freedom appear to be “permissive factors” rather than “causal” factors leading to the adoption of FOI laws.

Overall, model 1 does not offer much insight into the *causes* of adoption of FOI laws. One can assume that the possible “crises of trust” that emerge are caused by a series of elements that are not captured by the model. One possible exception is the variable measuring the degree of privatization. Table 1 shows that this variable is significant (at least in model 1 that includes only domestic independent variables) and is positively correlated with the adoption of freedom of information legislation. This offers support to the argument that in years in which the process of privatization is intense, societal groups intensify their efforts for the adoption of FOI legislation in order to avoid possible corrupt practices that often go hand-in-hand with the selling of state property. It also suggests that during intense processes of privatization, scandals revealing corrupt practices are more likely to emerge.³¹ Such scandals can trigger crises of government trust and lead to the adoption of FOI laws.

More important, model 2 shows that another possible explanation for the crises of trust (and implicitly for the adoption of freedom of information laws intended to signal credibility) is the increase in the flow of information from IOs to societies (IOINFOGROW). This variable is also significant in model 2' which introduces a one-year lag. This suggests that, as more information released by IOs reaches societal actors, and as some of this information is used to criticize governments, the crises of government trust are more likely to emerge and freedom of information laws are more likely to be adopted.

Hypothesis 1 (referring to the relevance of the *level* of flows of information from IOs to societies) is also supported by the significance of the variable IOINFO (in model 2). This suggests there might be a certain level of external information flow from which government elites conclude that they have lost their monopoly over information and are, therefore, likely to allow for the adoption of FOI laws. Overall, the variables reflecting the level and increase of information flows from IOs to the public, from model 2, add to the explanatory power of model 1 which includes only domestic variables.

Model 2' (which includes a one-year lag) suggests that the adoption of laws on access to information comes after the growth in external information flow. This offers support for the causal direction of hypothesis 2. This finding is relevant because the tests of model 3 (Table 2) suggest that the adoption of FOI laws is not a significant factor accounting for the increases in external flows of information. The sudden growth in information offered by IOs about a country appears to be rather the result of the organization's increased interest in a specific issue related to that country.

Taken together, models 2' and 3' suggest that the growth in external information flows comes before the growth in domestic transparency. This finding does not necessarily imply causality, but it does offer at least some plausibility to the main argument of this study. As more IO-released information flows toward societal actors (arrow 2 in Figure 2), the cost-benefit calculations of domestic elites are altered and the probability of adoption of institutions of transparency increases.

The significance of information flows from IOs to societies in accounting for the adoption of institutions of domestic transparency is a robust finding of these tests. It is significant even when controlling for other factors considered in the literature to affect government transparency. The significance stands for both European and non-European countries, as well as by considering a narrower definition of “democratic” (i.e., a different cut-off point for the DEMOC measure).

³¹ For example, in Bulgaria, the law on access to information was, in part, a reaction to scandals related to corrupt practices in the process of privatization.

TABLE 2. Increase in Information Released by IOs, 1995–2001

<i>Variable</i>	<i>Model 3</i>	<i>Model 3' (one-year lag)</i>
Adoption of FOI legislation (FOIADOPT)	2.63 (4.44)	3.54 (6.14)
Existence of FOI legislation (FOI)	6.46* (2.73)	9.00* (4.71)
Change in democracy score (DEMOCGROW)	.470 (1.55)	1.11 (1.85)
Level of democracy (DEMOC)	1.49 (1.38)	.360 (1.46)
Growth in press freedom (FREEPRESSGROW)	.190 (.195)	.064 (.267)
Press freedom (FREEPRESS)	.105 (.153)	.059 (.170)
Degree of privatization (PRIVATIZATION)	0.46e-3 (0.58e-3)	1.18 e-3 0.66e-3
GDP per capita (WEALTH)	1.65e-3** (5.41e-4)	2.87e-4 (5.41e-4)
Control over executive and legislative (EXECLEG)	10.55** (3.09)	2.62 (3.72)
Lagged dependent variable (LAGTOTALGROW)	– .257 (.247)	– .332 (.353)
Constant	– 17.63 (16.62)	– 2.69 (17.91)
Adjusted R square	29.44	28.14
N	294	245

Unstandardized coefficients with OLS standard errors in parentheses.

**Significant at .01 level; *significant at .05 level.

Overall, these tests suggest that governments of new democracies are more likely to become transparent domestically when other democratic institutions are in place, especially when institutions supporting press freedom have emerged. In other words, governments will institutionalize public access to information when the domestic balance of power shifts in favor of the groups advocating transparency. When civil society (including an independent press) is strong enough, we can expect access to information legislation to be passed.

Nevertheless, as the examples of traditional democracies such as the U.S. and the U.K. suggest, even when such “permissive factors” are in place, it may take decades before the initial equilibrium (i.e., the lack of institutions of transparency) shifts and institutions are finally adopted. In many cases it takes certain shocks to trigger the process leading to increased domestic transparency. In some countries such shocks have been generated by domestic developments alone. In the U.S., the Watergate scandal led to improvements in the access to information legislation. In Ireland the impulse that triggered such legislation came from a scandal involving food poisoning while in Japan it came from scandals related to official “entertainment” expenses and HIV contamination of the blood supply (Blanton, 2002).

This study has argued that IOs have recently emerged as an important alternative source of information for the public and have thus increased the likelihood for government scandals (or, at least, distrust of government) to emerge. Governments have a harder time hiding information from their societies and are, thus, even more likely than before to find it necessary to adopt access to information laws to boost their credibility.

This finding is important because it suggests a relevant additional policy tool for the support of democratic consolidation. If we want to increase the likelihood of the

many new democracies to survive, we should find ways to increase their transparency. While it may be easier to encourage less powerful states to adopt institutions of transparency, it is much more difficult to do so for countries like Russia or China where the U.S. and its democratic allies cannot influence domestic evolutions as easily. If membership or prospective membership in transparent IOs encourages the governments of such countries to become more open and accountable to their societies, we can and should encourage IOs to become more transparent. Some IOs have not changed their policies on public access to information (Audley and Florini, 2001:5). But others have slowly begun to do so and this study argues that the interconnectivity of information flows leads IO transparency to have a positive impact on the processes of democratic consolidation worldwide.

Appendix I: International Organizations Considered for the Measure of External Information Flow

African Bank
 Asian Development Bank
 Association of Southeast Asian Nations
 Council of Europe
 European Bank for Reconstruction and Development
 European Union
 Inter-American Development Bank
 International Monetary Fund
 Organization of American States
 Organization of Economic Cooperation and Development
 North Atlantic Treaty Organization
 Organization for Security and Cooperation in Europe
 Southern African Development Community
 The United Nations (with separate measures for
 United Nations Development Program and
 United Nations High Commissioner for Refugees)
 World Bank

Appendix II: Countries Considered in Study for 1995–2001 Period

Albania	Guyana	Panama
Argentina	Haiti	Paraguay
Armenia	Honduras	Philippines
Bangladesh	Hungary	Poland
Benin	Latvia	Romania
Bolivia	Lithuania	Slovakia
Brazil	FYR Macedonia	Slovenia
Bulgaria	Madagascar	South Africa
Central African Republic	Malawi	South Korea
Chile	Mali	Sri Lanka
Czech Republic	Mexico	Thailand
Dominican Republic	Moldova	Turkey
Ecuador	Mongolia	Ukraine
El Salvador	Mozambique	Uruguay
Estonia	Namibia	Zambia
Fiji	Nepal	
Guatemala	Nicaragua	

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Future Challenges For The RTI Movement

The Right-To-Information (RTI) movement has had a good ten years. Little more than a decade ago, transparency was not in vogue. The World Bank had not yet released its influential 1997 report on the importance of good governance. Transparency International had only just begun the publication of its annual corruption perceptions index. There were scarcely two dozen countries that had national RTI laws, most of them in the developed world.

Today, of course, we confront different circumstances. The concept of transparency is now so familiar that it has become, as Professor Christopher Hood recently observed, a "banal" idea, "taken as unexceptional in discussions of governance and public management." Almost seventy countries have national RTI laws. We have witnessed the emergence of an unprecedented global community of advocates, government officials, and academics interested in the promotion and study of RTI. And every day we hear stories about the ways in which RTI have helped to improve governmental accountability.

This is a considerable achievement. Nonetheless there are still several ways in which the RTI movement could be confounded. It is important -- and certainly consistent with our own insistence on the virtues of transparency -- to be candid about the challenges that the movement still confronts. I propose to outline five of these challenges.

1. The Workability of RTI Law

The first and most immediate urgent task is to deal directly with the reality that RTI law is a complicated policy instrument, easily prone to failure. We can view the problem of workability from three perspectives: those of users, administrators, and independent arbitrators.

First, the user's perspective. While lobbying for RTI laws, advocates have often understated the difficulties encountered when citizens actually exercise their statutory rights.

Users require three resources that are generally in scarce supply. The first is knowledge about bureaucracy and the law. Individuals who are effective in using RTI laws know what documents are held by government agencies, and where they are likely to be held. They also know how to file a request; understand when they are being put off, and when excuses are being improperly invoked; and know how to complain about bureaucratic recalcitrance.

A second requirement is gumption -- by which I mean the courage to exercise the right to information. This is a quality that is in surprisingly short supply, even among citizens who are well-educated and not dependent on governmental largesse. Even in jurisdictions that have long-established RTI laws, citizens worry that they will disrupt relations with government officials, or simply cause offense, by filing a request for information.

The third resource is persistence. Individuals must be prepared to pursue cases for months, and sometimes for years.

The difficulties encountered by users are aggravated by administrative shortfalls. But here we must deal candidly with the reality that RTI laws are not easily administered. They require special procedures and staff training. In every country that has established a passable RTI system, this has meant a significant investment of money. Today, however, many countries have taken the symbolical step of adopting an RTI laws without taking the substantive step of investing in administrative capabilities. Moreover it is not clear, given their poverty, that many countries are capable of developing capabilities like those in the rich democracies. One warning sign is the substantial

proportion of "test requests" that result in mute refusals in countries outside the first world.

Bureaucratic compliance might be better if enforcement bodies (that is, Information Commissioners) were effective in responding to problems of bureaucratic misbehavior. But commissioners have their own difficulties, which arise from a combination of resource shortfalls and problems of institutional design. As to the latter: commissioners are principally designed to resolve *cases* of alleged misconduct, not *patterns* of non-compliance that may involve hundreds or thousands of cases. This is an approach that is congenial to lawyers, who like to apply their forensic skills to particular disputes. But is also an approach that is easily confounded by errant bureaucracies. More cases of non-compliance increase a commissioner's workload, which results in delayed resolution of complaints, which further corrodes bureaucratic incentives for compliance.

These observations about the weaknesses of RTI law are informed by personal experience. I recently received a response to an RTI request that I filed with the U.S. Federal Bureau of Investigation five years ago; sadly I cannot say that this was the oldest of my U.S. requests. The delay was partly attributable to my own unwillingness to commit time and money in making an application for compliance to the federal court. I have also one complaint with the Canadian Office of the Information Commissioner that is now over two years old. I have seven complaints with the U.K. Information Commissioner that range in age from 21 to 30 months, without prospect of immediate resolution. (As a consequence I have stopped filing requests in the U.K, because -- at least in my case -- there is no effective remedy against bureaucratic non-compliance.) I recently spent more than two years fruitlessly pursuing a request for information under the United Nations Development Programme's Information Disclosure Policy.

Delay is so widespread, and so extensive, that I now find it possible to gauge roughly how many requests I could file in the rest of my working life. Assuming that I can handle two or three files at once, and assuming that each takes two or three years to reach a conclusion, I have perhaps two dozen requests left in me. In my own case, the grand promise of RTI has been reduced to a game of Twenty Questions. This should be regarded as a damning comment on the efficacy of RTI systems, even in wealthy democracies, for I am fortunate to have advantages -- in terms of education and position -- that are not shared by the vast majority of the world's population.

Moreover the evidence tends to support this skeptical view of RTI law. Who do we often find using RTI? Exactly those constituencies who have the advantage of the three resources that I described earlier: Businesses; current and former government employees; law firms; and well-funded interest groups. A case can be made, of course, that disclosure serves the public interest even in these circumstances. But it is a different and more complicated case than would be made if the *typical* requester were the citizen-hero who champions the dispossessed, as we often suggest.

I say this as a friend of RTI, wishing to see RTI laws work for the advantage of the vast majority of the world's citizens. However, attaining this goal will not be easy. Unless we grapple with the implementation challenges I have just described, we are at risk of achieving, on a global scale, the result that Antonin Scalia once said had befallen the U.S. Freedom of Information Act. The US FOIA, Scalia said in 1982, had become "the Taj Mahal of the Doctrine of Unanticipated Consequences . . . [The provisions of the law] were promoted as a boon to the press, the public interest group, the little guy; [but] they have been used most frequently by corporate lawyers."

2. The Changing Infostructure

A second RTI challenge may be peculiar to the developed countries. It arises because of changes in the governmental "infostructure" -- that is, the systems that are used by government organizations to contain and share information. (Professor Luciano Floridi defines the infostructure as "an organization's information assets that comprise the information base of the organization, including hardware, software, networks, infrastructure, information, and applications."). RTI laws were developed in a different and simpler era, so far as infostructure is concerned -- an era in which information was typically recorded on paper, contained in physical files and cabinets, and reproduced through relatively expensive photo-mechanical processes. This era has now faded away. Information is now typically digitized, and aggregated into vast electronic databases. The cost of storing and reproducing information has dropped dramatically, and consequently the volume of information held by government organizations has skyrocketed.

This technological transformation has profound implications for the operation of RTI systems. Increasingly, a request for information will pertain not to physical records, but

to digitized information held within government databases. In one sense this might seem to simplify the process of responding to RTI requests. After all, RTI officers might be able to use new document management systems to locate records that are responsive to a request more quickly.

On the other hand, new complications might be added. The volume of responsive records will probably increase substantially. Moreover, requesters might not want a specific record, but rather bulk data. This sort of request is much more complicated. Deciding precisely what to ask for, and whether it can be retrieved, requires a high degree of technical literacy on the part of requesters, RTI officials, and investigators within Commissioners' offices. Requesters may also lack the technical capacity to interpret bulk data after it is released.

Digitization also creates the threat of new impediments to access. Increasingly the databases that are used to warehouse government data are designed and maintained by private contractors.

Consider the following predicament, taken from personal experience. A request is made for information contained in a departmental database. The department replies that the database does not have the capability to download the requested information, because the department did not specify that capability when it procured the software. It is too expensive to hire the contractor to amend the software, says the department, which consequently refuses the request.

What has happened here? The department has effectively locked away a mass of information by the simple expedient of failing to insist that the contractor provide a capacity for retrieval. It should be added that this functionality can usually be added at little additional cost. But the department has no incentive to insist on it, and can justify its indifference by saying that the functionality is not essential to its "business needs." Nor does there appear to be a remedy for this predicament under major RTI laws. It is as though government departments have locked their filing cabinets and dropped the keys in the Thames (or the Potomac, or the Ottawa River).

3. Private and Quasi-Public Governance

A third challenge is the shift of functions to private or quasi-public organizations. It used to be said in the United States that certain activities -- known as "inherently governmental functions" -- could never be transferred out of the hands of government departments. We have now learned that this boundary line cannot be maintained in practice. There is nothing in the governmental sphere that could not be given to a contractor or autonomous agency. This creates significant difficulties for RTI systems, which are not well suited to these so-called "alternate service delivery mechanisms."

The problem is often framed as one of access to contract documents. While this is an important subject it is actually only one aspect of the larger issue. For example, should there be a right of access to *internal* documents of the contractor, if they pertain to the performance of some critical activity such as prison management or education? And if we acknowledge a right of access to such documents, how should it be exercised -- against the contractor directly, or through the contracting government?

Even more difficult are the cases in which critical services are delivered by organizations that are not tethered to a government department by contract. Air traffic control in Canada is a good example. We might add the National Electricity Reliability Council in the United States, which oversees the country's power grid; or the regulatory components of many of the world's major stock exchanges; or national organizations that run components of the World Wide Web. We lack generally accepted criteria for deciding when such organizations should be covered by RTI. And there is also little political support for the extension of RTI law to such organizations, even if the criteria should be decided upon.

The problem of assuring transparency when responsibilities are given to contractors and other non-governmental actors is not only, or even primarily, a rich-country problem. In the next thirty years, the developing world will undergo an unprecedented build-up of infrastructure, as a consequence of rapid urbanization and trade liberalization. Fiscal constraints, and pressure from eager investors, means that much of this build-up will be accomplished through private action. The ground rules for governance of such infrastructure are being negotiated now, and it is not likely that RTI will be properly accommodated in those negotiations.

4. Growing Complexity in the Security Sector

There are also mounting challenges in the sphere of national security. Of course, there is renewed sensitivity to security considerations in the post-9/11 era. In some countries -- notably the United States -- there are also serious problems in the operation of the security classification system, an invention of the early Cold War years that has become massive and unwieldy.

In addition, there have been important changes to the very structure of the security sector that threaten to undermine the right to information. In Iraq, for example, we have witnessed the substantial role of the private sector in functions that were once the exclusive preserve of governmental actors. Even combat roles are now fulfilled by contractors. This is only one instance of the threat to RTI posed by privatization.

A less obvious and even less tractable problem is the growth of intergovernmental security networks. By this I mean the interlinking of defense, intelligence and police organizations in different countries, and the corresponding growth of agreements on the sharing of information within these networks. One consequence is that the proportion of information held by one agency that has been received from other governments, often under strict assurances of confidentiality, continues to grow. This results in a quiet corrosion of national RTI requirements.

It is difficult to preserve openness in the security sector because of the deference that courts, legislatures and ombudsmen have traditionally shown to executives on national security issues. This is compounded by a massive mismatch in resources between security agencies and non-governmental watchdogs. The secrecy systems of most countries are highly complex. Few non-governmental groups have the resources to understand these systems, or to monitor changes such as the growth of transnational security networks.

5. Building Reliable Knowledge About RTI Systems

There is a final difficulty: the limits of our knowledge about the operations of RTI systems. As I noted earlier, there are now almost seventy national RTI laws, and many dozen sub-national laws. Some of these laws have been in force for decades. Still, consider how little we know about these basic questions:

- Who actually uses RTI laws?
- What sort of information do different kinds of requesters usually seek?
- What do requesters actually do with the information they obtain under RTI?
- Can we undertake a benefit/cost analysis of different types of requests, and distinguish those that yield great benefits at low cost, from those that yield little benefit despite substantial processing costs?
- To what extent do RTI laws simply reroute requests for information that were once handled by other means?
- How do RTI laws affect the internal operations of government agencies?
- How do fees and other administrative barriers -- such as requirements relating to the form of a request -- affect the demand for information?

These are important questions, some of which go to the core of the argument for RTI. Suppose, for example, that we found that many requesters did nothing at all with the information they received; how would we adjust our views about the value of RTI? Or suppose that the most costly requests came from affluent individuals or businesses: how would we adjust our views about fee policies?

Not only are these important questions; they are also questions that are frequently asked by government officials in poorer countries who are being encouraged to adopt new RTI laws. It is possible, of course, for any practiced advocate of RTI to hobble together a plausible answer to some (but not all) of these questions. Too often, however, these answers rely on anecdotes, selected because they bolster the case for adoption of an RTI law. Careful, reliable research is in short supply.

Why don't we do better in producing reliable knowledge about RTI? One reason, regrettably, is the impatience of funders and activists, who are reluctant to invest scarce resources in research that does not have a clear short-term payoff. Another reason is the defensiveness of government agencies, which are reluctant to support research whose conclusions cannot be controlled. (Hence the common resort to consultants, whose work can be more tightly controlled, but who often lack good knowledge of the RTI field.) Yet another reason is (again) the professional bias of lawyers -- whether situated in ombudsmen's offices, government departments, or advocacy organizations. Lawyers are good at interpreting law, and good at analysis of cases. They are less adept in studying complex bureaucratic and social systems.

We could know more about the operation of RTI systems than we do. And knowing more would be useful, in the long run. It would put us in a better position to make the case for RTI, or to adjust RTI systems so that benefits and costs are better balanced. There is an emergent community of new scholars who could be encouraged to undertake this research. However, good scholarship requires three things: a serious commitment of resources; tolerance of a long-time frame for production of results; and a willingness to cede complete control over the production of research to the scholarly community.

Only in the Foothills

A few months ago I had the good fortune to visit the Indian government's training facility for senior civil servants, the Lal Bahadur Shastri National Academy of Administration, which is located a few hours northeast of Delhi, on the edge of the Himalaya range. During a tea break I mentioned to an Indian colleague that the view of the mountains was breathtaking. My colleague corrected me. I was not looking at the mountains, he said; I was looking at the foothills. The mountains were hidden in the distance.

The RTI movement stands in a similar position. In the last decade the idea of transparency has seized public attention, and there have been great strides in persuading governments to acknowledge the right to information as a matter of principle. Compared to where we were only a few years ago, the prospect is spectacular. Nonetheless we are only in the foothills. Full realization of the RTI idea will require many more years of steady marching.



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**Information note on the decision of the Inter-American Court of Human Rights
in the case of *Claude Reyes and others vs. Chile***

**Note d'information sur la décision de la Cour interaméricaine des droits de l'homme
dans l'affaire *Claude Reyes and others vs. Chile***

Introduction

The Inter-American Court of Human Rights has ruled on 11 October 2006 (*Claude Reyes and others vs. Chile*) that there is a general right of access to information held by government. This is the first such ruling from an international tribunal. The case originates in a request for information made in 1998 by three environmental activists about a controversial logging project; no information was provided nor a reasoned refusal.

The judgment also makes clear that, to give full effect to this right, states must adopt legal and other provisions which ensure effective exercise of the right to information as well as define limited exemptions to be applied so as to minimise restrictions of this right. The Court further requires the Chilean state to train public officials on the right to information and the international standards for exemptions.

This document provides a non official English translation of the judgment, provided by Open Society Justice Initiative. The Spanish original version of the judgment can be found at: <http://www.corteidh.or.cr/casos.cfm?idCaso=245>

* * *

Introduction

La Cour Interaméricaine des Droits de l'Homme a reconnu le 11 octobre 2006 (*Claude Reyes et autres c. Chili*) l'existence d'un droit général d'accès aux informations détenues par le gouvernement. Il s'agit de la première décision en ce sens prise par une juridiction internationale. L'affaire remonte à une demande d'information faite en 1998 par trois activistes écologistes sur un projet controversé d'exploitation de bois ; aucune information ne leur a été donnée ni les raisons du refus.

L'arrêt indique aussi clairement que, pour donner plein effet à ce droit, les Etats doivent adopter des mesures, notamment des dispositions juridiques, pour assurer l'exercice effectif du droit à l'information. Ils doivent aussi déterminer un nombre limité d'exceptions à appliquer afin de causer le moins de restrictions possible à ce droit. La Cour demande de plus à l'Etat chilien de former les fonctionnaires au droit à l'information et aux normes internationales et matière d'exceptions.

Le présent document reproduit une traduction non officielle en anglais de l'arrêt qui a été fournie par Open Society Justice Initiative. On peut trouver la version espagnole originale de l'arrêt à l'adresse suivante : <http://www.corteidh.or.cr/casos.cfm?idCaso=245>

* * *

INTER-AMERICAN COURT OF HUMAN RIGHTS

CLAUDE REYES *ET AL.* V. CHILE

JUDGMENT OF SEPTEMBER 19, 2006

Paragraphs 61 to 103

The Court's findings

61. Article 13 (Freedom of Thought and Expression) of the American Convention establishes, *inter alia*, that:

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
 - a. respect for the rights or reputations of others; or
 - b. the protection of national security, public order, or public health or morals.
3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

[...]

62. Regarding the obligation to respect rights, Article 1(1) of the Convention stipulates that:

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

63. Regarding domestic legal effects, Article 2 of the Convention establishes that:

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

64. The Court has established that the general obligation contained in Article 2 of the Convention entails the elimination of any type of norm or practice that results in a violation of the guarantees established in the Convention, as well as the issue of norms and the implementation of practices leading to the effective observance of these guarantees.¹

¹ Cf. *Case of Ximenes Lopes*, *supra* note 2, para. 83; *Case of Gómez Palomino*. Judgment of November 22, 2005. Series C No. 136, para. 91; *Case of the "Mapiripán Massacre"*. Judgment of September

65. In light of the proven facts in this case, the Court must determine whether the failure to hand over part of the information requested from the Foreign Investment Committee in 1998 constituted a violation of the right to freedom of thought and expression of Marcel Claude Reyes, Sebastián Cox Urrejola and Arturo Longton Guerrero and, consequently, a violation of Article 13 of the American Convention.

66. With regard to the specific issues in this case, it has been proved that a request was made for information held by the Foreign Investment Committee, and that this Committee is a public-law juridical person (*supra* para. 57(2) and 57(13) to 57(16)). Also, that the requested information related to a foreign investment contract signed originally between the State and two foreign companies and a Chilean company (which would receive the investment), in order to develop a forestry exploitation project that caused considerable public debate owing to its potential environmental impact (*supra* para. 57(7)).

67. Before examining whether the restriction of access to information in this case led to the alleged violation of Article 13 of the American Convention, the Court will determine who should be considered alleged victims, and also define the subject of the dispute concerning the failure to disclose information.

68. In relation to determining who requested the information that, in the instant case, it is alleged was not provided, both the Commission and the representative stated that the alleged victims were Marcel Claude Reyes, Arturo Longton Guerrero and Sebastián Cox Urrejola. They also indicated that the State violated their right of access to public information because it refused to provide them with the requested information and failed to offer a valid justification. In this respect, Mr. Cox Urrejola affirmed in his written statement "that together with Marcel Claude and Arturo Longton, [he] presented the request for information to the Foreign Investment Committee [in] May 1998" (*supra* para. 48). While, Arturo Longton, in his written statement, indicated that, during the meeting held on May 19, 1998, he requested "several items of information regarding the foreign investor involved [...] and, in particular, the background information that demonstrated his suitability and soundness" (*supra* para. 48).

69. In the instant case, in which violation of the right to accede to State-held information is alleged, in order to determine the alleged victims, the Court must examine their requests for information and those that were refused

70. From examining the evidence, it is clear that Marcel Claude Reyes, as Executive Director of the Terram Foundation, requested information from the Foreign Investment Committee (*supra* para. 57(13), 57(14) and 57(16)), and also that Arturo Longton Guerrero participated in the meeting held with the Vice President of this Committee (*supra* para. 57(14)) when information was requested, part of which has not been provided to them. The State did not present any argument to contest that Mr. Longton Guerrero requested information from the Committee which he has not received. As regards, Sebastián Cox Urrejola, the Court considers that the Commission and the representatives have not established what the information was that he requested from the Foreign Investment Committee which was not given to him; merely that he

15, 2005. Series C No. 134, para. 109; and *Juridical Condition and Rights of Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 78.

recently took part in filing a remedy of protection before the Santiago Court of Appeal (*supra* para. 57(23)).

71. In view of the above, the Court will examine the violation of Article 13 of the American Convention in relation to Marcel Claude Reyes and Arturo Longton Guerrero, since it has been proved that they requested information from the Foreign Investment Committee.

*

Information not provided (subject of the dispute)

72. The Court emphasizes that, as has been proved – and acknowledged by the Commission, the representative, and the State – the latter provided information corresponding to four of the seven points included in the letter of May 7, 1998 (*supra* para. 57(13), 57(14), 57(15) and 57(19)).

73. The Court considers it evident that the information the State failed to provide was of public interest, because it related to the foreign investment contract signed originally between the State and two foreign companies and a Chilean company (which would receive the investment), in order to develop a forestry exploitation project that caused considerable public debate owing to its potential environmental impact (*supra* para. 57(7)). In addition, this request for information concerned verification that a State body - the Foreign Investment Committee – was acting appropriately and complying with its mandate.

74. This case is not about an absolute refusal to release information, because the State complied partially with its obligation to provide the information it held. The dispute arises in relation to the failure to provide part of the information requested in points 3, 6 and 7 of the said letter of May 7, 1998 (*supra* para. 57(13) and 57(17)).

*

* *

A) *Right to freedom of thought and expression*

75. The Court's case law has dealt extensively with the right to freedom of thought and expression embodied in Article 13 of the Convention, by describing its individual and social dimensions, from which it has deduced a series of rights that are protected by this article.²

76. In this regard, the Court has established that, according to the protection granted by the American Convention, the right to freedom of thought and expression includes "not only the right and freedom to express one's own thoughts, but also the

² Cf. *Case of López Álvarez*. Judgment of February 1, 2006. Series C No. 141, para. 163; *Case of Palamara Iribarne*. Judgment of November 22, 2005. Series C No. 135, para. 69; *Case of Ricardo Canese*. Judgment of August 31, 2004. Series C No. 111, paras. 77-80; *Case of Herrera Ulloa*. Judgment of July 2, 2004. Series C No. 107, paras. 108-111; *Ivcher Bronstein case*. Judgment of February 6, 2001. Series C No. 74, paras. 146-149; *Case of "The Last Temptation of Christ" (Olmedo Bustos et al.)*. Judgment of February 5, 2001. Series C No. 73, paras. 64-67; and *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, paras. 30-33 and 43.

right and freedom to *seek, receive and impart* information and ideas of all kinds.”³ In the same way as the American Convention, other international human rights instruments, such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, establish a positive right to seek and receive information.

77. In relation to the facts of the instant case, the Court finds that, by expressly stipulating the right to “seek” and “receive” “information,” Article 13 of the Convention protects the right of all individuals to request access to State-held information, with the exceptions permitted by the restrictions established in the Convention. Consequently, this article protects the right of the individual to receive such information and the positive obligation of the State to provide it, so that the individual may have access to such information or receive an answer that includes a justification when, for any reason permitted by the Convention, the State is allowed to restrict access to the information in a specific case. The information should be provided without the need to prove direct interest or personal involvement in order to obtain it, except in cases in which a legitimate restriction is applied. The delivery of information to an individual can, in turn, permit it to circulate in society, so that the latter can become acquainted with it, have access to it, and assess it. In this way, the right to freedom of thought and expression includes the protection of the right of access to State-held information, which also clearly includes the two dimensions, individual and social, of the right to freedom of thought and expression that must be guaranteed simultaneously by the State.⁴

78. In this regard, it is important to emphasize that there is a regional consensus among the States that are members of the Organization of American States (hereinafter “the OAS”) about the importance of access to public information and the need to protect it. This right has been the subject of specific resolutions issued by the OAS General Assembly.⁵ In the latest Resolution of June 3, 2006, the OAS General Assembly, “urge[d] the States to respect and promote respect for everyone’s access to public information and to promote the adoption of any necessary legislative or other types of provisions to ensure its recognition and effective application.”⁶

79. Article 4 of the Inter-American Democratic Charter⁷ emphasizes the importance of “[t]ransparency in government activities, probity, responsible public administration on the part of Governments, respect for social rights, and freedom of expression and of the press” as essential components of the exercise of democracy. Moreover, article

³ Cf. *Case of López Álvarez*, *supra* note 72, para. 163; *Case of Ricardo Canese*, *supra* note 72, para. 77; and *Case of Herrera Ulloa*, *supra* note 72, para. 108.

⁴ Cf. *Case of López Álvarez*, *supra* note 72, para. 163; *Case of Ricardo Canese*, *supra* note 72, para. 80; and *Case of Herrera Ulloa*, *supra* note 72, paras. 108-111.

⁵ Cf. Resolution AG/RES. 1932 (XXXIII-O/03) of June 10, 2003, on “Access to Public Information: Strengthening Democracy”; Resolution AG/RES. (XXXIV-O/04) of June 8, 2004, on “Access to Public Information: Strengthening Democracy”; Resolution AG/RES. 2121 (XXXV-O/05) of June 7, 2005, on “Access to Public Information: Strengthening Democracy”; and AG/RES. 2252 (XXXVI-O/06) of June 6, 2006, on “Access to Public Information: Strengthening Democracy.”

⁶ Cf. Resolution AG/RES. 2252 (XXXVI-O/06) of June 6, 2006, on “Access to Public Information: Strengthening Democracy,” second operative paragraph.

⁷ Cf. Inter-American Democratic Charter adopted by the General Assembly of the OAS on September 11, 2001, during the twenty-eighth special session held in Lima, Peru.

6 of the Charter states that “[i]t is the right and responsibility of all citizens to participate in decisions relating to their own development. This is also a necessary condition for the full and effective exercise of democracy”; therefore, it invites the States Parties to “[p]romot[e] and foster[...] diverse forms of [citizen] participation.”

80. In the Nueva León Declaration, adopted in 2004, the Heads of State of the Americas undertook, among other matters, “to provid[e] the legal and regulatory framework and the structures and conditions required to guarantee the right of access to information to our citizens,” recognizing that “[a]ccess to information held by the State, subject to constitutional and legal norms, including those on privacy and confidentiality, is an indispensable condition for citizen participation [...].”⁸

81. The provisions on access to information established in the United Nations Convention against Corruption⁹ and in the Rio Declaration on Environment and Development should also be noted.¹⁰ In addition, within the Council of Europe, as far back as 1970, the Parliamentary Assembly made recommendations to the Committee of Ministers of the Council of Europe on the “right of freedom of information,”¹¹ and also issued a Declaration establishing that, together with respect for the right of freedom of expression, there should be “a corresponding duty for the public authorities to make available information on matters of public interest within reasonable limits [...].”¹² In addition, recommendations and directives have been adopted¹³ and, in 1982, the Committee of Ministers adopted a “Declaration on freedom of expression and information,” in which it expressed the goal of the pursuit of an open information policy in the public sector.¹⁴ In 1998, the “Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters” was adopted during the Fourth Ministerial Conference “Environment for Europe,” held in

⁸ Cf. Declaration of Nuevo León, adopted on January 13, 2004, by the Heads of State and Government of the Americas, during the Special Summit of the Americas, held in Monterrey, Nuevo León, Mexico.

⁹ Cf. Articles 10 and 13 of the United Nations Convention against Corruption, adopted by Resolution 58/4 of the General Assembly of the United Nations of October 31, 2003.

¹⁰ Cf. Principle 10 of the Rio Declaration on Environment and Development adopted at the United Nations Conference on Environment and Development held from June 3 to 14, 1992.

¹¹ Cf. Recommendation No. 582 adopted by the Council of Europe Parliamentary Assembly on January 23, 1970. It recommended instructing the Committee of Experts on Human Rights Experts to consider and make recommendations on:

(i) the extension of the right of freedom of information provided for in Article 10 of the European Convention on Human Rights, by the conclusion of a protocol or otherwise, so as to include freedom to *seek* information (which is included in Article 19(2) of the United Nations Covenant on Civil and Political Rights); there should be a corresponding duty on public authorities to make information available on matters of public interest, subject to appropriate limitations;

¹² Cf. Resolution No. 428 adopted by the Council of Europe Parliamentary Assembly on January 23, 1970.

¹³ Cf. Resolution No. 854 adopted by the Council of Europe Parliamentary Assembly on February 1, 1979, which recommended the Committee of Ministers “to invite member states which have not yet done so to introduce a system of freedom of information,” which included the right to seek and receive information from government agencies and departments; and Directive 2003/4/EC of the European Parliament and Council of January 28, 2003, on public access to environmental information.

¹⁴ Declaration on the Freedom of Expression and Information adopted by the Committee of Ministers of April 29, 1982.

Aarhus, Denmark. In addition, the Committee of Ministers of the Council of Europe issued a recommendation on the right of access to official documents held by the public authorities,¹⁵ and its principle IV establishes the possible exceptions, stating that “[these] restrictions should be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecti[on].”

82. The Court also finds it particularly relevant that, at the global level, many countries have adopted laws designed to protect and regulate the right to accede to State-held information.

83. Finally, the Court finds it pertinent to note that, subsequent to the facts of this case, Chile has made significant progress with regard to establishing by law the right of access to State-held information, including a constitutional reform and a draft law on this right which is currently being processed.

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* *
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84. The Court has stated that “[r]epresentative democracy is the determining factor throughout the system of which the Convention is a part,” and “a ‘principle’ reaffirmed by the American States in the OAS Charter, the basic instrument of the inter-American system.”¹⁶ In several resolutions, the OAS General Assembly has considered that access to public information is an essential requisite for the exercise of democracy, greater transparency and responsible public administration and that, in a representative and participative democratic system, the citizenry exercises its constitutional rights through a broad freedom of expression and free access to information.¹⁷

85. The Inter-American Court referred to the close relationship between democracy and freedom of expression, when it established that:

Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a condition *sine qua non* for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.¹⁸

86. In this regard, the State’s actions should be governed by the principles of disclosure and transparency in public administration that enable all persons subject to its jurisdiction to exercise the democratic control of those actions, and so that they can question, investigate and consider whether public functions are being performed adequately. Access to State-held information of public interest can permit participation

¹⁵ Cf. Recommendation No. R (2002)2, adopted on February 21, 2002.

¹⁶ Cf. *Case of YATAMA*. Judgment of June 23, 2005. Series C No. 127, para. 192; and *The Word “Laws” in Article 30 of the American Convention on Human Rights*. Advisory Opinion OC-6/86 of May 9, 1986. Series A No. 6, para. 34.

¹⁷ Cf. *supra* note 75.

¹⁸ Cf. *Case of Ricardo Canese*, *supra* note 72, para. 82; *Case of Herrera Ulloa*, *supra* note 72, para. 112; and Advisory Opinion OC-5/85, *supra* note 72, para. 70.

in public administration through the social control that can be exercised through such access.

87. Democratic control by society, through public opinion, fosters transparency in State activities and promotes the accountability of State officials in relation to their public activities.¹⁹ Hence, for the individual to be able to exercise democratic control, the State must guarantee access to the information of public interest that it holds. By permitting the exercise of this democratic control, the State encourages greater participation by the individual in the interests of society.

B) The restrictions to the exercise of the right of access to State-held information imposed in this case

88. The right of access to State-held information admits restrictions. This Court has already ruled in other cases on the restrictions that may be imposed on the exercise of freedom of thought and expression.²⁰

89. In relation to the requirements with which a restriction in this regard should comply, first, they must have been established by law to ensure that they are not at the discretion of public authorities. Such laws should be enacted "for reasons of general interest and in accordance with the purpose for which such restrictions have been established." In this respect, the Court has emphasized that:

From that perspective, one cannot interpret the word "laws," used in Article 30, as a synonym for just any legal norm, since that would be tantamount to admitting that fundamental rights can be restricted at the sole discretion of governmental authorities with no other formal limitation than that such restrictions be set out in provisions of a general nature.

[...]

The requirement that the laws be enacted for reasons of general interest means they must have been adopted for the "general welfare" (Art. 32(2)), a concept that must be interpreted as an integral element of public order (*ordre public*) in democratic States [...].²¹

90. Second, the restriction established by law should respond to a purpose allowed by the American Convention. In this respect, Article 13(2) of the Convention permits imposing the restrictions necessary to ensure "respect for the rights or reputations of others" or "the protection of national security, public order, or public health or morals."

91. Lastly, the restrictions imposed must be necessary in a democratic society; consequently, they must be intended to satisfy a compelling public interest. If there are various options to achieve this objective, that which least restricts the right protected must be selected. In other words, the restriction must be proportionate to

¹⁹ Cf. *Case of Palamara Iribarne*, *supra* note 72, para. 83; *Case of Ricardo Canese case*, *supra* note 72, para. 97; and *Case of Herrera Ulloa*, *supra* note 72, para. 127. Likewise, cf. *Feldek v. Slovakia*, no. 29032/95, § 83, ECHR 2001-VIII; and *Surek and Ozdemir v. Turkey*, nos. 23927/94 and 24277/94, § 60, ECHR Judgment of 8 July, 1999.

²⁰ Cf. *Case of López Álvarez*, *supra* note 72, para. 165; *Case of Palamara Iribarne*, *supra* note 72, para. 85; *Case of Ricardo Canese*, *supra* note 72, para. 95; and *Case of Herrera Ulloa*, *supra* note 72, paras. 120-123.

²¹ Cf. *Advisory Opinion. OC-6/86*, *supra* note 86, paras. 26-29.

the interest that justifies it and must be appropriate for accomplishing this legitimate purpose, interfering as little as possible with the effective exercise of the right.²²

92. The Court observes that in a democratic society, it is essential that the State authorities are governed by the principle of maximum disclosure, which establishes the presumption that all information is accessible, subject to a limited system of exceptions.

93. It corresponds to the State to show that it has complied with the above requirements when establishing restrictions to the access to the information it holds.

94. In the instant case, it has been proved that the restriction applied to the access to information was not based on a law. At the time, there was no legislation in Chile that regulated the issue of restrictions to access to State-held information.

95. Furthermore, the State did not prove that the restriction responded to a purpose allowed by the American Convention, or that it was necessary in a democratic society, because the authority responsible for responding to the request for information did not adopt a justified decision in writing, communicating the reasons for restricting access to this information in the specific case.

96. Even though, when restricting the right, the public authority from which information was requested did not adopt a decision justifying the refusal, the Court notes that, subsequently, during the international proceedings, the State offered several arguments to justify the failure to provide the information requested in points 3, 6 and 7 of the request of May 7, 1998 (*supra* para. 57(13)).

97. Moreover, it was only during the public hearing held on April 3, 2006 (*supra* para. 32), that the Vice President of the Foreign Investment Committee at the time of the facts, who appeared as a witness before the Court, explained the reasons why he did not provide the requested information on the three points (*supra* para. 57(20)). Essentially he stated that "the Foreign Investment Committee [...] did not provide the company's financial information because disclosing this information was against the collective interest," which was "the country's development," and that it was the Investment Committee's practice not to provide financial information on the company that could affect its competitiveness to third parties. He also stated that the Committee did not have some of the information, and that it was not obliged to have it or to acquire it.

98. As has been proved, the restriction applied in this case did not comply with the parameters of the Convention. In this regard, the Court understands that the establishment of restrictions to the right of access to State-held information by the practice of its authorities, without respecting the provisions of the Convention (*supra* paras. 77 and 88 to 93), creates fertile ground for discretionary and arbitrary conduct by the State in classifying information as secret, reserved or confidential, and gives rise to legal uncertainty concerning the exercise of this right and the State's powers to limit it.

²² Cf. *Case of Palamara Iribarne*, *supra* note 72, para. 85; *Case of Ricardo Canese*, *supra* note 72, para. 96; *Case of Herrera Ulloa*, *supra* note 72, paras. 121 and 123; and Advisory Opinion OC-5/85, *supra* note 72, para. 46.

99. It should also be stressed that when requesting information from the Foreign Investment Committee, Marcel Claude Reyes “proposed to assess the commercial, economic and social elements of the [Río Cóndor] project, measure its impact on the environment [...] and set in motion social control of the conduct of the State bodies that intervene or intervened” in the development of the “Río Cóndor exploitation” project (*supra* para. 57(13)). Also, Arturo Longton Guerrero stated that he went to request information “concerned about the possible indiscriminate felling of indigenous forests in the extreme south of Chile” and that “[t]he refusal of public information hindered [his] monitoring task” (*supra* para. 48). The possibility of Messrs. Claude Reyes and Longton Guerrero carrying out social control of public administration was harmed by not receiving the requested information, or an answer justifying the restrictions to their right of access to State-held information.

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100. The Court appreciates the efforts made by Chile to adapt its laws to the American Convention concerning access to State-held information; in particular, the reform of the Constitution in 2005, which established that the confidentiality or secrecy of information must be established by law (*supra* para. 57(41)), a provision that did not exist at the time of the facts of this case.

101. Nevertheless, the Court considers it necessary to reiterate that, in accordance with the obligation established in Article 2 of the Convention, the State must adopt the necessary measures to guarantee the rights protected by the Convention, which entails the elimination of norms and practices that result in the violation of such rights, as well as the enactment of laws and the development of practices leading to the effective respect for these guarantees. In particular, this means that laws and regulations governing restrictions to access to State-held information must comply with the Convention’s parameters and restrictions may only be applied for the reasons allowed by the Convention (*supra* paras. 88 to 93); this also relates to the decisions on this issue adopted by domestic bodies.

102. It should be indicated that the violations in this case occurred before the State had made these reforms; consequently, the Court concludes that, in the instant case, the State did not comply with the obligations imposed by Article 2 of the American Convention to adopt the legislative or other measures necessary to give effect to the right to freedom of thought and expression of Marcel Claude Reyes and Arturo Longton Guerrero.

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103. Based on the above, the Court finds that the State violated the right to freedom of thought and expression embodied in Article 13 of the American Convention to the detriment of Marcel Claude Reyes and Arturo Longton Guerrero, and failed to comply

with the general obligation to respect and ensure the rights and freedoms established in Article 1(1) thereof. In addition, by not having adopted the measures that were necessary and compatible with the Convention to make effective the right of access to State-held information, Chile failed to comply with the general obligation to adopt domestic legal provisions arising from Article 2 of the Convention.

COMMENTARY

FREEDOM OF INFORMATION AND OPENNESS: FUNDAMENTAL HUMAN RIGHTS?

PATRICK BIRKINSHAW*

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*Where is the wisdom we have lost in knowledge?
Where is the knowledge we have lost in information?*¹

T.S. Eliot

Later this year the United States will celebrate the fortieth anniversary of the enactment of the Freedom of Information Act (FOIA).² In the United Kingdom (UK), we are just beginning the journey that the United States commenced in 1966. The UK enacted its own FOIA in 2000,³ but it did not come into effect until January 1, 2005, well over four years after its passage. Scotland has its own FOIA covering Scottish public authorities that was passed in 2002.⁴ It seems a fitting moment to ask whether access to government information, or freedom of information (FOI), is a basic or fundamental human right. This Article makes the case that FOI and openness should be regarded as a fundamental human right, an argument that is gaining currency in Europe. I argue that FOI is a fundamental human right both in civil law and common law systems. As I explain,

1. T.S. ELIOT, CHORUSES FROM THE ROCK I (1934), *reprinted in* THE COMPLETE POEMS AND PLAYS OF T.S. ELIOT 147 (Faber & Faber, 1969). Perhaps one may continue: "Where is the information we have lost in spam and spin?"

2. Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2000).

3. *See generally* Freedom of Information Act, 2000, c. 36 (UK) (describing public authorities and access to information, exempt information, and the amendments to the Data Protection Act of 1998).

4. *See generally* Freedom of Information (Scotland) Act, 2002 (A.S.P. 13) (examining the access to information held by Scottish public authorities, the effect of exemptions, and request refusals).

fundamental human rights are recent additions to English law. FOI is not usually regarded as one of those rights.

I will not set out arguments in favor of the existence or nature of human rights generally. The literature is replete with these arguments. I will argue FOI deserves to be listed along with those human rights internationally accepted as such: freedom of speech, access to justice and a fair trial, and protection of privacy for example. FOI is important in two senses: It is instrumental in realizing other human rights such as those just listed. FOI is also intrinsically important in establishing what governments do on our behalf and in our name. This dual sense of importance promotes FOI to a human right.

