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Comment

The National Context for Transparency-based Global Environmental Governance

*Ann Florini**

Introduction

Over the last three decades, the neoliberal transformation in domestic governance, combined with the globalization of production, has led to the creation of regulatory voids in both established and emerging markets. Privatization of goods and services ranging from energy to health care to prisons has required but has not always fostered new national regulatory mechanisms to ensure that public goods continue to be provided and that externalities generated by private businesses are appropriately managed. The globalization of production by multinational corporations has, moreover, seen the creation of supply chains reaching deep into developing countries that have less regulatory capacity than do the home countries of multinational corporations. The global transparency initiatives described in this special issue reflect multiple efforts to bridge resulting gaps.

However, such global governance initiatives do not float free of the state system. Their efficacy is likely to be shaped not only by global politics, as outlined by the various contributions in this issue, but also by norms and capacities prevailing within countries, and they will necessarily take effect within diverse national contexts. Over the past two decades, there has been an extraordinary transformation in transparency views and practices in numerous countries around the world. The changes have occurred in rich countries and poor, democratic and authoritarian. These changes provide the crucial context for understanding how the transparency transformation is unfolding in global environmental governance, and what its potential and limits might be. Thus, as a complement to the other articles in this special issue, which focus on *global* transparency measures, the focus here is on disclosure policies and practices at the *national* level.

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National-level Disclosure: Types of Transparency Policies

National transparency rules and policies are of many types, ranging from citizens' "right to know" laws to proactive disclosure of economically salient information to "targeted" disclosure meant to have specific regulatory effects. In this comment, I briefly note key developments relating to the first two types and then discuss targeted transparency in some detail, given its central relevance to environmental governance. In particular, I explore how targeted transparency is being deployed in the important but diverse national contexts of India and China.

Right to Know: Towards Citizen Empowerment?

With regard to right to know laws, on the surface the rapid growth in sheer numbers of laws and policies is impressive.¹ From fewer than a dozen at the beginning of the 1990s, some 86 countries now claim some sort of government disclosure law. Yet buried within this startling growth are significant disparities in intention, scope, and implementation.

The broad "right to know" laws are most familiar in the form of the US Freedom of Information Act (FOIA) and similar laws in a handful of developed countries. These generally require some pro-active disclosure of government-held information and provide means for citizens to demand specific information from governments. Virtually all have significant "exemptions"—arenas of government-held information to which the transparency laws do not apply. These exemptions always include some degree of protection for information of national security importance. In the past two decades, dozens of countries have adopted laws that in some cases have provisions that are considerably more far-reaching than those of the US FOIA, which applies only to federal government agencies.² One of these is India. The Indian Right to Know law, which originated in a grassroots movement in the Indian state of Rajasthan, applies to all levels of government and under some conditions also to the private sector. It covers information held by the executive, legislative and judicial branches of government, and under some conditions also by nongovernmental bodies that are substantially financed, directly or indirectly, by government funds. This can include private companies such as privatized public utility companies.³

Since its coming into force, there is some evidence that this Act has helped to empower citizens and improve government performance.⁴ Anecdotal ac-

1. Several NGOs do excellent monitoring and overviews of the state of Freedom of Information laws around the world. See Vleugels 2008; and Privacy International 2009 (particularly David Banisar's regularly updated surveys and maps). Another leading website for information related to transparency is www.freedominfo.org.

2. For assessment of broad transparency trends and their implications, see Florini 2007.

3. Ashraf 2008.

4. RTI Assessment & Analysis Group (RaaG) and National Campaign for People's Right to Information (NCPRI) 2009.

counts of how the Act has been used indicate a broad range of applications—exposing local corruption, pressuring the government to act on complaints and addresses grievance, and providing information that should already have been public. India’s combination of a flourishing NGO sector, free media, and public outrage in response to exposure of wrong-doing provides the necessary ingredients to enable the broad right-to-know rules to have significant impact. Nonetheless, awareness of it is greater in urban rather than rural areas, and implementation problems include bureaucratic obstructions, huge delays in processing applications and poor record management.⁵ Such challenges are likely to apply to transparency-based governance in diverse national contexts.

In contrast to India, the one-party state in China has taken a very different route toward a right to know and greater governmental disclosure with its Open Government Information (OGI) regulations, which came into effect in May 2008.⁶ At first glance, the regulations are similar to right to know laws around the world, requiring government agencies to pro-actively release information and giving citizens the right to receive government-held information, including environmental information, on request. However, the motivations and drivers of the Chinese regulations reflect the particularities of a government determined to manage an increasingly complex and globalized society while keeping political control firmly in central Party hands.

The apparent contradiction of an authoritarian, one-party state pursuing open government requires some explanation. The OGI regulations are part of a larger effort to tackle corruption and improve the efficiency of governmental service delivery in a rapidly modernizing country. China’s Open Government Information regulations came about in large part due to elite-driven decisions that continued economic success—the basis of the legitimacy of the one-party system—would require “informationizing” China, including not only the spread of information technology but also greater governmental openness that would make government more effective and responsive to the needs of citizens. The regulations do not, however, reflect grass-roots demands for information and are intended only to allow the citizenry to monitor government performance, not to have voice in decisions about what ends government should serve.