I. BACKGROUND

The following Article traces the evolution of the concepts of transparency and openness in both the United States and Europe. I offer this background as an introduction to European legal traditions, concepts, and institutions in hopes that it will aid the reader as I document the growth of FOI as a political and legal theory, and subsequently as a human right.⁵

The United Kingdom is a member of the European Union (EU or the Union). The EU shares some features of the North American Free Trade Agreement (NAFTA), but it has grown from an international community of nation states guaranteeing free trade and built on the basic freedoms of free movement of persons, goods, capital, and services together with freedom of establishment into a union, which has virtually all the competences (powers) of a nation state.⁶ Virtually all, but with some important exceptions. The inspiration behind the Union was the prevention of world wars such as those of the twentieth century that had their origins in Europe. When the Maastricht Treaty⁷ came into effect in 1993, the Union was split into three pillars or parts. The first is called the European Community. Its laws—treaty provisions, regulations, directives, and decisions—are binding within each of the 25 member states. Originally there were six members. Rather confusingly, the EU was referred to as the European Community (EC) before the Union was introduced under the Maastricht Treaty. “EU” and “EC” are used interchangeably, but strictly speaking, the EC is but one part of the EU. Much of EC law is in effect administrative law. The judicial organs of the EU, the European Court of Justice (ECJ) and Court of

5. See generally PATRICK BIRKINSHAW, *EUROPEAN PUBLIC LAW* (2003) (discussing the growth of English public law under European influence).

6. The European Union (EU) was originally known as the European Economic Community.

7. See Maastricht Treaty art. G, Feb. 2, 1992, 1992 O.J. (C 191) (amending the Treaty establishing the European Economic Community to establish a European Community (EC) and EU and amending various provisions to encompass this change).

First Instance (CFI), have borrowed heavily from the laws of member states to develop EU legal doctrine. EC laws, which operate within what is called community competence, take sovereignty over national laws. The competence is spelled out within the EU Treaty (currently the Treaty of Nice⁸ which came into force in 2003). The EC laws may also be directly effective. In other words, they may be used by *individuals* within their national courts, and rights or obligations under EC law take precedence over domestic law. They are not simply creatures of international law. In the 1960s, the judicial organ, the ECJ, determined in case law⁹ that EC law created its own legal order which was superior to that of national law and that EC treaty provisions could be directly effective in national systems. That is still the legal position. It was a development in constitutional common law on par with *Marbury v. Madison*.¹⁰ Member states' own legal systems may not see the relationship in quite the same terms, but "sovereignty" has not created serious practical problems that have not been resolved.

As well as the EC pillar, the Maastricht Treaty created two further pillars, now referred to as Common Foreign and Security Policy (second pillar), and Freedom, Security and Justice (third pillar),¹¹ which addresses questions of trans European criminal matters. Together these three pillars constitute the EU, and as already mentioned, the EC is now universally referred to as the EU. The second and third pillars do not as a treaty requirement become legally binding measures in domestic law. Unlike laws in the EC pillar, they remain international obligations only or "intergovernmental," subject to further unanimous agreement. Opponents of the EU within each member state accuse the EU of becoming a federal monster and say that the ECJ in particular has assumed powers not conferred by the EU treaty. The major institutions are the courts (discussed above), the Council of Ministers, the Commission, and the European Parliament. The Council of Ministers is composed of one individual Minister from each member state (Ministers differ according to subject matter) and acts as an executive body which makes laws together with the elected European Parliament. The Commission performs various functions and is best described as the administrative body of the Union.

8. Treaty of Nice, Mar. 10, 2001, O. J. (C 80).

9. See Case 26/62, *Van Gend & Loos v. Neth. Inland Revenue Admin.*, 1963 E.C.R. 3 (assuring individual citizens the benefit of EC law that applies to the member states); Case 6/64, *Costa v. ENEL*, 1964 E.C.R. 1141 (deciding that it is a main principle of the Treaty that no member state may enact laws above the Community Laws).

10. 1 Cranch 137 (1803).

11. See EILEEN DENZA, *THE INTERGOVERNMENTAL PILLARS OF THE EUROPEAN UNION* (2002).

In 2001, a process was commenced that led to the drafting of a treaty for a constitution for the European Union and its member states—the European Union Constitution (EUC).¹² Because it takes the form of a treaty, it has to be agreed to and ratified by all member states according to their own constitutional traditions. There has been widespread debate within member states about the advantages or disadvantages of the EUC. For present purposes, the EUC would simplify the complex EU structure by making the EU *one legal entity*. The pillars would be merged into one body. The EUC also introduces a Charter of Fundamental Rights,¹³ which serves as a list of legally binding rights. The Charter treats freedom of, or access to, information held by *all* EU bodies as a fundamental human right. The Charter is currently intergovernmental in status. The EUC will not come into effect until agreed to and ratified by all member states. The governments of the member states agreed to the EUC in June 2004. In 2005, the citizens of France and the Netherlands rejected the EUC after national referendums. This was largely because of fears of cheap labor from the East flooding their markets.¹⁴ The UK government is in favor of the EUC but has delayed a referendum until the positions of the Netherlands and France have been resolved. It is widely believed, however, that a majority of UK voters would reject the EUC.¹⁵ In my estimation, the EUC has been delayed but not defeated.

Finally, I reference the Council of Europe, the European Court of Human Rights (CHR), and the European Convention on Human Rights (ECHR or the Convention). These are entirely separate from the EU and emerged after the Second World War. The Council's governing provision is the Statute of the Council of Europe (CETS No: 001, ratified August 3, 1949). The Council of Europe sought to prevent a repetition of the atrocities associated with Soviet Communism and Nazism.¹⁶ The Council concentrates on the promotion of human rights throughout Europe. The Council has 46 members amongst European states, including Turkey. The

12. For the text of the European Union Constitution (EUC), see *Europa: A Constitution for Europe*, http://europa.eu.int/constitution/en/1stoc1_en.htm (last visited Feb. 9, 2006).

13. Charter of Fundamental Rights of the European Union, 2004 O.J. (C 84E/563) 1, 432-67. See THE EU CHARTER OF FUNDAMENTAL RIGHTS (S. Peers & A. Ward eds., 2004).

14. See Breffni O'Rourke, *EU Integration in Balance as France, Netherlands Prepare to Vote on Constitution*, EU BUS. NEWS ONLINE, May 25, 2005, <http://www.eubusiness.com/topics/Constitution/vote.2005-05-25> ("Membership [to the EUC] means that the Easterners' skilled but cheap labor and lower operating costs, are [] offered within the EU itself, [luring] manufacturers away from high-cost Western Europe.").

15. See Chris Johnston, *Tories and UKIP Claim Agreement is Bad for Britain*, TIMES (UK), June 19, 2004, at 4 (quoting Michael Ancram, the Shadow Foreign Secretary, as saying "The majority of British people—and business—oppose [the EUC] . . .").

16. See Council of Europe, Note by the Treaty Office, <http://conventions.coe.int> (last visited Feb. 9, 2006) (providing links to the documents that created and govern the Council of Europe).

Convention is likewise independent of the EU and is an international agreement aiming to protect civil and political human rights. British lawyers were highly influential in drafting the Convention, which was inspired by English common law, although the concept “human right” was unknown in English law until comparatively recently. Some states, including the UK, have incorporated the Convention into their domestic law. In the case of the UK, the incorporation came by way of the Human Rights Act 1998¹⁷ (HRA), which came into effect in October 2000. The HRA has been responsible for a far greater degree of human rights protection in the UK than was the case previously. The Act has created conflict between the senior judiciary and the government in relation to the treatment and detention of suspected terrorists without a trial.¹⁸

II. THE UNDERLYING CONCEPTS

With the coming anniversary of the United States FOIA and the recent enforcement of the UK FOIA, it is an appropriate time to reflect on the evolution of access to government information, or FOI, and to ask whether this constitutes a basic or fundamental human right. I take the two expressions—access to government information and FOI—to mean the same thing because FOI is never interpreted to mean access to all information without restraint.¹⁹ It is not a license. Although there should be a presumption of access in FOI laws, there are always restrictions.

The language of human rights has become a talisman of good governance, despite high-profile allegations of breaches of such rights by the US and UK governments.²⁰ In the EU, the checkered history of inadequate protection of human rights by the European Court of Justice (ECJ) caused one of the great constitutional upheavals in EC/member state

17. See generally Human Rights Act, 1998, c. 42 (UK) (providing for the protection of individual human rights within the UK, including protection for freedom of expression, thought, and religion).

18. See, e.g., *A v. Sec’y of State for the Home Dep’t*, [2005] 2 A.C. 68 (H.L.) (appeal taken from Eng.) (appealing the decision of a Court of Appeal that detaining foreign nationals who had been identified as international terrorists did not breach the 1950 European Convention on Human Rights (ECHR or the Convention)). The House of Lords ruled there were breaches of Articles 5 and 14, dealing respectively with detention and discrimination in the exercise of rights. *Id.*

19. See PATRICK BIRKINSHAW, *FREEDOM OF INFORMATION: THE LAW, THE PRACTICE AND THE IDEAL* 28 (Butterworths/Cambridge Univ. Press 3d ed. 2001) [hereinafter BIRKINSHAW, *FREEDOM OF INFORMATION*] (“Freedom of information does not mean access to brute information alone . . . in whatever form as we shall see.”); see also PATRICK BIRKINSHAW, *GOVERNMENT AND INFORMATION: THE LAW RELATING TO ACCESS, DISCLOSURE AND THEIR REGULATION* 126-32 (Tottel 3d ed. 2005) (listing the “categories of protected information,” including information regarding government intelligence).

20. See Michael L. Tan, *Torture and Terror*, PHIL. DAILY INQUIRER, May 12, 2004, at 15, http://inq7.net/opi/2004/may/12/text/opi_mltan-1-p.htm (referring to the opinion of Senator Edward Kennedy (D-MA) about US abuse of Iraqi prisoners and questioning whether the United States and the UK invaded Iraq to preserve human rights).

relations when Germany balked at the absence of adequate protection for human rights within EC law.²¹ The most recent development has seen the Charter of Fundamental Rights as an integral part (Part II of the EU Constitution—there are four parts in all) of the EU Constitution, making the Charter a document entailing legal rights if accepted by the member states and not one simply of political and intergovernmental aspirations. The ECJ itself has allowed human rights to overcome a fundamental freedom included in the Treaties—free movement of goods—to protect a right to freedom of speech and demonstration.²² Allowing such a demonstration did not amount to a “disproportionate and unacceptable” interference to the free movement of goods, according to the ECJ.²³ In the UK, the essential rights provisions of the ECHR (in Articles 2-18 excluding Articles 13 and 15, in the First Protocol and Sixth Protocol—the latter prohibits the death penalty) have been incorporated (though not all of the Convention) by the Human Rights Act 1998.²⁴ The power of UK judges is carefully confined by that statute so that they cannot interfere with Parliamentary sovereignty.²⁵ Judges can only declare that a statute breaches the Human Rights Act: They cannot, as can American courts, overrule statutes. The present climate is one of human rights consciousness. Should FOI join this cohort of human rights?

Transparency, openness, and access to government-held information are widely applauded as remedies for the deficiencies and operations of government when government claims to be democratic but falls short of its rhetoric. The United Nations endorsed freedom of information in its famous Resolution of the General Assembly of December 14, 1946:

21. See Juliane Kokott, *German Constitutional Jurisprudence and European Integration*, 2 EUROPEAN PUB. LAW 237, 414 (1996) (stating that the German Federal Constitutional Court relies on the European Court of Justice (ECJ) to guarantee the protection of “basic [human] rights in each individual case for the entire area of the European Communities”). The record on human rights protection by the ECJ has improved markedly in recent years. For comments by the Court of Human Rights (CHR) in Strasbourg on the ECJ and the protection of human rights, see *Bosphorus Airways v. Ireland*, App. No. 45036/98 (2005), <http://www.echr.coe.int/eng/Press/2005/June/GrandChamberJudgmentBosphorusAirwaysvIreland300605.htm>.

22. See Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzuge v. Republik Osterreich*, 2003 E.C.R. I-5659 (exemplifying how the ECJ did not quite attempt the balancing exercise that the CHR employed in weighing between conflicting rights and instead stating that the interference with a basic freedom (free movement of goods) by a human right (freedom of speech and demonstration) did not interfere disproportionately with that freedom). In his opinion for the ECJ, Advocate General Jacobs anticipated that limitations of fundamental liberties of the EC based on human rights considerations were likely to be raised far more frequently in the future. See *id.* ¶ 89.

23. See *id.* ¶ 80 (noting that the freedom of expression and the freedom of assembly may be restricted).

24. See generally Human Rights Act, 1998, c. 42 (UK) (giving “further effect to the rights and freedoms guaranteed under the European Convention on Human Rights”).

25. See *id.* § 3(2)(b)-(c).

“Freedom of information is a fundamental human right and is the touchstone for all freedoms to which the United Nations (UN) is consecrated.”²⁶ Article 19 of the Universal Declaration of Human Rights adopted by the UN Assembly in 1948 gave “the right to seek, receive and impart information and ideas through any media and regardless of any frontiers.”²⁷ At the Seventh Session of the Social and Humanitarian Committee of the UN General Assembly in October 1952, the UK delegates “stated their views to be that not only was freedom of information and the Press a fundamental human right and the touchstone of all the freedoms contained in the UN Charter but also it was essential to the preservation of peace and the existence of democracy.”²⁸ The right in question was focused on a right to seek and pass on information rather than a right to government-held documents.²⁹

In the Council of Europe, a body which promotes human rights throughout Europe, the Committee of Ministers of the Council passed a recommendation on access to documents in 1981.³⁰ Before that the ECHR, in force since 1953, had many implications for openness and information.

26. G.A. Res. 59 (I), at 95, U.N. Doc A/64 (Dec. 14, 1946).

27. Universal Declaration of Human Rights, G.A. Res. 217A, at 74-75, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948). On the UN Declaration, see UN DEPARTMENT OF SOCIAL AFFAIRS, FREEDOM OF INFORMATION: A COMPILATION (1950) (publishing the responses from member governments to the UN Secretary General’s request for information).

28. BARON RADCLIFFE OF WERNETH, FREEDOM OF INFORMATION: A HUMAN RIGHT 6 (1953). Lord Radcliffe describes how a convention on FOI was rejected because of governmental disagreement: “It looks as if this particular fundamental right is likely to defy human expression for a good deal longer yet, if not indefinitely.” *Id.* at 8-9. His tone in this lecture is paternalistic and deeply conservative—he was skeptical of whether FOI (i.e., freedom of speech) was a human right. *Id.* at 11. He was a Law Lord, which is a judge in the highest court of appeal in the UK. On FOI as a human right, see generally STEPHEN SEDLEY, INFORMATION AS A HUMAN RIGHT, in FREEDOM OF EXPRESSION AND FREEDOM OF INFORMATION 239, 242 n.9 (Jack Beatson & Yvonne Cripps eds., 2000) (providing an example of the right to give informed consent in medical treatment); *Chester v. Afshar*, [2005] 1 A.C. 134 (H.L.) (appeal taken from Eng.) (illustrating an aspect of such consent relating to causation in a House of Lords judgment).

29. RADCLIFFE, *supra* note 28, at 18 (“It does not mean that we, as individuals, or even powerful newspapers . . . are entitled to be told what we want to know, when we want to know it, by our government. It has got nothing to do with the old outcry against what used to be called Secret Diplomacy.”). On the relationship between the two rights, see SEDLEY, *supra* note 28, at 243-44 (reviewing a decision in which the former European Commission on Human Rights determined that access to information was “an essential tool for protecting public wellbeing and health”).

30. See Council of Europe Committee of Ministers, Recommendation No. R. (81)19 (Nov. 25, 1981), <http://cm.coe.int/stat/E/Public/1981/81r19.htm> (granting individuals within the given state’s jurisdiction the right to obtain information from public authorities “other than legislative bodies and judicial authorities”). See generally Council of Europe Committee of Ministers, Recommendation No. 854 (Feb. 1, 1979), replaced by Committee of Ministers, Council of Europe, Recommendation R(2002)2 on Access to Official Documents (Feb. 21, 2002) (recommending that member states should grant public access to official documents).

However, as seen below, the ECHR does not provide, in Article Ten³¹ (guaranteeing free speech), a right of access to information held by governments. The rights which may involve obtaining information are primarily directed to other rights such as protection of family and private life (Article Eight³²), access to justice (Article Six³³), and free speech (Article Ten³⁴). Transparency has been in widespread use in the EC/EU for about 15 years, leading to initiatives on access to documents in 1993.³⁵ At the national level, Sweden passed its Freedom of the Press Act in 1766,³⁶

31. See Convention for Protection of Human Rights and Fundamental Freedoms, art. 10, Nov. 4, 1950, 213 U.N.T.S. 221 (granting the freedom of expression, including the freedom to “hold opinions and impart information and ideas without interference by public authority”); *London Regional Transport v. Mayor of London* [2003] E.M.L.R. 4 ¶ 55 (Sedley L.J.) (stating on Art 10: “It is also about the right to receive and impart information . . . the life-blood of democracy”).

32. Convention for Protection of Human Rights and Fundamental Freedoms, art. 8, Nov. 4, 1950, 213 U.N.T.S. 221.

33. *Id.* art. 6.

34. *Id.* art. 10.

35. See Council Decision 93/730, 1993 O.J. (L 340) 41-42 (EC) (providing the code of conduct regarding public access to documents of European Council and the Commission); Council Decision 93/731, 1993, O.J. (L 340) 43-44 (EC) (setting forth conditions under which the public can have access to Council documents); Commission Decision 94/90, 1994 O.J. L 46/58 (doing likewise for the Commission); Council Decision 93/662, art. 7, 1993 O.J. (L 304) 3 (EC) (setting forth the Council’s Rules of Procedure making the record of votes public); Council Decision 95/c 213/47, 1995 O.J. (C 213) 22-23 (EC) (providing the Code of conduct on Public Access to the Minutes and Statements in the Minutes of the Council acting as Legislator and discussing times when the voting record was made public). The following cases contain law on these provisions. See, e.g., *Case T-194/94, John Carvel v. Council*, 1995 E.C.R. II-2765 (concluding that the Council, under Decision 93/731, must balance the citizens’ interest in gaining access to its documents against its own interest in confidentiality); *Case C-58/94, Kingdom of the Netherlands v. Council*, 1996 E.C.R. I-2169 (“So long as the Community legislature has not adopted general rules on the right of public access to documents . . . the institutions must take measures as to the processing of requests to that effect . . . to ensure that their . . . operations are in conformity . . . with good administration”); *Case T-105/95, Word Wide Fund for Nature (UK) v. Comm’n*, 1997 E.C.R. II-313 (deciding that the Commission, in adopting Decision 94/90, conferred legal rights to third parties that the Commission has to respect); *Case T-174/95, Svenska Journalistförbundet v. Council*, 1998 E.C.R. II-2289 (determining that a decision to refuse an applicant access to Council documents, solely because this disclosure “prejudice[s] the protection of the public interest” does not satisfy the requirements of the Decision); see also PATRICK BIRKINSHAW, 4 EUROPEAN PUBLIC LAW 613 (1998); *Case C-321/96, Wilhelm Mecklenburg v. Kreis Pinneberg—Der Landrat*, 1998 E.C.R. I-3809 (determining that “preliminary investigative proceedings” includes “proceedings before a court and contentious or quasi-contentious administrative proceedings”); *Case T-124/96, Interporc Im- und Export GmbH v. Comm’n*, 1998 E.C.R. II-231 (concluding that Decision 94/90 gives everyone the right to request unpublished Commission documents and noting that they do not need to state a reason for requesting such documents); *Case T-111/00, British Am. Tobacco Int’l (Investments) Ltd. v. Comm’n*, 2001 E.C.R. II-2997 (annulling the Commission’s decision to reject a portion of an application requesting access to minutes of the Committee on Excise Duties); *Case C-353/99P, Council v. Hautala*, [2002] 1 W.L.R. 1930 (“While Decision 93/731 did not expressly require the Council to consider whether partial access to documents could be granted it did not expressly prohibit such a possibility either.”). For more, see *infra* notes 38 and 140 and Part VII below for present EU laws on access.

36. Tryckfrihetsförordningen [TF] [Constitution] (Swed.), available in English at http://www.presscouncils.org/library/Swedish_Press_Law.doc (last visited Feb. 9, 2006).

and France has had a law regarding access to official documents since 1978.³⁷ Today, over 50 nation states possess access to information laws. International bodies such as the EU have passed access to information laws based on treaty provisions³⁸ and access laws feature in three parts of the draft EUC: (1) as constitutional measures,³⁹ (2) as fundamental human rights,⁴⁰ and (3) as provisions within the revised treaties under Part III of the EUC.⁴¹ The direction of reformers is increasingly turning toward the global dimension of access to information.

This new bearing is occurring, however, at a time when there has been a considerable reversal in FOI fortunes at the national level. The most famous example is presented by the American developments since September 11, 2001. Many members of the Anglo-Saxon community took inspiration from the FOI laws in the United States exemplified by the 1966 Freedom of Information Act.⁴² In the UK, there was no domestic inspiration in legislation or government practice: official secrecy protected

37. Law No. 78-753 of July 17, 1978, Journal Officiel de la République Française [J.O.] [Official Gazette of France], June 7, 2005, amended by Law No. 2000-321 of April 12, 2000, Journal Officiel de la République Française [J.O.] [Official Gazette of France].

38. See Consol. Version of the Treaty Establishing the EC, Dec. 24, 2002, art. 255, 2002 O.J. (C 325) 135 [hereinafter Consolidated Version] (granting any citizen of the EU a right of access to European Parliament, Council, and Commission documents subject to certain conditions included in the original 1997 Treaty); Council Regulation 1049/2001, 2001 O.J. (L 145) 43 (setting forth regulations and the scope of public access to European Parliament, Council, and Commission documents and noting that “[o]penness contributes to strengthening the principles of democracy”); see also Consolidated Version, *supra*, art. 207(3) (discussing access to the Council’s documents when it acts as a legislator and highlighting the Council Decision adopting the Council’s Rules of Procedure 2004/338/EC (Mar. 22, 2004) arts. 8 and 9 on public access to Council meetings, votes, explanations, and minutes as well as art. 10 and Annex II on access to documents). For a critique of the existing practices of the Council in relation to allowing public admission to meetings, see EUROPEAN OMBUDSMAN, SPECIAL REPORT FROM THE EUROPEAN OMBUDSMAN TO THE EUROPEAN PARLIAMENT (2005), <http://www.euro-ombudsman.eu.int/special/en/default.htm>. See also Case T-168/02 IFAW Internationaler Tierschutz-Fonds GmbH v. Comm’n, 2004 E.C.R. CELEX WL 602A0168 (Nov. 30, 2004) (concluding that “where access to a document in respect of which a Member State had made a request under Article 4(5) is not governed by the Regulation, it is governed by the relevant national provisions of the Member State concerned”); see also Bart Driessen, *The Council of the European Union and Access to Documents*, 30 EUR. L. REV. 675 (2005) (discussing access to the Council’s documents); *State Power to Block Open Access to its EU Documents*, TIMES (LONDON), Dec. 20, 2004, at 49 (discussing Article 4(5) of Regulation 1049/2001 and state exemptions when a Member State that provides documents to an EU institution refuses to allow that institution to disclose the documents to a requester).

39. See Treaty Establishing a Constitution for Europe, Dec. 16, 2004, art. I-50, 2004 O.J. (C 310) (requiring all Union institutions to conduct their work as openly as possible, that the European Parliament and Council, when the latter is considering and voting on draft legislation, shall meet in public, and that the public will have access to documents of the Union institutions).

40. See *id.* art. II-102 (concerning the right of access to documents located within the section of the constitution dealing with fundamental rights).

41. See *id.* art. III-399 (setting out the right to documents in the revised substantive law of the EU).

42. See DEP’T OF JUSTICE, FREEDOM OF INFORMATION ACT GUIDE AND PRIVACY ACT OVERVIEW (Pamela Maida ed., 2004 ed.) (offering a basic overview of FOIA and its goals).

by draconian laws was the culture, not openness and access to information.⁴³ The 1966 FOIA was “invigorated” in 1974. Laws opening up to the public the meetings of departments, agencies, and federal advisory committees added open government aspects.⁴⁴ Since September 11th, the United States has taken the lead in withdrawing from FOI commitments, most notably by the Homeland Security Act,⁴⁵ the Critical Infrastructure Information Act,⁴⁶ which is a part of that Act, the U.S.A. PATRIOT Act,⁴⁷ and other measures.⁴⁸

The object of this paper is to ask the following questions and to attempt to provide some preliminary answers to those questions: Are open government and FOI necessary for democracy? If so, what form of democracy? Democracy is a form of government that purports to treat everyone equally in terms of a right to equal and appropriate respect and consideration in the exercise of governmental power. Therefore, we find that democratic government protection of human rights has become universally accepted—if not maintained. With one notable exception, statements of fundamental human rights, however, rarely contain a right of access to information. Several constitutions in Europe make provision for access to government information a constitutional measure in various forms.⁴⁹ The South African statute, the Promotion of Access to Information Act 2 of 2000,⁵⁰ states that its purpose is to give effect to the

43. See PATRICK BIRKINSHAW, *REFORMING THE SECRET STATE* 22 (1991) (stating that the much maligned § 2 of the Official Secrets Act 1911 was probably the most notorious piece of legislation in the UK for the last hundred years). In addition, the section was repealed in 1989 but the measures introduced by the 1989 Official Secrets Act still contain controversial provisions. *Id.*

44. See Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770 (1972) (granting public access to advisory committee meetings); Government in the Sunshine Act of 1976, Pub. L. No. 94-409, 90 Stat. 1241 (1976) (requiring agencies to conduct open meetings with the exception that public interest requires otherwise).

45. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

46. 6 U.S.C. §§ 131-134 (2000).

47. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (U.S.A. PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272 (2001) (allowing for, among other things, enhanced surveillance procedures).

48. See Symposium, *Federal Information Practices in the Dawning Homeland Security Era*, 4 *GOV'T & INFO. Q.* (2004); G.M. STEVENS, *HOMELAND SECURITY ACT 2002: CRITICAL INFRASTRUCTURE INFORMATION ACT* (Congressional Research Service 2003) (providing a general overview of Subtitle B of Title II of the Homeland Security Act which provides the Department of Homeland Security with the power to obtain, use, and disclose critical infrastructure information). President Bush struck a more positive note on FOIA in his Exec. Order No. 13,392, 70 Fed. Reg. 75,373 (Dec. 19, 2005).

49. See Case C-58/94, *Kingdom of the Netherlands v. Council of the EU*, 1996 E.C.R. I-2169, 2179 n.16 (including a list of EU countries making access to information a constitutional matter); Draft Freedom of Information Bill—First Report, 1998-99, H.L. Bill [97] (reviewing the countries that have given FOI a constitutional status). For a recent list, see The Justice Initiative, <http://www.justiceinitiative.org/activities/foifoe/foi/foilaws/index.html?start:int=40>.

50. Promotion of Access to Information Act 2 of 2000.

constitutional right to information held by the state. But the constitutions of the United States,⁵¹ France,⁵² and Germany⁵³ do not. The UK does not have a written constitution but has a series of constitutional statutes, conventions and practices to which one refers as “constitutional law.” Nowhere does it state that FOI is a human right. The prescient Resolution from the United Nations in 1946⁵⁴—that “freedom of information is a fundamental human right”—is rarely repeated elsewhere.

The further question then arises: Should FOI be considered a fundamental human right? If it is, where does FOI stand in relation to other human rights and other basic features of democratic government such as guaranteeing free and secret elections, effective government, or even more basically, guaranteeing a food supply? Is it a right that is more important than these things? If it is a fundamental human right, is it one that only comes with a developed sense of democratic entitlement and with social and public structures that are capable of sustaining its onerous claims? Is FOI necessarily predicated by democratic development from simple representative models to advanced participatory ones? Does FOI, in other words, only arise in advanced democracy? If so, can it make valid claims to universality?

First of all we need to ask what the terms mean.

III. SOME EXPLANATIONS

A. Freedom of Information

FOI means access by individuals as a presumptive right to information held by public authorities. Reasonable and clearly defined time limits for the right must be in operation. In some regimes it is restricted to citizens or permanent residents within a legal regime although it may be extended. There are no such restrictions within the US⁵⁵ and UK FOIA legislation. The right must be defined in law to be a right. It imposes duties on others. The right is invariably limited by exemptions to protect the public welfare or safety or to protect items such as commercial secrecy or individual privacy.⁵⁶ The tests for establishing the exemptions are invariably demanding and the onus is on the public authority to justify its claim. Very

51. See generally U.S. CONST. (lacking provisions addressing a constitutional right to information).

52. See generally 1958 CONST. (failing to address access to information).

53. See generally GRUNDGESETZ [GG] (leaving out any provision addressing freedom of access to information).

54. See G.A. Res. 59 (I), at 95, U.N. Doc A/64 (Dec. 14, 1946).

55. See DEP'T OF JUSTICE, *supra* note 42, at 44 (noting that individuals who are not U.S. citizens may request U.S. government records).

56. See, e.g., 5 U.S.C. § 552a(j) (2000) (pertaining to records maintained on individuals).

frequently there are public interest tests allowing disclosure where a greater public interest is served by disclosure, even though the information is exempt. In the UK FOIA all but eight of the 23 sections containing exemptions (there are in fact more than 23 exemptions because some sections contain more than one exemption) are subject to public interest disclosures. The right covers access to information, records, papers, or computerized files—in short information however stored—that is held by public authorities. The UK law also covers Parliament.

More recent laws have moved the target of attention to private bodies that perform public functions or that are designated as “public” by a Minister (UK)⁵⁷ or to private bodies that interfere with the rights of individuals (South Africa).⁵⁸ Exemptions to the right of access typically include national security, personal privacy, commercial secrecy, defense, international relations, and interference with criminal investigation and prosecution or law enforcement processes. The UN draft convention on FOI provided an exemption for information unsuitable for children and youths—emphasizing the free speech aspects of that right.⁵⁹ There is inevitably an independent arbiter in the form of a court or a Commissioner to determine contested claims. The specific details of regimes differ, as one would expect. The paper will concentrate on the right of access.

B. Transparency

Transparency has a much wider meaning. It gained popular appeal within the European Community from the early 1990s when it was seen as a useful device to combat claims of democratic deficit and complexity in the operations of the EC. The EC was shortly to become a more complicated and even less perspicuous three pillar structure at Maastricht in 1993 and to be renamed the European Union.⁶⁰ Access to information is a component of transparency, but the latter also entails conducting affairs in the open or subject to public scrutiny. It means keeping observable records of official decisions and activities (for subsequent access). Transparency includes the provision of reasoned explanations for decisions, the giving of adequate reasons when power affecting the public weal or individuals is exercised in a negative or positive fashion. It also means making processes of governance and lawmaking as accessible and as

57. See Freedom of Information Act, 2000, c. 36, § 5 (U.K.) (allowing the Secretary of State to designate any person who appears to “exercise functions of a public nature” as a public authority).

58. See Promotion of Access to Information Act 2 of 2000, s. 3 (listing the access to the records of private bodies).

59. See RADCLIFFE, *supra* note 28.

60. See discussion *supra* Part I (reviewing background information on the EC and its transformation to the EU).

comprehensible as possible—to simplify them so that they are more easily understood by the public. Complexity, disorder, and secrecy are all features that transparency seeks to combat.

C. Openness

Openness is very similar to transparency. It goes beyond access to documents to cover such items as opening up the processes and meetings of public bodies. The Government in the Sunshine Act⁶¹ and the Federal Advisory Committee Act⁶² of the United States are as much examples of openness as they are of transparency. Openness means concentrating on processes that allow us to see the operations and activities of government at work—subject again to necessary exemptions. Local government in the UK must conduct its affairs under conditions of openness as a legal requirement under the terms of the Local Government (Access to Information) Act 1985⁶³—far more so than the national government. Even with the UK FOI legislation,⁶⁴ which came into effect on January 1, 2005, giving individual rights of access to requesters, much of the proceedings of the Cabinet and government departments will remain as secret as ever. The Cabinet, a party committee with obscure origins of the Privy Council and of Parliament, is the governing body of the UK. Though it is not organized or established by law, its proceedings are protected by the law of confidentiality,⁶⁵ and its deliberations are covered by a variety of exemptions under the UK FOIA.⁶⁶ Openness has also been used in a pejorative sense in the UK. It has been seen as the term used by government in the UK to avoid legal obligations of access to information. Open government, it has been claimed, means in this sense providing access to information under nonlegally binding codes that do not create rights.⁶⁷ The Public Administration Committee in the House of Commons

61. See Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241 (1976) (assuring that agencies will conduct their meetings in an open manner with certain exceptions allowed).

62. See Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770 (1972) (allowing access to advisory committee meetings).

63. See note 89 *infra*.

64. Freedom of Information Act, 2000, c. 36, §§ 35-36 (U.K.) (allowing for certain types of information to be kept from the public); see note 66.

65. See *Att'y Gen. v. Jonathan Cape Ltd.*, (1975) 3 All E.R. 484, 485 (conveying that relationships between Ministers in the Cabinet are protected by the law of confidentiality as emphasised by the convention of collective responsibility). This also covered advice by officials to Ministers. *Id.* However, the duty was not absolute and could evaporate over time as the case itself illustrated. *Id.* There are increasing examples of former Ministers and officials (including ambassadors) publishing their memoirs from diaries. The position will no doubt be subject to re-examination.

66. See Freedom of Information Act, 2000, c. 36, §§ 35-36 (UK) (enumerating exemptions relating to formulation of government policy or prejudice to the effective conduct of public affairs in particular).

67. See generally DEP'T OF CONSTITUTIONAL AFFAIRS, OPEN GOVERNMENT: CODE OF

and its report on the Freedom of Information Bill (UK) used the expression “open government” in a critical manner and followed the viewpoint of the detractors of open government.⁶⁸ I prefer to use the term in the wider sense outlined above and not the pejorative sense. The concept of openness has featured in the EU Commission’s White Paper on European Governance⁶⁹ and in discussions concerning the EU’s “open method of coordination,” which seeks to achieve progress in social welfare and employment across member states. Criticism has been made that these developments involve “soft” provisions and not ones that are backed by legal rights.

IV. ARGUMENTS AGAINST FOI AND OPENNESS

Today, openness, meaning open processes, and access to information are readily acknowledged as necessary components of responsible and responsive government. The arguments that used to oppose them, which have gained in currency, are centered around the belief that they undermined each of the following.

A. Representative Democracy

Government was like a swan—all elegance and tranquility above the surface, all hustle and bustle below the surface, and unseen. Representative government meant precisely that—that citizens in the UK were represented by government and by Parliament. Citizens did not participate in government beyond casting secret ballots. Matters of government were best kept discreet and reticent. Disagreements *within* government, at least in the Westminster system of government, should not be revealed. The serenity of the swan above the surface was all that was to be made public. There was no need to see the frenetic efforts under the surface and all the disagreements to which government operation was prone.

B. Efficiency and Strong Government

A core responsibility of strong government is protection of the people. This has become paramount in the attacks on FOI by the government of the

PRACTICE ON ACCESS TO GOVERNMENT INFORMATION (2d ed. 1997), <http://www.gov.uk/foi/ogcode981.htm> (listing the information that public bodies need to publish and make available to the public if they do not qualify for an exemption). For a review, see House of Commons Paper HC 59 (2005-06).

68. See SELECT COMMITTEE ON PUBLIC ADMINISTRATION, THIRD REPORT, 1998-99, H.C. 570-I, <http://www.publications.parliament.uk/pa/cm199899/cmselect/cmpubadm/570/57006.htm> (recommending legislation assuring access to information that would apply broadly and be understandable).

69. See generally COMMISSION OF THE EUROPEAN COMMUNITIES, EUROPEAN GOVERNANCE, A WHITE PAPER (2001), http://europa.eu.int/eurlex/en/com/cnc/2001/com2001_0428en01.pdf (proposing an EU policy for “better involvement and more openness”).

United States, as illustrated by the legislation following September 11th referred to above.⁷⁰ In terms of efficiency, too much openness will deflect resources away from the provision of essential public service and services. FOI regimes have devised safeguards to give greater scrutiny to requests from political opponents and from the media, causing accusations of unnecessary delay, manipulation, and game playing by governments in their responses. Do governments not have better things to do than to be forced into playing such games? In the UK, for example, a clearing house has been established in the Department for Constitutional Affairs (DCA), which acts as the lead authority on FOI, to coordinate responses to and procedures for difficult requests. Opponents of FOI may argue that this is a waste of government time, but the DCA argues that its role is necessary for consistency in responses. Will time spent on these matters mean less attention to more pressing concerns of government and administration? Efficient government means that government needs space to formulate its policies in private and to consider alternatives; publicity may inhibit that process.

C. Ministerial Responsibility (UK)

This is a particularly Westminster inspired excuse. Ministers by convention (custom and practice) must be a member of the House of Commons or House of Lords. The Minister at the head of a department of State is responsible to Parliament for his policies and must account for his actions. However, allowing public access to government information will undermine that responsibility. The hollowness of this excuse was exposed many years ago.

D. Parliamentary Supremacy (UK)

Again, this represents a characteristic British FOI avoidance device. Without considerable experience of the British system of rule, it is difficult to gain a clear understanding of the doctrine of Parliamentary Supremacy. It is a central pillar of British constitutionalism.⁷¹ It is not conferred by any statute but has its origins in the common law. Parliament, together with the Monarch (Queen in Parliament), is not only a sovereign legislator (modified by membership of the EU though arguments rage as to where ultimate sovereignty resides), but Parliament is also the supreme legal,

70. See discussion *supra* notes 45-47 (discussing the various ways in which the U.S. government has withdrawn from FOI in recent years).

71. See generally A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (E.C.S. Wade ed., 1961) (giving an introduction to the history of the constitution and the doctrines that form its foundation).

political, and constitutional institution in the British polity.⁷² FOI would undermine the doctrine's centrality. Its centrality, many have argued, had been undermined by successive post World War II governments, including that of Prime Minister Blair, which have bypassed Parliament whenever possible.

E. A Danger to Security and Innocent Third Parties

One can never be sure what bad uses information may be put to. Seemingly innocuous information may be lethal in the hands of terrorists or psychopaths.⁷³ One never knows what evil intent there may be towards individuals or societies. Err on the side of caution.

F. FOI Represents an Unjustified Invasion of Personal Privacy or Commercial Confidentiality

All FOI laws protect against unwarranted invasions of privacy or confidentiality⁷⁴—FOI judgments may be difficult in specific circumstances in drawing a balance between a right to know and a right to privacy, but the protection for privacy is always there. The crucial question is: What weight should be given to the right to privacy? There are many cases in which the judges have had to balance the right to privacy and the right to freedom of expression and to be informed within Articles 8 and 10 of the ECHR. A recent example in England concerns the right of parents to be informed when their daughter who is under the age of 16 seeks an abortion. The mother in question claimed a right to know. But a better characterization of this case is that of a clash between two aspects of the right within Article 8 of the ECHR—a right to family life, and its concomitant right to be informed, versus the child's right to privacy or private life.⁷⁵

72. See generally *id.*

73. See Kristen Elizabeth Uhl, Comment, *The Freedom of Information Act Post 9/11: Balancing the Public's Right to Know, Critical Infrastructure Protection, and Homeland Security*, 53 AM. U. L. REV. 261, 264-65 (2003) (providing examples of al Qaeda's possession of Government Accountability Office reports and infrastructure details relating to the 9/11 attacks and noting a risk that terrorists could use information obtained under FOIA requests).

74. See FOIA, 5 U.S.C. § 552(b)(6)-(7) (2000) (protecting the privacy of personnel and medical files and records compiled for law enforcement purposes). Suffice to say that English common law provides no freestanding right to privacy. Rights under Article 8 ECHR are being given fuller expression by the development of the law of confidentiality to protect personal privacy and autonomy. See *Campbell v. MGN Ltd.*, (2004) UKHL 22.

75. *R (Axon) v. Sec'y of State for Health*, (2006) EWHC 37 Admin. The mother sought to have the guidance of the Department of Health ruled unlawful because, she argued, it gave too much emphasis to the confidentiality of medical treatment of the under-16-year-old child in relation to sexual matters. The court ruled that the guidance was lawful, that the child was owed a duty of confidence in her medical treatment, and that the mother's rights under Article 8 ECHR were not infringed. *Id.*

G. FOI Undermines Trust and Panders to Irrelevance

The argument here is that the growing fixation with transparency and openness and access to information undermines the necessary trust that must exist between governors and the governed. We become obsessed with detail and trivia and this obscures identification of important objectives and intelligent assessment of their realization and performance. This statement has been powerfully expressed by Onora O'Neil in her 2002 BBC Reith lectures.⁷⁶

V. SOME ARGUMENTS IN FAVOR OF FOI AND OPEN GOVERNMENT

A. Information Is Used in the Public Interest and the Interests of All Individuals

How dependable is the information used by government? How is it used? What does it reveal about the process and reliability of government decisions and the identification of the public interest by governors? How partial or incomplete is that identification?

B. Information is a Necessity for Accountability

Accountability is based upon reliable information. If we or our representatives do not know what government is doing, how meaningful is accountability? Without information, accountability will merely be the shadow of an idea lacking any substance.

C. Information, Particularly Reliable Information, Is a Prerequisite to Establish Effectiveness and Efficiency of Government

What is the point of government if it is not managing our affairs with acceptable levels of efficiency and effectiveness? Without reliable information, how can we measure these outcomes in any meaningful sense?

D. Information Is a Necessary Right of Citizenship

I would argue that FOI duties should go further than conferring rights on citizens; they cover all individuals or, if you like, citizens of the world. This is the legal position in the United States and the UK.⁷⁷ In the EU, the

76. See generally Onora O'Neil, British Broadcasting Corp. Reith Lectures (2002), <http://www.bbc.co.uk/radio4/reith2002> (insisting that "trust . . . is a valuable social capital and not to be squandered").

77. See DEP'T OF JUSTICE, *supra* note 42.

right of access is restricted to citizens of the union and those residing in the union, although it may be extended, and has been extended, by discretion to others.⁷⁸

E. Information Is Power and Its Exclusive Possession Is Especially So, Both in Terms of Policy Formulation and Invasions of Personal Privacy by Government

It is well known that information is power. As has often been expressed, if I possess information to which you do not have access, I have power over you. This can all too easily lead to an abuse of power, as in any one-sided relationship. Access to information helps achieve greater equality.

F. Secrecy Is a Cloak for Arbitrariness, Inefficiency, Corruption, and So On

Secrecy is a way to “silence . . . the voice of the critic and hide the knowledge of the truth.”⁷⁹ These latter points have been most graphically illustrated long ago by Jeremy Bentham: “In the darkness of secrecy, sinister interest and evil in every shape shall have full swing.”⁸⁰ “Sunlight,” U.S. Supreme Court Justice Louis Brandeis suggested, “was the best of disinfectants.”⁸¹ Justice Brandeis also noted that the “electric light [is] the most efficient policeman.”⁸² Access to information enhances legitimacy.

G. FOI Reciprocates the Trust that People Place in Government

Until FOI takes effect, that trust is mostly one sided. Government shows its trust in the people through FOI. It admits them as full members of society in which government acts as a steward. But all the people cannot know everything all the time. Sensitive inquiries, audits, and value-for-money surveys will have to be conducted by experts although their processes are subjected to increasing degrees of openness and their outcomes are inevitably published, subject to any legitimate exemptions.

78. See European Parliament and Council Regulation (EC) No. 1049/2001 of 30 May 2001, art. 2, 2001 O.J. (L 145) 44, http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_145/l_14520010531en00430048.pdf (stating that institutions may grant access to documents not only to people residing in the member state, but also to any person not residing in the state as well). For the implementing rules of procedure of the Council, see Council Decision 338/2004 EC, Euratom, and for the rules of the Commission, see 2001 O.J. (L 145). The European Parliament is not as forthright in this matter but exercises discretion in individual cases. EUROPEAN PARLIAMENT RULES OF PROCEDURE, RULES 96, 97 (2005).

79. *Scott v. Scott*, [1913] A.C. 417, 477 (H.L.) (appeal taken from Eng.).

80. *Id.* (quoting Bentham); see also GERALD J. POSTEMA, *BENTHAM AND THE COMMON LAW TRADITION* 363-64 (1986) (discussing Bentham's view and strategy for protecting the population against governmental abuse of power).

81. *THE WORDS OF JUSTICE BRANDEIS* 151 (Solomon Goldman ed., 1953).

82. *Id.*

Others with more expertise will have to operate on our behalf in circumstances when this is unavoidable. However, exemption from access must be defended according to principle and clearly justified reasons.

VI. CONSTITUTIONALISM AND THE STRUGGLE FOR INFORMATION: FROM A RIGHT OF INSTITUTIONS TO A RIGHT FOR INDIVIDUALS

FOI is generally accepted as commencing with the freedom of the press act in Sweden.⁸³ Its modern analogues, as we saw above, originated in the United States in 1966, although the U.S. Administrative Procedure Act of 1946⁸⁴ did provide for some access to information rights on a need (not a right) to know basis. The UK has been among the last countries to adopt FOI laws—Germany is still in the process of implementing such laws at the federal level. To allow for a transition to a new culture of openness in the UK, Prime Minister Blair delayed the operation of access rights for over four years from the date of enactment of the UK FOIA in November 2000.⁸⁵ The concentration is on our individual rights of access. But institutional conflict for information features pervasively in English constitutional history.

The course of constitutional and legal history in England and the UK is, among other things, a struggle over information rights and the right to be better informed. The following principles⁸⁶ were benchmarks on the road to constitutionalism: the King can do no wrong, but the King is below God and the Law; the King's will must be a matter of record; the King is not answerable personally but is answerable via a Minister, his servant; Ministers must be known; a servant of the King cannot plead an illegality in his defense; the Commons has the power of inquiry as a necessary prelude to any impeachment (impeachment has now fallen into desuetude in the UK); Ministers must sit in Parliament; a Minister is responsible to Parliament for his advice and actions; a Minister must answer Parliament's questions; Parliament publishes its proceedings; who advises the Ministers if not the neutral civil servants mandated under the constitution; who are such advisers if not professional civil servants and under what controls do they operate? Parliament must know if it is to extract any form of meaningful accountability on behalf of those whom it represents. I would

83. See generally Tryckfrihetsförordningen [TF] [Constitution] (Swed.), http://www.presscouncils.org/library/Swedish_Press_Law.doc (last visited Feb. 9, 2006) (ensuring that all Swedish citizens shall have access to official documents unless the restriction meets certain criteria).

84. 5 U.S.C. §§ 551-559, 701-706 (2000 & Supp. II 2002).

85. See John Kampfner, *Is Britain Ready for the Right to Know?*, EXPRESS (UK), Dec. 28, 2004, at 16 (recalling that the UK FOIA included a five-year delay for its start when enacted in 2000). The period of delay was actually just over four years.

86. See BIRKINSHAW, FREEDOM OF INFORMATION, *supra* note 19, at 102-06 (discussing the problems with accountability in a monarchy).

continue that the public should know to engage fully as citizens and to give greater substance to democracy. This we can refer to as participatory democracy. In the representative model of democracy, the struggle over centuries was about Parliament being informed, and being properly informed. The institutional struggle is one that will never end. But it does not exhaust the rights that we have as individuals.

Once again, Bentham, one of the greatest of English legal philosophers, expressed the view: “Whatever is done by anybody, being done before the eyes of the universal public” is the “grand security of securities”; publicity and openness are vital for accountability.⁸⁷ The specific reference was to publicity for the doing of justice. But Bentham was equally fervent in his advocacy for publicity in government: “The eye of the public makes the statesman virtuous.”⁸⁸ From publicity has come today’s inheritance—a right of access to information. Government information is made accessible to the public on whose behalf that information is employed.

The themes of openness also pervade the common law. However, the common law was not concerned with giving access rights to individuals, except in very special circumstances of litigation.⁸⁹ The common law was concerned with the publication of law and with legal certainty, setting limits to arbitrary actions that undermined individual security and which were made more potent by dark and unpublished practices. If not directly concerned with FOI, numerous judgments of the courts of common law, and some of the more famous are set out below, display a constitutional preoccupation with openness or, as we would say today, transparency. Although more recently, the senior judge Lord Wilberforce asserted that it was not for judges to be advocates of open government.⁹⁰ But the traditions of publicity, that is making public the law and the authority under which powers are exercised, go back centuries. As long ago as the *Case on Proclamations*,⁹¹ the practice of declaring or amending law by prerogative power of the Crown was pronounced as unknown to the common law. The writs of *certiorari* and *habeas corpus* were devices aimed at producing

87. POSTEMA, *supra* note 80, at 363-64. This is also cited by JOSPEH M. JACOB, CIVIL JUSTICE IN THE AGE OF HUMAN RIGHTS (forthcoming) and JOSEPH JACONELLI, OPEN JUSTICE: REAPPRAISING THE PUBLIC TRIAL 36 (2002) (citing Postema when reviewing Bentham’s views on open justice). In this Part I have benefited from discussions with Joseph Jacob on open justice, and I am indebted to his research on classic texts.

88. POSTEMA, *supra* note 80, at 363 (citing Bentham’s THE COMMONPLACE BOOK).

89. There is a long line of case law discussing discovery (now known in England and Wales as disclosure) in litigation as well as the rights of local elected officials to documents in the possession of the council of which they are members. BIRKINSHAW, *supra* note 19, at 285-86.

90. *See* *Burmah Oil v. Bank of England*, [1979] 3 All E.R. 700, 707 (stating that the Law Lord was anxious to protect the “inner workings of government” from “captious criticism”).

91. *Case on Proclamations*, [1611] 12 Co. Rep. 74 (K.B.).

records or persons before the common law courts to explain and justify exercises of power in relation to the administration or the detention of persons, even a detention by the King himself under established powers.⁹² In *Entick v. Carrington*⁹³ the asserted power of exercising general warrants by the Secretary of State to search premises and seize papers without limit⁹⁴ was described as a purported power “so dark and obscure in its origin, that the counsel have not been able to form any certain opinion from whence it sprang.”⁹⁵ According to the court, “This is the first instance I have met with, when the ancient immemorable law of the land, in a particular matter, was attempted to be proved by the practice of a private person.”⁹⁶ The “private person” was the Secretary of State. It is worthwhile continuing: “Whoever conceived a notion, that any part of the public law of the land could be buried in the obscure practice of a particular person.”⁹⁷ Thus, the court found contrary to logic that laws pertaining to the general public could be secret, but the court went further:

Such is the power, and therefore one should naturally expect that the law to warrant it should be clear in proportion as the power is exorbitant. If it is the law, it will be found in our books. If it is not to be found there, it is not the law.⁹⁸

Could it be, asked Lord Camden, Chief Justice of Common Pleas, that Parliament through the Bill of Rights “should bind the King and leave his Secretary of State at large.”⁹⁹ The King was bound by various statutes as well as, it might be added, by principles of common law although he could not be subject to legal enforcement through his courts. He was left, like the Queen in *Hamlet*, “to ‘heaven, and to those thorns which in her bosom lodge to prick and sting her.’”¹⁰⁰ There were notable exceptions.

Another famous example concerns the right of access to open justice as a matter of constitutional right under the common law. In the 1913 case *Scott v. Scott*, Lord Shaw observed:

I will venture to enter . . . my respectful protest against the assumption of any general power . . . to hold any courts of justice with closed doors. I

92. In *Darnell's Case*, [1627] 3 State Trials 1 (establishing that the King had extensive powers of detention, which satisfactorily answered an application for habeas corpus, but the court had jurisdiction to hear the case). The regal power was removed (ineffectively) by the Petition of Right 1628 and abuse of regal authority was addressed generally by the Bill of Rights 1689. Liberty was buttressed by the Habeas Corpus Acts 1640 and 1679.

93. See [1765] 95 Eng. Rep. 807 (K.B.) (determining the scope of the search and seizure laws).

94. *Id.* (“[H]is house is rifled; his most valuable secrets are taken out of his possession . . . a power essential to government [claimed the Secretary of State].”).

95. *Id.*

96. *Id.* at 1068.

97. *Id.*

98. *Id.* at 1045.

99. [1765] 95 Eng. Rep. 807 (K.B.), at 1045.

100. WILLIAM SHAKESPEARE, *HAMLET* act 1, sc. 5, lines 86-88.

candidly confess, my Lords, that the whole proceeding shocks me. . . . This result, which is declared by the courts below to have been legitimately reached under a free Constitution, is exactly the same result which would have been achieved under, and accorded with, the genius and practice of despotism. What has happened is a usurpation—a usurpation which could not have been allowed even as a prerogative of the Crown, and most certainly must be denied to the judges of the land. To remit the maintenance of constitutional right to the region of judicial discretion is to shift the foundations of freedom from the rock to the sand.¹⁰¹

Lord Steyn, who has lamented that the centrality of freedom of speech becomes “the first casualty under a totalitarian regime,”¹⁰² recently issued an opinion with respect to the value of freedom of expression in a democratic society:

In a democracy it is the primary right: without it the rule of law is not possible . . . [although] freedom of expression is not an absolute right . . . [it] is intrinsically important . . . it is also instrumentally important [serving] a number of broad objectives [individual self fulfillment in society] . . . it tests truth by the competition of the market (after O.W. Holmes and John Stuart Mill). . . . Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve. . . . It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country.¹⁰³

The passage, about the important link between the dual freedoms of expression and information, is really a declaration of the importance of information, if not the importance of being honest.

In *In re S*, the same judge spoke of the dangers of inhibiting newspapers from their essential role in spreading information gathered from trials and the dangers of judges piling “exception upon exception” to maintain secret

101. *Scott v. Scott*, [1913] A.C. 417, 476-77 (H.L.) (appeal taken from Eng.) The memorable speeches were given by Viscount Haldane and Lord Shaw. See *Local Government Board v. Arlidge*, [1915] A.C. 149, 151 (H.L.) (appeal taken from Eng.), in which both judges also presided and which held that the standards of open justice demanded of courts of law were not to be applied to administrative inquiries and tribunals. The date, July 20, 1914, is crucial: War was imminent. For many years *Arlidge* set the template for administrative justice in England. The last 30 years have seen dramatic developments in the sophistication of administrative justice. See P. CRAIG, *ADMINISTRATIVE LAW* (5th ed. 2003). For nonjudicial procedures in the UK, see PATRICK BIRKINSHAW, *GRIEVANCES, REMEDIES AND THE STATE* (2d ed. 1994).

102. See *Att’y Gen. v. Guardian Newspapers*, [1987] 3 All E.R. 276, 346 (H.L.) (Lord Bridge) (providing dicta on the loss of free-flowing information under regimes that censor freedom of speech).

103. See *Regina v. Sec’y of State for the Home Dep’t ex parte Simms*, [2000] 2 A.C. 115, 125-26 (H.L.) (appeal taken from Eng.) (discussing the value of freedom of expression in a democratic society such as the UK).

trials.¹⁰⁴ The first thought goes to freedom of speech and a right to make communication. But governments invariably own the major repositories of information, access to which makes communication more meaningful and better informed. In terms of broadcasters, however, one senior judge in the UK, Lord Hoffmann, has stated obiter that Article 10 does not confer a right of access to a broadcaster. Its ambit is negative; there must be no unjustifiable interference with your right to pass on information.¹⁰⁵ Finally, Lord Nicholls observed in *Reynolds v. Times Newspapers, Ltd.*:

It is through the mass media that most people today obtain their information on political matters. Without freedom of expression by the media, freedom of expression would be a hollow concept. The interest of a democratic society in ensuring a free press weighs heavily in the balance in deciding whether any curtailment of this freedom bears a reasonable relationship to the purpose of the curtailment.¹⁰⁶

Thus, there exists some debate as to whether broadcasters enjoy special rights or whether they fall under special content restrictions.

The problem with the great utterances of constitutional principle from the oracle of the common law was that they could, and can, be defeated by an act of positive legislation. The Human Rights Act 1998 (HRA) does not upset the doctrine of Parliamentary Sovereignty.¹⁰⁷ Emphasis may be given to the interpretation of domestic legislation according to standards of private and international morality, as explained by Professor Dicey, a leading writer on the English constitution, but only once it is conceded that all rights bow to positive legislation.¹⁰⁸ In a British context, not only did the legislature fail to pass FOI laws until 2000,¹⁰⁹ but the state became preoccupied with secrecy and protection of state secrets as explained

104. See *In re S (a child)*, [2004] 4 All E.R. 683, ¶¶ 32-36 (H.L. 2004) (predicting harsh consequences of enjoining a newspaper from publishing information that could lead to the identification of a child of a mother charged with murder, including restricted freedom of press in reporting criminal trials, limited public information available for debate, and a chilling effect on local newspapers that want to avoid legal expenses involved in defending against injunctions).

105. See *R (Pro Life Alliance) v. British Broadcasting Corp.*, [2003] 2 All E.R. 977, [57] (H.L. 2003) (Lord Hoffmann) (stating that “[t]here is no human right to use a television channel” and arguing that the rights currently conferred are from Parliament and, although not an absolute human right, any restrictions of content should be subject to a standard of reasonableness).

106. *Reynolds v. Times Newspapers, Ltd.*, [1999] 4 All E.R. 609, 622 (H.L.).

107. Human Rights Act, 1998, c. 42 (U.K.).

108. See DICEY, *supra* note 71, at 62-63.

109. The position for local government differs. A FOI statute of sorts was introduced in 1985, and this also opened up all meetings of local authority committees and subcommittees to the public. Laws opening up Council meetings to the press go back to 1908. In 1960, a bill extending the openness provisions of the 1908 Act was piloted successfully through the Commons by a young Member of Parliament, Margaret Thatcher. A Data Protection Act was passed in 1984, c. 35 (U.K.), and replaced by the 1998 Data Protection Act, c. 29 (U.K.), which was necessitated by the EC Council Directive 95/46, 1995 O.J. (L 281) 31 (EC).

above. In Nazi Germany, much of the evil perpetrated in the name of the people was pursued in secret and not under the authority of written laws.¹¹⁰ In Communist Russia, the position was likewise.¹¹¹ There was nothing of this order in British government, but there were numerous episodes in which the British government acted arrogantly and in defiance of human rights and where secrecy acted as a barrier to effective relief. Lon L. Fuller has famously written of “the internal morality of law”¹¹² or the procedural necessities that must be pursued for a legal system to exist and to be called “legal.”¹¹³ Publication of law is one of these necessities. Although Fuller does not mention access to information, the procedural necessities that he describes relate in one way or another to transparency and openness of laws and legal processes.

British judges have, on the whole, been ill at ease when dealing with questions of fundamental rights.¹¹⁴ They have been slow to recognize the concept. Nonetheless, an increased sensitivity to fundamental rights has been apparent since the mid-1980s and was buttressed by the Human Rights Act 1998.¹¹⁵ Under the HRA, it is unlawful for public authorities to act in breach of the European Convention on Human Rights as implemented by the HRA¹¹⁶ and under which domestic judges must take account of judgments, decisions, and opinions of the European Court of Human Rights (CHR) in determining questions relating to Convention rights.¹¹⁷ The range of this duty is co-extensive with the extent to which

110. See generally MICHAEL BURLEIGH, *THE THIRD REICH: A NEW HISTORY* chs. 5, 8 (2001) (presenting information on the rise of German private individuals' interests in eugenics and their later racial aggression against and mass murder of Jews).

111. See generally MIKHAIL GORBACHEV, *PERESTROIKA* (1987) (seeking reform of the former Soviet Union and his exhortation for *glasnost* or openness in governance).

112. LON L. FULLER, *THE MORALITY OF LAW* (revised ed. 1969) (1964).

113. *Id.* at 4 (outlining the purpose of his chapter on the internal morality of law to address the problem of differentiating general concepts of morality, such as good and evil, and maintaining an orderly governmental system of legal rules and regulations, namely law).

114. See, e.g., *Att'y Gen. v. Guardian Newspapers*, [1987] 3 All E.R. 276, 346 (predicting the dangers of the limitations of the common law and non recognition of human rights).

115. Human Rights Act 1998, c. 42 (UK).

116. See *id.* § 6(1)-(2) (providing exceptions in cases in which laws make contravention of the Convention rights unavoidable).

117. *Id.* § 2. An English court has ruled that the Human Rights Act applies to protect those in the custody of the British army overseas (in a UK military detention center in Iraq), but it does not otherwise apply to that army overseas. See, e.g., *Al-Skeini v. Sec'y of State for Defence*, [2004] E.W.H.C. (Admin.) 2911 (Eng.) (summarizing that the act is territorial but noting that it also extends to “outposts of the United Kingdom” that includes the Iraqi prison in question). In *Al-Jedda v. Sec'y of State for Defence*, [2005] E.W.H.C. (Admin.) 1809, ¶¶ 17-18 (Eng.), the English High Court, while accepting the correctness of *Al-Skeini* before the announcement of the appellate decision, ruled that the rights as implemented by the HRA into domestic law are consistent with the rights in the ECHR and these latter rights are subject to higher forms of international law that would include a UN Security Council Resolution allowing detention of terrorist suspects. In other words, a measure made under

“in the opinion of the court . . . it is relevant to the proceedings in which the question has arisen.” Under Section Three, statutes and regulations “must be read and given effect in a way which is compatible with Convention rights,” but this interpretative duty is limited by the phrase “so far as it is possible to do so.”¹¹⁸ But judges in Britain are still lions under the Parliamentary Mace and respecters of Parliamentary sovereignty. They cannot strike down legislation that breaches the Convention. They can only issue a declaration of incompatibility with the Convention under the HRA. The judges have hinted extrajudicially of fundamental rights that Parliament would be wrong to undermine by legislation, legislation that judges might refuse to enforce.¹¹⁹ Removing judicial review from immigration decisions was seen by the then-Lord Chief Justice as a fundamental attack on the rule of law.¹²⁰ Both Lord Woolf, the Lord Chief Justice in question, and Sir Richard Scott¹²¹ offered evidence to the Commons select committee on public administration in its investigation into government proposals for a FOI statute in 1999.¹²² Neither believed FOI to be a fundamental right, although Lord Woolf hinted that he was more circumspect on the issue by stating “but I may be educated otherwise in the future.” The UK has no formal written constitution and must appeal

international law takes priority over UK domestic legislation. On one reading, this appears to give precedence to norms of international law over norms of domestic law which is heresy in traditional canons of English law. The court in *Al-Jedda* reasoned that it was simply a question of statutory construction. *Id.* The decision on custody in *Al-Skeini* was upheld by the Court of Appeal: *R (M.Mumaa, Al-Skeini) v. Sec’y of State for Defence*, [2005] EWCA Civ 1609.

118. Human Rights Act 1998, c. 42, § 3 (UK).

119. See Lord Woolf of Barnes, *Droit Public—English Style*, 1995 PUB. L. 57, 69 (stating that although the Parliament and the judiciary tend to function as a partnership, mutually respecting the roles of each, some judges might act in opposition to certain Parliamentary enactments limiting the review of the High Court by holding that Parliament could never intend such a result).

120. See Lord Woolf, *The Lord Chief Justice of England & Wales, Squire Centenary Lecture at Cambridge University: The Rule of Law and a Change in the Constitution* (Mar. 3, 2004), <http://www.dca.gov.uk/judicial/speeches/lcj030304.htm> (noting that the government, in the relevant Bill, went to great lengths to “exclude the possibility of intervention by the courts”).

121. Judge Scott (now Lord Scott) gave the judgment against the government in the famous Spycatcher trial. See *Att’y Gen. v. Guardian Newspapers (No.2)*, [1988] 3 All E.R. 545 (holding that no injunction could be granted if the Crown could not show that the publication of material would be contrary to public interest). He also conducted a major inquiry into the regime for exporting dual use (civil and military) equipment to Iraq and the use made by government of certificates attempting to prevent disclosure of evidence to assist the defendant in a criminal trial arising out of an export of such equipment. The public interest immunity certificates, as they are known, were dubbed by the press “gagging orders.” See H.C. 115 (1995-96) I-V & Index. They operate in a manner similar to executive privilege in the US and were originally referred to as Crown privilege certificates, but English courts did not like the use of “privilege” to describe their operation. Sometimes a Minister may be under a legal duty to invoke them.

122. See PUBLIC ADMINISTRATION COMMITTEE, MINUTES OF EVIDENCE, 1995-6, H.C. 570, 923-35 (providing statements by Lord Woolf and Sir Richard Scott indicating their opinions that FOI is not a human right).

to ancient understandings, and not so ancient understandings, on the nature of the constitution making it a “self referential exercise”—how have we behaved in the past, and how does this guide us in the present?¹²³ We refer to the rules of our constitutional traditions to guide us in the development of our unwritten constitution. Principles of the common law have provided basic constitutional rules such as Parliamentary Sovereignty¹²⁴ and the Rule of Law.¹²⁵ More recently, the judges have themselves developed a human rights consciousness in the common law.¹²⁶ In December 2005, the Law Lords ruled unanimously, reversing a majority decision of the Court of Appeal, that allowing intelligence obtained by torture overseas to be admitted as evidence in *judicial* proceedings in the UK was “abhorrent” to the common law and unlawful.¹²⁷ They will not allow fundamental rights to be overridden unless there is the clearest express provision for such in legislation.

Like freedom of speech, I would argue that FOI is also both intrinsically and instrumentally good. It is good in itself because it fulfils that relationship of trust that government must have in the people—not just its “own people”—those who are “one of us” as Mrs. Thatcher was fond of saying. But the government should have trust in all the people, not just the ones with whom it agrees. Furthermore, what is the value of freedom of speech if people are badly informed; if they lack the information base to

123. See NEIL MACCORMICK, *A UNION OF ITS OWN KIND: REFLECTIONS ON THE EUROPEAN CONVENTION AND THE PROPOSED CONSTITUTION OF THE EUROPEAN UNION* 18-21 (2004) (advocating for a European constitution and arguing that, although no formal constitution exists, the EU already functions as if working under a constitution); see also NEIL MACCORMICK, *QUESTIONING SOVEREIGNTY: LAW, STATE AND NATION IN THE EUROPEAN COMMONWEALTH* (1999) (opining an “institutional theory of law” regarding the roles of law, state, and nation in the “European Commonwealth,” now the EU).

124. See DICEY, *supra* note 71, at 3-4 (defining “Parliamentary sovereignty” as the ability to create or rescind laws without being usurped by any other authority).

125. See *id.* at 107 (describing “rule or supremacy of law” as a unique attribute of the English legal system that places the common law Constitution as controlling when determining individual rights).

126. See, e.g., *R v. Sec’y of State for the Home Dep’t ex parte Leech*, [1993] 4 All E.R. 539, 547 (declaring that, the more fundamental the right in question, the more difficult it is to imply a statute limits that right); *R v. Sec’y of State for the Home Dep’t ex parte Simms*, [1999] 3 All E.R. 400, 400-01 (H.L.) (holding that the right for a prisoner to speak with members of the press was not touched upon in the standing order at issue); *R v. Sec’y of State for the Home Dep’t ex parte Daly*, [2001] 3 All E.R. 433, 433-34 (H.L.) (using common law and ECHR principles to decide that a prisoner’s fundamental right to confidential communications with counsel was not disturbed by the order addressing discipline in the prison).

127. *A(FC) & Others (FC) v. Sec’y of State for the Home Dep’t*, [2005] UKHL 71. The Law Lords placed great emphasis on the almost total universal condemnation of torture under international law. The Law Lords decided 4-3 that the judicial tribunal in which an allegation of torture was raised should not admit the evidence if it concludes on a balance of probabilities that it was obtained by torture. The alternative test of the minority was that, once an allegation of torture is raised then unless it was established that torture was not used, the tribunal should reject the evidence. The test of the majority favors the government should the latter wish to enter contested evidence.

make sensible, intelligent or accurate judgments on which to express ideas or to make statements of fact. Government is the largest repository of information, information that it holds on its own activities and deliberations, information that it holds on others in its many regulatory responsibilities, and information that it holds on us as citizens. An informed citizenry is a citizenry better able to contribute to governmental processes sensibly; better able to understand and accept the basis of decisions affecting them; and better able to help shape the context—social, political, and environmental—in which they live. In the past, the first victim of totalitarian regimes was freedom of speech. One wonders whether the first victim of totalitarianism will be FOI? Individuals who are informed are more fully equipped to expose inconsistencies, weaknesses, and sheer “double-talk.” They are also individuals who are better equipped to sympathize with the difficulties of government. If government is arrogant and cares little about what individuals think, so long as it can muster enough support to win an election, FOI will be the first victim. Other victims of this arrogance will then swiftly follow.

It is my anticipation that access to information will be seen as a fundamental right in the sense described. This is because its centrality in maintaining accountability, legitimacy, other human rights, and even democracy itself will become increasingly apparent. Their realization through FOI makes FOI instrumentally important.

VII. A WIDER DEBATE

I must avoid parochialism. It seems to me that this tension between rational and humane standards of behavior and the failure of government to live up to such standards lies behind the debate for access to documents as a fundamental human right within the EC and EU. The first steps to FOI in the EC were faltering and were attacked for failing to appreciate the fundamental nature of the right in question. For example, many criticized the Council of Ministers because it merely adjusted its internal rules of procedure to allow public access to documents. In *Netherlands v. Council of the European Union*,¹²⁸ the Advocate General Tesouro, however, noted in his opinion for the ECJ that:

128. Case C-58/94, 1996 E.C.R. I-2169, 2179 (addressing the fact that most member states have adopted legislation dealing with the access to information). The Advocate General is a member of the Court, and he gives an opinion of the case to the judges on the Court, although he is not a judge and his opinion is not binding on the judges. It is usually, but not always, followed. This procedure was inspired by French public law procedures involving the *Commissaire du Gouvernement*. See L. NEVILLE BROWN & JOHN S. BELL, *FRENCH ADMINISTRATIVE LAW* 104-13 (5th ed. 1998) (reviewing the role and purpose of the *Commissaire du Gouvernement*).

[T]he basis for such a right should be sought in the democratic principle, which constitutes one of the cornerstones of the Community edifice . . . in the Preamble to the Maastricht Treaty and Article F of the Common Provisions [of the Treaty] [T]he right of access to official documents [is] now . . . part of that [democratic] principle.¹²⁹

Thus, the Advocate General referred more broadly to a right of access to documents as a constitutional or legislative principle enshrined in the legislation of most member states.

The European Parliament, in its intervention before the ECJ, “rightly stressed” the democratic nature of the Community legal order.¹³⁰ “[O]penness is a fundamental characteristic of a democratic system,” it claimed.¹³¹ The government of the Netherlands argued that the categorization of access as an internal bureaucratic matter (that is, a “right” governed by *internal* rules of procedure) by the Council was misconceived because it was a “fundamental right, namely the public’s right of access to information, the rules governing which must be accompanied by the necessary safeguards.”¹³² The right was an “innate feature of any democratic system.”¹³³ The ECJ declined to accept that it was such a fundamental right, although it acknowledged that the right of access has been reaffirmed by the Community “on various occasions.”¹³⁴ To amend the rules governing its internal administration, which were based on confidentiality in order to allow access by the public to its documents, the Council confirmed this trend of openness that “discloses a progressive affirmation of individuals’ right of access to documents held by public authorities.”¹³⁵ The ECJ held that the Council was empowered to amend its internal organization in this manner, by an administrative code backed up by formal legal decisions.

The ECJ and CFI—the latter of which deals with most of the cases on access to information at first instance and from which there is an appeal to the ECJ—have subsequently avoided ruling on the general principles of openness and access, finding technical or reviewable faults when the Council and Commission have denied access under the 1993 code and decisions. In *Hautala v. Council*,¹³⁶ both the Court of First Instance and the ECJ on appeal found for Ms. Hautala (a Member of the European

129. 1996 E.C.R. at I-2182 (citations omitted).

130. *Id.* at I-2196 to -97.

131. *Id.*

132. *Id.*

133. Case C-58/94, *Netherlands v. Council*, 1996 E.C.R. I-2169, 2171.

134. *Id.* at I-2197.

135. *Id.*

136. Case T-14/98, *Hautala v. Council*, 1999 ECJ CELEX LEXIS 9361 (July 19, 1999), *aff’d*, Case C-353/99P, 2001 ECJ CELEX LEXIS 6648 (Dec. 6, 2001).

Parliament) in her claim for access to documents relating to Title V information, the common foreign and security policy, which the Council (supported by Spain) had wrongly refused to consider disclosing in redacted form. In other words, the Council refused to fillet out information that was not covered by an exemption and claimed that the exemption covered *every* item of information in the documents. A failure to consider redaction rendered the decision a nullity. Both courts found it unnecessary to rule on Hautala's third claim that denial constituted a "breach of the fundamental principle" of Community law that citizens of the EU must be given the widest and fullest possible access to documents of the Community institutions and that refusal amounted to a denial of Ms. Hautala's legitimate expectations. The ECJ did not find it necessary to rule on the Council's ground of appeal that the CFI wrongly based its decision on a "right to information," finding that the refusal to consider disclosing redacted documents was illegal and disproportionate.¹³⁷ General principles of law such as proportionality help to interpret the right to access, but according to the ECJ, access is not yet a general principle itself. It should be emphasized that the general principles of law include fundamental rights taken from national constitutional systems, international treaties, and legal traditions as well as principles of judicial review within member states.

The Amsterdam Treaty on the European Union (1997, coming into effect in 1999) declared in Article 1(2) that the EU should operate as "openly and as closely as possible to its citizens."¹³⁸ Specifically, Article 255(1) provided for a right of access to documents of the EP, Council, and Commission.¹³⁹ The general principles and their limits were set out in Regulation 1049/2001.¹⁴⁰ Recital 2 of Regulation 1049 notes that openness

137. See Case C-353/99P, *Hautala v. Council*, 2001 ECJ CELEX LEXIS 6648 (Dec. 6, 2001) (dismissing an appeal where the Council wrongly refused to consider partial access to documents).

138. The Treaty of Amsterdam, Amending the Treaty on European Union, the Treaties Establishing the European Communities and Other Related Acts, art. 1(4), Nov. 10, 1997, 1997 O.J. (C 340), <http://europa.eu.int/eur-lex/lex/en/treaties/dat/11997E/htm/11997E.html#0001010001>.

139. See *id.* art. 255(1) (amending the Treaty to include the right of Union citizens to access European Parliament, Commission, and Council documents).

140. See COMMISSION OF THE EUROPEAN COMMUNITIES, REPORT FROM THE COMMISSION ON THE APPLICATION IN 2003 OF REGULATION (EC) NO 1049/2001 REGARDING PUBLIC ACCESS TO EUROPEAN PARLIAMENT, COUNCIL AND COMMISSION DOCUMENTS (2004) [hereinafter REGULATION 1049], http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2004/com2004_0347en01.pdf (listing the limits on the right of access and referring to case law concluded on the Regulation). The report deals with appeals lodged with the courts against refusals in 2003—there were twelve—and complaints submitted to the EU Ombudsman: seven were closed in 2003 and ten were outstanding. There were 1,523 initial requests; the largest number of requests came from members of the public (30.16%); the largest number of requests originated from Belgium (25.05%), and the largest area of interest was competition law. Overall, complete access was given in 66.83% of cases and partial access in 2.4%. There were 143 confirmatory requests (internal appeals against initial refusals to disclose) of which 30.13% were completely revised and 8.29% partly revised. *Id.* at 9-11,

contributes toward strengthening democracy and the protection of human rights within Article 6 EU and the Charter of Fundamental Rights.¹⁴¹ The purpose of Regulation 1049 is, among other things, “to give the fullest possible effect to the right of public access to [EU] documents” establishing general principles and limitations (Recital 4).¹⁴² Subsequently, a Directive of the European Parliament and Council of Ministers has set out provisions that seek to facilitate the reuse of public sector information by private sector bodies.¹⁴³

The draft EUC¹⁴⁴ has extended the right of access to cover *all* institutions, bodies, offices, and agencies of the EU, including the European Council, which has to conduct its work “as openly as possible” in accordance with EUC Article I-50.¹⁴⁵ The European Council of the EU is a meeting of the heads of state or government. It has no formal legal status within the EU Treaty—remarkably like the UK Cabinet within British laws. The European Council is the body that sets out the most important agendas for future development of the EU. The EUC in Article I-19(1) will give legal status to this body for the first time.¹⁴⁶ No working group in the Convention on the Constitution, which drafted the Constitution, dealt with access as a discrete topic because the Convention believed that what was required was more transparency and simplification of structure in the EU. The EUC does this in a number of ways, which include simplifying the EU

Annex. For 2004, see COM (2005) 348 final and Annex, and for the general report on implementation of Regulation 1049/2001, see COM (2004) 45 final. *See, e.g.*, Case T-76/02, *Messina v. Comm’n*, 2003 E.C.J CELEX LEXIS 374 (finding the documents to be an exception to disclosure under art. 4(5) of Regulation 1049) (see note 38 above for Art. 4(5)); Case T-84/03, *Turco v. Council*, 2004 E.C.J CELEX LEXIS 566 (Nov. 23, 2004) (dismissing the request for access to documents under the art. 4 exception); Case T-168/02, *Internationaler Tierschutz-Fonds (IFAW) GmbH v. Comm’n*, 2004 E.C.J CELEX LEXIS 593 (Nov. 30, 2004) (dismissing the request for access to documents under art. 4(5)); Case T-2/03, *Verein für Konsumenteninformation v. Comm’n*, 2005 E.C.J CELEX LEXIS 126 (Apr. 13, 2005) (annulling the Commission’s decision to withhold access for lack of concrete examination, and setting a demanding test for examination of large files of documents by the Commission); *Joined Cases T-110, 150 & 405/03, Sison v. Council*, 2005 E.C.J CELEX LEXIS 174 (Apr. 26, 2005) (rejecting the plea for access to documents as unfounded and refusing the access); *see also* TRANSPARENCY IN EUROPE II: PUBLIC ACCESS TO DOCUMENTS IN THE EU AND ITS MEMBER STATES (P. J. Stolk et al. eds., 2005).

141. *See* REGULATION 1049, *supra* note 140, at 6-8 (creating a register containing internal Commission documents).

142. *Id.* at 9-11.

143. *See generally* Council Directive 2003/98/EC of the European Parliament and of the Council on the Re-use of Public Sector Information, 2003 O.J. (L 46) 90, http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/l_345/l_34520031231en00900096.pdf (discussing the provisions for reuse of public sector information). This has been implemented into English law by regulations SI 2005/1515.

144. *See* discussion *supra* Part I (giving the history and development of the EUC).

145. Treaty Establishing a Constitution for Europe, art. I-50(1), Oct. 29, 2004, 2004 O.J. (C 310) 41, http://europa.eu.int/constitution/download/part_I_en.pdf.

146. *See id.* art. I-19(1) (including the European Council within the institutional framework of the Union); art. I-21.

so that it will no longer be divided into three pillars, giving legal status to the EC, simplifying the legislative process, and opening up the Council when acting as a legislator. However, other reforms were not so forward looking.¹⁴⁷

The EU draft constitution places access to documents in Article I-50 within Part I of the Treaty and places the basic constitutional measures under the title on “Democratic Life” of the EU.¹⁴⁸ The right covers access to documents in the possession of the institutions, including the European Council, the agencies, offices, and bodies of the EU. Its scope is far wider than the present Regulation. It will cover agencies and committees of the Council and Commission.¹⁴⁹ The right of access is accompanied by the principles of democratic equality (Article I-45); representative democracy (Article I-46); participatory democracy (Article I-47); and, among other things, data protection (Article I-51). Access also finds its way into the Charter of Fundamental Rights in Part II as Article II-102, together with a right to good administration (Article II-101).¹⁵⁰ Part III, Article III-398 makes provision for an “open, efficient and independent European administration.”¹⁵¹ Article III-399 confers a right of access to documents held by the bodies covered in Article I-50. In addition, the ECJ and European Central Bank are to be covered when exercising “administrative functions.”¹⁵²

Despite some criticisms that can be made, these are crucial developments in the EU, and there is no doubt that FOI is treated as a constitutional and fundamental human right. In a publication in 2005 from the European Data Protection Supervisor, an office established under the EC Data Protection

147. See Patrick Birkinshaw, *A Constitution for the European Union?—A Letter from Home*, 10 EUR. PUB. L. 57 (2004); Patrick Birkinshaw, *Supranationalism, The Rule of Law, and Constitutionalism in the Draft Union Constitution*, in 2004 YEARBOOK OF EUROPEAN LAW 199, 211 (Piet Eeckhout & Takis Tridimas eds., 2005) (discussing *inter alia* a provision added to Article I-46, which paid “lip service . . . to the principle of representative democracy and participatory democracy but without any hard detail”).

148. See generally Treaty Establishing a Constitution for Europe, Oct. 29, 2004, 2004 O.J. (C 310), http://europa.eu.int/constitution/download/part_I_en.pdf (comprising different directives on the “life” of the Union).

149. See *id.* art. I-50 (giving instructions on the transparency of proceedings and access).

150. See Treaty Establishing a Constitution for Europe, Part II, Oct. 29, 2004, 2005 O.J. (C 310) (granting the fundamental rights of citizens and stating that that Part is an integral and binding part of the constitution subject to general principles on interpretation and application in Arts. II-111-114 and a Declaration on interpretation drafted by the Praesidium of the Convention (the secret part of deliberations) describing itself as a “valuable tool on interpretation”). It is felt that this is an attempt by member states’ governments to influence the EU and member states’ courts in interpretation of fundamental rights.

151. See Treaty Establishing a Constitution for Europe, art. III-398, Oct. 29, 2004, 2004 O.J. (C 310), http://europa.eu.int/constitution/download/part_III_en.pdf.

152. See *id.* art. III-399(1).

Directive, public access to information is described as a fundamental right along with privacy, data protection, and integrity of the individual.¹⁵³

VIII. ACCESS TO INFORMATION AND DATA PROTECTION¹⁵⁴

In the public eye, data protection laws are the most conspicuous example of access to information laws—access to information or data about oneself. There is an EC Directive (95/46) on Data Protection. Data Protection laws are also derived from Article 8 ECHR which concerns the protection of privacy. Some see it as incongruous that the Directive also seeks to facilitate transborder flows of personal information for purposes of the single EC market. While the thrust of this paper has been an argument in favor of FOI as a human right, I have no doubt of the essential importance of privacy protection. Data protection is not a complete privacy law, far from it. But it has a vital role to play in securing the integrity of individuals. It has been noted, however, that it can be abused by national governments and the Commission in the following manner.

The Directive, and national laws implementing it, have been invoked in order to deny access to information about the identity of individual officials or persons with whom they had met when there were no security or safety reasons not to allow disclosure of identity.¹⁵⁵ The laws have also been used to prevent individuals from obtaining access to information because it contained personal data that was irrelevant to the request and in every other respect completely marginal to it.¹⁵⁶ Data protection was simply a convenient excuse not to disclose. This begs a series of questions about the proper scope of privacy and the extent to which officials are themselves protected by privacy when performing public business. I have no doubt there is a serious issue in this wider question when personal safety is, or

153. See EUROPEAN DATA PROTECTION SUPERVISOR, PUBLIC ACCESS TO INFORMATION AND DATA PROTECTION 4 (2005) [hereinafter PUBLIC ACCESS TO INFORMATION] (stating that fundamental rights include access to information, privacy, integrity, and data protection).

154. See generally Council Directive 95/46/EC, 1995 O.J. (L. 281) (EU) (laying down the foundation for the protection and free movement of personal data by member states); EUROPEAN DATA PROTECTION SUPERVISOR, *supra* note 153, at 16-21 (discussing the application of data protection regulation within the EU); Regulation No. 45/2001, 2001 O.J. (L 8) 1 (providing a code of data protection covering EC institutions).

155. See EUROPEAN DATA PROTECTION SUPERVISOR, *supra* note 153, at ch. 5, and examples cited therein.

156. *Id.* The UK Information Commissioner in January 2006 criticized government departments that routinely blanked out officials' names in documents for no justifiable reason. See Patrick Wintour, David Leigh & Rob Evans, *Information Commissioner Clashes with Whitehall over Deleting Civil Servants' Names in FOI Requests*, THE GUARDIAN (UK), Feb. 1, 2006, <http://www.guardian.co.uk/freedom/Story/0,,1699294,00.html>.

may be, in question. Too often, however, what has been resorted to is overkill and not the genuine protection of personal privacy that is necessary and desirable.¹⁵⁷

IX. ACCESS TO ENVIRONMENTAL INFORMATION

Reference must be made to Directive 2003/4/EC of the European Parliament and of the Council of January 28, 2003 on public access to environmental information. The Directive followed the Århus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.¹⁵⁸ This measure has to be implemented into UK and other Member States' law and allows individual rights of access to environmental information, which is very broadly defined. Its scope is truly enormous. Unlike the UK FOIA, it also covers the security and intelligence services in the UK, although a national security exemption will apply to much of the work of these bodies. There is no doubt that access to environmental information will have significant human rights implications, a factor realized by the decisions of the European Court of Human Rights (CHR) outlined in the following Part.¹⁵⁹ Environmental rights in themselves are referred to as one of the "third generation of human rights." To my mind it seems appropriate to place access to information rights generally within this category of third generation rights.

X. THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Reference has been made to the Articles of the ECHR and various recommendations of the Committee of Ministers above on access to information.

Article 10 is not an access to information provision. Instead, it is a free speech and freedom to pass on information provision. However in *Gaskin*

157. See IAN HARDEN, OPENNESS AND DATA PROTECTION IN THE EUROPEAN UNION 19 (2002) (Queen's Papers on Europeanisation No. 9, Queen's University Belfast, 2002) (noting that this has been an issue between the Commission and the EU Ombudsman); see also European Convention on Human Rights, art. 8; *Amann v. Switzerland*, LEXIS [2000] E.C.H.R. 277798/95 (Feb. 16, 2000) ("Telephone calls received on private or business premises are covered by the notions of 'private life' and 'correspondence' within the meaning of Article 8."); *Case C-465/00, Rechnungshof v. Österreichischer Rundfunk* [2003] E.C.J. CELEX LEXIS 209; EUROPEAN DATA PROTECTION SUPERVISOR, *supra* note 153, at 16-21.

158. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, <http://www.unece.org/env/pp/documents/cep43e.pdf>. A common position has been agreed between the European Parliament and the Council of Ministers to apply Århus to the institutions and bodies of the EC: OJC 264E/18 (Oct. 23, 2005). The English implementing regulations are the Environmental Information Regulations, SI 2004/3391.

159. See cases cited *infra* Part X.

v. United Kingdom, the CHR ruled that Article 8, which guarantees a right to family life and privacy, may provide a right to independent arbitration of a contested claim to records held about an individual by a public authority.¹⁶⁰ These had been refused by the authority after a request by the applicant, who had been brought up in the statutory care of the local authority and who claimed he had suffered damage as a consequence of the authority's negligence.¹⁶¹ The refusal to give access was not subject to any independent system of arbitration to determine whether grounds for withholding personal information under Article 8(2) were justified.¹⁶²

In *Guerra v. Italy*, the former European Commission on Human Rights believed that local residents had an entitlement under Article 10 to access environmental information about a chemical works program that was causing pollution.¹⁶³ The CHR disagreed with this finding on Article 10 but did find a breach of duty by the state under Article 8 insofar as there was an interference with family and private life by not ensuring disclosure of information about harmful substances. In *McGinley & Egan v. United Kingdom*, the CHR determined that members of the British armed forces would have a right under Article 8 to access documentation on the effects of experimental atomic explosions on those members of the armed forces who had witnessed them.¹⁶⁴ However, because they had not exhausted all domestic provisions entitling them to access, their rights had not been breached in the case. The following from the judgment is pregnant with potential:

Whe[n] a government engages in hazardous activities, such as those in issue in the present case, which might have hidden adverse consequences on the health of those involved in such activities . . . Article 8 requires that an effective and accessible procedure be established which enables such persons to seek all relevant and appropriate information.¹⁶⁵

160. See *Gaskin v. United Kingdom*, 12 Eur. H.R. Rep. 36, 50 (1989) (reiterating that "a system is only in conformity with the principles of proportionality if it provides that an independent authority . . . decides whether access has to be granted"); see also *M.G. v. United Kingdom* CHR Case No. 39393/98 (2002).

161. See *id.* (stating that he had suffered damage due to the negligence of the local authority).

162. Cf. *Leander v. Switzerland*, 9 Eur. H.R. Rep. 433, 453 (1987) (naming 12 different safeguards the government of Sweden had put in place to protect the privacy of the individual while protecting the state's legitimate national security interests in restricting access to personal records).

163. See 26 Eur. H.R. Rep. 357, 372-73 (1998) (the Court ruled that local residents have a right to information detailing threats to their health under art. 8 and the state authorities had failed in their duty by failing to collect and provide the 'essential information'). See generally *Oneryildiz v. Turkey*, [2002] ECHR 496 (June 18, 2002) (recognizing that under Article 2 of ECHR (right to life) individuals have a right to be informed of danger).

164. See *McGinley v. United Kingdom*, 27 Eur. Ct. H. R. 1, 35 (1998) (holding that refusing information could be a violation of Article 8); *Roche v. United Kingdom* (2005) (App No. 32555/96 Court of Human Rights).

165. *Id.*

One only need refer to *Fressoz v. France* to demonstrate the close relation between the right to free speech under Article 10 and the right of access to information.¹⁶⁶ On many occasions, courts have determined that a criminal defendant's right of access to information held by the prosecutors is a requirement to guarantee a fair trial under Article 6. It has also illustrated a very difficult dilemma of ensuring a fair criminal trial in circumstances in which state security or informers' identities may allegedly be compromised.¹⁶⁷

These are European cases. One should not ignore developments from the American continent. The meaning of freedom of expression will be tested in the Inter American Court on Human Rights (IACHR) for the first time in relation to access to information. Article 13 IACHR (a free speech provision) has been invoked to provide an access right to state-held information. The litigation concerns a refusal by Chile to provide information about inward investment and its environmental impact.¹⁶⁸ The dependence of freedom of speech upon FOI is raised once again in these proceedings.

166. See *Fressoz v. France*, 31 Eur. Ct. H.R. 2, 45-46 (2001) (Court of Human Rights report). In *Fressoz*, journalists were prosecuted and convicted under French criminal law for publishing articles about the activities of the managing director of Peugeot based on his tax returns. The information was otherwise publicly available, and the managing director had been offered very substantial pay rises while denying far more modest awards to the employees. The journalists pointed this out in their publication. The CHR held that Article 10 was breached on the grounds of proportionality by stating that:

In essence, that Article leaves it for journalists to decide whether or not it is necessary to reproduce such documents to ensure credibility. It protects journalists' right to divulge information on issues of general interest provided that they are acting in good faith and on an accurate factual basis and provide 'reliable and precise' information in accordance with the ethics of journalism.

Id.

167. The use of special advocates by the UK in deportation appeals and their spread to nonterrorist but serious criminals and procedures involving the latter. *Roberts v. Parole Bd.*, [2005] UKHL 45, 1 All E.R. 39 (2005), has witnessed erosion of procedural protection for those suspected of terrorist connections, and the procedure now covers the Parole Board. The Board deals with discretionary release of prisoners. A specially appointed and vetted advocate would represent the appellant before the Special Immigration Appeal Commission (SIAC) or the Parole Board, in the absence of the appellant and his legal representatives, at a closed hearing before the tribunal. The Special Advocate may not discuss the case with the appellant after the "closed evidence" is given to the Advocate. The House of Commons Constitutional Affairs Committee (House of Commons Paper 323-I (2004-05)) has issued a critical report. In *Roberts*, the House of Lords was divided 3-2 in upholding the legality of the extension of the special advisers to the Parole Board. See *Roberts v. Parole Bd.*, [2005] UKHL 45, 1 All E.R. 39 (2005) (holding that information on a prisoner's parole review may be withheld from his legal representation). Lord Bingham discusses the use of special advocates under statutory procedures in anti terrorist, race relations and zoning decisions. *Id.* ¶¶ 27-28. See also CONSTITUTIONAL AFFAIRS COMMITTEE, THE OPERATION OF THE SPECIAL IMMIGRATION APPEALS COMMISSION (SIAC) AND THE USE OF SPECIAL ADVOCATES, H.C. 232-I (2004-05), <http://www.parliament.the-stationery-office.co.uk/pa/cm200405/cmselect/cmconst/323/323i.pdf> (discussing the use of special advocates in SIAC litigation).

168. See Brief for Open Society Justice Initiative as Amici Curiae Supporting Marcel Claude Reyes, at 1-4, Case 12.108, *Claude Reyes v. Chile* (2005), www.justiceinitiative.org/db/resource2/fs/?file_id=15384.

XI. WHERE ARE WE?

The closest we come to acceptance of access to information laws as a fundamental human right is in the draft EUC yet to be formally ratified by all member states according to their domestic constitutional provisions. France and the Netherlands have rejected the draft in popular referenda. There is an irony in that development within the EUC when nation states' national constitutions rarely make FOI a fundamental human right (although some continental constitutions make it a constitutional right). This is not so in many common law regimes, although the South African FOI law of 2000 was mandated by the 1996 South African constitution. The argument for human rights is based upon protection for individuals against one-sided, deceitful, inefficient, oppressive, arbitrary, cowardly, and bullying government. They are the rights that are necessary for our individual integrity, for our acceptance by the state and civil society as full members of that community, of our right to belong. When power is exercised on our behalf, or our sufferance, we are not treated as full members of that community if those who wield power deny us information about why they used or are using their power the way they did, or are doing. We are not treated as full members when government does not provide us with information about the justification for the exercise of power and does not provide us with information about the effect of such decisions, the outcomes of such decisions, or the use of resources that made the exercise of power possible. In Western developed countries with a free press and media, we are used to critical reports and analyses of government and its actions. But the power of the state can still be mobilized for ill-conceived and oppressive purposes. Its powers of patronage, subordination, and concealment are virtually all conquering. In the UK FOI legislation for instance, the Minister possesses an overriding veto over any disclosure (subject only to judicial review challenge), and some exemptions to access are absolute. In such cases, there is no statutory public interest discretion to disclose. The test on the efficacy of access may soon come in the request for details about the advice of the Attorney General on the legality of the war in Iraq and whether a veto may be placed by the Cabinet (in the legislation it is a ministerial veto but the Government undertook that a veto would be a collective Cabinet decision) on any decision to disclose.¹⁶⁹ Even if this veto happened, one should not dismiss

169. OFFICE OF THE ATTORNEY GENERAL (UK), *ADVICE ON IRAQ: RESOLUTION 1441* (2003), http://www.lslo.gov.uk/foi/Iraq_Resolution_1441.pdf (discussing the legality of military action against Iraq pursuant to UN Resolution 1441). The UK government published a version of the advice before the 2005 UK general election but only after it was leaked. Much had been made of the fact that the Attorney General had seemed to alter his position in various stages of giving advice. FOI requests still cover other aspects of the advice.

the UK FOIA as irrelevant. The majority of requests are likely to be successful and will relate to relatively mundane matters.

If I give my life for a cause that the government determines is in the public interest, should my next of kin not be in a position to establish the veracity, or at least reliability, of what is being alleged? If I pay taxes, do I not have a right to know how they are spent? If I rely on subsistence, do I not have a right to know that calculations are correctly made and policies on amounts of payment are properly arrived at? If I am a recipient of public services, do I not have a right to know how much is being invested in those services and how they are performing? Do I not have a right to know the basis on which government formulates policy on behalf of the public welfare? These points have to a large extent been conceded by government in passing FOI laws. The right to information, like all rights, is never absolute. There are always qualifications to human rights, apart from torture, but even that seems now quite ashamedly to be compromised by so-called democratic and liberal regimes. The House of Lords judgment on use of intelligence extracted by torture in judicial proceedings was cited above.¹⁷⁰ FOI is a right of citizenship but it embraces the non-citizen. It is fundamental to all other human rights and is to that extent instrumental in their realization. FOI is necessary to protect the form of democracy that developed through the twentieth century.

But FOI laws have more basic uses. Secrecy protects corruption and brutality. One of the means of confronting corruption in third world recipients of western aid can be seen in the adoption of FOI laws to trace the payments of money, the number and loci of transactions involved in transforming money into goods, or the amount of aid supposedly distributed. Here, FOI is seen as a necessary means of survival. The right to information in all these examples is fundamental to my status as a full member of the human race. Information held by governments, or those private bodies used by governments, is fundamental to my position as a citizen, fundamental to my treatment with equal concern and respect by power wielders. It is also fundamental to my rights as a beneficiary of the information held by the government on my behalf. Information in these cases is intrinsically important.

FOI is also instrumentally a fundamental right and not simply an "important thing" in itself. It is the means by which I, or others on my behalf, extract accountability, responsiveness, efficiency, responsibility, financial regularity, and the means by which we expose wrongdoing.

170. See *supra* note 127 and accompanying text.

Furthermore, as many FOI regimes realize, the right is not restricted to citizens or those residents within the state, regardless of their nationality. The duty is owed in some regimes to everyone. Anyone may apply to UK public authorities for information held by those bodies. The same is true for the American government, although some limitations were imposed on foreign government requests for intelligence information under the U.S. Intelligence Authorization Act 2003.¹⁷¹ This provides a global dimension to FOI.

XII. FREEDOM OF INFORMATION AND GLOBALIZATION

Throughout this paper I have focused upon the traditional relationships in FOI: the state and the citizen or the state and individuals. The EU is not a state, but a supranational union of states. One of the points that has come to the foreground in recent years has been the fact that private companies can abuse rights in a manner similar to corrupt governments. This is true at a national level. It is also emphatically so at the global level. I cannot do justice to this topic in the short space allowed in this present Article, and it is a theme I have addressed elsewhere.¹⁷² What I will say is that FOI is a subject that will have to be addressed to global corporations because of their power to act like governments and to dominate national governments and regional governance. The arrangements that we have on transparency for such organizations usually work on a voluntary basis, although the point was made about South Africa's FOI laws above and how they apply to the private sector.¹⁷³ South Africa's Public Access to Information Act provides an individual right of access to information in private hands, where that information relates to the exercise or protection of rights. Secondly, the Act permits the state to exercise the right of access to information in private hands.

[T]he Act starts from the assumption [that] any information in private hands with a demonstrable and sufficient connection to the exercise or protection of any rights legitimately belongs to the public domain. It does this by providing a right to request such information and placing a burden on a private entity to justify why the requested information should not be disclosed. It allows public bodies to exercise this right,

171. See generally Intelligence Authorization Act for Fiscal Year 2003, § 1009, Pub. L. No. 107-306, 116 Stat. 2383 (2003) (making certain provisions of FOI inapplicable).

172. PATRICK BIRKINSHAW, "GLOBAL TRANSPARENCY" IN GLOBAL GOVERNANCE AND THE QUEST FOR JUSTICE (Vol. II: Corporations, Governance and Globalisation) (forthcoming).

173. See discussion *supra* Part II (comparing FOI laws in various countries while paying particular attention to the laws of South Africa).

effectively granting a wide and general power to the state to seek information from the private sector to protect rights or the public interest.¹⁷⁴

There will be enormous barriers to FOI advancing on the global level as well as formidable political and legal difficulties. But one of the reasons why such serious disequilibrium exists in the world order, and why human rights are so easily abused by power wielders, relates to the information resources put to exploitation by transnational corporations. Abuse is also dependent on corruption. India in particular has placed its faith in FOI as the solution to address problems that have been brought about by corruption in the distribution of aid. There is a long road ahead.

CONCLUSION

FOI is a human right; it enables us to fulfill our potential as humans. Without such rights, we are little more than subjects. Perhaps we are content, but we are still subjects who are denied the right to make integrity and individual responsibility a reality. FOI is both intrinsically and instrumentally important. It will be most developed in advanced economies and democracies, but FOI also has vital uses in less developed societies in helping to overcome corruption, oppression, and inhumanity. It is vital that such abuses must be addressed, but governments will have to engage in trade-offs between a more modest FOI regime that they can afford and other priorities. Access and openness are fundamental rights, but FOI details will differ according to particular social, economic, and political circumstances. Such circumstances, however, should not be allowed to defeat the underlying principles. Nor should one be blind to the fact that FOI may be very popular with western governments and banks seeking to facilitate debt recovery from third world countries.

It may be objected that I have not addressed sufficiently the antidemocratic tendencies of FOI. Its use by businesses to enhance their commercial capacity, to enhance their power at the expense of weaker bodies or individuals, or to thwart government maneuvers in regulating major corporations. FOI may be used to attempt to make invasions of privacy by the press for salacious reasons and not for public interest motives. Profit is then the driving force. FOI could seriously limit the capacity of government to govern in all our interests. Because laws are used by sinners as well as saints does not mean that a law should be removed. A law should only be removed when it is in itself inherently bad,

174. See IAIN CURRIE & JONATHAN KLAAREN, THE PROMOTION OF ACCESS TO INFORMATION ACT COMMENTARY 19 (2002) (applauding the government of South Africa's effort to grant public bodies "a wide and general power . . . to seek information from the private sector to protect its rights or the public interest").

misdirected, or redundant. I hope that the arguments above outlining why FOI is a human right have shown why FOI is necessary and that, when governments seek to remove it or reduce it, there is a great danger that governments are inevitably acting from exaggerated and selfish motives. But FOI is not an easy matter, and the law requires a considerable degree of administrative skill and oversight, care and attention, and commitment. If the laws are drafted too broadly and allow access to information that endangers personal or collective safety, then let the case for reform be made and justified publicly. Let the strength or weakness for change be seen.

As the burden of this paper has been that FOI is a fundamental right on par with freedom of speech, it is too important a right to be defeated by simple majority vote. FOI laws will always be unpopular with governments in power and some of the officials who serve them. That is probably the true test of their importance. FOI deserves constitutional protection. In the UK, this could only be within the terms of Parliamentary sovereignty. The British judges have made enormous inroads into the practical operation of this doctrine including their recognition of “constitutional statutes” deserving of particular protection.¹⁷⁵ One such statute would be the Freedom of Information Act 2000. To amend the UK Human Rights Act 1998 to include a right of access to information would probably require a revision of the European Convention on Human Rights. Although this is unlikely for the foreseeable future,¹⁷⁶ such an unlikelihood should not detract from the greater sensitivity of British courts, prompted by the jurisprudence of the European Court of Human Rights, to access and openness. The common law is incrementally recognizing such rights.¹⁷⁷

175. See *Thoburn v. Sunderland City Council*, [2002] 4 All E.R. 156 (CA) (Laws, L.J.); *R (Jackson) v. Att’y Gen.*, [2005] UKHL 56; see also *Case C-213/89, Factortame v. Sec’y of State for Transport (No. 2)*, [1991] 1 All E.R. 70 (HL) (stating that where there are persuasive and good grounds for alleging that a UK statute contravenes EC law, British courts may prohibit enforcement of the statute by injunction, even against the Crown).

176. In the Council of Europe (CoE), the question of a treaty providing for access to official documents binding on the CoE’s member states has been discussed. This would build on the CoE Recommendation 2002(2) on Access to Official Documents, http://www.justiceinitiative.org/db/resource2?res_id=102667. See CoE Recommendation 2002(2) on Access to Official Documents, Open Society Justice Initiative, Apr. 13, 2005, at http://www.justiceinitiative.org/db/resource2?res_id=102667 (urging the adoption of the Access to Information Treaty by the Council of Europe).

177. See case law *supra* notes 101-04 and 121; *McCartan Turkington Breen v. Times Newspapers*, [2000] 4 All E.R. 913 (HL) (granting a qualified privilege for reporting public meetings); *R v. Shayler*, [2002] UKHL ¶ 27-33 (discussing avenues through which a member of the security service may challenge a refusal to allow publication of memoirs); *R v. H*, [2004] 1 All E.R. 1269 (HL). Inroads into public interest immunity commenced with *Conway v. Rimmer*, [1968] AC 910. See also *R (M.Mumaa, Al-Skeini) v. Sec’y of State for Defence*, [2005] E.W.C.A. Civ 1609 ¶ 208 (Sedley L.J.); *D v. Home Office*, [2005] E.X.C.A. Civ 38 ¶ 130 (Brooke L.J.); cf. *Roberts v. Parole Bd.*, [2005] UKHL 45, 1 All E.R. 39 (2005); *Mersey Care NHS Trust v. R. Ackroyd*, [2006] EWCH 107 (QB).

Nonetheless, a revision of the Convention to include FOI and national incorporation are necessary to give FOI an appropriate status as a human and fundamental right.

DOES MORE TRANSPARENCY GO ALONG WITH BETTER GOVERNANCE?

ROUMEEN ISLAM*

This paper explores the link between information flows and governance. It develops a new indicator, the transparency index, which measures the frequency with which governments update economic data that they make available to the public. The paper also uses the existence of a Freedom of Information Act and the length of time for which it has been in existence as an indicator reflecting the overall legislative environment for transparency. Measures of the type developed in this paper have hitherto not been used in the cross-country literature on governance and growth. Cross-country regression estimation shows that countries with better information flows as measured by these indices also govern better.

INFORMATION IS a critical ingredient in efficient, well-functioning markets, both economic and political. More information allows better analysis, monitoring and evaluation of events that are significant for people's economic and social well-being. It allows economic and political decision-makers to evaluate opportunities and manage risks better and enhances the possibility that decisions in economic and political markets will enhance social welfare. The importance of information in markets for different types of goods and services has long been recognized in theory (Akerlof, 1970; Braverman and Stiglitz, 1986; Rothschild and Stiglitz, 1976; Spence and Zeckhauser, 1971; Stigler, 1961; Stiglitz, 1984, 1987a, 1987b, 1987c, 1988a, 1988b, 1989, 2002; Stiglitz and Grossman, 1980; Stiglitz and Weiss, 1981, among others).

Modern macroeconomics as well as microeconomics and finance are based on theories of how expectations are formed using the information available to decision-makers and how these expectations translate into actions which affect future outcomes. These theories focus not only on the incentives for producing information but also on how people use that information. For example, several authors have investigated the effects of economic information on stock markets and on interest rates. In the aftermath of the recent financial crises around the world, several empirical papers have looked at how information might be used to predict macroeconomic crises and/or to adapt policy so that future crises are prevented (Chote, 1998; Chowdhry and Goyal, 2000; Wirjanto, 1999). Jappelli and Pagano (1993,

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2001), Galindo and Miller (2001), Falkenheim and Powell (2003), and Barron and Staten (2003) are among those that consider how information provided by credit rating agencies or bureaus affects how markets function.

More recently, papers have looked at the empirical evidence linking the responsiveness of governments as well as private actors to better information provided by the media (Islam, 2002a, 2002b; World Bank, 2001). For example, Besley and Burgess (2001, 2002) find that regions in India where the media are more active are also regions which are the least likely to suffer from famines during droughts. This is because regions where the media have a greater reach are also the areas where voters are more informed about political choices and able to cast votes accordingly. Political leaders knowing that their performance can be monitored and that it may affect re-election possibilities are more accountable to voters. Dyck and Zingales (2002) find that a more active media as proxied by a media which has a greater circulation can be a powerful influence on the corporate governance environment. The media provide information that affects the reputation of corporate managers and thus their incentives to behave in a certain manner. Shiller (2002) and Herman (2002) discuss how media influence may in fact distort economic reality or provide a biased version of the "truth."

There is a tremendous range of information that is potentially valuable in making economic decisions: to give some examples, it can vary from simple price information on goods, to the disclosure of government processes and laws, to disclosure of private company accounts, or ownership of individual assets or income. Information is thought to be critical in affecting how a country is governed, how efficient markets are and how accountable private business is to its customers and shareholders. Yet what information is produced, disseminated, and analysed depends on the incentives of public and private agents. Stiglitz (2002) discusses the incentives of governments to restrict the flow of information. Governments play a critical role as they can restrict or facilitate information flows within countries or across borders. Many of the institutions (laws, regulations, codes of conduct) that governments design are created to manage the flow of information in an economy. For much of the information relevant to decision-makers in political and economic markets, government is in fact the sole repository (and producer).

Djankov et al. (2001) demonstrate that who provides information has a strong influence on what information is transmitted. They show that the nature of media ownership affects economic and political outcomes by influencing the nature of the information transmitted. Specifically, they investigate the effect of concentrated state ownership of the media on social and economic outcomes. A factor missing from their analysis is the effect of concentrated *private* ownership of the media on these same outcomes. Private business owners will produce, analyse, and disseminate information if it is profitable to do so, or if it enables them to influence public opinion in a way that increases their non-financial gains, such as social stature. Demsetz

and Lehn (1985) hypothesize that this effect (which they call the “amenity potential”) is quite high. Grossman and Hart (1986) refer to the non-financial benefits as the “private benefits of control.”

Consumers (including producers/businesses that consume information) and citizens will only demand information if it is perceived as useful and will only pay for it if they cannot get it for free.¹ Countries are often described as having or lacking a “culture” of openness. In other words, citizens either do not see value in having certain kinds of information being made public or, put another way, do not have strong enough incentives to pressure governments or private agents to make such information available. Sometimes they do not have sufficiently strong coalitions to support their desire for greater openness and/or the transactions cost of forming coalitions is too high.

This paper extends the empirical work on information and its effect on economic and political markets. It examines how the availability of information and the quality of governance are related. Specifically, it analyses (a) the relationship between basic economic data and governance and (b) the relationship of the Freedom of Information Law/Act (FOIA) and different measures of governance. In order to examine the first issue I construct an index measuring the timeliness of economic data published by government on the assumption that the more up-to-date are the data provided, the more relevant they are likely to be to economic/political decision-makers. The second measure I consider is the adoption of an FOIA. FOIAs determine the modalities by which citizens can obtain information that resides with public entities, on outcomes and procedures.² FOIAs can be useful to individuals, businesses, watchdog organizations or NGOs, and of course media organizations. The latter category is particularly important since mass media provide a critical link between the general public (who would find it prohibitively expensive to get such information from the source individually) and public or private organizations/individuals.

It is clear how economic data help economic markets function better. Investors, consumers and producers can make better business decisions by better assessing market conditions for their products. For example, price and inflation data help determine consumers’ expenditure patterns both between products and over time. And it helps determine the potential profitability of investment. Why might we expect a greater availability of economic data to be associated with better quality government? For a number of reasons more widely available data can affect the quality of governance. For one, the public can judge their governments’ ability to make sound policy by looking at such data. The ability to judge leaders according to how they perform in

¹Information being a public good suffers from the classical problems.

²An example might be the criteria on which a private contractor is chosen for government-financed contracts.

the economic sphere can affect the level of support the government has and determines how long they stay in power. In countries where different constituents are able to gauge economic performance, and where citizens are well informed, people are more likely to demand governments that govern better and governments have a greater incentive to do well. That is, governments become more accountable to their people. Even in non-democratic countries policy-makers may feel bound to produce better economic policy because they are monitored more effectively and they care about their reputations. They will be more wary of making large mistakes.

Second, these data improve coordination between government departments. For example, the budgetary process can benefit from data on outcomes related to fiscal expenditures. Third, the use of data to design policy can improve policy design, help identify goals, target potential beneficiaries, and evaluate alternative policies and procedures; and it can help policy-makers to understand the relative magnitudes of the issues for which they may have had only a qualitative feel. A better understanding of the effects of policies can lead to a change in the nature of the policies and institutions adopted. For these reasons, the provision of timely and good quality economic data can improve governance.

Countries that produce economic data on a timely basis and promote their dissemination are also likely to be countries which support better information flows all around. In other words, economic data can be thought of as a proxy for other kinds of data. It is of course an imperfect proxy since experience clearly shows that governments may on occasion be more willing to divulge certain economic data but not political data.

Aside from access to regular economic data people need information on a variety of issues related to public sector activity; information that is not immediately encapsulated in the type of economic data discussed above, but that can be very important in ensuring accountability of government. A key question is how does society get information on what it wants and needs to know about its government? In many countries there are clear rules or laws which define the rights of individuals and private entities – often defined in general terms in the constitution or in more detailed laws. They need timely information on decisions related to various aspects of government activity, on how these decisions will be implemented, information on the consequences of these decisions and the process through which they are reached. In practice, access to this type of information can be very limited either because of the nature of the laws or regulations which effectively restrict access, or simply because the administrative capacity to organize and disseminate information does not exist. A critical law facilitating access to information held by the public sector is an FOI law. This paper examines the relationship between the existence of a freedom of information (FOI) law and governance. Of course, the extent to which better information will affect choices will ultimately depend on how people can act upon their choices –

many other laws affect this ability (e.g. insult and defamation laws, journalist licensing laws or electoral laws). I focus on only one of the several possible relevant laws.

The discussion in the text has so far focused on the link between information flows in an economy and the efficiency of governance broadly defined; that is, the ability of governments to effectively design and implement policies that support market development, and overall growth. A number of authors have discussed various theories of institutional effectiveness (or good governance), linking the latter to countries' economic, political, and social (or cultural) histories. These authors posit that countries' initial conditions and history may have long-term effects on how they govern over time. Institutions, or the "rules of the game" (North, 1981) change slowly over time, thus history and initial conditions, not just current forces, play a strong role in how they develop. In this paper, I will recapitulate briefly some of the theories underlying institutional development and investigate how important information flows are, after accounting for the other determinants of institutional quality, put forward by the existing theory and empirical work on institutions.

In terms of the theoretical underpinnings of institutional development and the empirical analysis to date, economists argue that institutions are created when the costs of creating them (or changing them) are outweighed by the benefits (Demsetz, 1967; North, 1981). A number of papers have shown a strong relationship between measures of income and institutions: as income increases not only can countries "afford" better institutions but the demand for them is posited to increase as well. So higher income may lead to better institutions over time. However, better institutions also support higher growth and income (North, 1981). Cross-country regressions support the view that income and institutions are positively correlated and some show evidence of causality from institutions to growth. Examples are these: Mauro (1995), Easterly and Levine (1997), Acemoglu et al. (2001, 2002), Hall and Jones (1999), and Rodrik (1999). Kaufmann and Kraay (2002) demonstrate that the reverse effects of income on governance are, if anything, negative. Thus, the first economic variable I consider in explaining institutional quality is initial income per capita.

Recently, papers have focused on the links between institutional quality and trade openness (Hall and Jones, 1999; Islam and Montenegro, 2002; Wei, 2000; World Bank, 2001). More open economies are posited to have better institutions since open countries are more likely to have more competition (a factor favouring good institutional development) and also more opportunities for learning. So the second "economic" variable I look at to test the robustness of the basic results is trade openness which has been found to have an impact on institutional development. It may also be argued that countries with better governance are those that choose more open policies; in other words, that any correlation between openness and

institutional quality reflects the effect of the latter over the former. Empirical work has shown that there is a significant influence from greater openness to better governance.

A strand of the literature links a country's endowments to greater economic inequality, and poor quality institutions. Engerman and Sokoloff (1997) find that factor endowments linked to the production of tropical commodities in Latin American countries led to high inequality and consequently to the development of an elite class in society. This elite class did not find it in their interest to promote the welfare of the many, the result being low levels of public good provision, poor institutions, and low growth. They contrast this type of development with the North American experience where the existence of land favouring the development of non-tropical commodities encouraged family farms, which in turn implied greater equality. Greater equality then led to the emergence of better institutions. Hall and Jones (1999) found that tropical location was a factor determining the quality of institutions. Easterly (2000) links the existence and size of what he calls the middle class (the degree of inequality being inversely related to the size of the middle class) in society to the natural resource endowments of countries, finding that a higher concentration of exports in primary commodities is a good indicator of a more unequal distribution of income (and worse growth outcomes). He also finds geographical location (which he calls a Tropics Dummy Variable) to be a good indicator for a high concentration of exports in primary commodities. In this paper, I consider the effect of both geographical situation (a country's latitude) and concentrated exports in primary products on institutional quality.

A strand of the literature focuses on the effect of social conflict or polarization on institutional and development outcomes. Social conflict arising from differences in culture/beliefs among other things can be expected to lead to difficulties in governance – in designing good institutions that are accepted by all and in designing policies that increase society's overall welfare or in designing policies that serve the poor as well as the rich. In particular, this literature links ethnic fragmentation/diversity to poor development outcomes. Among these articles, Easterly and Levine (1997) find that a high degree of linguistic diversity in Africa helps explain the low provision of public goods. Alesina et al. (1999a) find that more ethnically diverse US cities and counties devote fewer resources to public good provision than do more ethnically homogenous cities and counties. In situations where ethnic diversity is high it is difficult to get agreement on the nature and level of public services. Polarized ethnic groups are unable to get agreement on "good" institutions in the fear that these would disproportionately benefit other ethnic groups. Alternatively, governments may become more interventionist and less efficient. Mauro (1995) and La Porta et al. (1999) find that ethnic diversity predicts poor quality of government services. Rodrik (1999) finds that ethnically polarized nations react adversely to

external terms of trade shocks because they are less well able to manage such shocks. Knack and Keefer (1995) find that ethnic homogeneity tends to raise social capital or trust (an important ingredient determining how government institutions work). In this paper, I use a measure of ethnic diversity to control for the effects of possible social polarization on governance.

In order to control for the effect of a country's political history on institutional development I follow La Porta et al. (1999), in identifying countries according to their legal origin under the hypothesis that a country's legal heritage is inextricably linked with the design and development of institutions today. To a certain extent legal heritage reflects historical political influences that determine how the economic rights of various agents are protected over time. These authors find legal heritage to be an important influence on the quality of governance, the French civil law heritage being associated with less effective governance (especially, it seems, poorer countries that have tried to transplant the French legal system) relative to countries that have the common law legal heritage or German or Scandinavian civil law heritages. Beck et al. (2001, 2002) find the impact of legal heritage on institutional development in the financial sector to be significant. Legal tradition is typically segregated into one of three categories: the civil, common, and socialist codes. In particular, the English common law heritage is thought to closely reflect the attempts of government to limit the power of the sovereign and to protect private property rights (David and Brierly, 1978; Finer, 1997; La Porta et al., 1999). The civil law system has been seen by some as codifying the power of the state, with this objective as being its main goal rather than limiting the power of the state in order to protect private property. The French civil law is seen as representative of this tradition. The socialist legal system is seen as overly interventionist and ineffective (so would lead to poor governance). In order to control for legal heritage, I group countries into the main classes: those with civil, common, or socialist law heritage.³

This paper shows that even after controlling for the above variables, there is a strong positive relationship between transparency and governance, with the likely effect running from the former to the latter, namely that greater transparency improves economic governance.⁴ It also shows that once

³It has been argued by some that German and Scandinavian civil law countries, while sharing the main features of French civil law countries, have developed other compensatory elements (such as what La Porta et al. refer to as a "professional" bureaucracy so that their performance is better relative to French civil law countries). Some specifications have also been done with the finer division (including German and Scandinavian heritages as distinct from the French civil system) but they do not affect the variable of interest. (However, one or more of the legal origin variables are often insignificant.)

⁴I use the term economic governance since I focus mostly on indicators of government regulation and bureaucratic efficiency (including corruption) rather than on political aspects of governance.

transparency indicators have been taken into account, the relationship between some of the variables that have been found to be important in explaining governance and governance indicators is not always significant.

In terms of papers that empirically address the relationship between information flows and public governance, the paper by Besley and Burgess (2001) is especially related to this one. Besley and Burgess document how the presence of mass media (in the form of a high level of newspaper circulation) influences government responsiveness in India. They find that governments in India face greater electoral accountability where newspaper circulation, and thus information on government (or political representatives') policy and position is highest. The rest of the paper is organized as follows: I first describe the derivation of the transparency index(es) used in the empirical section and then describe the empirical strategy and other data used. This is followed by a discussion of the regression results.

1. A NEW TRANSPARENCY INDEX

In order to investigate the relevance of widely available economic data for the quality of governance, I created an index which I call the "transparency" index, *T*. I define "available" by checking the following sources: the *World Development Indicators* (WDI) published by the World Bank, the *International Financial Statistics* (IFS) published by the International Monetary Fund (November 2002) and the internet (official websites of the government, such as Central Banks, statistical agencies, the Ministry of Finance, etc.). Some of the internet sources and the WB/IMF publications are based on national publications.

I take 11 representative variables from four sectors: the real, fiscal, financial and external sectors for a total of 170 countries, among which 136 are developing and 34 developed, using the World Bank definition of developed and developing.⁵ The 11 representative variables are: gross domestic product (Q, line 99b in IFS),⁶ unemployment (Q, line 67c in IFS), the consumer price index (M, IFS line 64), exports (M, line 70 in IFS), imports (M, line 71 in IFS), foreign direct investment (Q, line 78 bed), the exchange rate (M, exchange rate at the end of period national currency units, line ae in IFS), government revenue (Y, IFS line 81, central government fiscal revenue), government expenditure (Y, IFS line 82, central government fiscal expenditure), money supply-M2 (M, sum of IFS lines 34 and 35) and the deposit interest rate⁷ (M, IFS line 60l). These indicators are certainly not an exhaustive list of economic data that might be considered important for

⁵Developed countries are those classified as "high income" or having gross national income equal to or greater than US\$9,386 per capita in 2003. Countries with lower per capita income are classified as developing.

⁶IFS refers to the *International Financial Statistics* – a publication of the International Monetary Fund.

⁷Generally this is a three-month deposit rate.

TABLE 1 DATA CODING

	M	Q	Y
1	3 months lag: 2002/7	6 months lag: 2002/1q	1 year lag: 2001
2	6 months lag: 2002/4	12 months lag: 2001/3q	1.5 year lag: 2000
3	With longer lag	With longer lag	Longer lag
4	Lower frequency, reasonably up to date (2002/1q for M, 2001 for Q)		
5	Lower frequency, longer lag		
6	Not available from WDI, IFS, or any other official websites		

Notes: Meaning the data exist for July 2002 if November is the cut-off date. The table is based on two sets of observations. The first set was taken for a subset of countries at end-June 2002, and 40 additional countries were added to the list at mid-November.

monitoring and judging economic policy outcomes, but they do represent the indicators that all countries should and do compile to some degree.

For each of these variables, I determined the “desirable” frequency level. This level was determined by observing the actual frequency level with which the data are published in most of the industrialized/high-income countries and taking the most frequent level observed as being something that is both achievable and desirable. A “Q” indicates that the data are expected to be available on a quarterly basis; the “M” indicates their availability on a monthly basis; and a “Y” its availability on a yearly basis. In other words, GDP numbers can be and are produced on a quarterly basis in some countries. These countries are assigned the highest score (or a “1”) in terms of “transparency” with respect to GDP as long as they are also available on a timely basis. As Table 1 explains, both the frequency and the date for which the latest data are available are counted in formulating the index.

For example, if I search for CPI data (expected to be reported monthly) in middle November 2002, and if the data are available for July 2002 or for more recent months, it is assigned a score of “1.” If monthly data are available, not for July or later, but at least up to April 2002, then the score is “2.” If the monthly data are only available for March 2002 or are even older, the score is “3.” If the data are reported in lower frequency, for example, they are quarterly or annual and if the data are reasonably up to date (for data such as the CPI which are “desired” on a monthly basis, the requirement is that if it is reported as quarterly data, it should be available at least for the first quarter of 2002 or if annual data, then it needs to be available at least for the year 2001), then the score is “4.” If the data are both produced at a lower frequency and is older than required, a score of “4” or “5” will be assigned. If the data are not available from any of the four sources (WDI, IFS, IMF, or WB external websites or official websites of the countries), a “6” is assigned. The scores for each country on all indicators are averaged.

For GDP data, quarterly data are “desired,” if the data are available for the first quarter of 2002 or for a more recent quarter, the country gets a score of “1” on this measure. If quarterly data are available but only for the third quarter of 2001 or later, but not for the first quarter of 2002, the score assigned is “2.” If the quarterly data are only available for the second quarter of 2001 or are even older, the score is a “3.” If the data are reported at a lower frequency, for example, they are annual, then in order to get a “4,” the data need to be available for at least up to the year 2001. Otherwise it will be assigned a “5.” Again, “6” will be assigned if none of the sources checked have the data.

For annual data, such as government revenue or expenditure, if the data are available up to the year 2001, it is assigned a “1”; “2” is assigned if the most recent data are for the year 2000. Otherwise the score is “3.” Using this methodology, the United States is assigned a value of 1 for the consumer price index because the CPI for September 2002 is available in the IFS November 2002 edition. Uruguay is assigned a value of 2 because the most recent CPI is for June 2002. And Zambia is assigned a value of 5 because the most recent CPI was reported for 1997.⁸

For a couple of countries the coding was not followed exactly. Two countries got a better score for having higher than “desirable” reporting frequency though their scores would have been lower since the lag in data was longer than the optimum or desired lag. Armenia has GDP figures up to October 2001 and Luxembourg has FDI data up to April 2001; both are of monthly frequency. The former could only score a “2” and the latter a “3,” by considering the lags. But they receive “1” and “2,” respectively, because the data are available at a higher than “desired” frequency.⁹

When coding information from a website of the Central Bank and/or the statistics agency, in cases where there were no actual statistics on the site but it was indicated that the relevant data were available in a publication, the country received a score that reflected the most recently published issue of the printed publication. For example, for the end-June cut-off date, if the website indicated that there was a report containing the data published in March or later, then the country received a 1 for that data. If the last issue available was that of January 2002, the score was a 2 and so on. These decisions were particularly relevant for statistical information published by the national statistics agencies in several middle-income or rich countries, especially Brazil, Cyprus, Greece, and Germany.

⁸Note that for some of the countries the index was prepared looking at end-June publications. The index was then broadened to cover 40 more countries, but the end-date for these is November. This discrepancy has not made much of a difference since countries that tend not to report on a timely basis would have the same tendency whether one looks at their numbers in June or in November.

⁹For these two countries the cut-off point was June; they were in the first group investigated.

In cases where the website was inaccessible after two attempts, the information was considered as *not* being available from this source. Countries affected include Costa Rica, Guatemala, Honduras, and Benin. The code for each data type is then added together to create an index of transparency in economic activities and they are averaged. The best score that any country can get is 1, and the worst possible is 6 (if a country scores 6 on all 11 indicators). For ease of interpretation, particularly in the econometric section below, the actual transparency indicator is 7 minus the score they get from the above coding exercise. In other words, if a country scores 6 on all fronts, and is therefore “non-transparent,” then the transparency indicator for the country is $7-6$ or 1. A more transparent country gets a higher score. This is transparency indicator T . This indicator is shown in the first column of Table 2. The indicator TI will be explained below.

It is important to note two things: even if the internet site is accessible, many individuals with interest in the data may not have easy access or any access to the internet. In cases where there are national publications, interested people may not be able to purchase it in a bookstore or the cost may be exorbitantly high. I did not check the actual publication and the frequency may be overstated for the countries that had no data in other sources but which indicated that the data existed in a national publication. A mitigating factor may be that as long as some key individuals or organizations (such as researchers and the media) have access to this information, there is some chance that others who are interested in key variables will be able to obtain the necessary information. Despite this fact, the measure of availability used in this paper almost surely overstates how much information on common economic data is easily available in practice.

The transparency index indicates how much economic information governments are willing to disclose – but the FOI law gives access to more than just economic data.

2. ACCESS TO INFORMATION INDEX

The adoption of FOI laws is quite recent in the case of most countries. As citizens around the world have become progressively more aware of their rights and have learned the value of adopting such laws from their neighbours, countries have gradually adopted legislation promoting access to information. FOI laws may vary in both content and scope from country to country. Some laws are very detailed regarding what information may be kept secret and under what circumstances, and some are quite general.¹⁰

Regulations and laws governing access to information and the ability of people to disseminate information freely may be covered in other related laws as well. Laws that govern the ownership of information producing/

¹⁰See Martin and Feldman (1998), Transparency International website.

TABLE 2 THREE TRANSPARENCY INDICATORS FOR 170 COUNTRIES

Country	T	TI	T2	Country	T	TI	T2	Country	T	TI	T2
Afghanistan	1	1	1	Germany	6	6	6	Norway	6	7	11
Albania	4.8	5.8	5.8	Ghana	3.2	4.2	4.2	Oman	5	5	5
Algeria	4.5	4.5	4.5	Greece	5.5	6.5	8.5	Pakistan	4.4	4.4	4.4
Angola	3.5	3.5	3.5	Guatemala	4.7	4.7	4.7	Panama	5.1	6.1	6.1
Argentina	5.6	6.6	6.6	Guinea	2.6	2.6	2.6	Papua New Guinea	4.6	4.6	4.6
Armenia	5	5	5	Guinea-Bissau	3.1	3.1	3.1	Paraguay	3.2	3.2	3.2
Australia	6	7	11	Guyana	3.9	3.9	3.9	Peru	6	6	6
Austria	6	6	6	Haiti	4.5	4.5	4.5	Philippines	5.8	5.8	5.8
Azerbaijan	4.5	4.5	4.5	Honduras	4.4	4.4	4.4	Poland	6	7	7
Bahamas, The	4.5	4.5	4.5	Hong Kong, China	6	7	8	Portugal	6	7	8
Bahrain	4.5	4.5	4.5	Hungary	6	7	9	Qatar	3.9	3.9	3.9
Bangladesh	4	4	4	Iceland	5.6	6.6	7.6	Romania	5.9	6.9	6.9
Barbados	5.4	5.4	5.4	India	5.1	5.1	5.1	Russian Federation	6	7	8
Belarus	5.8	5.8	5.8	Indonesia	4.2	4.2	4.2	Rwanda	4.3	4.3	4.3
Belgium	5.7	6.7	7.7	Iran, Islamic Rep.	4	4	4	São Tome & Principe	2.4	2.4	2.4
Belize	4.2	5.2	6.2	Iraq	1.7	1.7	1.7	Saudi Arabia	4.4	4.4	4.4
Benin	3.1	3.1	3.1	Ireland	5.9	6.9	7.9	Senegal	3	3	3
Bhutan	3.4	3.4	3.4	Israel	5.6	6.6	6.6	Sierra Leone	3.9	3.9	3.9
Bolivia	4.9	4.9	4.9	Italy	6	6	6	Singapore	6	6	6
Bosnia & Herzegovina	3.5	4.5	4.5	Jamaica	4.3	4.3	4.3	Slovak Republic	6	7	7
Botswana	4.2	4.2	4.2	Japan	6	7	7	Slovenia	5.7	5.7	5.7
Brazil	6	6	6	Jordan	4	4	4	Solomon Islands	5.3	5.3	5.3
Brunei	1.1	6.5	6.5	Kazakhstan	5.8	5.8	5.8	Somalia	1.1	1.1	1.1
Bulgaria	4.7	4.7	4.7	Kenya	4.4	4.4	4.4	South Africa	5.9	6.9	6.9
Burkina Faso	4.3	4.3	4.3	Korea, Dem. Rep.	1	7	8	Spain	6	7	9
Cambodia	3.3	3.3	3.3	Korea, Rep.	6	7	8	Sri Lanka	4.6	4.6	4.6
Cameroon	6	7	10	Kuwait	4.3	4.3	4.3	St. Vincent & the Grenadines	3.9	3.9	3.9
Canada	6	7	10	Kyrgyz Republic	5.2	6.2	6.2	Sudan	3.8	3.8	3.8

TABLE 2 *Continued*

Country	T	TI	T2	Country	T	TI	T2	Country	T	TI	T2
Cape Verde	3.5	3.5	3.5	Lao PDR	3.8	3.8	3.8	Suriname	3.5	3.5	3.5
Cent. African Rep.	2.7	2.7	2.7	Latvia	6	7	7	Swaziland	4.5	4.5	4.5
Chad	4.3	4.3	4.3	Lebanon	4	4	4	Sweden	5.9	6.9	11
Chile	6	7	7	Lesotho	3.8	3.8	3.8	Switzerland	6	6	6
China	4.5	4.5	4.5	Liberia	3.5	3.5	3.5	Syrian Arab Republic	3.5	3.5	3.5
Colombia	6	7	11	Libya	3	3	3	Taiwan, China	5.6		
Comoros	2.2	2.2	2.2	Lithuania	5.5	6.5	7.5	Tajikistan	2.1	2.1	2.1
Congo, Rep.	2.2	2.2	2.2	Luxembourg	5.2	5.2	5.2	Tanzania	4.3	4.3	4.3
Costa Rica	4.9	4.9	4.9	Macedonia, FYR	4.6	4.6	4.6	Thailand	6	7	8
Côte d'Ivoire	4	4	4	Madagascar	3.3	3.3	3.3	Togo	4.4	4.4	4.4
Croatia	5.9	5.9	5.9	Malawi	4	4	4	Trinidad & Tobago	1.5	2.5	2.5
Cuba	1.6			Malaysia	6	6	6	Tunisia	5.5	5.5	5.5
Cyprus	6	6	6	Malta	5.1	5.1	5.1	Turkey	6	6	6
Czech Republic	5.6	6.6	6.6	Mauritania	3	3	3	Turkmenistan	1.5	1.5	1.5
Denmark	6	7	10	Mauritius	4.6	4.6	4.6	Uganda	4.3	4.3	4.3
Djibouti	3.5	3.5	3.5	Mexico	5.8	5.8	5.8	Ukraine	4.6	5.6	7.6
Dominica	3	3	3	Moldova	4.7	5.7	5.7	United Arab Emirates	4.9	4.9	4.9
Dominican Republic	4	4	4	Mongolia	3.8	3.8	3.8	United Kingdom	6	7	7
Ecuador	5.8	5.8	5.8	Morocco	4.8	4.8	4.8	United States	6	7	11
Egypt, Arab Rep.	4.3	4.3	4.3	Mozambique	2.8	2.8	2.8	Uruguay	4	4	4
El Salvador	5.5	5.5	5.5	Myanmar	4	4	4	Uzbekistan	1.7	2.7	3.7
Equatorial Guinea	3.4	3.4	3.4	Namibia	3.6	3.6	3.6	Vanuatu	3	3	3
Estonia	6	7	7	Nepal	4.2	4.2	4.2	Venezuela, RB	4.6	4.6	4.6
Ethiopia	3.3	3.3	3.3	Netherlands	5.8	6.8	8.8	Vietnam	3.7	3.7	3.7
Fiji	3.5	3.5	3.5	New Caledonia	1.9			Yemen, Rep.	4.7	4.7	4.7
Finland	6	7	11	New Zealand	5.6	6.6	11	Yugoslavia, FR	5.4	5.4	5.4
France	6	7	11	Nicaragua	4.2	4.2	4.2	Zambia	3.1	3.1	3.1
Gabon	2.9	2.9	2.9	Niger	3.2	3.2	3.2	Zimbabwe	3.4	3.4	3.4
Georgia	3.8	4.8	4.8	Nigeria	3.1	4.1	4.1				

disseminating entities and competition in these industries have a large impact on the quantity and quality of information flows (these issues are summarized in World Bank, 2001, 2002). Press and media laws may determine how much information is circulated. Restrictive practices such as requiring journalists or newspapers to be licensed by the state may limit the flow of information, either by restricting entry or by inducing media personnel to censor information for fear of reprisal from government or others. These restrictions also vary in kind and scope between countries. For example, in Austria there is no requirement on journalists or newspapers to be licensed.¹¹ In the Czech Republic journalists are not required to be licensed or accredited but newspapers are required to be licensed. However, an amended Press Law in 1990 has changed the former licensing requirements of any publishing activity into a simple registration. All periodical press is registered with the Ministry of Culture.¹²

In Ethiopia, journalists are not required to be licensed or accredited; however, newspaper licences are issued by the Ministry of Information and Culture and are annual, being renewed upon payment of the prescribed annual fee.¹³ There is a fee of US\$1,185 for renewal of a licence; and prospective and existing newspapers are required to maintain bank balances of US\$1,250 as a bond against potential offences that journalists might commit. Publications that fail to demonstrate at least this degree of solvency whenever required by the Ministry of Information and Culture may have their licences revoked.¹⁴ The fee, compared with Ethiopia's per capita GDP, is high – GDP per capita being US\$122.1 in 2001.¹⁵

The purpose of all such laws is to define a framework for the sharing of information. Sometimes just the act of adopting a law can signify a reduction in the restrictions imposed on information flow. Sometimes the adoption of an FOI law can make people more aware of the value of information (Chongkittavorn, 2002). Such laws are one important element in the whole institutional environment affecting information flow.

Adopting an FOI is clearly not enough to ensure that it is effective. Government agencies must be required to publish information and there must be some implementing mechanism for the FOI. For example, in some countries a central commission is charged with ensuring that information gets out to the public as in the case of the Information Commission in

¹¹<http://www.austriaemb.org.au/media.htm> and www.hrcr.org/safrica/expression/telesystemaustria.html.

¹²Law No. 81/1966 ("On periodical printings" regulates the publications of the press and other mass media.

¹³(Proclamation 34/1992, Art. 7). According to the website ijnet.org/Archive/2001/8/17-10268.html, an editor of the sports newspaper *Kicker*, failed to renew its licence and was sentenced to one month in prison.

¹⁴www.cpj.org/attacks00/africa00/Ethiopia.html and www.cpj.org/protests/01ltrs/Ethiopia31Oct01pl.html.

¹⁵World Bank data.

Ireland, the Data Protection Inspectorate in Estonia, and the Office of the Official Information Board in Thailand,¹⁶ while in Georgia, Bulgaria, and Finland this is not the case. Countries vary greatly in the time it takes to satisfy requests for information. In Estonia, Hong Kong, China, and Hungary, the laws specify that responses to requests must be made before or by the 15th day. In South Africa, the limit specified is 30 days and in Thailand the limit is not specified though it must be within a “reasonable period.”

When requests for information are denied, in most cases, the nature of the appeals process is also specified. Generally, the courts are responsible for oversight: in Canada the final appeal goes to the Federal court. In Ireland there is a review by an Information Commissioner and then an Appeal to the High Court. In Thailand, appeals are made to the Information Disclosure Tribunal, and in Hong Kong, China, to the Ombudsman. It is clear that several institutional features need to be developed to ensure there is effective implementation of FOIs. A survey by the Bulgarian Access to Information Programme Foundation in 2000, found that one year after the country adopted an FOI law, only 42% of the Bulgarian public administration had implemented it effectively. A study by the Romanian Academic Society showed that while 68% of Romanian public institutions surveyed had an office in charge of informing citizens about what they did, only 34% had the list of data they were required to prepare. Only 15% of the public administration had implemented substantial aspects of the law (Romanian Academic Society, 2002).¹⁷ Despite these caveats, however, it is possible to say that a country with an FOI law is more likely to be more open having taken an important step towards allowing better information flows from the public sector to the private sector.

Not only are FOI laws a relatively recent phenomenon on the scene (see Table 3) with only 54 countries having adopted one as of end-2002, but also many countries are still trying to work out how to implement them effectively. Precisely because the adoption of such laws is relatively recent, in some countries it might be difficult to argue that they have had a substantial effect on governance. Yet, even in these cases it might be argued that adoption of an FOI Act may be taken as one of the acts a government takes in an ongoing process to improve transparency: it is rarely the first act. Thus the existence of an Act may be an indicator for a general move towards ensuring greater access to information.

Table 3 shows the countries that have adopted an FOI law. A dummy variable which distinguishes between countries that have an FOI law and

¹⁶Various sources: (1) Information Commissioner in Ireland – Freedom of Information Act 1997, Part IV, Article 33; obtained from: www.humanrightsinitiative.org. (2) Data Protection Inspectorate in Estonia – Public Information Act, RT1 2000, 92, 597, Chapter VI, Article 44; obtained from: IJNET. (3) Office of the Official Information Board – Official Information Act, B.E. 2540 1997, Section 6; obtained from: www.humanrightsinitiative.org.

¹⁷The FOI Act was passed in 2001.

TABLE 3 COUNTRIES WITH A FREEDOM OF INFORMATION LAW OR ACT (FOI)

Country	<i>foi</i>	Year of introduction	<i>foi2</i>	Name of the law
Albania	Yes	1999	1	Law on the right of information over official documents
Argentina	Yes	1998	1	FOI law
Australia	Yes	1982	5	FOI Act (foiA)
Belgium	Yes	1991–2001	2	Series of laws and decrees
Belize	Yes	1994	2	FOIA
Bosnia-Herzegovina	Yes	2001	1	FOIA
Bulgaria	Yes	2000	1	Access to Information Act
Canada	Yes	1983	4	Access to Information Act
Chile	Yes	1999	1	Law on Administrative Documents
Colombia	Yes	1888, 1985	5	1888: Code of Political and Municipal Organizations (allows citizens to request official documents); 1985: Law Ordering the Publicity of Official Acts and Documents
Czech Republic	Yes	1999	1	Law on free access to information
Denmark	Yes	1985	4	Public Information Law
Estonia	Yes	2000	1	Public Information Act
Finland	Yes	1951, 1999	5	1951: Act on Publicity of Official Documents (in effect until 1999); 1999: Act on the Openness of Government Activities
France	Yes	1978	5	Freedom of access to the administrative documents
Georgia	Yes	1999	1	The Law on Freedom of Information (as Chapter 3 of the General Administrative Code of Georgia)
Ghana	Yes	1999	1	Right to Information Bill
Greece	Yes	1986, 1999	3	1986: Law 1599 On the Relations between Citizens and the State; 1999: Administrative Proceedings Code, Article 5
Hong Kong	Yes	1995	2	Code on Access to Information
Hungary	Yes	1992	3	Data Protection Law
Iceland	Yes	1996	2	Information Act
Ireland	Yes	1997	3	Freedom of Information Act
Israel	Yes	1998	1	Freedom of Information Law (5758 – 1998)
Japan	Yes	1999	1	Law concerning the Disclosure of Information held by administrative organs
Korea Republic	Yes	1996	2	Act on Disclosure of Information by Public Agencies
Kyrgyz Rep.	Yes	2001	1	Law on the Guarantees and Freedom of Access to Information
Latvia	Yes	1998	1	Freedom of Information Law

TABLE 3 *Continued*

Country	<i>foi</i>	Year of introduction	<i>foi2</i>	Name of the law
Lithuania	Yes	1996	2	Law on Provision of Information to the Public
Moldova	Yes	2000	1	Law on Access to Information
New Zealand	Yes	1982	5	Official Information Act
Nigeria	Yes	1999	1	Freedom of Information Bill
Norway	Yes	1971	5	Freedom of Information Act
Panama	Yes	2002	1	Law on Free Access to Public Records
Poland	Yes	2001	1	Freedom of Information Act
Portugal	Yes	1993	2	Law on Access to Administrative Documents
Romania	Yes	2001	1	Law regarding the free access to the information of the public interest
Russian Federation	Yes	1995	2	Law on Information, Information and Protection of Information; Law on State Secrets
Slovakia	Yes	2000	1	Act on free access to information
South Africa	Yes	2000	1	Promotion of access to information Act
Spain	Yes	1992	3	Legal regime of the public administrations and the common administrative procedure
Sweden	Yes	1766	5	Freedom of the Press Act
Thailand	Yes	1997	2	Official Information Act
Trinidad & Tobago	Yes	1999	1	Freedom of Information Act
Ukraine	Yes	1992	3	Law on Information
United Kingdom	Yes	2000	1	Data Protection Act 1998; Freedom of Information Act 2000
United States	Yes	1966	5	Freedom of Information Act
Uzbekistan	Yes	1997	2	Law on guarantees and freedom of access to information

Notes: For Argentina, only the city of Buenos Aires adopted a Freedom of Information Act in 1998. However, it is given a "1."

Main sources: Article 19 of International Center and Censorship (ICC, 1993) and various websites maintained by individual countries, website www.freedominfo.org. Note that the table contains information till June 2002, countries adopting FOI after that are not included (such as Mexico).

Austria and Italy are deemed as not having FOIA although they have some related legislation. In Austria, the Federal Law on the Duty to Furnish Information obliges federal authorities to answer questions within eight weeks. However, the law does not oblige government bodies to provide access to the documents. If an interest can be shown, then the individual requesting the information can obtain copies of the documents under the Code of Administrative Procedures or the Data Protection Act.

For *foi2*, if various legislation was introduced in different years, we take the average value we would obtain by taking each time period individually, calculating *foi2* and averaging.

those that do not is created. This indicator (*foi*) is composed from data held by Article 19 of International Center and Censorship (ICC, 1993) and other sources.¹⁸ The second column in Table 2, *T1*, represents a linear combination of *T* and the FOI dummy variable, *foi*.¹⁹ An alternative index (*foi2*) is created that varies with the length of time that a country has had an FOI law. I assume that countries that have had the law in existence for longer are more likely to be more transparent, the reason being that it takes time for laws to take effect. This index is compiled by looking at how many years prior to 2003 the FOI was adopted (the data were collected in 2002). Both the supply side (the agencies that produce and provide information) and the demand side (those that ask for information) are more likely to be active (and the society is more likely to value information), the longer the FOI has been in effect. For countries that adopted a FOI in the last five years, the value of the *foi2* indicator is "1"; if the FOIA has been in existence more than five years but equal to 10 years or less the *foi2* indicator is "2," between 10 and 15 years it is "3," between 15 and 20 years it is "4," and over 20 years it is "5." The second column presents this index *foi2*. Column *T2* in Table 2 represents a linear combination of *T* and *foi2*. Summarizing the data in this manner helps to easily compare countries in terms of how recently these issues have been of interest to policy-makers.

3. EMPIRICAL STRATEGY, OTHER DATA, AND DESCRIPTIVE STATISTICS

Empirical investigations conducted in this paper take the following form:

$$I_t = \alpha + \beta X_t + \gamma E_t + \delta T + \varepsilon_t, \quad (1)$$

where *I* represents the institutional (or governance) variable of interest, *X* represents variables related to a country's political or social history, *E* represents variables that we might think of as representing economic (or geographic) influences, and *T* represents the information/transparency variables of interest. The hypothesis is that increases in transparency lead to better governance.

In terms of the data used in the estimation, the first variable is the initial value of GDP per capita which is used to assess the importance of initial conditions. Initial income is expected to have a significant effect on how institutions develop over time. The openness indicator (*openness*) is based on the Frankel and Romer (1999) openness variable which stresses geographical factors and countries' proximity to each other to estimate openness.

For the index reflecting ethnic diversity (*avelf*), I use Easterly and Levine's (1997) measure which is based in turn on five different indices. The indicator measures the probability that two people chosen randomly from the

¹⁸ Author's compilation; for sources see notes to table.

¹⁹ This indicator may be thought of as a broader measure of governance, though as constructed it gives more weight to the economic indicator.

population, will be from the same ethnic group.²⁰ The dummy variable for the civil, common, and socialist legal heritages (*legor_civil*, *legor_uk*, *legor_so*, respectively) are obtained from Djankov et al. (2003).

The indicator I use for a country's geographical position is latitude (*lat*). Note that this variable reflects the influence of geographic and economic conditions – particularly being in the tropics has been found to be a good predictor for concentration in exports/production in primary commodities (and/or subsequent inequality) and also a good explanatory variable for institutional development (Easterly, 2000; Hall and Jones, 1999).

For the dependent variables, I use mainly subjective indicators of governance/institutional quality. These indicators are based on polls of experts or on in-country surveys. While subjective indicators are often criticized because of non-comparability of responses across countries (e.g. because of different expectations and cultural variations), they do provide some important information. First, perceptions of the quality of governance may be as important as objective measures of governance (e.g. if people believe a political candidate is corrupt, whether he is or not, may not matter for the electoral outcome). Subjective measures may be quite good indicators of how the system functions overall. Second, for objective measures of institutional quality it is difficult to get standards of what is “good” – since good institutions may take many forms.²¹ Finally, subjective indicators have been shown to have explanatory power for economic outcomes.²²

The first set is developed by Kaufmann, Kraay, and Zoido-Lobodan (KKZ) and Kaufman, Kraay, and Mastruzzi (KKM) (Kaufmann et al., 1999a, 1999b, 2004). These indicators reflect several dimensions of governance covering 199 countries and territories for four time periods, 1996, 1998, 2000, and 2002. The indicators are based on several hundred individual variables measuring perceptions of governance and are drawn from 25 separate datasets constructed by 18 different organizations. KKZ classify all these indicators into six different categories which describe political as well as more “economic” governance dimensions. The advantage of their dataset is that by aggregating over various sources, they have a large number of countries and observations (examples of some of their sources are the World Bank, Gallup International, the Economist Intelligence Unit, Political Risk Services, and Business Environment Risk Intelligence).²³ Of the six composite indicators they develop, I take those that summarize the ability of the government to formulate and implement sound policies or what I call the

²⁰The ethnic group is identified by the language that is spoken.

²¹For example, a court may be very good in terms of how fast it settles disputes – an objective measure – but the way this outcome is achieved can differ among nations.

²²See Kaufmann et al. (1999a, 1999b) for a discussion of subjective indicators.

²³Table I (p. 43) of their 2004 paper lists all the sources. Use a variant of an unobserved components model to combine the information from different sources. Two of the assumptions they make in their aggregation is that the distribution of unobserved (true) governance is normal and that the relationship between unobserved governance and observed indicators is linear.

“economic governance” indices. These are the “government effectiveness” (*geffect*) and “regulatory burden” (*regbrdn*) indicators and the “*graft*” or control of corruption indices that measure perceptions of corruption (defined as the exercise of public power for private gain).²⁴ I also consider one measure that reflects how citizen preferences are expressed and how governments respond to them. To this end, I use their “voice and accountability” (*voice*) index. This index includes a number of indicators that measure aspects of the political process, civil liberties, independence of the media, and political rights. As Kaufmann et al. (1999a, 1999b) show, aggregate indicators can provide more precise measures of governance than individual indicators. The KKZ/KKM indicators are constructed so that increasing numbers indicate better governance.²⁵ For example, a country with a score of -2.94 for regulatory burden in Table 4 (*regbrdn*) is more poorly governed than one with a score of 1.00.

One of the sources used in KKZ/KKM is the Political Risk Services which produces the *International Country Risk Guide* (ICRG). This publication has indicators that have been widely used in recent research. In order to see how my indicator performs against these more traditional (subjective sources), sources that have been used by previous authors, I also use these as dependent variables. The ICRG indicators span several years and are compiled on an annual basis. I use data for the period 1984–2003. For the ICRG indicators, the corresponding indicators of interest, measuring how government is perceived to support market transactions and protect property rights are corruption (*corup*) and bureaucratic quality (*bureau*).

In order to gain robustness, I also do estimations to see how my transparency indicator performs against the output of public goods under the assumption that countries that govern well will have higher quality public goods. While these measures are not direct measures of institutional quality, the state of governance in a country is critical to achieving good outcomes on these measures. These are described in the next section.

To recapitulate, the first transparency index used here examines the effect of “economic” information on governance. The second index is the dummy variable for the FOI law (*foi*). The third index combines the effects of the FOI law and economic transparency on governance and is a wider transparency measure.²⁶ Finally, the fourth index weights the FOI by the length of time that it has been in existence, *foi2*.

²⁴I do not focus on the groups in this dataset that refer to the process by which authority is selected and replaced and indicators such as rule of law which measure the extent to which citizens have confidence in and abide by the rules of society. It is noteworthy that the “voice and accountability” measure is strongly related to the transparency index, though I do not show these results in this paper. Use a variant of an unobserved components model to combine the information from different sources.

²⁵Their aggregation procedure, details of which are provided in their paper, generates a range of values that includes negative values. A higher value indicates better governance.

²⁶Results from the regressions are not reported because they mirror those for the *T* variable.

4. DESCRIPTIVE STATISTICS

Table 4 shows standard descriptive statistics for the main variables used in this paper and for the dependent variables.^{27,28} Aggregating and averaging the transparency indicator among countries of different income levels shows that rich countries are more than twice as “transparent” (Table 5) as poor countries. The variation among high-income countries is the highest among the three groups. For the low-income countries not only is the average transparency lower but the variation between countries is also smaller. The overall correlation between T and income is under 0.65 and between the FOI indicator, foi and income under 0.5. The correlation between T and foi indicators is 0.43 and between T and $foi2$ is 0.44. As Table 6 shows, high-income countries are much more likely to have FOI laws but many still do not have them (57% of them do). The differences among the countries at different income levels are magnified if the $foi2$ indicator is considered. This is because among those rich countries that have adopted FOIAs, many have done so several years ago, while poorer countries have begun adopting such legislation more recently. Among the low-income countries, countries such as Moldova and the Kyrgyz Republic have an FOI law but neither India nor Bangladesh does. Yet looking at the freedom of the press ratings, Freedom House²⁹ rates India and Bangladesh higher than the Kyrgyz Republic. The freedom of the press rating for India, Bangladesh, and the Kyrgyz Republic are 58.33, 43.78, and 40, respectively, in 2002. The difference is probably due to two facts: first information can be “free” although countries may not have an FOI Act, and second the press can be free but not have access to reliable information. The existence of an FOI is not a guarantee for free flows of information, even implementation issues aside. Governments or others can find other ways to restrict information.

5. REGRESSIONS RESULTS

The base regression is shown in Table 7a where both T and foi index are explanatory variables.³⁰ This regression is estimated using 2SLS because the openness variable is instrumented. The regressions indicate that apart from the voice and accountability index, and the KKZ graft index the governance indicators show a significant positive relationship with the economic transparency indicator, T (at the 5% or 1% confidence level).³¹ The foi index is significant for all the governance indicators except government effectiveness.

²⁷The Appendix shows the correlation matrices for the dependent and independent variables.

²⁸Data sources are described in detail in Table A1 at the end of the paper.

²⁹Freedom House assesses three factors in order to rate countries – the legal, the political, and the economic environment.

³⁰The regressions have also been done with each separately, with similar results.

³¹The coefficient on the T indicator for graft may be biased downward since the IV regression of graft on T shows a *negative* and significant relationship running from the graft indicator to the transparency indicator.

TABLE 4 DESCRIPTIVE STATISTICS FOR VARIABLES

Variable	No. of obs.	Mean	SD	Min.	Max.
<i>Independent variables in base regressions</i>					
<i>T</i>	170	4.46	1.31	1.00	6.00
<i>foi</i>	180	0.27	0.44	0.00	1.00
<i>T1</i>	165	4.81	1.49	1.00	7.00
<i>foi2</i>	180	0.59	1.25	0.00	5.00
<i>avelf</i>	161	0.35	0.30	0.00	1.00
<i>legor_so</i>	199	0.17	0.38	0.00	1.00
<i>legor_civil</i>	199	0.49	0.50	0.00	1.00
<i>legor_uk</i>	199	0.34	0.47	0.00	1.00
<i>lat</i>	189	24.79	16.41	0.23	64.22
<i>inst1*</i>	146	27.51	29.24	2.30	281.29
<i>income: gdpp96**</i>	169	8.34	1.12	6.11	10.42
<i>income: gdpp84**</i>	136	8.29	1.08	6.12	10.38
<i>openness: tg9602**</i>	182	4.32	0.58	0.74	5.63
<i>openness: tg8402**</i>	186	4.26	0.54	1.83	5.57
<i>Independent variables in robustness check regressions</i>					
<i>circulation: lcir9600**</i>	166	3.55	1.91	-4.72	6.67
<i>circulation: lcir8500**</i>	175	3.55	1.94	-4.71	6.63
<i>election: eiec8400**</i>	175	5.21	1.78	1.29	7.00
<i>election: eiec9600**</i>	173	5.82	1.86	1.00	7.00
<i>fpres: fp9602**</i>	187	53.78	24.56	0.57	94.43
<i>fpres: fp9402**</i>	187	53.56	24.11	1.00	93.67
<i>school: school_9601**</i>	188	66.27	33.97	5.69	154.38
<i>school: school_8501**</i>	188	62.26	32.80	5.32	134.18
<i>indep</i>	182	3.83	1.16	1.39	5.69
<i>expp</i>	213	0.31	0.46	0.00	1.00
<i>oeed</i>	206	0.14	0.35	0.00	1.00
<i>Dependent variables used</i>					
<i>voice96_02</i>	193	0.00	0.97	-2.01	1.61
<i>geffect96_02</i>	191	0.01	0.95	-2.14	2.34
<i>regbrdn96_02</i>	191	0.01	0.95	-2.92	1.94
<i>graft96_02</i>	191	0.01	0.96	-1.56	2.39
<i>icrgb_8403</i>	141	3.33	1.10	0.96	5.62
<i>corup_8403</i>	141	3.19	1.19	0.36	6.00
<i>bureau_8403</i>	141	3.19	1.64	0.00	6.00
<i>Dependent variables for robustness check</i>					
<i>life_8002</i>	197	64.43	10.75	36.13	78.87
<i>phone_8002</i>	205	153.62	177.57	0.69	846.58
<i>mort8002</i>	189	50.96	42.85	4.33	174.40
<i>ilit8403</i>	126	24.70	22.70	0.21	87.16

Notes: **inst1* is the constructed trade share compiled by Frankel and Romer (1999); it is used as an instrument for current trade share or openness.

**Note that the numbers following the variables indicate the period over which average values of the variables were constructed. So *openness 9602* refers to data during the period 1996–2002. Note that the table shows all variables used in subsequent regressions. See the Appendix for details on variables.

TABLE 5 DESCRIPTIVE STATISTICS: TRANSPARENCY, T , RELATIVE TO INCOME LEVELS

Income	No. of obs.	Mean	SD	Min.	Max.
Low	55	3.53	1.01	1.00	5.27
Middle	76	4.63	1.19	1.45	6.00
High	38	5.44	1.09	1.09	6.00
High (North America and Europe)	33	5.71	0.54	3.55	6.00

Notes: I use the World Bank's definition to categorize countries according to per capita income level. Low-income countries are those which have GNI of US\$765 or less in 2003. Middle-income countries have income between US\$765 and US\$9,385. At per capita income levels above US\$9,385, the countries are categorized as high income.

TABLE 6 FOIA DISTRIBUTION IN HIGH-MIDDLE-LOW-INCOME COUNTRIES

Income	Number of countries	foi				$foi2$			
		Mean	SD	Min.	Max.	Mean	SD	Min.	Max.
Low	57	0.09	0.29	0	1	0.11	0.36	0	2
Middle	85	0.26	0.44	0	1	0.40	0.85	0	5
High	37	0.57	0.50	0	1	1.81	1.97	0	5

The regressions indicate that both T and foi are important in explaining governance. A one-unit increase in T improves the indicator $regbrdn$ by 0.22. Alternatively, a one standard deviation improvement in T improves $regbrdn$ by 0.30 standard deviations.

Trade openness continues to explain aspects of governance; more open countries having better governance for the KKZ variables but not the ICRG variables. Ethnic diversity, a variable that has been found to be a significant predictor of the quality of institutions does not explain institutional quality once transparency and other factors are taken into account being significant for only one of the six governance indicators. The latitude variable – the variable being higher the greater the distance from the equator – is generally always significant, usually at the 1% level, supporting the theory that tropical location is associated with poorer institutional quality. Legal origin has been shown to be a good predictor of institutional quality but in these estimations, once the other variables posited by economic theory are accounted for, legal origin is only significant for the governance variables in the KKZ set and not the ICRG set. For the KKZ indicators, the civil and common-law heritages are associated positively and significantly with governance relative to the socialist legal heritage (the third and omitted dummy variable). Results for the combined index, TI , though not shown, are, as would be expected, stronger since the indicator picks up the relationship with both the T and foi variables. The same base regression set has been estimated using the variable $foi2$. As may be expected, the significance of the

TABLE 7a BASE REGRESSION WITH *T* AND *FOI* INDICES

	Open	Income	<i>legov_civil</i>	<i>legov_uk</i>	<i>aveff</i>	Latitude	<i>T</i>	<i>foi</i>	Constant	Obs.	<i>R</i> ²
<i>voice96_02</i>	0.49** (2.42)	0.18 (1.56)	0.71*** (3.31)	-0.72*** (-3.29)	-0.30 (-1.17)	0.009* (1.69)	0.09 (1.19)	0.54*** (3.04)	-4.98*** (-5.96)	125	0.53
<i>geffect96_02</i>	0.29 (1.50)	0.33*** (3.74)	0.74** (2.31)	0.82** (2.61)	0.09 (0.55)	0.02*** (5.14)	0.16** (2.45)	0.20 (1.54)	-5.93*** (-8.19)	125	0.77
<i>regbrdr96_02</i>	0.32** (1.99)	0.24*** (3.13)	0.64*** (3.4)	0.67*** (3.56)	-0.20 (-1.21)	0.002 (0.60)	0.22*** (3.39)	0.29*** (2.78)	-4.90*** (-8.82)	125	0.72
<i>graff96_02</i>	0.26 (1.64)	0.36*** (4.57)	0.93*** (3.55)	1.08*** (4.14)	-0.08 (-0.44)	0.02*** (5.58)	0.06 (1.29)	0.22* (1.69)	-5.92*** (-10.04)	125	0.79
<i>corup_8403</i>	0.52 (1.65)	0.04 (0.26)	0.58 (1.53)	0.45 (1.16)	0.32 (0.82)	0.03*** (4.53)	0.24** (2.34)	0.63*** (2.93)	-2.10 (-1.60)	99	0.63
<i>bureau_8403</i>	0.33 (0.99)	0.55*** (2.91)	0.16 (0.24)	0.74 (1.09)	0.94** (2.23)	0.03*** (4.29)	0.28** (2.27)	0.53** (2.19)	-5.74*** (-3.93)	99	0.73

Notes: Openness is instrumented trade share (out of GDP, averaged over 1996-2002) for the first four KKZ variables, and instrumented trade share (out of GDP, averaged over 1984-2002, for the next two ICRG variables. Instrument is fitted trade share constructed by Frankel and Romer (1999). Income for the first four KKZ variables is log GDP per capita (for 1996: *gdp96*), and logged GDP per capita (for 1984: *gdp984*) for ICRG variables ***, **, * denote significance at 0.01 level; at 0.05 level; at 0.10 level.

TABLE 7b COEFFICIENTS ON *foi2* AND *T* IN THE BASE FORMULATION

	<i>voice96_02</i>	<i>geffect96_02</i>	<i>regbrdn96_02</i>	<i>grafi96_02</i>	<i>corup_8403</i>	<i>bureau_8403</i>
<i>T</i>	0.09 (1.12)	0.16** (2.34)	0.22*** (3.12)	0.06 (1.22)	0.23** (2.16)	0.27** (2.17)
<i>foi2</i>	0.16*** (2.9)	0.11*** (2.83)	0.09*** (2.76)	0.14*** (3.13)	0.27*** (4.08)	0.22*** (3.52)

Notes: Income for the first four KKZ variables is log GDP per capita (for 1996: *gdp96*), and logged GDP per capita (for 1984: *gdpp84*) for ICRG variables
 ***, **, * denote significance at 0.01 level; at 0.05 level; at 0.10 level.

coefficient on *foi2* is always greater (though the magnitude may be higher or lower). Table 7b shows only the coefficients on *T* and *foi2* when the base regression is estimated with *foi2* instead of *foi*.

6. ESTIMATION OF GOVERNANCE

An issue with doing the estimation of (1) is that without additional measures it is not possible to say much about the direction of causality between transparency and governance. In other words, there may be effects from better institutional quality to greater transparency. Governments are one of the actors that influence the level of transparency in the economy and good governments may be more likely to encourage the free flow of information (bad governments would also share information when the indicators are beneficial to them). So the true system may be one which also takes account of the possibility that good governments take measures to raise transparency and the positive correlation between governance and transparency indices reflects this relationship rather than the effect of an increase in transparency on governance. Equation (2) says that transparency is a function of the quality of government and other economic variables:

$$T_t = a + bI_t + cE_t + v_t, \quad (2)$$

where *T*, *I*, and *E* represent institutional and economic variables as before, and *v* is an error term. Income would be an important variable in equation (2) because rich countries would presumably find it easier to produce better information, and is the variable in *E*. Good instruments are available for estimating equation (2) as variables in the set *X* in equation (1) could be used as instruments for *I*. IV regression could take care of concerns related to endogeneity of *I*, omitted variable and attenuation bias in the coefficients. I have estimated equation (2) using the set of instruments in *X*, namely legal origin and latitude.³² Tables 8a–c shows that when equation (2) is estimated with *T* as the dependent variable, all the governance indicators are

³²This linear combination turns out to be a good set of instruments for all of the governance indicators.

TABLE 8a TRANSPARENCY REGRESSED ON GOVERNANCE: 2SLS

	<i>T: voice</i> 96_02	<i>T: geffect</i> 96_02	<i>T: regbrdn</i> 96_02	<i>T: graft</i> 96_02	<i>T: corrup_</i> 8403	<i>T: bureau_</i> 8403
Governance	0.13 (0.26)	0.04 (0.10)	-1.61 (-1.11)	-0.14 (-0.45)	0.09 (0.25)	-0.05 (-0.22)
Income	0.42** (1.98)	0.46* (1.86)	1.17* (1.89)	0.55*** (3.18)	0.39* (1.88)	0.48*** (2.66)
Constant	1.3 (0.81)	1.06 (0.58)	-4.19 (-0.92)	0.32 (0.25)	1.42*** (2.95)	1.16 (1.63)
No. of obs.	144	144	144	144	117	117

Notes: Instruments for governance are legal origin (*legor_civil* and *legor_uk*) and latitude.

Income in the regression is GDP per capita in a year 2001, as both transparency is coded in June and November 2002 and *foi/foi2* till June 2002.

***, **, * denote significance at 0.01 level; at 0.05 level; at 0.10 level.

insignificant, although the coefficient on income is significant and positive. In other words, governments that govern well are not more likely to publish economic data more frequently than those that do not. However, when *foi* or *foi2* are the dependent variables, the governance indicators show up with a positive and significant coefficient while the coefficient on income is not significant. These results would lead us to think the probability that FOI legislation is adopted is higher when governance is better. It also seems to imply that the adoption of FOI legislation has little to do with income levels.

In order to check the robustness of these results, other variables, that theoretically might be expected to affect the level of information flows, are added to the regression. In doing this, I draw on plausible omitted variables. What factors, that are not captured in income, might account for higher levels of transparency? I hypothesize that education may affect the demand for information (and therefore raise the levels of transparency observed in an economy). Similarly, when other variables, such as the degree of political competition (countries where there is more political competition would presumably support greater transparency), or newspaper circulation (a more active media would likely demand more information) are included relative to the base in Table 8, the governance variables are not significant; adding latitude has the same results (not shown).³³ The results for *foi2* are shown in Table 9, though the overall message is the same for all the indicators.

7. NEXT STEPS

The above results do not seem to provide justification for the hypothesis that better governments are more transparent, particularly for the *T* indicator. While the results indicate that there may be some influence from better

³³The instruments in this case being the legal origin variables.

TABLE 8b *foi* REGRESSED ON GOVERNANCE: 2SLS

	<i>foi:</i> <i>voice96_02</i>	<i>foi:</i> <i>geffect96_02</i>	<i>foi:</i> <i>regbrdn96_02</i>	<i>foi:</i> <i>graft96_02</i>	<i>foi:</i> <i>corup_8403</i>	<i>foi:</i> <i>bureau_8403</i>
Governance	0.33* (1.71)	0.37** (2.08)	-0.15 (-0.37)	0.07 (0.63)	0.27 (1.64)	0.17* (1.69)
Income	-0.01 (-0.13)	-0.06 (-0.61)	0.19 (1.09)	0.08 (1.33)	-0.01 (-0.16)	-0.002 (-0.03)
Constant	0.35 (0.54)	0.71 (0.98)	-1.18 (-0.90)	-0.39 (-0.81)	-0.41 (-1.47)	-0.20 (-0.52)
No. of obs.	156	156	156	156	118	118

Notes: Instruments for governance are legal origin (*legor_civil* and *legor_uk*) and latitude. Income in the regression is GDP per capita in year 2001, as both transparency is coded in June and November of 2002 and *foi/foi2* till June 2002.

***, **, * denote significance at 0.01 level; at 0.05 level; at 0.10 level.

TABLE 8c *foi2* REGRESSED ON GOVERNANCE: 2SLS

	<i>foi2:</i> <i>voice96_02</i>	<i>foi2:</i> <i>geffect96_02</i>	<i>foi2:</i> <i>regbrdn96_02</i>	<i>foi2:</i> <i>graft96_02</i>	<i>foi2:</i> <i>corup_8403</i>	<i>foi2:</i> <i>bureau_8403</i>
Governance	1.22* (1.76)	1.40** (2.16)	1.16 (1.05)	0.72* (1.84)	1.12* (1.92)	0.61* (1.88)
Income	-0.08 (-0.29)	-0.26 (-0.82)	-0.06 (-0.15)	0.05 (0.29)	-0.15 (-0.47)	-0.02 (-0.09)
Constant	1.24 (0.58)	2.64 (1.09)	1.09 (0.32)	0.20 (0.14)	-1.56* (-1.77)	-0.97 (-0.90)
No. of obs.	156	156	156	156	118	118
R ²	0.10	0.19	0.18	0.31	0.23	0.31

Notes: Instruments for governance are legal origin (*legor_civil* and *legor_uk*) and latitude. Income in the regression is GDP per capita in year 2001, as both transparency is coded in June and November of 2002 and *foi/foi2* till June 2002.

***, **, * denote significance at 0.01 level; at 0.05 level; at 0.10 level.

governance to the adoption of FOIAs, the results are not robust to the addition other variables besides income.

Regressions of equation (1) show a strong positive correlation between *T* and governance. Given these results, it seems that if any robust correlation exists between transparency indicators and governance, particularly indicators of economic transparency, then they are probably reflecting the effect of *T* on *I* and not vice versa. In the absence of instruments for *T*, I investigate the robustness of the association among the governance and transparency variables in specification (1) by introducing several plausible (and currently omitted) variables, as indicated by theory into the regressions. A second step I take is that I use some objective measures of public sector governance as dependent variables. Even after searching for plausible omitted variables, the regressions may be suffering from measurement error

TABLE 9 *foi2*, GOVERNANCE AND SCHOOLING

	<i>foi2</i> : <i>voice96_02</i>	<i>foi2</i> : <i>geffect96_02</i>	<i>foi2</i> : <i>regbrdn96_02</i>	<i>foi2</i> : <i>graft96_02</i>	<i>foi2</i> : <i>corup_8403</i>	<i>foi2</i> : <i>bureau_8403</i>
Governance	-0.36 (-0.69)	-0.12 (-0.21)	-0.45 (-0.63)	-0.12 (-0.29)	0.24 (0.39)	0.33 (1.27)
Income	0.11 (0.63)	0.04 (0.22)	0.19 (0.67)	0.05 (0.29)	-0.007 (-0.03)	-0.12 (-0.63)
School	0.02*** (2.67)	0.01*** (2.66)	0.01** (2.12)	0.01** (2.59)	0.02** (2.17)	0.01** (2.26)
Constant	-1.5 (-1.19)	-0.92 (-0.64)	-1.96 (-1.00)	-0.95 (-0.83)	-1.29 (-1.13)	-0.69 (-0.73)
No. of obs.	85	85	85	85	58	58
R^2	0.06	0.15	0.06	0.15	0.25	0.29

Notes: Instruments for governance are legal origin (*legor_civil* and *legor_uk*) and latitude. Income in the regression is GDP per capita in year 2001, as both transparency is coded in June and November of 2002 and *foi/foi2* till June 2002.

School is enrolment rate in secondary school (2001), coded as *school01*.

***, **, * denote significance at 0.01 level; at 0.05 level; at 0.10 level.

for the T_t and *foi* variables. I would argue that for both the *foi* and T_t indicators, these are small.³⁴ The issue is more complicated if T_t/foi are viewed as proxy variables for overall transparency. In particular, if $T_t = \vartheta_0 + \vartheta_1 T + u_t$, where u is the error term and T_t is the true overall transparency indicator. Even if u is uncorrelated with the other explanatory variables (T is a good proxy for true transparency), the estimator δ will not be an unbiased estimator of overall transparency.

I find that even when plausible right-hand-side variables suggested by theory are included as regressors in equation (1) the transparency variables remain significant. Among the initial conditions that affect how government works, Acemoglu et al. (2002) have argued that more capable populations govern better. The secondary school enrolment rate is used to represent initial conditions related to the population's capacity level. The data are obtained from the World Bank. This variable was not significant save in one case, nor does its inclusion change the main results. My indicator for concentration of exports in primary/commodity sectors is from the World Bank. It is a dummy variable that assigns 1 to all countries that have 50% or more of their total exports as primary exports (see Appendix Table A) and 0 to all other countries. This variable did not enter significantly in most cases (not shown).

As institution building takes a long time, and a lot depends on learning by doing, it could be argued that countries that have had more experience with

³⁴While T does not encompass all the possible economic indicators that may be relevant to economic decisions, it does cover the most important ones and one can argue that countries that perform well on this set would also perform well on the larger set; that is, the true T 's are close. Some countries may have legislation affecting freedom of information that is not codified as FOIA.

state building would have better governance. In other words, the longer a country has been independent, the more likely it is that it will have adapted old regimes and developed the mechanisms to govern effectively. The years since independence are therefore used as an explanatory variable to account for this hypothesis but it is only significant for the KKZ variables and its inclusion does not affect the significance of the *T* and *foi* variables. It might be expected that countries with more competitive political systems would be more likely to be accountable to their constituents and therefore more likely to govern well. The variable *eiec* is used to identify differences in the political system and is an index of electoral competitiveness that evaluates how legislatures are elected (e.g. whether multiple parties won seats or not, whether there is one party with multiple candidates, etc.). These data are from the World Bank.³⁵ The coefficient on this variable is generally significant but its inclusion does not change the conclusions on the variables of interest (not shown).

The base specification and others have also been run using lagged income and contemporaneous income. Lagged income has the advantage of accounting for factors that may have affected institutions in the past but are not specified in equation (1). Despite the inclusion of these variables, the transparency indicators retained significance in most specifications.

To see whether the transparency variables are picking up the effects of other variables related to transparency itself, I add indicators the freedom of the press and newspaper circulation. The indicator for the freedom of the press is taken from Freedom House and ranges between 1 and 100, higher values indicating more freedom.³⁶ I use another variable related to transparency and to the indicator used by Besley and Burgess, newspaper circulation which is defined as the log of newspaper circulation per 1,000 people. This data too is taken from the World Bank and is also available from the United Nations Educational, Scientific, and Cultural Organization, *Statistical Yearbook*. The results show that *T* is generally always significant at the 1% or 5% levels for governance indicators that reflect the ability of government to interact effectively in the economic marketplace: namely, government effectiveness, regulatory burden, and bureaucratic efficiency. In some cases, it is also significant for the corruption indicator. The FOI indices remain significant for most variables in the different specifications.

Tables 10a and 10b add the following variables to the base regression: a measure of the initial level of skill/capacity of the population (*school*), the years a country has been independent, concentration of exports in primary commodities, the degree of competition in the political system, newspaper circulation, and freedom of the press. The regressions are also done using GDP at different periods (concurrent and lagged).

³⁵Some of the governance indicators, specifically the VA index, and the ICRGb index, may have overlap with the EIEC index which is basically entered to show how political governance affects more economic governance measures.

³⁶Regressions with freedom of the press and lagged/contemporaneous income not shown.

TABLE 10a VARIATIONS ON EQUATION (1): ROBUSTNESS OF RELATIONSHIP

	Openness	Income	School	Circulation	legor_civil	legor_uk	anelf	Latitude	T	foi	Constant	Obs.	R ²
<i>voice96_02</i>	0.58*** (2.67)	-0.05 (-0.31)	0.01** (2.35)		0.77*** (3.44)	0.72*** (3.23)	-0.20 (-0.75)	0.006 (1.17)	0.08 (1.10)	0.46** (2.55)	-3.95*** (-4.14)	125	0.53
<i>geffect96_02</i>	0.33 (1.58)	0.24** (2.42)	0.003 (1.52)		0.76** (2.4)	0.82** (2.62)	0.13 (0.75)	0.01*** (4.62)	0.15** (2.36)	0.17 (1.3)	-5.55*** (-6.92)	125	0.77
<i>regbrdn96_02</i>	0.35** (2.07)	0.16* (1.82)	0.003 (1.31)		0.66*** (3.53)	0.67*** (3.61)	-0.17 (-0.97)	0.001 (0.31)	0.21*** (3.28)	0.27** (2.42)	-4.57*** (-6.88)	125	0.72
<i>graff96_02</i>	0.29* (1.73)	0.29*** (3.00)	0.003 (1.2)		1.08*** (4.17)	1.08*** (4.17)	-0.05 (-0.25)	0.02*** (5.33)	0.06 (1.22)	0.19 (1.48)	-5.60*** (-8.6)	125	0.79
<i>corup_8403</i>	0.53 (1.62)	-0.04 (-0.23)	0.005 (0.72)		0.61* (1.72)	0.46 (1.25)	0.34 (0.85)	0.04*** (3.88)	0.24** (2.3)	0.57** (2.53)	-1.65 (-1.05)	99	0.63
<i>bureau_8403</i>	1.00 (1.76)	0.42* (1.91)	0.007 (1.08)		0.21 (0.34)	0.75 (1.17)	0.98** (2.28)	0.03*** (3.65)	0.27** (2.16)	0.44# (1.63)	-5.02*** (-2.78)	99	0.73
<i>voice96_02</i>	0.37* (1.76)	0.22* (1.72)		-0.03 (-0.88)	0.60** (2.19)	0.57** (2.11)	-0.36 (-1.38)	0.008 (1.44)	0.13 (1.49)	0.54*** (2.89)	-4.64*** (-5.01)	112	0.55
<i>geffect96_02</i>	0.46*** (2.86)	0.33*** (3.74)		-0.03 (-1.39)	0.90** (2.6)	0.98*** (2.79)	0.11 (0.60)	0.02*** (5.3)	0.17** (2.45)	0.34** (2.52)	-6.77*** (-9.99)	112	0.78
<i>regbrdn96_02</i>	0.43*** (2.87)	0.22*** (2.61)		-0.007 (-0.30)	0.77*** (3.73)	0.76*** (3.66)	-0.26 (-1.44)	0.001 (0.33)	0.23*** (3.21)	0.39*** (3.41)	-5.31*** (-9.27)	112	0.70
<i>graff96_02</i>	0.33** (2.21)	0.40*** (4.98)		-0.04** (-2.13)	1.06*** (3.38)	1.23*** (3.91)	-0.06 (-0.34)	0.02*** (5.84)	0.09 (1.58)	0.32** (2.32)	-6.62*** (-10.72)	112	0.80
<i>corup_8403</i>	0.53 (1.62)	0.08 (0.54)		-0.05 (-0.73)	0.54 (1.41)	0.43 (1.10)	0.24 (0.59)	0.03*** (4.43)	0.25** (2.35)	0.65*** (2.95)	-2.30 (-1.64)	99	0.63
<i>bureau_8403</i>	0.29 (0.87)	0.48** (2.53)		0.08 (0.87)	0.23 (0.35)	0.77 (1.15)	1.05** (2.26)	0.04*** (4.2)	0.27** (2.25)	0.50** (2.00)	-5.40*** (-3.49)	99	0.73

Notes: Openness is instrumented trade share (out of GDP, averaged over 1996–2002) for the first four KKZ variables, and instrumented trade share (out of GDP, averaged over 1984–2002), for the next two ICRG variables. Instrument is fitted trade share constructed by Frankel and Romer (1999). Income for the first four KKZ variables is log GDP per capita (for 1996: *gdp96*), and logged GDP per capita (for 1984: *gdpp84*) for ICRG variables. For the first four KKZ variables, *school_9601* is used; for the two ICRG variables, *school_8501* is used. For the first four KKZ variables, *lcir9600* is used; for the two ICRG variables, *lcir8500* is used. For the first four KKZ variables, *fp9602* is used; for the two ICRG variables, *fp9402* is used. ***, **, * denote significance at 0.01 level; at 0.05 level; at 0.10 level.

TABLE 10b VARIATIONS ON EQUATION (1); ROBUSTNESS OF RELATIONSHIP

	Openness	Income	Election	legor_civil	legor_tuk	indep	aveff	Latitude	T	foi	Constant	Obs.	R ²
<i>voic96_02</i>	0.43** (2.63)	0.25*** (2.83)	0.21*** (6.61)	0.49*** (2.77)	0.50*** (2.83)		-0.29 (-1.62)	0.007 (1.5)	0.04 (0.55)	0.39*** (3.00)	-6.05*** (-9.7)	122	0.71
<i>geff96_02</i>	0.32* (1.66)	0.33*** (3.88)	0.02 (0.77)	0.72** (2.2)	0.80** (2.5)		0.07 (0.43)	0.02*** (4.95)	0.14** (2.21)	0.18 (1.36)	-6.14 (-7.97)	122	0.77
<i>regbrdn96_02</i>	0.33** (2.16)	0.25*** (3.48)	0.06*** (3.11)	0.58*** (2.9)	0.61*** (3.09)		-0.23 (-1.35)	0.002 (0.53)	0.19*** (3.11)	0.23** (2.21)	-5.25*** (-9.26)	122	0.72
<i>Graf96_02</i>	0.26 (1.53)	0.36*** (4.52)	0.004 (0.19)	0.93*** (3.47)	1.07*** (4.03)		-0.07 (-0.39)	0.02*** (5.37)	0.06 (1.14)	0.21 (1.54)	-5.93*** (-9.00)	122	0.78
<i>corup_8403</i>	0.52* (1.89)	0.02 (0.16)	0.16*** (3.63)	0.30 (0.73)	0.14 (0.33)		0.57 (1.65)	0.04*** (4.87)	0.16 (1.43)	0.53** (2.54)	-2.29* (-1.92)	98	0.66
<i>bureau_8403</i>	0.36 (1.24)	0.54*** (3.24)	0.15*** (2.87)	-0.09 (-0.13)	0.47 (0.65)		1.17*** (2.8)	0.03*** (4.40)	0.21* (1.72)	0.47* (1.97)	-6.11*** (-4.56)	98	0.75
<i>voic96_02</i>	0.54*** (2.49)	0.17 (1.42)	0.69*** (3.08)	0.75*** (3.35)	0.11 (1.36)	0.11 (1.36)	-0.21 (-0.79)	0.01* (1.92)	0.06 (0.81)	0.51*** (2.91)	-5.4*** (-5.63)	125	0.52
<i>geff96_02</i>	0.35** (2.15)	0.31*** (3.6)	0.70** (2.5)	0.86*** (3.07)	0.15** (2.09)	0.15** (2.09)	0.21 (1.25)	0.02*** (5.52)	0.12* (1.66)	0.16 (1.28)	-6.52*** (-9.88)	123	0.78
<i>regbrdn96_02</i>	0.42*** (3.31)	0.21*** (2.78)	0.59*** (4.7)	0.73*** (5.33)	0.23*** (3.95)	0.23*** (3.95)	-0.02 (-0.18)	0.004 (1.37)	0.15** (2.62)	0.23** (2.4)	-5.80*** (-11.50)	125	0.74
<i>Graf96_02</i>	0.32** (2.14)	0.35*** (4.3)	0.90*** (4.03)	1.11*** (4.91)	0.13* (1.71)	0.13* (1.71)	0.02 (0.12)	0.02*** (5.97)	0.03 (0.50)	0.18 (1.45)	-6.45*** (-10.55)	125	0.79
<i>corup_8403</i>	0.52* (1.88)	0.03 (0.23)	0.67*** (2.00)	0.66* (1.76)	0.18 (1.19)	0.18 (1.19)	0.45 (1.12)	0.04*** (4.84)	0.18 (1.57)	0.54*** (2.49)	-2.78* (-1.9)	99	0.63
<i>bureau_8403</i>	0.32 (0.97)	0.55*** (2.86)	0.16 (0.23)	0.73 (1.00)	0.73 (1.00)	-0.007 (-0.05)	0.93** (2.24)	0.04*** (3.93)	0.28** (2.22)	0.53** (2.03)	-5.71*** (-3.46)	99	0.73

Notes: Openness is instrumented trade share (out of GDP, averaged over 1996–2002) for the first four KZK variables, and instrumented trade share (out of GDP, averaged over 1984–2002), for the next two ICRG variables. Instrument is fitted trade share constructed by Frankel and Romer (1999). Income for the first four KZK variables is log GDP per capita (for 1996: *gdp96*), and logged GDP per capita (for 1984: *gdp84*) for ICRG variables. For the first four KZK variables, *etic9600* is used; for the two ICRG variables, *etic8400* is used. For the first four KZK variables, *school_9601* is used; for the two ICRG variables, *school_8501* is used. For the first four KZK variables, *lcir9600* is used; for the two ICRG variables, *lcir8500* is used. Note that the freedom of the press index is used in composing the VA index, making this regression invalid. ***, **, * denote significance at 0.01 level; at 0.05 level; at 0.10 level.

TABLE 11 REGRESSIONS USING OBJECTIVE GOVERNANCE INDICATORS

	Openness	Income	<i>legor_civil</i>	<i>legor_uk</i>	<i>ave1f</i>	Latitude	<i>T</i>	<i>foi</i>	Constant	Obs.	<i>R</i> ²
<i>Life_8002</i>	2.74 (1.47)	5.35*** (5.58)	-3.26 (-0.60)	-3.14 (-0.58)	-8.82*** (-3.24)	0.009 (0.23)	1.87*** (2.66)	1.40 (1.10)	5.49 (0.60)	114	0.75
<i>Phone_8002</i>	91.7*** (2.89)	49.8*** (3.27)	118.9 (1.58)	106.8 (1.42)	10.3 (0.29)	4.96*** (6.93)	25.85*** (2.91)	83.8*** (3.18)	-1,024.8*** (-7.37)	114	0.76
<i>Morr8002</i>	-9.53 (-1.62)	-23.61*** (-7.04)	26.37 (1.65)	20.70 (1.3)	26.93*** (2.83)	0.18 (1.35)	-6.2** (-2.33)	-4.2 (-1.08)	276.7*** (9.41)	113	0.74
<i>Iiti8403</i>	0.32 (0.06)	-14.6*** (-4.06)	17.2** (2.64)	9.86 (1.52)	14.43** (2.2)	0.39*** (2.73)	-2.23 (-1.08)	-8.42** (-2.58)	129.1*** (5.24)	86	0.60

	Openness	Income	<i>legor_civil</i>	<i>legor_uk</i>	<i>ave1f</i>	Latitude	<i>T</i>	<i>foi2</i>	Constant	Obs.	<i>R</i> ²
<i>Life_8002</i>	2.52 (1.26)	5.48*** (5.43)	-3.75 (-0.72)	-3.42 (-0.65)	-8.75*** (-3.24)	0.01 (0.34)	1.9** (2.62)	0.17 (0.54)	5.64 (0.63)	114	0.75
<i>Phone_8002</i>	111.7*** (3.33)	43.6*** (2.94)	103.9 (1.27)	87.8 (1.06)	11.7 (0.35)	4.51*** (5.71)	23.7** (2.49)	39.8*** (4.2)	-1,026*** (-7.16)	114	0.76
<i>Morr8002</i>	-8.73 (-1.4)	-24.06*** (-6.89)	27.8* (1.86)	21.5 (1.42)	26.7*** (2.81)	0.16 (1.22)	-6.27** (-2.31)	-0.43 (-0.42)	275.8*** (9.54)	113	0.73
<i>Iiti8403</i>	0.57 (0.10)	-15.0*** (-4.13)	18.4*** (2.82)	10.13 (1.51)	14.01** (2.11)	0.38** (2.54)	-2.1 (-0.99)	-2.8* (-1.82)	129.7*** (5.19)	86	0.59

Notes: Openness is instrumented trade share (out of GDP, averaged over 1980–2002) for the first three variables over the period of 1980–2002, and instrumented trade share (out of GDP, averaged over 1984–2002) for *itit8402*. Instrument is fitted trade share constructed by Frankel and Romer (1999). Income for the first three variables are logged GDP per capita (for 1980), and logged GDP per capita (for 1984) for *itit8403*. ***, **, * denote significance at 0.01 level; at 0.05 level; at 0.10 level.

The above estimations are concerned with subjective indicators of governance and their relationship to transparency indicators. In order to gain robustness, I also estimate the effect of transparency on some dependent variables that might be thought of as “objective” measures of good governance. Specifically, I use some measures of the output of public goods, two related to the health and productivity of the population – namely, infant mortality and life expectancy – and two related to the condition of infrastructure – namely, the percentage of paved roads in the country relative to total roads and the number of telephone lines (telephone mainlines per 1,000 people), all from the World Bank’s database.³⁷ The output of public goods may be taken as an indicator of how well countries govern in terms of their main responsibility – that of providing public goods. Table 11 shows these regression results. The transparency index, T , is significant for three of the four dependent variables at either the 1% or the 5% level. The *foi* indicator is also mostly significant. However, openness and legal origin do not perform well in these regressions.

The robustness of the association between the transparency indicators and indicators of governance is strong. The data do not show that better governments are more likely to provide more information on economic data (although they may be more likely to provide more information through FOI laws). While I cannot claim that I have shown the reverse causality (that greater transparency will lead to better governance), these preliminary results indicate that this topic is worthy of future empirical research, the association between governance and these new indicators of transparency being strong.

8. CONCLUSION

Economic theory tells us that information is needed to make sound economic and political choices, to monitor agents and reward or punish them accordingly. Commonsense tells us that governments that do not produce, organize and share information will be hampered in policymaking and probably less accountable to citizens. Good policymaking requires up-to-date information on the economic situation; good policymaking requires the sharing of information for better coordination, analysis, and monitoring. Better governance has been empirically demonstrated to be correlated with higher growth. Extrapolating, better information flows can be expected to influence how fast economies grow.

Empirical investigation carried out in this paper has demonstrated that readily available information on economic data (as defined by the transparency index, T) and the access to information index, are positively related to the quality of governance. More transparent governments govern better. Using 2SLS estimation on two new indicators of transparency I find that better governments do not necessarily promote more economic transparency as measured by the index in this paper; and they may or may not be more

³⁷While phone lines may not be provided directly by government in many countries, the telecommunications infrastructure is overseen by government regulation.

likely to adopt FOIAs (the evidence being inconclusive). This still leaves open the question of whether greater transparency will promote better governance. In the absence of suitable IV for the transparency indicators, I have tried to account for possible omitted variables. After all plausible variables, as suggested by theory, have been entered as explanatory variables the correlation between the transparency index and governance remains significant. This relationship holds when objective (output) measures of governance are used as independent variables. These results indicate that there is some evidence in support of economic theories that argue the importance of transparency/information in explaining governance. In addition, some of the variables that have been found to be significantly related to governance lose their significance in regressions that include the transparency variables, even when they are not highly correlated with the new indicators.

Going forward, one would want to develop stronger tests of the relationship running from transparency to governance. The indicators used in the paper could be developed further. For example, the transparency indicator could be strengthened by considering not just the frequency and availability of data but also the quality of the data produced by governments. Moreover, my definition of “availability” probably overestimates the actual availability of data in developing countries and could be fine-tuned. Expanding the dataset (e.g. to look at social indicators) would also be another direction in which the indicator could be developed. The FOI indicator could be substantially strengthened by considering how these laws are actually implemented, if at all, in countries. Another issue would be whether people are allowed to use the information they obtain: for example, whether newspaper journalists are able to print information they obtain without fear of imprisonment – harsh libel and defamation laws would affect journalists’ behaviour. Looking at other restrictions, such as licensing of the media to prevent entry – would also enrich the analysis.

Finally, on the policy side, we know that many different policy choices and institutional features affect information flows. Governments can choose to publish data and other information on their activities and they can choose whether or not to establish the regulatory system and organizational structure that allows production and dissemination of data and access to information. Thus, in the policy guidance that development advisers seek to impart, advising countries on the importance of processing and sharing data, on making these data widely available is policy advice that can probably boost economic development.

TABLE A1 Continued

	<i>T1</i>	<i>T</i>	<i>T2</i>	<i>foi</i>	<i>foi2</i>	<i>aveif</i>	<i>indep</i>	<i>legor_so</i>	<i>legor_~l</i>	<i>legor_uk</i>	<i>lat</i>	<i>instlp84</i>	<i>instlp96</i>	<i>gdpp96</i>	<i>gdpp84</i>	<i>gdpp01</i>	<i>gdpp80</i>	<i>tg9602</i>	<i>tg8402</i>
<i>instlp96</i>	-0.03	-0.04	-0.04	0.00	-0.04	-0.07	-0.19	0.02	-0.33	0.33	0.08	0.98	1.00						
	0.73	0.67	0.62	0.99	0.67	0.46	0.04	0.85	0.00	0.00	0.34	0.00							
<i>gdpp96</i>	0.69	0.63	0.68	0.42	0.48	-0.49	0.33	-0.10	0.04	0.04	0.54	0.38	0.42	1.00					
	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.20	0.60	0.62	0.00	0.00	0.00						
<i>gdpp84</i>	0.69	0.62	0.67	0.49	0.51	-0.48	0.32	0.00	0.06	-0.06	0.63	0.36	0.39	0.96	1.00				
	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.98	0.50	0.50	0.00	0.00	0.00	0.00					
<i>gdpp01</i>	0.68	0.65	0.69	0.44	0.51	-0.49	0.34	-0.10	0.10	-0.02	0.56	0.36	0.40	0.98	0.95	1.00			
	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.21	0.22	0.78	0.00	0.00	0.00	0.00	0.00	0.00			
<i>gdpp80</i>	0.66	0.58	0.64	0.47	0.49	-0.47	0.37	0.00	0.06	-0.06	0.60	0.34	0.38	0.94	0.99	0.93	1.00		
	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.98	0.50	0.50	0.00	0.00	0.00	0.00	0.00	0.00	0.00		
<i>tg9602</i>	0.00	0.01	-0.03	0.02	-0.05	-0.06	-0.30	0.03	-0.15	0.14	0.07	0.62	0.61	0.23	0.22	0.23	0.19	1.00	
	0.96	0.87	0.69	0.84	0.50	0.45	0.00	0.68	0.05	0.07	0.40	0.00	0.00	0.00	0.01	0.00	0.04		
<i>tg8402</i>	-0.02	0.00	-0.06	-0.02	-0.09	-0.06	-0.38	0.05	-0.18	0.15	0.06	0.65	0.63	0.22	0.22	0.22	0.18	0.96	1.00
	0.79	0.98	0.43	0.80	0.21	0.47	0.00	0.52	0.02	0.04	0.40	0.00	0.00	0.00	0.01	0.00	0.05	0.00	

Note: *instlp96* and *instlp84* are the first-stage regression results of trade share in base regressions; see Table 7a.

TABLE A2 CORRELATION BETWEEN TRANSPARENCY INDICATORS AND DEPENDENT VARIABLES
(p-Value is shown below correlation)

	<i>T1</i>	<i>T</i>	<i>T2</i>	<i>foi</i>	<i>foi2</i>	<i>voice9~2</i>	<i>gef~6_02</i>	<i>reg~6_02</i>	<i>graf19~2</i>	<i>cor~8403</i>	<i>bur~8403</i>	<i>lif~8002</i>	<i>pho~8002</i>	<i>morr8002</i>	<i>ilit8403</i>	
<i>T1</i>	1.00															
<i>T</i>	0.96	1.00														
<i>T2</i>	0.92	0.84	1.00													
<i>foi</i>	0.00	0.00		1.00												
<i>foi2</i>	0.00	0.00	0.00	0.79	1.00											
<i>Voice96_02</i>	0.62	0.60	0.63	0.44	0.46	1.00										
<i>geffec96_02</i>	0.00	0.00	0.00	0.00	0.00		1.00									
<i>regbrdn96_02</i>	0.71	0.69	0.68	0.42	0.45	0.77	0.90	1.00								
<i>graf96_02</i>	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	1.00							
<i>corup_8403</i>	0.62	0.58	0.68	0.42	0.54	0.75	0.95	0.84	0.70	1.00						
<i>bureau_8403</i>	0.58	0.48	0.65	0.47	0.57	0.72	0.81	0.70	0.85	0.85	1.00					
<i>life_8002</i>	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.75	0.85	1.00				
<i>phone_8002</i>	0.65	0.53	0.68	0.49	0.56	0.72	0.86	0.75	0.85	0.78	0.85	0.63	1.00			
<i>morr8002</i>	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.64	0.54	1.00		
<i>ilit8403</i>	0.64	0.53	0.61	0.44	0.42	0.58	0.65	0.58	0.64	0.54	0.63	0.63	0.71	1.00		
	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.80	0.71	1.00	
	0.66	0.58	0.74	0.50	0.62	0.69	0.84	0.72	0.86	0.78	0.86	0.80	0.71	1.00		
	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
	-0.67	-0.56	-0.63	-0.44	-0.41	-0.61	-0.65	-0.61	-0.64	-0.54	-0.63	-0.94	-0.66	1.00		
	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
	-0.49	-0.32	-0.49	-0.41	-0.37	-0.36	-0.37	-0.31	-0.35	-0.33	-0.42	-0.78	-0.58	0.80	1.00	
	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00

TABLE A3 DATA DESCRIPTION AND SOURCES

Variable	Description	Source
<i>T</i>	(7- <i>transp</i>)	Author's estimation; see coding of <i>transp</i> in the paper
<i>foi</i>	Dummy to show if a country has Freedom of Information Act	Author's estimation in 2002
<i>foi2</i>	<i>foi</i> weighted by length of period <i>foi</i> a has been adopted	Author's estimation in 2002, see coding method in the paper
<i>T1</i>	Combined measure of transparency and <i>foi</i> , defined as (7- <i>transp</i> + <i>foi</i>)	Author's estimation; where <i>transp</i> is as described in paper
<i>avelf</i>	Ethno-linguistic fractionalization. It is the average of five different indices compiled by Easterly and Levine. It is the probability of two random people in a country not speaking the same language	From W. Easterly and R. Levine, 1997, Africa's growth tragedy: policies and ethnic divisions. <i>Quarterly Journal of Economics</i> 112, 1203–1250
<i>indep</i>	Years since independence. If the value is 297 or higher, it will be fixed at the cap value of 297. After that, natural log of the years since independence are used	<i>CIA World Factbook</i> , 1997 (http://www.cia.gov/cia/publications/factbook/)
<i>legor_so</i>	Dummy to indicate the country's legal origin is socialist	Courts, S. D., R. La Porta, F. López-de-Silanes, and A. Shleifer, May 2003, <i>Quarterly Journal of Economics</i>
<i>legor_civil</i>	Dummy to indicate civil law heritage	Same as above
<i>legor_uk</i>	Dummy to indicate the common law heritage	Same as above
<i>expp</i>	Dummy for primary product (including fuel) exporting countries, defined as countries with 50% of more of its total exports of goods and services being either of the two categories: non-fuel primary (SITC 0.1, 2, 4, plus 68), fuels (SITC 3), in the period of 1989–1992	Global Development Network Growth Database, World Bank (http://www.worldbank.org/research/growth/GDNdata.htm) (1995 <i>World Development Report</i>)
<i>lat</i>	Absolute value of latitude	Same as above
<i>openiv</i>	Natural openness compiled by Wei, which is fitted value of trade share in GDP (over the period of 1978–1980) regressed on remoteness, population, dummy for landlocked, coast length/land area, island dummy, English dummy, French dummy, and Spanish dummy	Wei, S., Natural openness and good government. NBER Working Paper 7765
<i>inst I</i>	Constructed trade share (used as instrument for openness), for the year of 1985. It is derived from underlying geographic characteristics of countries involved in trade	Frankel, J. and D. Romer, 1999, Does trade cause growth? <i>American Economic Review</i> 89, 379–399.

TABLE A3 Continued

Variable	Description	Source
<i>gdpp9602/8403</i>	Natural log of GDP per capita (PPP, 1995 constant int'l \$), averaged over the years of 1996–2002. For some specifications I use averages over 1984–2003	World Bank, GDF & WDI central database, August 2004 (http://www.worldbank.org/data/online/databases/online/databases.html)
<i>gdpp96</i>	Natural log of GDP per capita (PPP, 1995 constant int'l \$), in year 1996	Same as above
<i>gdpp84</i>	Natural log of GDP per capita (PPP, 1995 constant int'l \$), in year 1984	Same as above
<i>gdpp80</i>	Natural log of GDP per capita (PPP, 1995 constant int'l \$), in year 1980	Same as above
<i>gdpp01</i>	Natural log of GDP per capita (PPP, 1995 constant int'l \$), in year 2001	Same as above
<i>lcir9600/8500</i>	Natural log of daily newspaper circulation per 1,000 persons, averaged over 1996–2000 or averaged over 1985–2000	Same as above
<i>tg9602</i>	Trade share in GDP, averaged over 1996–2002	Same as above
<i>tg8402</i>	Trade share in GDP, averaged over 1984–2002	Same as above
<i>tg8002</i>	Trade share in GDP, averaged over 1980–2002	Same as above
<i>etic8400</i>	Executive index of electoral competitiveness, averaged over 1984–2000. Defined as: No legislature: 1; Unelected legislature: 2; Elected, one candidate: 3; one party, multiple candidates: 4; multiple parties are legal but only one party won seats: 5; multiple parties <i>did</i> win seats but the largest party received more than 75% of the seats: 6; largest party got less than 75%: 7	Beck, T., G. Clarke, A. Groff, P. Keefer, and P. Walsh, 2001. New tools in comparative political economy: the database of political institutions <i>World Bank Economic Review</i> 15, 165–176 (http://www.worldbank.org/research/bios/pkeefe.htm)
<i>etic9600</i>	Same as above	Same as above
<i>lcir9600</i>	Natural log of daily newspaper circulation per 1,000 persons, averaged over 1996–2000	World Bank, GDF & WDI central database, August 2004 (http://www.worldbank.org/data/online/databases/online/databases.html)
<i>lcir8500</i>	Natural log of daily newspaper circulation per 1,000 persons, averaged over 1985–2000	Same as above

TABLE A3 *Continued*

Variable	Description	Source
<i>fp9602</i>	Freedom of press, averaged over 1996–2002. The original data range from 0 to 100, with low score for higher degree of press freedom. We use 100 to subtract the original value in order to have higher score for higher degree of freedom. Data before 1994 are in letter value, not in score, therefore not included	Freedom House (freedomhouse.org)
<i>fp9402</i>	Same as above, averaged over 1994–2002	Same as above
<i>school_9601</i>	Enrolment rate in secondary school, averaged over 1996–2001	World Bank, GDF & WDI central database, August 2004 (http://www.worldbank.org/data/online/databases/online/databases.html)
<i>school_8501</i>	Enrolment rate in secondary school, averaged over 1985–2001	Same as above
<i>school01</i>	Enrolment rate in secondary school, 2001	Same as above
<i>set.mort.</i>	Settler's mortality rate	Same as above
<i>life_8002</i>	Life expectancy at birth, average over 1980–2002 (not every year has data)	Acemoglu et al. (2001)
<i>phone_8002</i>	Telephone mainlines (per 1,000 people), average over 1980–2002	World Bank, GDF & WDI central database, August 2004 (http://www.worldbank.org/data/online/databases/online/databases.html)
<i>mort8002</i>	Infant (1 year or under) mortality rate per 1,000 live births, average over 1980–2002 (not every year has data)	Same as above
<i>lit8403</i>	One minus total adult literacy rate (%), adult refers to those 15 years or older, average over 1984–2003	Same as above
<i>T1</i>	Combined measure of transparency and <i>foi</i> , defined as $(7-transp + foi)$	Author's estimation; see coding of <i>transp</i> in the paper
<i>T</i>	Inversed measure of transparency to make sure the higher the value, the more transparency, calculated as $(7-transp)$	Author's estimation; see coding of <i>transp</i> in the paper
<i>foi</i>	Dummy to show if a country has Freedom of Information Act	Author's estimation in 2002
<i>foi2</i>	<i>foi</i> weighted by length of period <i>foi</i> has been adopted	Author's estimation in 2002; see coding method in the paper
<i>avelf</i>	Ethno-linguistic fractionalization. It is the average of five different indices compiled by Easterly and Levine. It is the probability of two random people in a country not speaking the same language	Easterly, W. and R. Levine, 1997, Africa's growth tragedy: policies and ethnic divisions. <i>Quarterly Journal of Economics</i> 112, 1203–1250

TABLE A3 Continued

Variable	Description	Source
<i>indep</i>	Years since independence. If the value is 297 or higher, it will be fixed at the cap value of 297. After that, take natural log of the years since independence	<i>CIA World Factbook, 1997</i> (http://www.cia.gov/cia/publications/factbook/)
<i>legor_so</i>	Dummy to indicate the country's legal origin is socialist system	Courts, S. D., R. La Porta, F. López-de-Silanes, and A. Shleifer, May 2003, <i>Quarterly Journal of Economics</i>
<i>legor_civil</i>	Dummy to indicate the country's legal origin is civil law	Same as above
<i>legor_uk</i>	Dummy to indicate the country's legal origin is common law	Same as above
<i>expp</i>	Dummy for primary product (including fuel) exporting countries, defined as countries with 50% or more of its total exports of goods and services being either of the two categories: non-fuel primary (SITC 0, 1, 2, 4, plus 68), fuels (SITC 3), in the period of 1989–1992	Global Development Network Growth Database, World Bank (http://www.worldbank.org/research/growth/GDNdata.htm) (1995 <i>World Development Report</i>)
<i>lat</i>	Absolute value of latitude	Same as above
<i>Gini5</i>	Gini coefficient, measure of inequality. We pick the best estimation as deemed by Deininger and Squire; when that is not available, we pick the most recent national estimation	Deininger, K. and L. Squire, 1996. A new data set measuring income inequality. <i>World Bank Economic Review</i> 10(3), 565–591 (http://www.worldbank.org/research/growth/dddeisqu.htm)
<i>openiv</i>	Natural openness compiled by Wei, which is fitted value of trade share in GDP (over the period of 1978–1980) regressed on remoteness, population, land-lock dummy, coast length/land area, island dummy, English dummy, Frech dummy, and Spanish dummy	Wei, S., Natural openness and good government. NBER Working Paper 7765
<i>inst1</i>	Constructed trade share (instrument for openness), for the year of 1985. It is derived from underlying geographic characteristics of countries involved in trade	Frankel, J. and D. Romer, 1999, Does trade cause growth? <i>American Economic Review</i> 89, 379–399.
<i>gdpp9602</i>	Natural log of GDP per capita (PPP, 1995 constant int'l \$), averaged over the years of 1996–2002	World Bank, GDF & WDI central database, August 2004 (http://www.worldbank.org/data/onlinedatabases/onlinedatabases.html)
<i>gdpp8403</i>	Natural log of GDP per capita (PPP, 1995 constant int'l \$), averaged over the years of 1984–2003	Same as above
<i>gdpp9096</i>	Natural log of GDP per capita (PPP, 1995 constant int'l \$), averaged over the years of 1990–1996	Same as above

TABLE A3 *Continued*

Variable	Description	Source
<i>gdpp7884</i>	Natural log of GDP per capita (PPP, 1995 constant int'l \$), averaged over the years of 1978–1984	Same as above
<i>gdpp96</i>	Natural log of GDP per capita (PPP, 1995 constant int'l \$), in year 1996	Same as above
<i>gdpp84</i>	Natural log of GDP per capita (PPP, 1995 constant int'l \$), in year 1984	Same as above
<i>lcir9600</i>	Natural log of daily newspaper circulation per 1,000 persons, averaged over 1996–2000	Same as above
<i>lcir8500</i>	Natural log of daily newspaper circulation per 1,000 persons, averaged over 1985–2000	Same as above
<i>lcir8000</i>	Natural log of daily newspaper circulation per 1,000 persons, averaged over 1980–2000	Same as above
<i>lcir9000</i>	Natural log of daily newspaper circulation per 1,000 persons, averaged over 1990–2000	Same as above
<i>tg9602</i>	Trade share in GDP, averaged over 1996–2002	Same as above
<i>tg8402</i>	Trade share in GDP, averaged over 1984–2002	Same as above
<i>pl8402</i>	POLITY (measure of democracy/autocracy), ranges from +10 (strongly democratic) to -10 (strongly autocratic), averaged over 1984–2002 (we assigned the special coding of -66, -77, and -88 to missing values to keep the average smooth)	Polity IV Project, CIDCM, University of Maryland, College Park 20742 (www.cidcm.umd.edu/inscr/polity)
<i>pl9000</i>	Same as above, averaged over 1990–2000	Same as above
<i>pl8000</i>	Same as above, averaged over 1980–2000	Same as above
<i>pl9602</i>	Same as above, averaged over 1996–2002	Same as above
<i>etic8400</i>	Executive index of electoral competitiveness, averaged over 1984–2000. Defined as: No legislature: 1; Unelected legislature: 2; Elected, one candidate: 3; one party, multiple candidates: 4; multiple parties are legal but only one party won seats: 5; multiple parties <i>did</i> win seats but the largest party received more than 75% of the seats: 6; largest party got less than 75%: 7	Beck, T., G. Clarke, A. Groff, P. Keefer, and P. Walsh, 2001, New tools in comparative political economy: the database of political institutions. <i>World Bank Economic Review</i> 15, 165–176 (http://www.worldbank.org/research/bios/pkeefcer.htm)

TABLE A3 *Continued*

Variable	Description	Source
<i>eiec9600</i>	Same as above, averaged over 1996–2000	Same as above
<i>eiec9000</i>	Same as above, averaged over 1990–2000	Same as above
<i>eiec8000</i>	Same as above, averaged over 1980–2000	Same as above
<i>fp9602</i>	Freedom of press, averaged over 1996–2002. The original data range from 0 to 100, with low score for higher degree of press freedom. We use 100 to subtract the original value in order to have higher score for higher degree of freedom. Data before 1994 are in letter value, not in score, therefore not included	Freedom House (freedomhouse.org)
<i>fp9402</i>	Same as above, averaged over 1994–2002	Same as above
<i>fp9400</i>	Same as above, averaged over 1994–2000	Same as above
<i>school8001</i>	Enrolment rate in secondary school, averaged over 1980–2001 (not every year has data)	World Bank, GDF & WDI central database, August 2004 (http://www.worldbank.org/data/online/databases/online/databases.html)
<i>school9000</i>	Enrolment rate in secondary school, averaged over 1990–2001 (not every year has data)	Same as above
<i>school_96</i>	Enrolment rate in secondary school, for 1996	Same as above
<i>school_85</i>	Enrolment rate in secondary school, for 1985	Same as above
<i>life_8002</i>	Life expectancy at birth, average over 1980–2002 (not every year has data)	Same as above
<i>phone_8002</i>	Telephone mainlines (per 1,000 people), average over 1980–2002	Same as above
<i>mor18002</i>	Infant (1 year or under) mortality rate per 1,000 live births, average over 1980–2002 (not every year has data)	Same as above
<i>lit18403</i>	One minus total adult literacy rate (%), adult refers to those 15 years or older, average over 1984–2003	Same as above

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Myths and Realities of Governance and Corruption

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Governance and corruption remain controversial and misunderstood topics. But they are now given higher priority in development circles and by the corporate sector, including multinationals.

Indeed, some donors and international financial institutions (IFIs) increasingly work with emerging economies to help reduce corruption, and increase citizen voice, gender equality, and accountability. The 2005 World Economic Forum in Davos highlighted the agreement reached among 63 multinationals in key sectors to work within a set of principles to control corporate bribery. Further, with 29 countries having ratified already, and another handful of developing countries on the verge of doing so,² the UN convention against corruption signed almost two years ago is about to come into force, requiring, among other things, repatriation of looted assets stashed abroad by corrupt leaders.³

And when in July 2005 the Group of Eight countries announced their decision to double aid and debt relief to the poorest countries in Africa, governance concerns were prominent. As the recent joint report by the Africa Commission explicitly stated, “Good governance is the key... Unless there are improvements in capacity, accountability, and reducing corruption ... other reforms will have only limited impact.” Similar statements are voiced in other regions of the world, and there is also increasing scrutiny about corruption in OECD countries, and of multinationals.

But is good governance and controlling corruption really fundamental for growth, development, and security? The explosion of empirical research over the past decade, coupled with lessons from countries’ own experience, have given us a more solid basis for judging many of the effects of governance on development, and the effectiveness—or lack thereof—of strategies to improve it. In our contributions to the *Global Competitiveness Reports* (GCR) in recent years⁴ we have presented a number of selected governance topics. Insights derived from the analyses of the Executive Opinion Surveys (Survey) conducted by the World Economic Forum every year, and presented in previous GCR chapter contributions, include the study of determinants of governance at the city level, the anatomy of undue influence, state capture and bribery involving many domestic private firms, multinationals, and public officials, and the links between governance, corruption and security threats, and others.

Unfinished business

Yet in spite of the myriad contributions to the field by many authors, there are still serious unresolved questions and debates in the development community, not only about the importance of governance and corruption, but also about the willingness and ability of the international

community, including the private sector, to help countries improve in these areas.

In this year's chapter, we provide a synthesis of the key challenges, many of which are unresolved or have become popularized notions. Some of them, we believe, are outright myths. At the risk of oversimplification, and for the sake of expositional clarity and generating debate, we present these unresolved or misunderstood issues as myths on governance and corruption, although we acknowledge at the outset that there is often a more nuanced reality. In each case, we present a "myth," with which we obviously disagree, and then discuss why we think it is mistaken. Following the eight myths, we present underemphasized interventions in the area of transparency reform, complemented by improvements in freedom of the press and gender equality. If implemented, such reforms could have a major impact on improving governance and anti-corruption in the next stage.

Myth #1: Definition: Governance and anti-corruption are one and the same.

We define *governance* as the traditions and institutions by which authority in a country is exercised for the common good. This includes:

- the process by which those in authority are selected, monitored, and replaced (the political dimension);
- the government's capacity to effectively manage its resources and implement sound policies (the economic dimension); and
- the respect of citizens and the state for the country's institutions (the institutional respect dimension).

By contrast, *corruption* is traditionally defined more narrowly as the "abuse of public office for private gain." In last year's GCR chapter on governance, we challenged this definition of corruption as placing too much emphasis on public office, and on the ostensible legality of the act. We analyzed the implications of viewing corruption as a broader phenomenon where private agents also share responsibility, and where many acts which are not ethical (and thus may be regarded as corrupt) may not necessarily be illegal. We presented empirical evidence of the extent to which many powerful private firms engage in undue influence, to shape state policies, laws and regulations, for their own benefit. Related to this, we also highlighted the extent to which they make campaign contributions, which may, in fact, be legal, but which unduly influences the rules of the game, for their benefit. Moreover, from the Survey results we showed that favoritism toward particular firms in the awarding of public procurement bids and contracts is widespread.

To generate debate, we offered an alternative, broader definition of what constitutes corruption, namely, "the privatization of public policy," in which public policy is seen as including access to public services. According to this more neutral definition, an act may not necessarily be illegal for it to be regarded as corrupt in a broader sense. Consider the situation in which legislative votes or executive decisions in sectoral policy-making—e.g., in telecommunications or energy—have been unduly influenced by either private campaign contributions to legislators, or by private favors provided to decision-makers. In such a case, corruption would be considered to have taken place, even if the act was not strictly illegal. And within such a broad definition, responsibility resides with *both those who exert undue influence, and those who are unduly influenced*. Based on the empirical results from the Survey last year, we also provided an illustrative index of corruption within this broader definition, which pays closer attention to the deeds of the private sector. We found that a number of rich OECD countries fare rather poorly when this more subtle, and not purely legalistic, definition of corruption is used in the analysis.

Such debates on alternative definitions of corruption notwithstanding, it is clear that the scope of the concept of governance is much broader than that of corruption. As we will see later, governance and corruption may be related, but they are distinct notions, and ought not to be regarded as one and the same.

Myth #2: Governance and corruption cannot be measured.

Less than a dozen years ago, few comparable, worldwide measures of governance or corruption existed. Yet in recent years, through the efforts of institutions such as the World Bank (the Governance Indicators), the World Economic Forum (the Executive Opinion Survey), Transparency International (Corruption Perception Index), Freedom House (political and civil liberties and freedom of the press), and numerous other institutions, we have sought to counteract this widespread perception.

At the World Bank, in order to more closely define and measure governance, we have constructed these aggregate Governance Indicators, which now cover more than 200 countries, based on more than 350 variables, obtained from dozens of institutions worldwide, including the Survey. The Governance Indicators capture six key dimensions of institutional quality or governance, and measure, through two indicators each, the political, economic, and institutional dimensions of governance described above. The following six dimensions are measured:

1. *Voice and accountability*—measuring political, civil and human rights

2. *Political instability and violence*—measuring the likelihood of violent threats to, or changes in, government, including terrorism
3. *Government effectiveness*—measuring the competence of the bureaucracy and the quality of public service delivery
4. *Regulatory burden*—measuring the incidence of market-unfriendly policies
5. *Rule of law*—measuring the quality of contract enforcement, the police, and the courts, as well as the likelihood of crime and violence
6. *Control of corruption*—measuring the exercise of public power for private gain, including both petty and grand corruption, and state capture

While the Governance Indicators may represent a big step forward, there are measurement challenges. Margins of error are not trivial, and caution in interpreting the results is warranted—i.e., countries cannot be precisely ranked. But these margins of error have declined, and are substantially lower than for any individual measure of corruption, governance, or the investment climate. As a result, these governance indicators are used worldwide for monitoring performance, country assessment, and research. These indicators have been available since 1996, and in recent months we released the last installment for 209 countries, with data up to the end of 2004.⁵

Myth #3: The importance of governance and anti-corruption efforts is overrated.

In order to give an approximation of the importance of corruption, one might pose the question: How large is the corruption “industry” worldwide? But it is very difficult to obtain even a rough estimate of the size of the corruption industry, given its hidden nature, for corruption and bribery typically operate in the dark. This makes official estimates virtually impossible to obtain, and, of course, unreliable. Nonetheless, thanks to the increasing availability of particular questions in enterprise and household surveys, which ask for quantitative estimates of bribery, it is possible, under certain conditions, to make calculations, and to extrapolate for the whole population.

In interpreting the results of this exercise, significant caution applies, given the margin of error in the data, the assumptions in the extrapolation exercise itself, and the fact that some forms of corruption are not quantified through this approach—e.g., budgetary leakages or asset theft within the public sector. Bearing such serious caveats in mind, an estimate of the extent of annual worldwide transactions that are tainted by corruption puts it close to US\$1 trillion. The margin of error of this estimate being

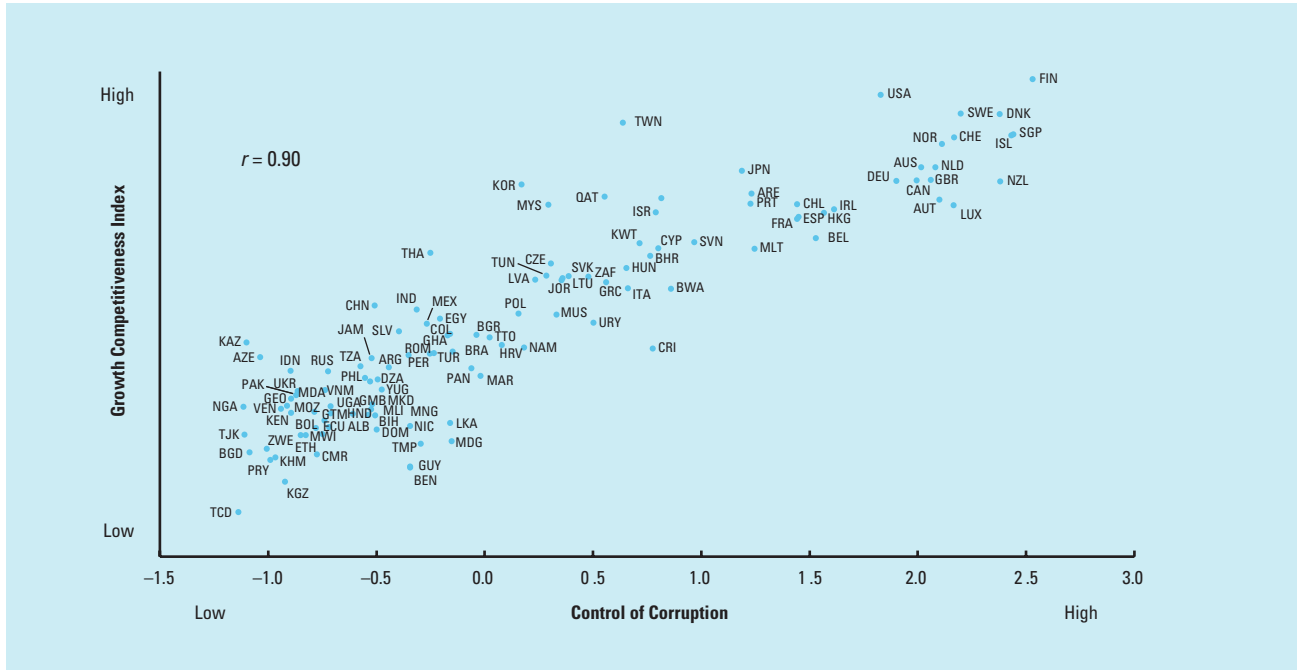
obviously large, it may well be as low as US\$600 billion; or, at the other extreme of the spectrum, it could well exceed US\$1.5 trillion.⁶

But even if a US\$1 trillion estimate of the global size of bribery worldwide seems very large, it does not, in and of itself, give us much of a guide to the actual cost of corruption. Theoretically, it could be argued that all these bribes just grease the wheels of commerce, and no productive value added is lost to the economy. Therefore, to get a closer idea of the costs of corruption and poor governance, it is important to relate governance indicators with outcome variables, such as incomes or infant mortality, for instance.

Thanks to the advances in empirical measurement, a number of researchers have examined the impact of governance on development. The research generally shows that countries can derive a very large *development dividend*, as we have called it, from better governance. Indeed, there is now a growing consensus among both academics and policymakers that good governance provides the fundamental basis for economic development. Academic research has focused on the effects of institutional quality on growth in the very long run, noting that there is a strong causal impact of institutional quality on per capita incomes worldwide. These estimates of the development dividend of good governance suggest that a realistic one-standard-deviation improvement in governance would raise incomes in the long run by about two- to threefold.⁷

Such improvement in governance by one standard deviation is feasible, since it is only a fraction of the difference between the worst and best performers, and would correspond, for instance, to an improvement in the current ratings of voice and accountability from the lowest levels of Myanmar to that of Kazakhstan, or Kazakhstan to Georgia, or Georgia to Botswana. For improvements in *rule of law*, a one standard deviation difference would constitute the improvement from the level of Somalia to those of Laos, from Laos to Lebanon, Lebanon to Italy, or Italy to Canada; for *control of corruption* it is the improvement from the lowest levels of Equatorial Guinea to those of Cuba, Honduras, or Uganda, from Uganda to Lithuania or Mauritius, from Mauritius to Portugal, or from Portugal to the stellar standards of Finland, Iceland, or New Zealand. We also find that even over much shorter periods, such as the past 10 years, countries with better institutional quality have grown faster. And in our research, we have also found that good governance not only matters significantly for higher incomes per capita, but also for substantially reducing infant mortality and illiteracy.

Governance also matters significantly for a country’s competitiveness. For this year’s GCR, we performed a simple exercise, relating the recently released Governance Indicators (measuring country’s ratings for the 2004 period), with the updated Growth Competitiveness Index

Figure 1: Better governance is associated with greater country competitiveness

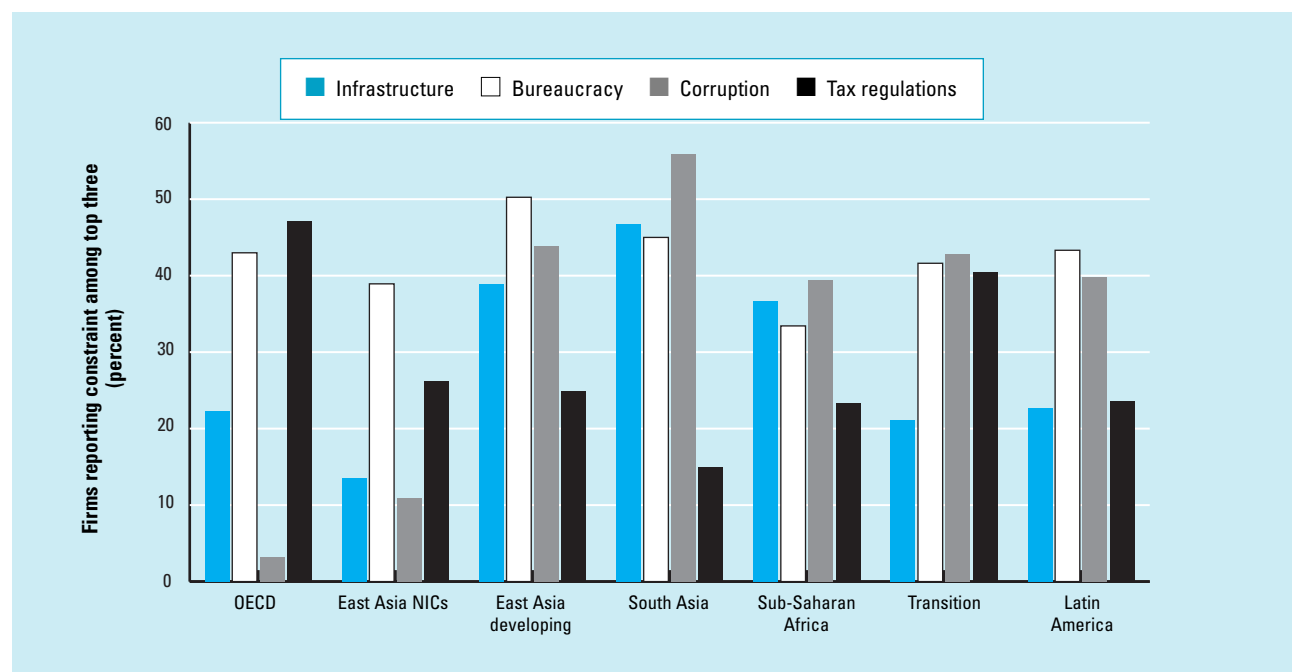
Sources: GCI is based on 2005 data of the World Economic Forum; control of corruption is for 2004, from Kaufmann et al. 2005.

(GCI) for 2005, which is featured in this *Report* (Part 1). It should be noted that the data used to compute the GCI this year (drawn in large measure from this year's Survey) did not feature in any of the calculations for the Governance Indicators, which utilized earlier data. Against such a background, it is noteworthy that the correlation between governance (measured through the Governance Indicators) and competitiveness (through the GCI) is extremely high. As we observe in Figure 1, for the case of one of the Governance Indicators, namely corruption control, the correlation is 0.9, i.e. an extremely tight fit. Obviously such a close correlation is highly significant statistically, and remains so after controls for income levels are included in econometric specifications which explain the country's competitiveness. On average, an improvement in control of corruption by only one standard deviation (which is realistic) is associated with a jump in the GCI for a country by almost 30 rank positions. Even after controlling for the income level of the country, improvement in corruption control can produce a very large jump in the competitiveness of a country, between 15 and 20 rank positions.

The most direct way to ascertain the importance of governance is to ask firms and households themselves. In the case of enterprises, insights can be derived from the synthesis question, at the end of the Survey, which asked firms to rank the most important constraints from a long

list of 14 potential problems. The results are telling: firms in OECD countries rated labor regulations, bureaucracy, and taxes as the most problematic for their business, while firms in emerging economies considered that by far the largest constraints are bureaucracy and corruption. Finance and infrastructure are rated significantly lower than corruption and bureaucracy, but are still perceived by business executives worldwide as posing serious concerns for many enterprises. In terms of constraint severity, these dominate many of the other constraints.

It is important to disaggregate to the regional and country level, however, since averages for emerging economies mask significant variations. We see some of these in Figure 2, showing regional averages for some constraints. Bureaucracy is a serious constraint on governance everywhere, including in OECD countries. Corruption is also a serious impediment, especially in many emerging economies. Tax regulations constitute a severe constraint in OECD and in post-socialist transition countries, in contrast with regions such as South Asia, where it ranks low as an impediment, relative to the other constraints. Similarly, infrastructure is a major constraint in Africa and developing Asia, in contrast with the East Asian tigers, and, to an extent, Latin America and the transition economies (see Figure 2). This does not imply that in these regions it is unimportant to focus on infrastructure investments, since this type of question gives only a rela-

Figure 2: Some key constraints to business, by region: Responses from firms in Survey 2005

Source: Current Survey. The question posed to the firm was: “Select among the above 14 constraints the five most problematic factors for doing business in your country.”

tive ranking across different constraints for each country. But the fact that infrastructure was not rated at the top in so many countries—in Latin America, Africa, transition, and others, which also suffer from infrastructure problems, and are in dire need of investments—is a sure sign of the extent to which some other factors—largely governance and corruption-related—impose even more severe constraints on business development.⁸

Regional averages always mask substantial variations across countries in each region. For instance, at only 3 percent, the percentage of firms reporting that corruption is one of the top three constraints across the 24 countries in the OECD (in the Survey) is very low. Yet this is only an average of varying country estimates ranging from zero—i.e., not a single enterprise ranking corruption as a constraint—in countries such as Finland, New Zealand, Norway, Iceland, and Australia, to a much higher 18 percent of the respondents mentioning corruption as a top impediment in Greece. In fact, there are a number of emerging economies in the various regions where the response rate is lower than for Greece, such as the cases of Uruguay (4 percent), Chile (7), Slovenia and South Africa (10), Botswana and Ghana (12), Estonia (13), and others. Yet the constraint posed by corruption to business, ranked much higher, on average, in the emerging economies, is the result of the prevalence of countries where over one-half of the respondents claim that corruption is one of the

top constraints to their business, such as Armenia, Azerbaijan, Bangladesh, Benin, Cambodia, Cameroon, Guatemala, Kazakhstan, Kenya, Morocco, Mozambique, Pakistan, Paraguay, Romania, Russia, Uganda, and Vietnam, among others.

The impact of poor governance and corruption is not limited to the corporate sector. In many countries, corruption represents a “regressive tax” on the household sector as well: as compared with higher-income groups, lower-income families pay a disproportionate share of their incomes in bribes to have access to public services, and end up with less access to such services because of corruption. Related, there is also the finding of research that corruption increases income inequality.⁹

Moreover, governance matters significantly for aid effectiveness. While some have challenged their findings, the widely known Burnside and Dollar¹⁰ work on assessing aid effectiveness shows, on the basis of cross-country aggregate data, that the quality of policies and institutions of the aid recipient country is critical. It is at least as revealing, however, to explore these links at the microeconomic level, focusing, for instance, on the effectiveness of investment projects, which show that institutions matter for project effectiveness.¹¹ Also, our calculations of World Bank-funded projects suggests that if there is high corruption in an aid-recipient country, the probability of project success, of institutional development impact, and of long-

term sustainability of the investment, is much lower than in countries with better governance.

These results are of particular relevance in the context of a corollary myth, the contention that donor agencies can “ringfence” projects in highly corrupt countries and sectors, and thus ensure that it is efficiently implemented, and that objectives are attained, even where other projects fail. This is unrealistic. With the possible exception of some humanitarian aid projects, the notion that the aid community can fully insulate projects from a country’s overall corrupt environment is not borne out by the evidence. The data suggest that when a systemic approach to governance, civil liberties, rule of law, and control of corruption is absent, the likelihood of an aid-funded project being successful is greatly reduced.

Clearly, governance and corruption matter. Space constraints preclude an exhaustive presentation in this chapter of the literature on this topic, or a presentation of all the complex links between governance and other important factors and outcomes. For instance, the extent to which corruption and the absence of rule of law may undermine fledgling democracies is of critical importance, and worthy of deeper treatment elsewhere. Similarly, the links between misgovernance, corruption, and money laundering with such security threats as organized crime and terrorism require deeper analytical and empirical treatment.¹²

The answer to the myth that the importance of governance and anti-corruption is overrated would be incomplete without pointing out the obvious: governance is not the only important driver of development. Macroeconomic, trade, and sectoral policies are also important. But when governance is poor, policymaking in other areas is also, and often, compromised.

Myth #4: Good governance and corruption control is a luxury that only rich countries can afford.

Some claim that the link between governance and income does not mean that better governance *boosts* incomes, but, rather, the reverse, that higher incomes automatically translate into better governance. However, our research does not support this claim. It is misleading to suggest that corruption is due to low income, and thus, to invent a rationale for discounting bad governance in poor countries. In fact, the evidence points to better governance as being the *cause* of higher economic growth. Furthermore, a number of emerging economies, including the Baltics, Botswana, Chile, and Slovenia, have shown that it is possible to reach high standards of governance, without having yet joined the ranks of the wealthy nations.

While this finding applies across the globe, the recent focus on Africa by the international community makes this point particularly relevant for debates on aid effective-

ness, and about the priority the continent needs to give to improving governance to complement aid inflows. Indeed, in recent years, the international community has rightly turned its attention to the problems of underdevelopment in Africa. Not only is Africa poorer than other regions in the developing world, it also lags far behind other regions in terms of progress in achieving the Millennium Development Goals. If past trends continue, many countries in Africa will have to double their per capita incomes over the next decade, in order to attain the goal of halving poverty by 2015. There is widespread consensus that a combination of substantial aid inflows, together with concerted domestic policy effort, is necessary to meet this challenge.

In light of the strong positive effect of governance on development, and in light of its importance for effective aid delivery, it is then a matter of considerable concern that governance performance in sub-Saharan Africa is on average quite weak. Many countries in Africa are not only poor, but also poorly governed. Fully 38 out of 46 countries in the region are both poorer than the world average, and also exhibit worse governance than the world average. Some observers have argued that we should thus discount the poor governance performance of the region, based on the fact that these countries have very low income levels, thus arguing that good governance costs money. Yet, as described above, recent research provides very little evidence to support the proposition that poor governance (or corruption) in Africa is attributable to Africa’s poverty. Rather, the direction of causality is largely in the opposite direction, from better governance to better development outcomes.¹³

Myth #5: It takes generations for governance to improve.

Reformers in many governments as well as investors, civil society leaders, and the international aid community increasingly view governance as being key to development, and to improving the investment climate. This, in turn, has increased the demand for monitoring the quality of governance in a country over time. Further, aid donors are also coming to the view that aid flows have a stronger impact on development in countries with good institutional quality. In light of this, it is important to measure trends over time, as well as levels of governance. Our new governance indicators now span an eight-year period from 1996 to 2004, a sufficiently long period to begin looking for meaningful trends in governance. As we have emphasized in our work, the presence of measurement error in all types of governance indicators, including our own, makes assessing trends in governance a challenging undertaking.

In the recently released paper “Governance Matters IV” (Kaufmann et al., 2005) we develop a formal statistical

Table 1: Significant changes in governance worldwide in short-term, 1998–2004

Selected countries based on aggregate indicators for 209 countries

Voice and accountability	
Significantly worsened.....	Central African Republic, Nepal, Ivory Coast, Haiti, Zimbabwe, Russia, Kyrgyz Republic, Eritrea, Pakistan, Belarus, Solomon Islands, Venezuela, Kazakhstan, Bangladesh, Ecuador, Iran, Gabon
Significantly improved.....	Chile, Kenya, Bahrain, Gambia, Algeria, Mexico, Senegal, Peru, Turkey, Slovak Republic, Nigeria, Indonesia, Ghana, Croatia, Bosnia and Herzegovina, Sierra Leone, Serbia
Regulatory quality	
Significantly worsened.....	Zimbabwe, Venezuela, Ivory Coast, Ethiopia, Bangladesh, Pakistan, Philippines, Lebanon, Egypt, Zambia, Myanmar, Guinea, Eritrea, Bolivia, Peru, Tunisia, Honduras, Guatemala, Ecuador, Kazakhstan, Cameroon, Cuba
Significantly improved.....	Cape Verde, Armenia, Tajikistan, Azerbaijan, Bosnia and Herzegovina, Serbia, Estonia, Zaire, DRC, Equatorial Guinea, Iceland, Lithuania, Slovak Republic, Iraq
Rule of law	
Significantly worsened.....	Zimbabwe, Argentina, Ivory Coast, Ethiopia, Moldova, Cuba, Venezuela, Nepal, Haiti, Lebanon, Papua New Guinea, Dominican Republic, Myanmar, Eritrea
Significantly improved.....	Mozambique, Slovak Republic, Estonia, Latvia, Lithuania, Madagascar
Control of corruption	
Significantly worsened.....	Zimbabwe, Bangladesh, Eritrea, Ivory Coast, Swaziland, Ethiopia, Equatorial Guinea, Central African Republic, Sudan, Moldova
Significantly improved.....	Tanzania, Madagascar, Croatia, Serbia, Colombia, Bulgaria, Estonia, Latvia, Slovak Republic

Note: The significance level for the list of countries shown in this table was calculated at 75 percent confidence level. For the full list, including all governance components, and also at 90 percent confidence level, see Kaufmann et al., 2005. Source: Kaufmann et al., 2005.

methodology, as well as some simple rules of thumb, for identifying changes in governance that are likely to be statistically and practically significant. Over the eight-year period spanned by our governance indicators, we find that in about 10 percent of countries we can be fairly confident (at the 90 percent significance level) that governance has changed substantially, while at a lower (75 percent significance) level, roughly 20 percent of all observed changes stand out as significant. Similarly, in a nontrivial number of countries there have also been significant changes in the shorter six-year period from 1998 to 2004 (Table 1). Importantly, we show that there is a great deal of agree-

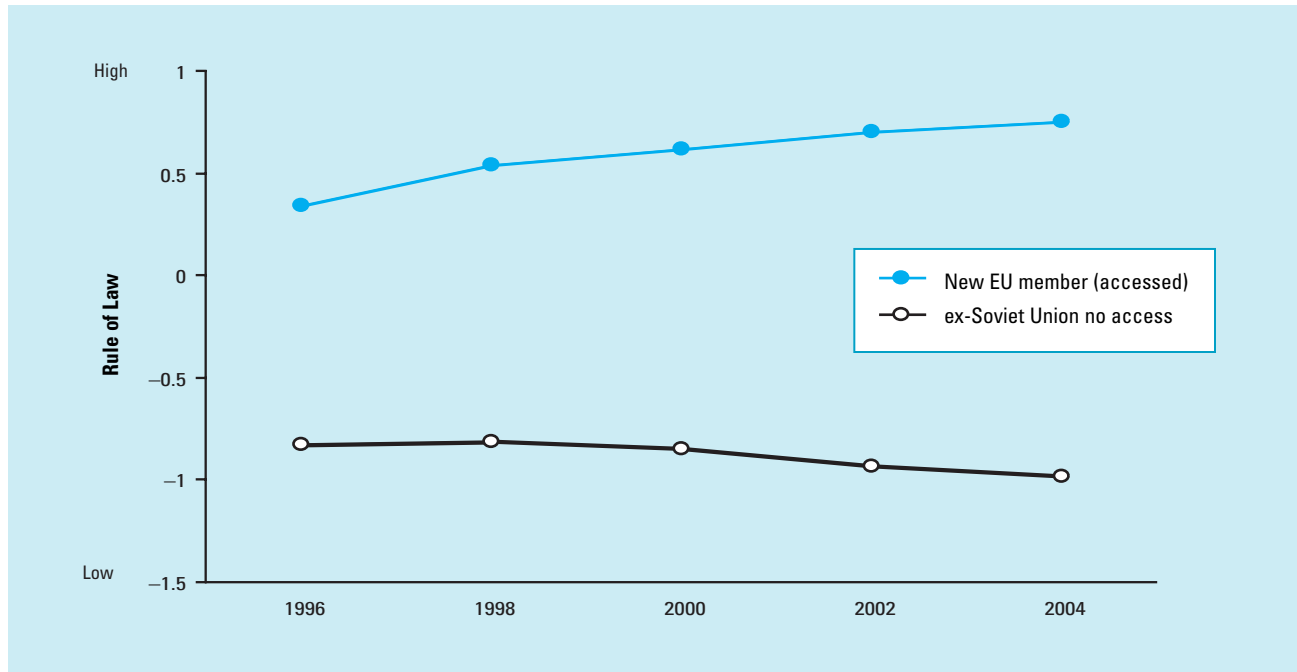
ment among our many data sources about the direction of change in governance in these countries. Overall, this reminds us that, while changes in institutional quality are usually gradual, there are also countries which have achieved sharp improvements—or suffered rapid deterioration—over an eight-year period. This finding is of particular interest, given the common perception that, while deterioration in a particular country *can* take place rather quickly, improvements are of necessity slow and incremental.

Challenging the “institutional pessimists,” Table 1 provides a list of countries that have improved markedly in selected dimensions of governance since the late 1990s. As we can see, this also challenges the “Afro-pessimists,” since we can see in the same table that there are a number of countries in Africa which have improved in a rather short period of time, even if it is still the case that other countries have not. Generally, as shown in Table 1, it is found that roughly as many countries in Africa show declines in these particular governance dimensions as show improvements.

As Table 1 shows, there has been significant improvement since 1998 in *voice and accountability* in a number of countries, such as in Chile, Bosnia and Herzegovina, Croatia, Serbia, Ghana, Indonesia, Sierra Leone, Slovak Republic, and Peru, while a significant deterioration has taken place in countries such as Ivory Coast, Zimbabwe, Kyrgyz Republic, Russia, Venezuela, Pakistan, Belarus, Nepal, and Haiti. Similarly, a deterioration in *rule of law* during that period has taken place in a number of countries, such as Ethiopia, Namibia, and Argentina, while significant improvements in *government effectiveness* have taken place in South Africa and Bulgaria, among others.

We have also addressed the question of whether governance has been improving worldwide on average. We find that, in fact, there is no evidence that governance has improved since 1996 (or any period thereafter). It is quite sobering to see, from the review of these indicators, that, on average, the quality of governance worldwide has remained stagnant. Although, as pointed out earlier, there are a number of countries where significant improvement has taken place, there are also countries exhibiting significant deterioration, and many where little change has taken place.

In this context, it is telling that there are clusters of countries that have been improving, in comparison with others. For instance, there is some evidence of improved governance in a number of dimensions in some Caribbean countries, in contrast with much of Latin America. Particularly telling is the story of the post-socialist transition countries. As illustrated in Figure 3, those transition countries, which in the mid-1990s were promised potential entry to the European Union—upon fulfillment of an appropriate institutional and political path—exhibit an

Figure 3: The tale of transition: Stagnating world average, but variation in trends across groups of countries

Source: Kaufmann et al., 2005.

improved trend in governance (shown in the figure on the rule-of-law variable), while those post-socialist countries which were not offered such a window of opportunity, stagnated or worsened.

Thus, while it is true that institutions tend to change only gradually, and that in many countries there has been little improvement in the short term, we can also see that in some countries there has been a sharp improvement during a short period of time. This defies the view that while governance may deteriorate quickly, improvements are always slow and incremental.

Myth #6: Fight corruption by fighting corruption.

A fallacy promoted by some in the field of anti-corruption, and at times also by the international community, is that the best way to fight corruption is by fighting corruption—that is, by means of yet another anti-corruption campaign, the creation of more anti-corruption commissions and ethics agencies, and the incessant drafting of new laws, decrees, and codes of conduct. Moreover, in some settings, the disproportionate emphasis on prosecutions—typically of a few corporations or individuals, and often of the political opposition—at the expense of a focus on prevention and incentives for integrity, has reduced the effectiveness of anticorruption efforts. An instinctive tendency to over-regulate, which may take place in the throes of a corruption scandal, is not infrequent, and can also be

counterproductive. Excessive regulations not only do not address the more fundamental causes of corruption, but often create further opportunities for bribery. Overall, these anti-corruption initiatives-by-fiat appear to have little impact, and often serve as politically expedient ways to react to the pressure to “do something” about corruption. Often, this results in neglect of more fundamental and systemic governance reforms.

Myth #7: The culprit in developing countries is the public sector, which is solely responsible for shaping the inadequate business environment.

A common fallacy is to focus solely on the failings of the public sector. The reality is much more complex, since powerful private interests often exert undue influence in shaping public policy, institutions, and state legislation. In extreme cases, so-called oligarchs capture state institutions. These are issues we have reviewed in some detail in the chapters on governance in previous *Reports*, presenting evidence from previous Surveys on the extent of undue influence, as well as outright capture of state institutions by corporate potentates. Contrary to conventional wisdom, the public sector is not the sole shaper of the investment climate faced by domestic firms and foreign investors in a country, and, similarly, the private sector is not the passive recipient of the investment climate. In reality, there is a complex interplay between corporate and

public sector governance and policymaking, whereby powerful segments of the private sector also play a very important role in shaping key public policy, legislation, and regulations which constitute the rules of the game, and the business environment within which these corporations operate.¹⁴

Behind the conventional definition of corruption (as the abuse of public office for private gain) lies the image of a predatory state, seen as a huge outstretched hand, extorting firms for the benefit of politicians, high officials, and bureaucrats. The research carried out over the past six years argues for balancing the focus, to include the important role of private firms, since the evidence suggests that many firms collude with politicians for their mutual benefit. Even in strong states, such as in rich OECD countries, powerful conglomerates can have significant influence in shaping regulatory policy. Consequently, it is of paramount importance to revisit the traditional notions of the investment climate. More specifically, money in politics is at the heart of the interplay between the corporate and public sectors, in terms of policy and institutional outcomes, and within it, the role played by political finances in exerting undue influence.

The private-public sector governance challenge is not confined to the domestic players in a country. In spite of the fact that the OECD Anti Foreign Bribery Convention came into force over five years ago, many multinational corporations still bribe abroad, at times affecting public policy, and more generally undermining public governance in emerging economies. In the articles in previous *Reports* we codified in some detail the fact that there still appears to be considerable bribery by multinationals headquartered in OECD countries, but which operate outside of the OECD. While one ought not rule out that the OECD Convention may be effecting some progress—and there is an increase in the number of investigations in a few OECD countries—there appears to be little progress in most OECD signatory countries in actually bringing serious cases of bribery to court.

In fact, the data from the 2004 Survey illustrate the fact that domestic and multinational firms operating *within* the OECD may be behaving rather differently from those multinationals headquartered in the OECD and operating outside it. About 7 percent of firms were estimated to have bribed in public procurement contracts by multinationals headquartered in an OECD country and operating in another OECD country, which compares favorably with the estimate of about 10 percent of domestic firms bribing within their own OECD country. However, it does not compare well with the estimate exceeding 17 percent for multinationals that are also headquartered in an OECD country, but which operate outside of OECD.¹⁵ We lack the same type of data from years past for precise comparison, and therefore it is not possible to indicate

whether a downward trend is evident. Yet the existence of a significant gap between practices of multinationals within the OECD and outside of it in terms of bribery points to the need for tougher monitoring and enforcement of the Convention across the OECD, and of considering more effective complementary measures.

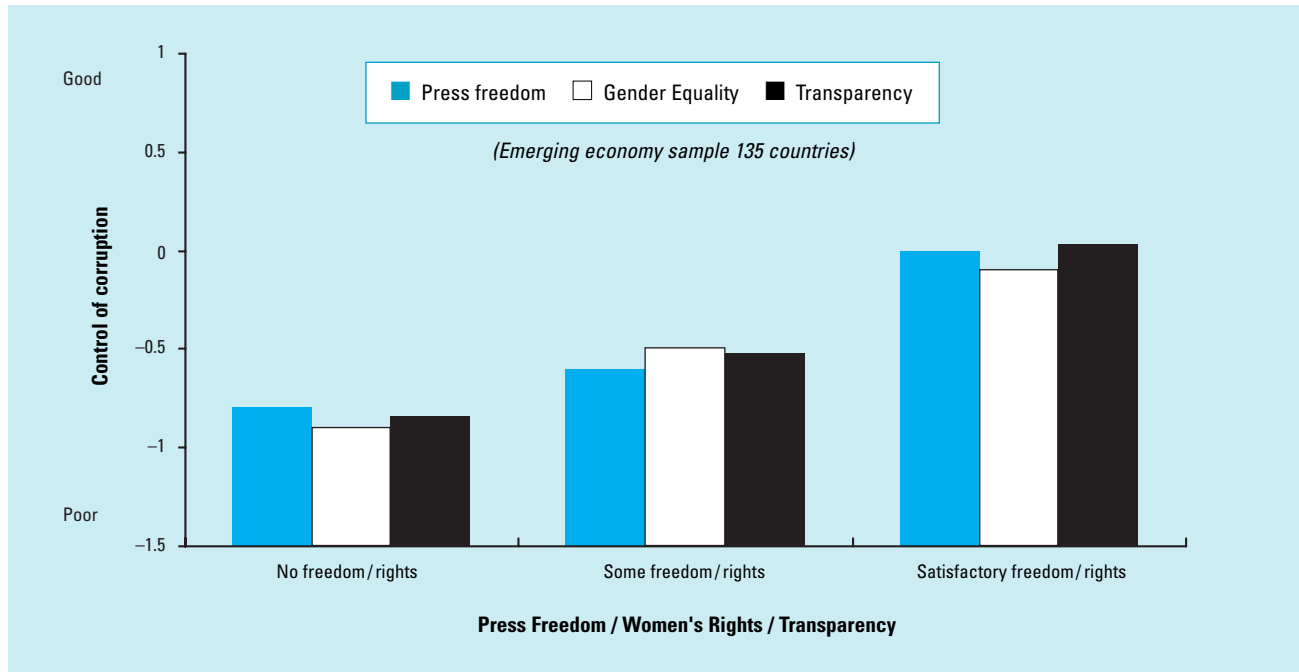
The fact that the private sector also plays a key role in governance and corruption has rather different implications for action. In fact, having ignored the private-public governance nexus for very long, the international community has often erred in its emphasis on conventional public sector interventions as a key instrument to help countries improve governance. Simply put, traditional public-sector management interventions have not worked, because they have focused on technocratic organizational “fixes,” often supported through technical assistance, the importation of hardware, organizational templates, and visits by “experts” from rich countries.

Myth #8: Countries can do little to improve governance, and IFIs and the donor community can do even less.

Given the long list of interventions that have not worked, as well as the role often ascribed to historical and cultural factors in explaining governance, it is easy to fall into the pessimist camp. That would be a mistake. First, historical and cultural factors are far from deterministic—witness, for instance, the diverging governance paths of neighboring countries in the southern cone of Latin America, the Korean peninsula, the transition economies of Eastern Europe, and in southern Africa. Second, there are strategies that offer particular promise. The coupling of progress on improving voice and participation—freedom of expression and gender mainstreaming—with transparency reforms can be particularly effective, as seen in Figure 4.

Unfortunately, progress in these areas of political and institutional governance, such as freedom of the press, gender equality, and transparency, has been checkered in many countries in the world. This disappointing reality highlights the pitfalls of focusing only on formalistic political changes. For instance, over the past 20 years there has been a substantial increase in the number of electoral democracies across emerging economies, with dozens more countries joining the ranks of countries holding elections. However, improved formal polity has not always translated into improved freedoms for the press, increased citizen voice, or opportunities for women. For instance, out of the 121 countries which Freedom House classified as electoral democracies in 2002, 49 are in fact classified as *not* having a fully free press.¹⁶

The data for Africa are also telling. According to Freedom House, there has been significant progress in the area of political rights over the past two decades. Yet press freedoms, which it has been tracking since 1995, have not

Figure 4: Gender equality, freedom of the press, and transparency are associated with corruption control

Note: Satisfactory Freedom/Rights reflect higher ratings in press freedom, gender equality, and transparency.

Sources: for *control of corruption*: Kaufmann et al., 2005; for *press freedom*: Freedom House, 2005, online at: <http://www.freedomhouse.org>; for *gender equality*: World Bank, 2004; for *transparency*: Bellver and Kaufmann, 2005.

improved, as seen in Figure 5. There is evidence, in fact, that some deterioration may even have taken place in recent times in a number of countries in the continent, as suggested not only by the Freedom House evidence depicted here, but also by the responses by firms to the Survey questions. Over the past couple of years, an increasing number of respondents from the enterprise sector in Africa do report growing obstacles in terms of what media can report and print.¹⁷

In sum, while in many countries in the world there has been progress in selected political rights areas, this has not always been translated into enhanced media freedoms, gender equality, or political and institutional transparency. And this matters a great deal, because where there is progress in these areas, progress can also be expected in corruption control. There is nothing deterministic about corruption, yet difficult political and systemic institutional reforms are often needed.

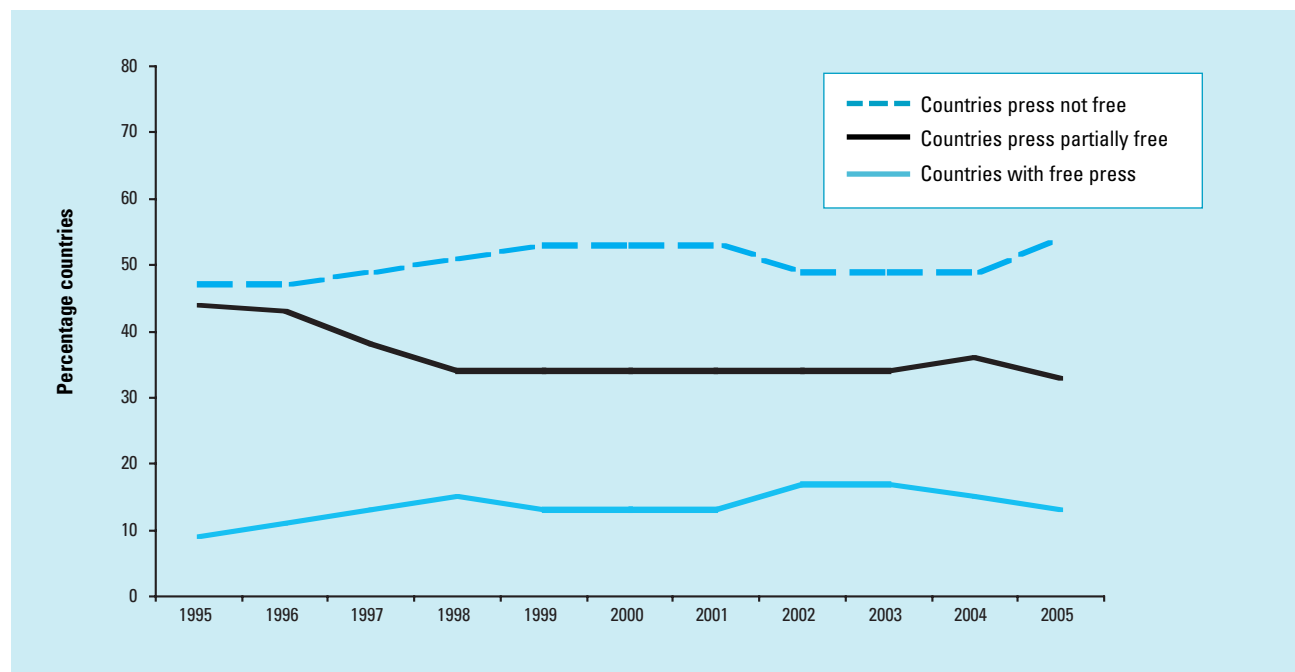
Some argue that there is not much the IFIs can do about helping a country improve governance and controlling corruption, even if the country is not viewed as facing a historical or culturally deterministic fate to stay with poor governance for many generations to come. Some development experts are skeptical about the ability of IFIs and donors to help countries improve their governance, either because of a conviction that the “macro” matters more, a mistaken belief in historical determinism, or, the

more nuanced view, that because the interventions needed to improve governance are politically sensitive, they are very difficult for outsiders to encourage.

Indeed, there are areas that fall outside the mandate of IFIs, such as promotion of fair multiparty elections. But it may well be within the ability of IFIs and donors to do something about initiatives to encourage transparency, freedom of information and an independent media, participatory anti-corruption programs led by the country, and gender equality—all of which have been underemphasized so far in the fight against corruption.

The next stage of institutional reform: A strategy for transparency

Partly because there is a higher comfort level with technocratic “fixes,” traditional themes such as Public Sector Management (including civil service reforms, codes of conduct, etc.) continue to be given significant prominence in the aid community. By contrast, transparency has been an underemphasized pillar of institutional reforms. That there has been relatively little progress on the ground in this area is regrettable, in view of the influential conceptual contributions of a number of Nobel-laureates, who have developed a framework linking the citizen’s right to know and access to information with development outcomes.¹⁸ Even popular lore subscribes to the importance

Figure 5: Press freedom in sub-Saharan Africa, 1995–2005

Note: Y-axis reports percentage of countries within the region with a free/partially free/not free rating, associated with scores in press freedom.

Source: Freedom House, 2005, online at: <http://www.freedomhouse.org>

of transparency, as illustrated by the old adage “sunlight is the best disinfectant.”

Yet not only does the implementation of transparency-related reforms remain checkered on the ground virtually everywhere, but, in contrast with other dimensions of governance, such as the rule of law, corruption, and regulatory burden, there is a large gap between the extent of the conceptual contributions and the progress on its measurement and empirical analysis.¹⁹

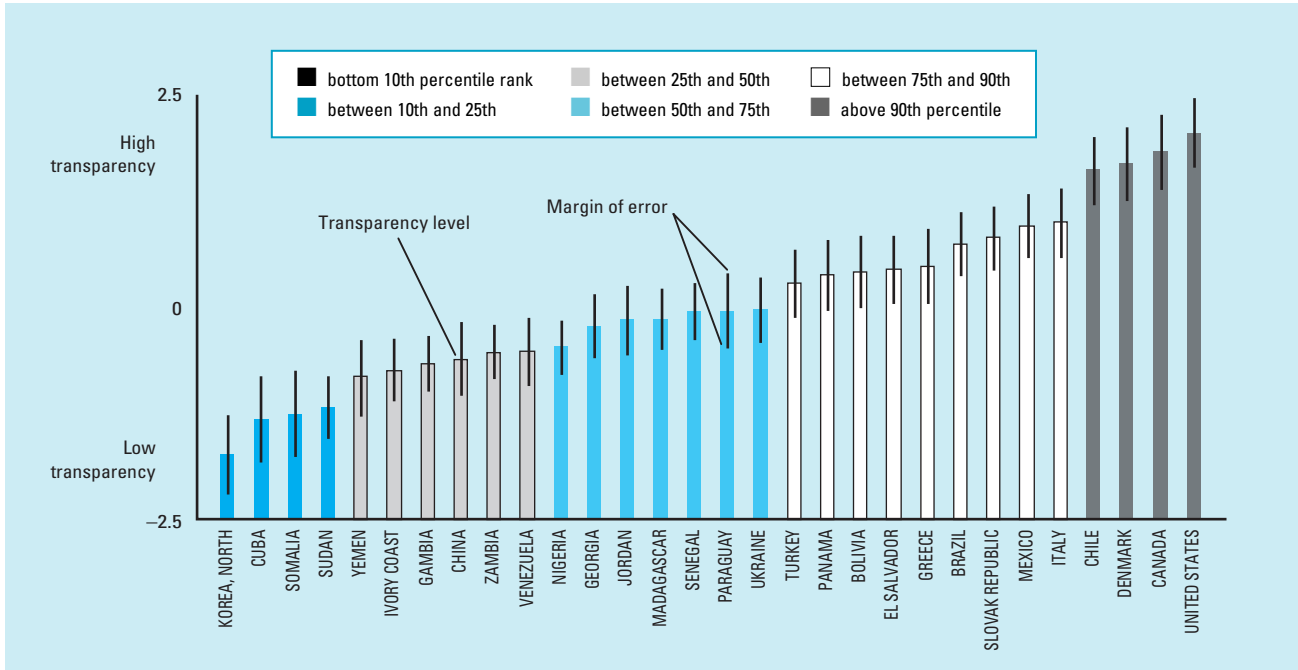
Thus, we are attempting to contribute to the empirical understanding of various dimensions of transparency by undertaking construction of a transparency index for 194 countries, based on over 20 independent sources (including the Survey). Country ratings and their margins of error are generated, for an aggregate transparency index with two subcomponents: economic/institutional transparency and political transparency. The results suggest enormous variation across countries in the extent of their transparency. In fact, a high level of transparency is not the exclusive domain of a particular region, or of rich countries, and there are transparency-related challenges in countries in each region, as illustrated in Figure 6.²⁰ We find that transparency is associated with better socioeconomic and human development indicators, as well as with higher competitiveness and lower corruption. In presenting concrete policy initiatives, we suggest that much progress can be achieved without inordinate resources. In

fact, transparency reforms are substantial net *savers* of public resources, and can obviate the necessity for excessive regulations or rules. And transparency reforms need not remain abstractions at the level of rhetoric any longer. Some concrete examples of concrete reforms, which some countries have taken selectively, and which many more could consider undertaking comprehensively, are listed in the accompanying box.

Of course, transparency reforms are not the only institutional reform priorities. IFIs and donors can complement these reforms by continuing to support traditional core competencies, helping with capacity-building, sharing knowledge, and focused reforms in key institutions in emerging economies, such as in the judiciary, customs, and tax and procurement. Further, at the municipal level, and in the context of decentralization, the donor community can also help to further institutional progress and anti-corruption in emerging economies.

These targeted reforms supporting highly vulnerable institutions would have, however, to be adapted to the specific country realities, and thus might vary considerably from country to country in their priority and in specific design. In some countries, the first priority identified might be to support procurement reforms, strengthening accountability institutions in parliament, and freedom of the press; in others, it may be reforms in the judiciary, women’s rights, and the revamping of customs. In-depth

Figure 6: Transparenting transparency: Toward an index of overall country transparency, selected countries



Note: Selected countries are presented for illustration, and due to margins of error, no precise ranking is warranted.
 Source: Belver and Kaufmann, 2005.

Box 1: Concrete Transparency Reforms

Since research shows clearly that transparency helps improve governance and reduce corruption—essential ingredients for better development and faster economic growth—the international community and individual countries must pay closer attention to this issue. Within a concerted, practical, and comprehensive pro-transparency strategy, a basic checklist of concrete reforms, which countries may use for self-assessment, a report-card of sorts, might include the following items:

- public disclosure of assets and incomes of candidates running for public office, public officials, politicians, legislators, judges, and their dependents;
- public disclosure of political campaign contributions by individuals and firms, and of campaign expenditures;
- public disclosure of all parliamentary votes, draft legislation, and parliamentary debates;
- effective implementation of conflict of interest laws, separating business, politics, legislation, and public service, and adoption of a law governing lobbying; publicly blacklisting firms that have been shown to bribe in public procurement (as done by the World Bank); and a requirement to “publish-what-you-pay” by multinationals working in extractive industries;
- effective implementation of freedom of information laws, with easy access for all to government information;
- freedom of the media (including the Internet);
- fiscal and public financial transparency of central and local budgets, adoption of the IMF’s Reports on Standards and Codes framework of fiscal transparency, detailed government reporting of payments from multinationals in extractive industries, and open meetings involving the country’s citizens;
- disclosure of actual ownership structure and financial status of domestic banks;
- transparent (Web-based) competitive procurement;
- periodic implementation and publicizing of country governance, anti-corruption and public expenditure tracking surveys, such as those supported by the World Bank;
- Transparency programs at the city level, including budget disclosure and open meetings.

governance diagnostics at the country level are thus required first,²¹ working closely with experts and institutions within the country, which must, itself, take the lead in such reforms, allowing donors to play an important, but supportive, role.

Conclusions: A global compact on governance?

The challenge of governance and anti-corruption confronting the world today calls for something other than business-as-usual. A bolder approach is needed, and collective responsibility at the global level is called for. The myths discussed in this chapter highlight areas where the international community and individual countries may need to reconsider strategies and approaches. Improving governance and controlling corruption matter enormously for development, and countries can substantially improve, even in the short term, if the appropriate strategy and political resolve are present.

Whatever the strategy, it ought to benefit from the support of the international community, as well as the involvement of the private sector. Indeed, we emphasize that governance and corruption challenges are not the exclusive responsibility of the emerging economies (or poor world), nor are public institutions the only culprits. The rich world must not only deliver on its aid and trade liberalization promises, it must also lead by example. OECD countries, which are lagging behind, should ratify and effectively implement the 2003 UN Convention Against Corruption, and take concrete steps—as Switzerland is beginning to do—to repatriate assets looted and stashed abroad by corrupt officials.²² It is also important that OECD countries address the daunting challenges of cross-border money laundering and arms trading.

Much more should be done to ensure that transnational corporations refrain from bribery abroad, and that they contribute to improved governance practices in host countries. Corporate initiatives promoting general principles against corruption, or voluntary codes of conduct, may raise awareness, and at times have a modest impact, but much tougher incentives and measures are called for, to encourage the private (including multinational) sector to refrain from engaging in bribery. Public disclosure and widespread dissemination of lists of offending firms could act as a serious deterrent. As for the IFIs and donors, there is a need to grapple with questions of selectivity and effectiveness in aid programs, rewarding countries which are making improvements in governance, and moving away from the notion that large scale financing to highly corrupt governments will benefit the poor. The notion that the donors can “ringfence” (or insulate) most projects from a generally corrupt environment ought to be abandoned.

It is clear that additional income flows alone will not improve governance. Indeed, we have learned that improved governance by a country *results* in higher incomes, not the other way around. Countries themselves must shoulder responsibility and take the lead in implementing often difficult political and institutional reforms.

Notes

- 1 The author is Director of Global Programs at the World Bank Institute. This chapter draws on collaborative research projects with Aart Kraay, Joel Hellman, Massimo Mastruzzi, and Ana Bellver, and has benefited from collaboration with Augusto Lopez-Claros and the Global Competitiveness team. I also thank Massimo Mastruzzi and Lorena Lenhart for their invaluable assistance. The views and errors expressed are the author's own. Neither those errors nor the data (which are subject to margins of error and do not imply precise country rankings) necessarily reflect the official views of the World Bank. An abridged version of some of the detailed material in this chapter is forthcoming in the fall issue of the IMF quarterly *Finance and Development*.
- 2 At the time of this writing, of the countries having already ratified the Convention only one is a rich OECD country, the remaining 28 being emerging economies, as is the next set of countries about to ratify. Well over 100 countries have signed the Convention, which requires ratification by 30 countries in order for it to come into force. Once the Convention is ratified—which is imminent—the central challenge will be its effective monitoring and implementation by the countries.
- 3 A precedent-setting concrete case is currently in the making, thanks to the imminent return by Switzerland to Nigeria of funds looted during the Abacha regime and stashed in Swiss banks.
- 4 Kaufmann, 2003 and 2004.
- 5 The updated set of aggregate governance indicators is available at: <http://worldbank.org/wbi/governance> The complete methodology, new findings, and data may be obtained in Kaufmann et al., 2005.
- 6 See Appendix for a methodological explanation of how these estimates were derived.
- 7 The estimates come from Alcalá and Ciccone (2004), Acemoglu, Johnson and Robinson (2001), Kaufmann and Kraay (2002), and Rodrik, Subramanian and Trebbi (2004).
- 8 Caution in making precise comparisons across regional averages is warranted, since some regions are significantly underrepresented in the Survey. The Survey coverage has been steadily increasing over the years, and, with a current coverage of 117 countries in 2005, it is by far the broadest of any cross-country survey of firms. Yet it is typically those countries *not covered* in these surveys, such as some in the Middle East, Africa, and the CIS, which tend to rate lower in governance within their regions, compared with those surveyed.
- 9 Alonso-Terme et al., 1998.
- 10 Burnside and Dollar, 1999.
- 11 See Isham et al. (1997) and Dollar and Levin (2005).
- 12 See, for instance, the Report of the Commission on Weak States (2004), and Kaufmann (2004), each reporting on selected links between governance and security, areas which have typically been treated in isolation from each other. It is worth noting again the extent to which terrorism may often constitute the globalized result, in one country, of misgovernance in another.
- 13 See Kaufmann et al. (2005) for details.
- 14 Even the definitions and views as to what constitutes the investment climate tend to underestimate the importance of governance factors. Until very recently, the focus has been on a rather narrow and traditional set of factors comprising the investment climate, emphasizing economic, financial, and legal regulations by fiat, while divorced from the political dimensions of governance. A simple Web search illustrates the biases in how the investment climate is viewed and ana-

lyzed: of the almost 10,000 articles on investment climate since 1996 that come up in a search for prominent papers in the Factiva search engine (online at <http://www.factiva.com>) over 50 percent address issues related to economics or policy, 30 percent address monetary or financial factors, almost 20 percent address issues related to law or legal matters; yet less than 10 percent bring up issues related to corruption or governance. This means that in the literature, the treatment of the concept of the investment climate itself is not in tune with what the enterprises themselves report in surveys of what matters the most for their operations.

- 15 These are conservative estimates, and based on the sample of countries covered by the Survey. In countries not covered by the Survey, the prevalence of such bribes may be even higher, since there is a direct correlation between the propensity of multinationals to bribe, on the one hand, and the overall extent of domestic corruption in the host investment country, on the other.
- 16 Freedom House, online at: <http://www.freedomhouse.org>
- 17 For instance, the Survey reports that, while 29 percent of the respondent firms in 17 countries in sub-Saharan Africa reported very serious constraints in what the media could publish in their countries, the percentage of highly dissatisfied respondents in the same set of countries rose to 41 percent.
- 18 See Stiglitz (1999) and Sen (1981).
- 19 Further, there has been a particular paucity of literature on transparency which breaks down or unbundles transparency into its specific components, such that it becomes usable as policy advice and intervention. Our ongoing research attempts to partly fill these empirical and policy-related gaps. In a recent paper, we have reviewed the existing literature, and present various definitions of transparency, with a view to providing an empirical framework of worldwide indicators on various dimensions of transparency. These initial empirical results are intended to help bring about concrete policy and institutional innovations related to transparency reforms. See Bellver and Kaufmann (2005).
- 20 There is even significant variation in transparency within countries, such as differences in performance between the economic/institutional and political dimensions of transparency, or, related to this, differences in the way institutions within a country operate as regards transparency.
- 21 For details of participatory in-depth governance diagnostics at the country level, in which the country takes the lead in designing action programs, see <http://www.worldbank.org/wbi/governance/capacity-build>
- 22 It should be noted that there is more corruption in some of the richer OECD countries than in some emerging economies; thus the OECD must redouble its efforts among its own members.

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Appendix: The US\$1 trillion estimate of worldwide bribery: Synthesis of the approach¹

We present here, in brief, the method used to arrive at a rough estimate of the annual amount of worldwide bribery. Calculations are made under various scenarios and assumptions, which provide our range of estimates. A likely estimate derived from these calculations is roughly US\$1 trillion, although the confidence range may be relatively wide, as will be suggested in the following. Nonetheless, even under very conservative assumptions, the estimate is highly unlikely to be less than about US\$600 billion, while at the other extreme of the likely range of values it may well exceed an annual amount of US\$1.5 billion.

Additionally, we reviewed the available literature and explored alternative estimation procedures, as a sort of external validation of this estimation exercise, simply by comparing the rough estimates derived from our method with independent proxies drawn from other sources or studies. Following is a description of the approach.

The strategy for estimating the annual amount of bribes is based on available data from surveys, in which firms and households report on average annual bribery payments as a share of sales (for enterprises), or incomes (households). Based on these, we made extrapolations for countries not covered in these surveys, and then also assumed that the overall population exhibits similar patterns to those of the sampled population.

We utilized various enterprise and household surveys for this estimation, including two different enterprise surveys: the World Bank Enterprise Survey (WBES) carried out in the year 2000 in 81 countries, and drawing on 10,033 responses from firms (WBES 2000), and on the Global Competitiveness Survey in 104 countries, drawing on 8,729 responses (Survey 2004). We also used the results from household surveys carried out by the World Bank in the context of 16 different Governance and Corruption Diagnostic Surveys. From these we extrapolate and compute estimates of bribery worldwide. Given the gaps, measurement errors and difficulty of data collection in the area of corruption, mentioned earlier, calculations were made under multiple scenarios, utilizing different assumptions, ranging from least to most conservative. Indeed, the main objective of this exercise was to arrive at a preliminary *likely* range of estimates, rather than a precise point estimate, which would be misleading.

Bribery paid by the household sector was computed by first obtaining the estimated share of bribes in total incomes from the diagnostic surveys, carried out

between 1999 and 2003 in 16 countries. We mapped these available estimates of household bribery against the *control of corruption* indicator available worldwide from our aggregate Governance Indicators database (which is denominated in an ordinal scale), and regressed the reported bribe share from the household responses (dependent variable) against the control of corruption variable. The resulting coefficient from the regression and the actual values of the control of corruption variable was then used to have an estimate of the household bribe share for the countries, which did not have a direct measure from a country diagnostic report. This then gave an estimate of household bribery share in personal incomes for all countries. Each country estimate was multiplied by its GDP and then factored by 0.7, the estimate of the ratio of personal consumption to GDP.²

Estimates from corporate bribery were computed on the basis of two different surveys, utilized for alternative estimation scenarios, namely the WBES 2000 and the Survey 2004, respectively. In each scenario, we extrapolated worldwide bribe shares on the basis of quantitative responses of firms to the questions on the extent of administrative bribe share (in sales), as well as the bribe fees paid to secure public procurement contracts (as a share of the contract). Sensitivity analysis with multiple scenarios, under different assumptions, was done (including very conservative assumptions), in order to derive a broad-based range of likely bribery estimates.

In the case of WBES, worldwide administrative bribery was computed as the product of the world-weighted bribe share average and overall GDP (net of procurement), factored by 0.7, the assumed contribution of business to overall GDP. The bribe share average, in turn, was drawn from WBES 2000 findings, weighted by GDP per capita levels and converted using either mid-points (base scenario) or initial points (conservative case).

In the case of the alternative scenario based on the Survey, administrative bribery was computed as the product of the world-weighted bribe share average and overall GDP (net of procurement), factored by 0.7, i.e. contribution of business to overall GDP. The worldwide bribe and procurement shares, in turn, were drawn from Survey 2004 findings, weighted by GDP per capita levels.

The multiple scenarios, under many different assumptions, yielded multiple results and a range of estimates. Overall, 138 different scenarios were run, including 48 scenarios based on the WBES, and 90 scenarios

Appendix: The US\$1 trillion estimate of worldwide bribery: Synthesis of the approach¹ (cont'd.)

based on the Survey, and within each, under many different scenarios and assumptions about different degrees of “conservatism” in the data analysis. For instance, under many scenarios, instead of deriving the bribe share estimate from a firm by computing the midpoint in the survey questionnaire range questions, the initial point of each range, given as the option in the question was used.

Utilizing the 48 estimations derived by adding household bribery estimates to those for corporate bribery, based on the survey of firms from the WBES, we obtained an average bribery estimate of US\$1.25 trillion (with a median value of US\$1.18 trillion). If, instead of the WBES, we use the Survey figures for the estimates for bribery by the corporate sector, we get a lower estimate for average bribery of about US\$830 billion (median at US\$820 billion).

From the 138 scenarios used, if one were to leave out the extreme “tails” (5 percent in each tail), the range of (reasonable) estimates would range from \$604 billion to \$1.76 trillion. In summary, based on this exercise, a reasonable *range* of estimates for annual bribery would appear to be between US\$0.6 and well over US\$1.5 trillion a year, with a reasonable *midpoint* being close to US\$1 trillion. It should be noted that this rough estimate of around US\$1 trillion did not include the extent of corrupt leakages from public budgets or theft of public assets—or other forms of corruption, such as nepotism—since the focus was on estimating bribery transactions.

External checks and validation

In order to obtain a reality check on these rough estimates, we searched the literature for existing estimates in related areas. There were no existing estimates of bribery worldwide, hence the search was broadened to estimates of related areas such as the unofficial economy, money laundering, and the like. For other proxies for corruption, or related to it, we did a literature and data review search, and provide calculations for the unofficial economy and money laundering, as well as other bribery estimates. For the size of the unofficial economy, we rely on studies by Schneider and Enste (2002) and Friedman et al. (2000). For money laundering, we use an IMF study (Camdessus, 1998), as well as a paper by John Walker (1999). And finally, for other bribery estimates, however unreliable, we look at the results of an online survey, and report on a recent survey of corruption in Russia.

Unofficial economy estimates ranging between US\$3.4 to US\$5.1 trillion worldwide

The first, and lower, estimate of the unofficial economy, based on the data in Friedman et al. and part of the World Bank governance databank³ was computed as the sum of the products of individual unofficial country economy figures in 1997, and the associated GDP in 2002 (assuming no change in estimated shares in the last five years), adjusted by a factor of 1.19, on the assumption of a similar trend in unofficial economy shares in the countries missing from the database. A higher estimate was drawn from Schneider and Enste (2002), who provide estimates of the shadow economy in 76 developing and developed economies. Their findings highlight a large shadow economy. For 21 OECD economies they estimated the size of the underground economy as having moved from US\$2 trillion (12.7 percent of GDP) in 1989, to US\$3.4 trillion (16.7 percent of GDP) in 2001. It should be noted, however, that many unofficial economy transactions are not necessarily corrupt, and, conversely, many bribes and corrupt transactions do not necessarily take place in the unofficial economy.

Worldwide money laundering estimates: US\$600 billion to US\$2,800 billion

In a 1998 IMF study, it was estimated that the aggregate size of money laundering in the world could be somewhere between 2 and 5 percent of the world’s gross domestic product, or between US\$600 billion and US\$1.5 trillion. In an unrelated study, conducted by John Walker (1999), the author provides an alternative estimate of money laundering of US\$2.8 trillion. He does so by first estimating the numbers of crimes recorded by police in each country in each of eleven crime types, using data from United Nations Centre for International Crime Prevention database of recorded crime statistics, the UN Survey on Crime Trends, and the Operations of Criminal Justice Systems. The author then uses this model to estimate the total amount of money that is laundered within a country, or to a foreign country (per recorded crime). Such estimates are extrapolated for each country keeping accounts of corruption and income levels.

Other bribery estimates: US\$1 trillion and higher

Further, and separately, a “Worldwide Bribe-Fee Commission in Tainted Procurement” was drawn from

Appendix: The US\$1 trillion estimate of worldwide bribery: Synthesis of the approach¹ (cont'd.)

an online governance survey, carried out in 2003 by the World Bank Institute.⁴ The estimate was computed as the sum of the products of regional procurement figures (using 1998 worldwide procurement figures of US\$5.5 trillion) and the associated bribe shares in procurement. The latter was derived directly from the survey results, using midpoints. The resulting estimate from this independent Web source is about US\$1 trillion. It should be noted that this estimate focuses on one area of bribery, namely procurement. Particular caveats apply to this exercise, given margins of error, and potentially large sample biases (through voluntary surveys on the Web).

Finally, a new study estimating bribery in Russia (Satarov and Levin, 2005), if validated, would hint at a vastly larger estimate of worldwide corruption. The report estimated an annual bribe amount exceed US\$316 billion, or 73 percent of Russian GDP. Even if figures such as these are, in fact, substantial overestimates, and the actual figure is much smaller for Russia, the implications for worldwide bribery would suggest a global estimate that may vastly exceed an annual figure of US\$1 trillion.

Notes

- 1 A more detailed description is available from the author upon request.
- 2 Many variations of the base scenario were performed, and are described in detail in Kaufmann and Mastruzzi (2005).
- 3 Online at: http://www.worldbank.org/wbi/governance/govdata/unofficial_data.xls
- 4 See http://www.wbigf.org/hague/hague_survey.php3



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Accessibility of Government Information as a Determinant of Inward Foreign Direct Investment in Africa

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Abstract

Development priorities of African countries include achieving sustained economic and human development to reduce poverty by strengthening technological capacities and skills, improving access to world markets, creating more and better employment opportunities, and protecting and sensibly exploiting their natural endowments. To pursue these strategies confidently, the countries need significantly increased flow of investment capital, especially foreign direct investment (FDI). Unfortunately, Africa's share of global inward FDI flows and other forms of equity investments has been very low. A new wave of reforms in economic and political spheres designed to change this situation is yielding only very weak results due to the fact that the continent continues to suffer from high investor perception of risk far greater than warranted by objective factors. The negative investor perception and the consequent low capital inflows could be linked to inadequate information possessed by investors. The findings of this study that there is a direct relationship between high accessibility of government information and high inward FDI flows, go a long way to support this hypothesis.

1. Introduction

African countries face daunting development challenges. With 800 million people and vast natural resources, Africa's potential is high, but the performance of almost all African countries fall behind in the main dimensions of economic and human development. This state of affairs characterized by low tradable value creation, corruption, low human capital, massive health crisis, deep-rooted poverty and low life expectancy, is as a result of weak institutions and widespread exclusion of the large segments of the population from participation in economic and political activities.

It is now widely accepted that rapid development in Africa, including achieving the Millennium Development Goals (MDGs), rests on generating surpluses through innovation, massive value-creating investments, increased productivity and trade. In this vein, one of the main priorities of African leaders as outlined in the New Partnership for Africa's Development (NEPAD), is to attract foreign direct investment (FDI) as a means of improving Africa's share of world trade and to move African countries from the margins to the centre of the global economy (North-South Institute, 2003).

2. FDI in economic and human development

Research results tell us that there is a correlation between FDI inflows and host country economic and human development - when the transfer of the tangible and intangible gains of FDI to appropriate sectors is managed effectively. The following are among the gains FDI inflows bring to a country:

Dependable foreign capital: FDI increases productive financial resources in a host country by bringing in foreign exchange and supplementing domestic savings. Typically invested in long-term projects, FDI is a dependable source of foreign capital, as it does not take a quick flight during most financial crises, and it is easier to service than commercial debt or portfolio investment (Lipsey, 1999).

New knowledge and best practices: FDI brings new knowledge to a receiving country. Inflow of new knowledge may benefit domestic firms through imitation and learning of best practices, increased competition in local markets, as well as efficient local labour mobility and virtual knowledge linkages among firms (Busse and Groizard, 2006).

Technology and innovation: Foreign firms bring in proprietary and new technology to an economy. They also can easily adapt technologies to local conditions, set up local

R&D facilities, and stimulate technical efficiency and technical change among local firms, suppliers, clients and competitors.

Market access: Foreign investors can provide access to foreign markets for goods and services that exploit a host economy's comparative advantages. The growth of exports itself offers benefits in terms of technological learning, realization of economies of scale, and gaining of knowledge of the investors' home country markets.

Environmental management: Environmental sustainability can be enhanced by FDI, especially from transnational corporations (TNCs), which are leaders in developing clean technologies and modern environmental management systems. And the spillovers of technologies and management methods can potentially enhance environmental management in local firms.

Stimulus for good governance: Global mobility of capital limits the ability of governments to pursue bad policies, as FDI acceptance may come with more openness and disclosure requirements from home countries of foreign investors.

Tax revenue: Profits generated by FDI contribute to corporate tax revenues in the host country.

3. FDI inflows to Africa

Over the last ten years, the share of global FDI inflows to Africa's 53 countries of 800 million people averaged less than 2%, which is less than the percentage inflows to Singapore with a population of about 4.5 million. The quality of the flows is also poor, as the largest portion goes to extractive sectors especially petroleum and solid minerals, which tend to have a less pronounced impact on productivity and poverty reduction than investments in other sectors such as manufacturing and services.

Table 1 below shows a comparative picture of the global inward FDI performance by region for the period 1988-2003. A rating of above 1.00 means performance is above global mean, and below 1.00 means performance is below mean. It can be seen that Africa as a region fared less than all other developing regions throughout the period. Its above global performance in 2001-2003 was due to the sky-high commodity prices, which attracted "gold rush" risk capital into Angola, Equatorial Guinea, Nigeria, and Sudan. These four natural resource-rich countries along with Egypt accounted for roughly 50% of FDI inflows to Africa during this period.

Table 1: Inward FDI Performance Against a Global Benchmark by Region, 1988–2003

Region	1988–1990	2001–2003
Global	1.00	1.00
Developed countries	1.03	0.92
Developing countries	0.99	1.25
Africa	0.70	1.16
Latin America and Caribbean	0.90	1.42
Asia	1.09	1.19
Central and Eastern Europe	1.04	1.35

Adapted from World Investment Report, UNCTAD (2004); and Dupasquier and Osakwe (2006)

Despite this significant change, Africa's share of FDI flows worldwide remained low, clearly underlying the very low assessed potential for inward FDI of African countries.

Table 2 illustrates clearly illustrates how poorly most African countries perform on inward FDI inflows. Even then, the majority of African countries are still awaiting the realization of their inward FDI potential as can be seen on table 2, which presents inward FDI achievement rating (difference between potential and performance) for African countries for which was available. The figure was calculated using median Inward FDI Performance Index (2000-2004) and median Inward FDI Potential Index (1995, 2000-2003) from the *World Investment Report 2005*. Median figures were used because they offered the most representative data.

Table 2: Relative Performance of African Countries on Inward FDI (showing performance above or below assessed Potential)

Economy	Performance Above or Below Potential		Economy	Performance Above or Below Potential
Libyan	96		Malawi	-17
Gabon	52		Ghana	-18
Egypt	39		Congo, DR	-22
Cameroon	22		Cote d'Ivoire	-28
Algeria	19		Madagascar	-30
South Africa	14		Nigeria	-34
Botswana	1		Uganda	-36
Tunisia	-1		Benin	-37
Kenya	-4		Namibia	-41
Sénégal	-4		Sierra Leone	-48
Burkina Faso	-6		Togo	-49
Niger	-6		Ethiopia	-72
Guinea	-7		Zambia	-73
Zimbabwe	-10		Mali	-75
Rwanda	-11		Congo	-76
			Gambia	-95

Formulated from data from UNCTAD, 2005 (World Investment Report 2005)

It can be seen from the table above that indeed Africa's potential for inward FDI is grossly under-tapped, as only seven (7) of the 37 African countries studied perform at or above potential. That means that only about 4% of African countries are performing well on inward FDI. It can also be seen that six of the seven best performers are resource-rich countries, showing that FDI in Africa at present is extracting instead of creating wealth.

4. Market Failures due to Information Failure

Foreign direct investment and the benefits of FDI do not accrue automatically. Normally, countries must work for them. That much of Africa's potential for FDI is unutilized represents major market failures across Africa as a result of the failure of most countries to communicate appropriate information about their endowments in adequate quantity and through proper channels. Because the objectives of foreign

investors differ from those of host governments: governments seek to spur national development, while foreign investors seek to enhance their own competitiveness to maximize profits in an international context (UNCTAD, 1999) – policy measures and communication of information must aim to achieve congruence between investor objectives and country economic objectives. To achieve this congruence, governments must use policy instruments, comprehensive information services and country institutions to link investors and opportunities. This is to say that opening up economies by providing a level playing field and letting investors respond to market signals is sufficient only to the extent that markets work efficiently. To achieve the desired results, deliberate information dissemination about investment policies, geographic and human factors, as well as business climate need to be carried out as a last mile programme to attract foreign investors.

5. The Link between FDI Inflows and Accessibility of Government Information

In searching for a strong link between government information and inward FDI, it was necessary to establish what attributes of a country's information disposition would matter most to investors. Availability of information is the first necessary attribute, followed by awareness of what is needed, and then the accessibility of the available and needed information. Accessibility emerged as the most important factor on which analysis could be anchored.

In determining what constitutes accessibility of government information that is comparable on the basis of the timeframe of the data used in evaluating inward FDI flows for the various countries, standardized information was sought and found in *Benchmarking E-government: A Global Perspective* (United Nations, 2002) compiled by the United Nations Division of Public Economics and Public Administration (DPEPA) in collaboration with the American Society for Public Administration (ASPA). Two overlapping indices presented in that work: E-Government Index and Access to Information Index were found to encapsulate accessibility of information. E-government index captures the capacity of a country to sustain the development and delivery of online information services. It incorporates accessibility of government information enabled by official online presence, telecommunications infrastructure to facilitate information flow, and human development capacity to manage and disseminate information; while Access to Information Index incorporates elements that measure public access and dissemination of information and public sector corruption due to opaque processes. The data to formulate Access to Information Index were compiled by Transparency International and Freedomhouse International. The indices were considered to be composite enough to capture the essence of accessibility of government information in this digital age, and hence very suitable for the purpose of this paper.

Information Access Index forms part of E-Government Index in their originators' conception, but it was used on its own for the purpose of this paper because it directly measures the essential intermediate outcomes of information accessibility irrespective of the level of information and communication technology (ICT) infrastructure. This methodological adjustment is particularly practical given the African context in the early 2000s (the time scope of the research) when ICTs in government were still in their very infancy in Africa.

Table 3 shows the global comparative summary of accessibility of information by regions.

Africa lags on both access to information index and e-government index. Africa's mean e-government index is just half of the global mean, and four times lower than North America's.

Table 3: Accessibility of information by Continent

Economy	Information Access Index (2001)	E-Government Index (2001)
Global	0.646	1.62
Africa	0.446	0.84
Asia/Oceania	0.446	1.34
Europe	0.863	2.01
South America	0.740	1.79
North America	0.916	2.60

Table 4 displays the performance of African countries on the two dimensions of accessibility of government information. It can be seen that in Africa, only Egypt achieved e-government performance that was above the global mean. All other African countries performed below global average.

Table 4: Accessibility of Information as Measured by E-Government Index and Information Access Index

Economy	Information Access Index Max=2	E-Govt Index Max = 4.00	Economy	Information Access Index Max=2	E-Govt Index Max = 4.00
Egypt	.250	1.73	Tanzania	.500	0.83
Libyan	.001	1.57	Sénégal	.583	0.80
South Africa	.916	1.56	Madagascar	.667	0.79
Morocco	.416	1.47	Zimbabwe	.250	0.76
Tunisia	.250	1.36	Burkina Faso	.500	0.75
Djibouti	.416	1.35	Zambia	.416	0.75
Algeria	.250	1.27	Mozambique	.583	0.71
Gabon	.416	1.17	Sierra Leone	.416	0.68
Cote d'Ivoire	.460	1.05	Guinea	.250	0.65
Nigeria	.500	1.02	Namibia	.750	0.65
Botswana	.833	1.01	Togo	.333	0.65
Cameroon	.83	0.99	Gambia	.167	0.64
Ghana	.750	0.98	Malawi	.667	0.64
Congo	.333	0.94	Mali	.750	0.62
Mauritania	.250	0.91	Ethiopia	.333	0.57
Kenya	.250	0.90	Chad	.250	0.55
Angola	.167	0.85	Niger	.500	0.53
Mauritius	.916	0.84	Uganda	.250	0.46

Source: United Nations, 2002

However, the purpose of the research is not to rank African countries on e-government and FDI inflows, it is to see whether there is a strong link between inward FDI achievement and accessibility of government information.

To determine the link, 31 countries were used. These are the ones which had both information for inward FDI and accessibility information indices. These countries were divided into two: 16 countries were at or above African average for relative FDI performance, and the other half scored below the African average.

These two categories were displayed on a four-window matrix according to their performance on accessibility of government information. A country which scored above African average for either e-government index (0.84) or access to information index (0.446) is scored above average for accessibility, and a below average score on either of the two, got below average score for accessibility. The result is displayed on Table 5.

Table 5: Relative Inward FDI Performance Compared Against Accessibility of Government Information

Relative Inward FDI Performance	Above African Average	Algeria, Botswana, Burkina Faso, Cameroon, Cote d'Ivoire, Egypt, Ghana, Kenya, Libyan, Malawi, Niger, Senegal, South Africa, Tunisia	Gabon, Guinea
	Below African Average	Madagascar, Mali, Mozambique, Namibia, Nigeria, Tanzania	Angola, Congo, Ethiopia, Gambia, Sierra Leone, Togo, Uganda, Zambia, Zimbabwe
		Above African Average	Below African Average
Accessibility of Government Information			

It was found that 14 of the 16 (88%) countries with above average inward FDI, scored above average for accessibility of government information, and 9 of 15 (60%) with below average inward FDI also scored below average on accessibility of government information. Even more confirming of the link is the fact all the seven countries that performed above their inward FDI potentials all had above average scores on accessibility of government information.

Accessibility of government information seems to correlate with positive perception also. In a UNIDO investor perception survey, the five countries which scored above average on government information accessibility were ranked the most attractive to foreign investors in Africa for the period 2000-2003, they include South Africa, Nigeria, Botswana, Côte d'Ivoire and Tunisia. Also among the five countries that were most frequently mentioned as regards the creation of a business-friendly environment: Botswana, South Africa, Nigeria, and Côte d'Ivoire, scored high on accessibility of information too (UNIDO, 2003).

6. The value of government information in attracting inward FDI

How does government information contribute to investor decision-making? From my analysis I could identify five ways in which government information influence FDI decision-making:

- a) it enhances an investor's knowledge of the behaviours and operations of institutions in a target economy;
- b) it helps reduce uncertainty about future changes in policies and administrative practices in the business environment,

- c) it increases transparency of transactions involving state and non state actors;
- d) it contributes data and perspectives on how best an investment project can be initiated and managed; and
- e) it contributes to the creation of country image and affect investor perception.

6.1. Accessibility of Government information enhances the knowledge of institutions in the investment environment

Institutions are rules, enforcement mechanisms and organizations (World Bank, 2002; Rodrik et al, 2002). Institutions facilitate information flow and transactions cross sectors and among legal persons, enforce rules of equity and resource utilization, and promote competition. They form the bedrock of effective economic development.

The most important determinant of investor success is the quality of knowledge it has about institutions in the business environment, because as can be seen from the above definition, institutions rule in matters of markets and public management. Hence, the firm that knows the institutions, knows the economy as well as the polity. And the more quality information a firm has about what institutions exist and how they operate, the more understanding of their behaviours and operations it would have.

Government information gives perspective pictures of the performance of institutions. Hence, the more comprehensive, regular and complete the information provided, the more knowledge of institutions would be afforded investors.

6. 2. Reduction of uncertainty about future policy and administrative changes

A core constraint on foreign investment by firms is uncertainty and asymmetric information (Audretsch and Weigand, 2005). This thesis suggests that corporate investment opportunities can be represented as a set of real options to acquire productive assets, and that the present values of cash flows generated by these assets are uncertain and that their evolution can be described by a stochastic process. Consequently, identification of the optimal exercise strategies for the real options plays a crucial role in capital budgeting and in the maximization of a firm's value. Within such a framework, the implicit assumption is made that the firm has virtually no information about the mechanisms governing the shocks in the economy. Hence, the shortest average expected time to invest is strictly associated with positive change in the perception of uncertainty (Grzegorz and Kort, 2005). The main means of changing perception of uncertainty in foreign investment situation is the accessibility of relevant government information.

6.3. Accessibility of Government Information increases transparency of transactions involving state and non-state actors

The subject of transparency focuses on a state of affairs in which foreign participants in the investment process are able to obtain sufficient information from host governments in order to make informed decisions and meet obligations and commitments. At the same time, however, transparency issues may also be of particular concern to the host country in an investment relationship. At the broadest level of generality, the host country may wish to have access to information about foreign investors as part of its policy-making processes and for regulatory purposes. Similarly, the host countries and the foreign investor may want to have access to information concerning investor's home country measures designed to promote development oriented outward FDI (UNCTAD, 2004).

The overriding aim of transparency in relation to FDI policy is to enhance the predictability and stability of the investment relationship and to provide a check against circumvention and evasion of obligations by covert or indirect means. Transparency demands clear rules and expectations, and information about them in order to monitor performance (World Bank, 2006). Thus, transparency is served when the following information related events, among others, occur in an investment context: dissemination of information on investor support measures, information about business conditions and opportunities in host countries is targeted to prospective investors, and when open and free access to information creates a climate of good governance, including, for example, a reduction of the likelihood of illicit payments in the investment process.

In relation to government information, the categories of items used to promote transparency include:

- a) general host country policies that may be of importance to investors;
- b) laws and regulations;
- c) administrative rulings and procedures, including the criteria and procedures for applying for or renewing relevant investment authorizations, as well as to deadlines for processing applications;
- d) specific administrative decisions as evidence of application of policies, laws and regulations;
- e) information relating to proposed laws or regulations, which may be disclosed to afford interested parties the possibility to express their views on such proposals before their final adoption;
- f) judicial proceedings in open courts;
- g) instruments that demonstrate general commitment to the rule of law;

- h) publications on the process of conducting government business, including procurement and privatization procedures; and
- i) issuances on government budgets and planned business events, including information on projects, privatization and other forms of asset disposals.

Means of assurance of information access include consultation and information exchange, making information publicly available and accessible, answering requests for information, and notification of requirements of specific measures to investors. Freedom of information laws go further to provide legal persons, including firms, with the objective right to access government information.

6.4. Contribution of data and perspectives on how best the investment project can be initiated and managed.

Goldstein and Razin (2006) demonstrates that the choice to make direct investment instead of portfolio investment in a particular economic space is highly information-intensive. This is to say that foreign direct investors attempt to know a great deal more about the fundamentals of their investment projects than foreign portfolio investors because they take more risks and expect to manage their projects themselves. Therefore foreign direct investors require much more pre-investment information. They like to know how administrative and legal process would affect their activities and returns, as well as the costs of setting up facilities, operating them, dealing with labour issues, importing and exporting goods, and paying taxes. The more accessible those sets of information are the faster the decision on a direct investment is made.

6.5. Information can be used to build a positive country image and affect investor perception

Despite good resource base and strong economic fundamentals, it is still possible for a country to receive lower FDI than its potential if it has a generally negative image. Country image affects perception and investment inflows. Hence the use of specialized and general forms of government information to build a positive image of a country is a legitimate practice.

7. Investment Promotion or Information Targeting

In addition to opening up their economies, African countries have emphasized investment promotion through the use of investment promotion agencies (IPAs) as the main informational cum incentives strategy to attract FDI. Unfortunately research has

shown that IPAs in Africa have been minimally effective in attracting the right investors (UNIDO, 2003).

Effective promotion should go beyond simply “marketing a country” to provide targeted information services. In general, incentives play a relatively minor role in a good promotion programme, as good long-term investors are not the ones most susceptible to short-term inducements. IPAs must therefore be prepared to use information targeting to address specific investor needs and attempt to alter the perception of potential investors by providing more and better information. Such promotion efforts are highly skills-intensive and potentially expensive, therefore they need to be carried out by professionally qualified and experienced personnel to maximize their impact. The experiences of Ireland, Singapore and Costa Rica suggest that jointly using incentives and information targeting can be quite effective in raising the inflow of investment and its quality (United Nations 1999).

8. Conclusions and implications

Certain country characteristics are cited as attracting FDI, including sound macroeconomic policy management, political freedom and stability, physical security, reliable legal frameworks, an open trading environment, competent institutions, and no or low corruption. Regulatory regimes based on transparency, predictability, and fairness is also important. But the potency of these conditions is dependent of the accessibility of information, especially government information, because foreign direct investors are affected by market failures due to their lack of adequate information due partly to geographical asymmetry of information accessibility (Portes and Rey, 2000).

Countries in Africa should re-examine their investment promotion strategies to include information targeting so as to do more than simply “marketing a country.” To make this move would mean the adoption of a new form of investment information strategy designed to remedy the information or coordination failures in the investment process, which can lead a country to attract insufficient FDI, or the wrong quality of FDI.

This work breaks the ground for further research on the link between access to government information and FDI inflows. It also points to the need for targeted as well as generic information production and dissemination by African governments to address the decision-making requirements of foreign investors. Governments hoping to attract FDI must first close investors’ information gaps before they can close their countries’ inward FDI gaps.

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Access to Information and Pro-Poor Development: Lessons from Two Cases in India

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Even those who are sympathetic to the argument that transparency is an essential feature of democratic governance are sometimes dismissive of the idea that access to information is a key element of pro-poor development – that is, for the realization of social and economic rights. The oft-expressed view is that disadvantaged social groups – not just people with low-incomes, but those who have faced discrimination on the basis of gender, religion, race, or ethnicity – ‘can’t eat information.’

This is true, of course, and it is certainly the case that advocates of enhanced citizen access to publicly held information often overstate the likely impacts of legislative and regulatory changes that enhance transparency. For instance, many e-governance programmes have been hyped to such an extreme degree that when they fail to deliver the promised benefits the result is a sense of disillusionment that taints the entire transparency agenda.

There is also the view – similarly inflated by skeptics, but also containing considerable truth – that the ‘costs’ of making information accessible frequently outweigh the benefits. These costs include not only the time and energy required to establish a regime of information-access (passing legislation, framing administrative procedures, instituting oversight mechanisms), and to operate it effectively, but also the undermining of public-sector initiative that can result when officials fear that their actions will be subjected to scrutiny, *ex post*, by external assessors with little understanding of the context in which policy options were debated, consensus generated, or decisions taken. Even if exaggerated, especially by those with an interest in maintaining high barriers to information-access, these concerns do reflect a genuine phenomenon.

There are several factors that fuel suspicion of ATI as tool of improved pro-poor governance. The first concerns evidence. It is difficult, if not impossible, to make the case on the basis of statistical data that access to information has improved outcomes for disadvantaged people – whether expressed in terms of ‘rights’ (procedural or substantive), or in terms of concrete developmental outcomes. There are too many other variables involved in the process of governance to attribute positive (or indeed negative) trends to increased access to information. And there are of course many places where rapid poverty reduction has taken place amidst highly opaque public-sector bureaucracies. The case of China, where more people have been lifted out of poverty in a shorter space of time than perhaps anywhere else in history, is a frequently cited case. A slightly less visible example is Vietnam, where a ruling party that maintains a tight grip on official information has nevertheless improved human development indicators in similarly dramatic fashion over the past dozen years.

But even if we accept that such criticisms have some validity, they do not in themselves constitute sufficient grounds for halting what is by now a widespread movement for greater access to publicly held information. Given the role of access to information as a global norm, a recognized right in a variety of international treaty instruments, it is not unreasonable to conclude that the burden of proof is on those who resist greater openness. In other words, where is the evidence that China or Vietnam would not have reduced poverty as quickly had their governments moved more rapidly (or at all, some critics might say) to increase access to government-held information?

Socioeconomic Rights and Accountability-Deprivation

The benefits of ATI for social and economic rights can be portrayed in various ways, but it is perhaps best to think of ATI as an element in the strengthening of accountability institutions so that they better support human development (understood as the progressive acquisition of freedoms and the capacities to exercise them). The *lack* of accountability – the failure of oversight institutions of various kinds – is a crucial reason why people fail to experience as a concrete reality the national and international rights protections their government’s ostensibly provide them. The impunity with which government officials and other holders of power operate contributes directly to at least four types of human development deprivation (these could as easily have been classified as rights deprivations): (1) declining physical security (when, for instance, police forces escape civilian oversight); (2) eroded environmental quality (when regulators are bought off); (3) reduced access to decent livelihood opportunities (when labour markets are rigged to benefit powerful employer groups; and (4) reduced access to capability-enhancing services (most notably, health and education, but also access to courts, well-functioning citizenship services, and so forth).

The idea of accountability contains within it a large information-access component. The very essence of accountability – one party requiring answers of another, and potentially suffering sanction if unforthcoming or unconvincing – involves actors seeking, shaping, and concealing information. To exercise surveillance over someone you are holding accountable requires the party under scrutiny to part with information relevant to his or her performance. When in possession of sufficient data (whether qualitative or quantitative), one can engage in informed deliberation with officials to whom power has been delegated. Officials' explanations for their actions – which often highlight extenuating circumstances, sometimes convincingly – involve a form of reasoning that becomes meaningless unless there has been a sufficient degree of information dispersion. Information is necessary, though not sufficient, to holding the powerful accountable; and without systems of accountability, social and economic rights tend not to be realized.

Making public agencies more accountable to the citizens they serve is a central part of building effective states that can deliver poverty reduction. Understanding accountability means analysing relationships between power holders and those affected by their actions. The key actors in accountability relationships are the delegator (the principal) and the delegate (the agent). In the context of governance and development, examples of principals and agents include voters and politicians, service users and service providers, activists who file public-interest litigation and government officials whose decisions have been challenged, aid donors and partner governments, and so forth.

In fact, accountability centres upon one of the oldest human problems, found in many relationships but particularly acutely in the case of governments and large organisations: the problem of delegation. Government officials and other actors whose power affects large groups of people operate under grant of authority vested in them by the public at large (implicitly or explicitly).ⁱ

However, *delegates* often have incentives that put them at odds with their *delegators*, those from whom they derive their mandate. This gives rise to the need for monitoring and surveillance over the power holders. An essential accountability challenge is how to engineer a system that empowers public authorities to undertake work on a large scale, and provides them with the flexibility to experiment and innovate, while still holding these powerful actors accountable for their performance.

Accountability requires power-holders to:

- a) answer to constituencies -- explain/justify actions (answerability);
- b) suffer sanctions for poor decisions or criminal acts (enforcement).

These two processes are sometimes seen as ‘weak’ and ‘strong’ forms of accountability. Being accountable in the sense of having to explain one’s actions is a lot less onerous than being subject to sanction.

Answerability

- Explanation: A less demanding form of answerability requires a holder of delegated power simply to furnish an explanation, or rationale, for his or her actions. For instance, when asked by a group of concerned citizens why a building permit was issued for a structure that encroaches on common lands, planning officers typically supply vague, formulaic answers – for example, that permission was granted because all required steps under the relevant legislation were taken. Such a response provides little of substantive value for people seeking a full justification of how competing considerations were weighed.
- Information: But when the explanatory component to answerability is combined with an information component – for instance, an obligation of full disclosure that requires officials to reveal the evidence basis upon which decisions were taken, such as supporting documentation and testimony from experts consulted – then officials find it harder to get away with explanations based on unsound logic. This ‘hardens’ accountability, even in the absence of workable enforcement mechanisms.

Enforcement

- Adjudication: Adjudication involves a determination as to the persuasiveness of an official’s explanation of his or her conduct and outcomes. Adjudication is undertaken on the basis of available information and in the context of prevailing standards, which may change over time.
- Sanctioning: After the assessment of performance has been made, an enforcement actor must decide on the nature of the penalty to be applied. This process involves at least three elements:
 1. assessing the future *deterrent* effect of competing sanctions;
 2. considering whether *justice* will be seen to have been done by the public, and
 3. calculating the *capacity* of the sanctioning authority to carry out the chosen form of enforcement.

So as we can see, information is an important element in all accountability mechanisms. And since the idea of accountability is central to democratic

governance, we can see a direct line leading from the foundations of democracy to the notion of transparency.

Two Cases from India

Two case studies from India may help to illustrate how the link from democratic (ie accountable) governance can lead through transparency, toward the realization of social and economic rights in practice. It is important to emphasise that, in both cases, information must be actively sought and operationalised by vigilant citizens and their associations in civil society. In addition, in their different ways (one by positive example, the other by negative example) these two cases illustrate a practical point: whether or not a country possesses generalized public ATI legislation, it is advisable to build additional (sector-specific) transparency provisions into key pieces of economic or social legislation.

In making the case for the practical benefits of information-access – in terms of the realization of socio-economic rights or, more prosaically, the promotion of pro-poor development – it is helpful to distinguish between two types of activities in which citizens are engaged: the productive and the redistributive. Each of the two case studies discussed below represents a particular type of government initiative – one related to the productive economy, the other to the redistributive realm of public administration.

1. NREGA

We will begin with the redistributive realm – where, in India, the losers from economic liberalization are supposed to be cushioned from dislocations created by the globalization of the Indian economy. The National Rural Employment Guarantee Act 2005 is the flagship social-protection initiative of the United Progressive Alliance coalition government that has ruled India since 2004. The NREGA is a New Deal-style programme that creates unskilled labour opportunities for people and whole regions suffering unemployment and chronic underemployment. The NREGA extends this concept radically by ‘guaranteeing’ employment for each rural household that demands it. It is a right-to-employment programme, albeit of limited proportions (providing a maximum of 100 days of labour per household).

While employment-generation schemes are considered well targeted (because only the truly poor would be willing to undertake such onerous work), they are also prone to other forms of corruption – most notably the padding of payrolls with ghost workers, whose ‘wages’ (kickbacks to the scheme’s administrators) are taken from payments due *genuine* workers, hence the underpayment of wages that is such a huge source of economic distress in rural India. If corruption could be fought in such circumstances, it would make the right to employment (and all the other rights that access to a secure income helps to make available) that much more of a concrete reality.

With precisely this in mind, the framers of the NREGA included specific provisions to enable workers -- who might otherwise unfairly lose part of their wages -- to monitor the actions of project administrators. This meant gaining access to information about project work sites, the number of workers employed, the hours billed, the quantities (and price) of building material delivered, and so forth. All this information must, under the statute and the regulations framed to operationalise it, be provided without hindrance and under threat of material penalty to the officials concerned.

An important aspect of the NREGA's ATI provisions is their full-spectrum nature: they stretch from the beginning of the project lifecycle (the identification of a road-repair site, the dissemination of programme eligibility guidelines), all the way to its completion (including the auditing of physical assets created under the scheme, and the accounts submitted in connection with their completion). Due to the thoroughness of its designers, the NREGA has, in effect, created a full-fledged 'information regime', in which specific actions trigger the release and (in some cases) dissemination of data/records/reports to specified groups. All of this is underwritten by a specialized Information Technology platform devised for the NREGA's implementation. The IT platform tracks each works project and each individual work applicant in ways that severely reduce the scope for officials (and their accomplices in local politics) to doctor records and thereby cheat workers of their wages.

The IT system allows various levels of access, permitting both individuals and (more plausibly) local activists working on their behalf, to obtain financial records, which can then be cross-checked against information provided by local workers/citizens. This process of collective verification is itself built into the NREGA, which stipulates that works projects must be subjected to popular audit in the relevant local government forum (in this case, the village assembly). The rules for conducting such an audit are set forth in detail.

If the idea of collectively auditing expenditure on employment-creation programmes sounds familiar, that is because over the past decade and a half, among the most inspirational examples of using information to advance socioeconomic rights involved precisely this method. The Indian social-activist group, the MKSS, pioneered these social audit procedures in informal/non-official hearings in various parts of Rajasthan throughout the late 1990s. After successfully lobbying the Rajasthan government to pass a right to information act, as well as to change the local government act to require public auditing in local councils throughout the state, the MKSS found itself, in the early years of the current decade, in the midst of a campaign demanding that the Rajasthan government adopt an employment guarantee act along the lines of what had existed in the western state of Maharashtra since the early 1970s. The MKSS activists and likeminded advocates in civil society ended up, by late 2004, convincing not so much the lame-duck chief minister of Rajasthan as the leader

of the Congress Party, Mrs Sonia Gandhi. Mrs Gandhi became a strong believer that a nationwide EGS would help to demonstrate that the incoming (Congress-led) UPA government was, unlike its BJP-led predecessor, concerned about those left behind in India's rush toward prosperity. MKSS and like-minded activists joined the National Advisory Council, which Mrs Gandhi led as a kind of party/coalition think tank. It was via this body that ATI activist groups were able to make the NREGA as progressive a piece of legislation as it became.

The NREGA's transparency provisions were put in place, it should be noted, despite the fact that India already had a Right to Information Act, and was passing a new and better version at the very time the NREGA was being formulated and debated. The transparency provisions in the NREGA go beyond mere information-provision, or the compilation of data on programme inputs and outputs. The NREGA provides disaggregated and actable information, which allows engaged citizens to audit in detail the low-level bureaucrats whose actions most directly affect their development prospects.

This kind of direct-citizen engagement in the accountability process – using an information regime built around a specific government programme – represents a new channel, or axis, of accountability, which combines features of the two standard channels: vertical and horizontal accountability. In *vertical* accountability institutions, states are held to account by citizens, jointly and severally, whether through elections and other *formal* processes, or through lobbying or mass mobilization, both of which rely on the existence of a set of *informal* institutions (such as the press, social networks, etc). This is the most direct form of accountability, but faces huge challenges (e.g. clientelism). *Horizontal* accountability institutions are those in which state entities demand answers from (and sometimes possess the power to sanction) other state entities. Auditors-general, anti-corruption commissions, bureaucratic oversight boards, Parliaments (e.g. parliamentary committees and commissions) – these and other bodies stand in for citizens who generally lack the time, expertise, and collective-action resources to monitor the detailed work of their public representatives. Unfortunately the lack of balanced gender representation within these institutions can further entrench gender inequalities at a societal level.

More recently, a third category has emerged thanks to increased efforts by citizens to engage directly in state processes once reserved for state agencies.ⁱⁱ This category concerns the direct engagement of ordinary people with service providers and state budgeting, auditing and other oversight processes which have traditionally been the arena of state actors alone. Combining elements of vertical and horizontal accountability, experiments in direct citizen engagement amount to hybrid forms of accountability, located somewhere in between.ⁱⁱⁱ In this sense, they can be thought of as representing a '*diagonal*' channel of accountability.

Such efforts to by-pass cumbersome or compromised formal accountability systems in order to participate in expenditure tracking, public hearings, and so on, are sometimes referred to as '*direct*', '*social*' or '*demand-side*' accountability processes, and possess three main characteristics:

- they by-pass the formal institutional intermediaries that slow down or subvert accountability processes;
- they seek answers *ex ante* from policy-makers as opposed to the conventional *ex post* approach to accountability (e.g. participatory budgeting);
- they focus on the fairness of outcomes, not just procedural correctness.

2. India's Special Economic Zones

The second case that demonstrates the importance of ATI to the realization of social and economic rights comes from India's productive economy of private markets, whereas the first was drawn from the redistributive realm of public policy. This second case, Special Economic Zone Act 2005 was passed in the same year as the NREGA. But its relationship to transparency is far more problematic than in the case of the NREGA.

The SEZ Act was passed by parliament in order to allow the creation of Chinese-style Special Economic Zones (SEZs), enclaves whose tax breaks and relaxed regulatory requirements are intended to attract foreign investment, spur the creation of world-class infrastructure, and create jobs. Since February 2006, when the SEZ Act came into force, India's usually slow-moving bureaucracy has acted with unprecedented vigor, clearing proposals for more than 400 SEZs.

India's adoption of the SEZ concept was, according to a former commerce minister, 'inspired' by the success of China's SEZs, which turned sleepy provincial backwaters like Shenzhen into global manufacturing hubs in less than two decades. Even so, India's SEZ policy is strikingly different from the Chinese one. In China, the emphasis was on large sites – industrial cities, really – whereas Indian SEZs can be as small as 10 hectares (about 25 acres, or 1.07 mn square feet). The theory behind SEZs favors larger sites. In the absence of scale, it is difficult to recoup the costs of building world-class infrastructure. Additionally, without a critical mass of firms in a given sector, the synergies arising from 'clustering' are lost. Moreover, China's SEZs were established on land belonging to the state, and developed by Chinese government agencies in anticipation of leasing space and facilities to private firms. In India, the policy framework relies largely on private developers to own, develop, and operate the SEZs.

Tailoring foreign ideas to fit domestic circumstances is not necessarily a bad impulse. But the design of India's SEZ policy, and the manner in which it has been implemented, raises suspicious that the Chinese model was indigenized

not so much to suit India's national interest as to benefit elite interest *groups*. These include prominent industrial houses, real estate developers, and last, but by no means least, the politicians and bureaucrats who stand to gain (politically and personally) by acting as midwives at the birth of SEZs. By approving hundreds of small SEZs throughout India, the government has adapted the policy concept to India's democratic context, where placating powerful interests across the country helps to cultivate broad-based support among the political elite.

The very existence of this 'spatial' form of development policy – where liberalization is confined to defined jurisdictions – is a reflection of the fact that India, as a whole, is considered not ready (politically speaking) for radical economic change. That being the case, liberalizers maintain, why not simply confine reforms to those parts of the country that are prepared to embrace liberalization? Through the expedient of SEZs, the cutting edge of reform can be applied selectively, creating a patchwork of tiny hyper-liberalized jurisdictions dotting the country. Political resistance to reform could thereby be fragmented. Unfortunately, confining the vanguard of the reform agenda to just a small fraction of India's landmass has not quelled political resistance in quite the fashion that the SEZ policy's architects in Delhi had hoped.

To implement the policy, the central government must rely on India's state governments to assist SEZ developers to acquire land, to obtain the necessary clearances from state-level agencies, and to shepherd SEZ applications through the approval process in New Delhi. States are pleased with the investment-promotion opportunities the new policy makes possible, and have acted with remarkable alacrity to facilitate the process. State governments have thus demonstrated a high level of 'buy in' to the SEZ policy. And because state governments are ruled by a wide array of political parties, many of whom sit in opposition in the national parliament, their participation as enthusiastic implementers of the SEZ policy should, in theory, weaken the association of the policy with solely the parties that make up the United Progressive Alliance coalition government in Delhi. This should make the SEZ policy a much less partisan issue.

However, none of the state or non-state actors involved in the SEZ policy have operated with anything like a sufficient degree of transparency. Where the NREGS made ATI a central pillar of its design, building transparency provisions and procedures for collective citizen-auditing into the legislation itself, the SEZ Act 2005 appears to prize opacity.

This is true at almost every point of the SEZ cycle. There is a great deal of ambiguity surrounding the minimum requirements for the establishment of a privately operated SEZ, for instance – and these rules have been subjected to almost constant revision.

While India's Right to Information legislation makes it possible for citizens and their associations to obtain (if persistent) copies of SEZ applications submitted to the Commerce Ministry-run Board of Approvals, which (as the name implies) approves the creation of SEZs, the application documents received are not always full. And even where it is possible to obtain the complete documentation submitted, the untransparent nature of the BoA deliberative process means that little or no information is provided on the basis upon which decisions were taken. This has a close bearing on the nature of the information provided by private-sector applicants seeking approval for their SEZs, because the applications often make dubious and seemingly inflated claims about the benefits likely to result from the establishment of the SEZ in question. The lack of a clear rationale justifying extreme claims in SEZ applications – and the failure of the BoA to subsequently explain, through a process of public reason-giving, why the application was approved anyway – was the subject of a close analysis of SEZ applications conducted by the Delhi-based Centre for Policy Research.^{iv}

There are even greater transparency considerations involved in the process by which approved projects go about establishing themselves on the ground. The acquisition of land the SEZs – which up until April 2007, when abuses became too obvious to ignore, was conducted in many cases by state governments on behalf of the private promoters – was a very untransparent process as well, so much so that it led to suspicions of underhanded tactics even in those few cases where transactions appear to have been handled in a relatively straightforward fashion. The lack of publicly available 'socioeconomic impact assessment' studies (because these are not mandated by the Act) is the kind of information deficit that makes accountability institutions – of the type designed to prevent abuses by the state in the process of industrialization – incapable for performing the functions assigned to them.

The applicability of national laws within SEZs, once up and running, is also a matter of concern. SEZs, where large numbers of people will live as well as work, are mandated to operate under a special set of governance institutions, in which a state-government-appointed Development Commissioner appears likely to wield an excessive amount of authority. Whether it will be possible to make use of ATI under the conditions that will prevail in future SEZs is open to question. There is certainly considerable worry among activist groups that, in the absence of dedicated ATI provisions within the SEZ Act, each request for access to information on the running of SEZs, their financial situation, and the operation of the special courts provided for in the SEZ Act, will prove another hurdle. Whether the rights of inhabitants of SEZs can effectively be protected in such a circumstance – especially where the line separating public authority and private business are blurred – remains to be seen.

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ⁱ Much of this section is adapted from, and is an elaboration of, Anne Marie Goetz and Rob Jenkins, *Reinventing Accountability: Making Democracy Work for Human Development* (New York: Macmillan/Palgrave, 2005)

ⁱⁱ See Anne Marie Goetz and Rob Jenkins, *Reinventing Accountability: Making Democracy Work for Human Development* (Palgrave/Macmillan 2005).

ⁱⁱⁱ Anne Marie Goetz and Rob Jenkins, 'Hybrid Forms of Accountability: Citizen Engagement in Institutions of Public-Sector Oversight in India', *Public Management Review*, vol. 3, no. 3 (2001), pp. 363-84.

^{iv} See Partha Mukhopadhyay, 'Ghosts in the Machine', *Hindustan Times*, 22 January 2008.

Globalization's Democratic Deficit

How to Make International Institutions More Accountable

Joseph S. Nye, Jr.

Seattle; Washington, D.C.; Prague; Québec City. It is becoming difficult for international economic organizations to meet without attracting crowds of protesters decrying globalization. These protesters are a diverse lot, coming mainly from rich countries, and their coalition has not always been internally consistent. They have included trade unionists worried about losing jobs and students who want to help the underdeveloped world gain them, environmentalists concerned about ecological degradation and anarchists who object to all forms of international regulation. Some protesters claim to represent poor countries but simultaneously defend agricultural protectionism in wealthy countries. Some reject corporate capitalism, whereas others accept the benefits of international markets but worry that globalization is destroying democracy.

Of all their complaints, this last concern is key. Protest organizers such as Lori Wallach attributed half the success

of the Seattle coalition to "the notion that the democracy deficit in the global economy is neither necessary nor acceptable." For globalization's supporters, accordingly, finding some way to address its perceived democratic deficit should become a high priority.

IT'S A SMALL WORLD

Globalization, defined as networks of interdependence at worldwide distances, is not new. Nor is it just economic. Markets have spread and tied people together, but environmental, military, social, and political interdependence have also increased. If the current political backlash against globalization were to lead to a rash of protectionist policies, it might slow or even reverse the world's economic integration—as has happened at times in the past—even as global warming or the spread of the AIDS virus continued apace. It would be ironic if current protests curtailed the positive aspects of globalization while leaving the negative dimensions untouched.

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Globalization's Democratic Deficit

Markets have unequal effects, and the inequality they produce can have powerful political consequences. But the cliché that markets always make the rich richer and the poor poorer is simply not true. Globalization, for example, has improved the lot of hundreds of millions of poor people around the world. Poverty can be reduced even when inequality increases. And in some cases inequality can even decrease. The economic gap between South Korea and industrialized countries, for example, has diminished in part because of global markets. No poor country, meanwhile, has ever become rich by isolating itself from global markets, although North Korea and Myanmar have impoverished themselves by doing so. Economic globalization, in short, may be a necessary, though not sufficient, condition for combating poverty.

The complexities of globalization have led to calls for a global institutional response. Although a hierarchical world government is neither feasible nor desirable, many forms of global governance and methods of managing common affairs already exist and can be expanded. Hundreds of organizations now regulate the global dimensions of trade, telecommunications, civil aviation, health, the environment, meteorology, and many other issues.

Antiglobalization protesters complain that international institutions are illegitimate because they are undemocratic. But the existing global institutions are quite weak and hardly threatening. Even the much-maligned World Trade Organization (WTO) has only a small budget and staff. Moreover, unlike self-appointed nongovernmental organizations (NGOs), international institutions tend to be highly

responsive to national governments and can thus claim some real, if indirect, democratic legitimacy. International economic institutions, moreover, merely facilitate cooperation among member states and derive some authority from their efficacy.

Even so, in a world of transnational politics where democracy has become the touchstone of legitimacy, these arguments probably will not be enough to protect any but the most technical organizations from attack. International institutions may be weak, but their rules and resources can have powerful effects. The protesters, moreover, make some valid points. Not all member states of international organizations are themselves democratic. Long lines of delegation from multiple governments, combined with a lack of transparency, often weaken accountability. And although the organizations may be agents of states, they often represent only certain parts of those states. Thus trade ministers attend WTO meetings, finance ministers attend the meetings of the International Monetary Fund (IMF), and central bankers meet at the Bank for International Settlements in Basel. To outsiders, even within the same government, these institutions can look like closed and secretive clubs. Increasing the perceived legitimacy of international governance is therefore an important objective and requires three things: greater clarity about democracy, a richer understanding of accountability, and a willingness to experiment.

WE, THE PEOPLE

Democracy requires government by officials who are accountable and removable by the majority of people in a jurisdiction,

*In the Parliament of man, the Federation of the world.
There the common sense of most shall hold a fretful realm in awe,
And the kindly earth shall slumber, lapped in universal law.*

—from "Locksley Hall," by Alfred, Lord Tennyson

together with protections for individual and minority rights. But who are "we the people" in a world where political identity at the global level is so weak? "One state, one vote" is not democratic. By that formula, a citizen of the Maldiv Islands would have a thousand times more voting power than would a citizen of China.

On the other hand, treating the world as a single global constituency in which the majority ruled would mean that the more than 2 billion Chinese and Indians could usually get their way. (Ironically, such a world would be a nightmare for those antiglobalization NGOs that seek international environmental and labor standards, since such measures draw little support from Indian or Chinese officials.)

In a democratic system, minorities acquiesce to the will of the majority when they feel they are generally full-fledged participants in the larger community. There is little evidence, however, that such a strong sense of community exists at the global level today, or that it could soon be created. In its absence, the extension of domestic voting procedures to the global level makes little practical or normative sense. A stronger European Parliament may reduce the "democratic deficit" within a union of relatively homogeneous European states, but it is doubtful that such an institution makes sense for the world at large. Alfred, Lord

Tennyson's "Parliament of man" made for great Victorian poetry, but it does not stand up to contemporary political analysis. Democracy, moreover, exists today only in certain well-ordered nation-states, and that condition is likely to change only slowly.

Still, governments can do several things to respond to the concerns about a global democratic deficit. First, they can try to design international institutions that preserve as much space as possible for domestic political processes to operate. In the WTO, for example, the procedures for settling disputes can intrude on domestic sovereignty, but a country can reject a judgment if it pays carefully limited compensation to the trade partners injured by its actions. And if a country does defect from its WTO trade agreements, the settlement procedure limits the kind of tit-for-tat downward spiral of retaliation that so devastated the world economy in the 1930s. In a sense, the procedure is like having a fuse in the electrical system of a house: better the fuse blow than the house burn down. The danger with the WTO, therefore, is not that it prevents member states from accommodating domestic political choices but rather that members will be tempted to litigate too many disputes instead of resolving them through the more flexible route of political negotiations.

CLEARER CONNECTIONS

Better accountability can and should start at home. If people believe that WTO meetings do not adequately account for environmental standards, they can press their governments to include environment ministers or officials in their WTO delegations. Legislatures can hold hearings before or after meetings, and legislators can themselves become national delegates to various organizations.

Governments should also make clear that democratic accountability can be quite indirect. Accountability is often assured through means other than voting, even in well-functioning democracies. In the United States, for example, the Supreme Court and the Federal Reserve Board respond to elections indirectly through a long chain of delegation, and judges and government bankers are kept accountable by professional norms and standards, as well. There is no reason that indirect accountability cannot be consistent with democracy, or that international institutions such as the IMF and the World Bank should be held to a higher standard than are domestic institutions.

Increased transparency is also essential. In addition to voting, people in democracies debate issues using a variety of means, from letters to polls to protests. Interest groups and a free press play important roles in creating transparency in domestic democratic politics and can do so at the international level as well. NGOs are self-selected, not democratically elected, but they too can play a positive role in increasing transparency. They deserve a voice, but not a vote. For them to fill this role, they need information from and dialogue with international institutions.

In some instances, such as judicial procedures or market interventions, it is unrealistic to provide information in advance, but records and justifications of decisions can later be disclosed for comment and criticism—as the Federal Reserve and the Supreme Court do in domestic politics. The same standards of transparency should be applied to NGOs themselves, perhaps encouraged by other NGOs such as Transparency International.

The private sector can also contribute to accountability. Private associations and codes, such as those established by the international chemical industry in the aftermath of the Bhopal disaster, can prevent a race to the bottom in standards. The practice of “naming and shaming” has helped consumers hold transnational firms accountable in the toy and apparel industries. And although people have unequal votes in markets, the aftermath of the Asian financial crisis may have led to more increases in transparency by corrupt governments than any formal agreements did. Open markets can help diminish the undemocratic power of local monopolies and reduce the power of entrenched and unresponsive government bureaucracies, particularly in countries where parliaments are weak. Moreover, efforts by investors to increase transparency and legal predictability can spill over to political institutions.

NEW DEMOCRATS

Rather than merely rejecting the poorly formulated arguments of the protesters, proponents of international institutions should experiment with ways to improve accountability. Transparency is essential, and international organizations can provide more access to their deliberations,

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even if after the fact. NGOs could be welcomed as observers (as the World Bank has done) or allowed to file "friend of the court" briefs in WTO dispute-settlement cases. In some cases, such as the Internet Corporation for Assigned Names and Numbers (which is incorporated as a nonprofit institution under the laws of California), experiments with direct voting for board members may prove fruitful, although the danger of their being taken over by well-organized interest groups remains a problem. Hybrid network organizations that combine governmental, intergovernmental, and nongovernmental representatives, such as the World Commission on Dams or U.N. Secretary-General Kofi Annan's Global Compact, are other avenues to explore. Assemblies of parliamentarians can also be associated with some organizations to hold hearings and receive information, even if not to vote.

In the end, there is no single answer to the question of how to reconcile the necessary global institutions with democratic accountability. Highly technical organizations may be able to derive their legitimacy from their efficacy alone. But the more an institution deals with broad values, the more its democratic legitimacy becomes relevant. People concerned about democracy will need to think harder about norms and procedures for the governance of globalization. Neither denying the problem nor yielding to demagogues in the streets will do. ☺

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