The experiences of India and China reflect patterns seen in scores of countries over the past twenty years, experimenting with new approaches to information disclosure at the national level. The end of the Cold War and the subsequent wave of democratization saw new right to know laws sweeping through much of central and Eastern Europe as well. In such diverse parts of the world as East Asia and Latin America, democratization has also played a role. In general, combating corruption and holding public officials accountable are primary

5. RTI Assessment & Analysis Group (RaaG) and National Campaign for People’s Right to Information (NCPRI) 2009.

6. For discussion of the emergence of the Chinese OGI regulations, see Zhou 2007; and Horsley 2007.

goals of right to know laws. Their potency in furthering the goals of governmental (and private actor) accountability in the environmental domain is a crucial area requiring further systematic and comparative study.

Pro-active Dissemination of Economically Salient Data

A second category of transparency policies relate to proactive dissemination of economically salient data. Even countries with limited or no “right to know” rules increasingly publicize economically salient data. This reflects an emphasis on transparency as key to efficient economic operation rather than rights of citizens, thus it needs to be addressed separately. It is quite possible for countries to rank low on political openness—that is, to deny citizens access to government-held information—and high on economic transparency—that is, to make publicly available specific economic information.

Prior to the 1990s, many countries treated basic economic statistics, including such matters as international reserve holdings, as state secrets. However, the globalization of capital and the growing desire of countries to attract foreign direct investment have led to new pressures to make such information publicly available, as investors increasingly demanded such data as a condition of investment. The push for greater release of economic information has received strong support not only from such private sector actors but also from the international financial institutions, particularly the International Monetary Fund (IMF), which established new standards for “good practices” in this area.⁷ Countries such as India, China, Mexico and South Korea are now, to greater or lesser extent, disclosing economically salient information.⁸ Disclosure of economically salient information is thus at the heart of a worldwide push for financial transparency, yet it is fueled by normative imperatives distinct both from the right to know movement for citizen empowerment and from targeted transparency to meet specific regulatory ends. This third category of transparency policies is discussed next.

“Targeted” Disclosure

The third category—targeted disclosure requirements—is the most directly relevant to environmental governance. Governments are increasingly turning to disclosure as a form of direct regulation, in what can be termed “regulation by revelation.”⁹ While right to know policies aim to inform the public as an end in itself, targeted transparency provides information that aims to influence choices. Disclosure-based regulation is not new—it has been the basis for regulation of the US stock market for many decades—but it is now an approach of

7. International Monetary Fund 2001 and 2004.

8. International Monetary Fund 2001, 2004 and 2006.

9. Florini 1998.

choice for everything from nutritional labeling to airline baggage handling. The basic idea is simple: rather than requiring the targets of regulation to achieve specific behavioral standards, regulators require that those targets provide information about what behavioral standards they are achieving. The public release of that information is intended to push those targets into behaving in more socially desirable ways. The targets for such policies are typically organizations that are “viewed as responsible for some public risk or performance problem (and therefore have unique access to information about it).”¹⁰

Targeted disclosure regulation has been used extensively in the environmental field, in such mechanisms as the US Toxics Release Inventory (TRI), and the related Pollution Release and Transfer Registries now operational in most OECD countries. The approach represents a “third wave” of environmental regulation, following difficulties arising from reliance on traditional command and control regulatory approaches and then limits to the success of the second wave approach that relied on market-based instruments.

By far the most rigorous work to date on targeted transparency is that of Fung, Graham, and Weil, who have assessed the conditions under which national disclosure-based regulation has impacts for which it was designed (although largely in an industrialized country context). They have found that disclosure-based regulation works well under three conditions. First, a potential audience for disclosure exists, one that is making less than ideal choices about a matter of public concern because of lack of information. Second, potential recipients of information could and would change their behavior if they had appropriate information. Third, the changed behavior would cause disclosers, in turn, to act in ways desired by regulators.¹¹ When any of these conditions is missing, government may have to do more than require disclosure to bring about desired changes in behavior. And even if all conditions are present, regulatory systems need to carefully design what information is to be provided, to whom, in what format, and when, if disclosure is to have a significant impact on behavior. Indeed, this need for good design applies to transparency-based governance at all levels of decision-making.¹²

In considering targeted transparency in non-US contexts, we can again consider the cases of India and China. Despite its significant moves toward institutionalizing a domestic right to know law, the Indian government does not yet rely much on disclosure-based regulation. However, at least one NGO has pursued the approach directly with industry, with some effects on both corporate environmental performance and public policy. The Centre for Science and Environment (CSE) launched a Green Ratings Project in the late 1990s, initially covering 31 large corporations in the pulp and paper industry. It secured their participation in providing data on environmental performance in part by

10. Fung, Graham, and Weil 2007, 41.

11. Weil et al. 2006.

12. Gupta 2008; Mason 2008; and Florini 2008.

threatening to rank last a company that failed to disclose data. Thereafter, the CSE expanded its scope to cover other sectors such as the car industry.¹³ One assessment of the experience with the pulp and paper industry component found that it had been effective in improving the industry's environmental performance.¹⁴

In contrast to the relative slowness to embrace regulation by revelation in India, China is beginning to experiment extensively with targeted disclosure policies in the environmental area. Article 11 of China's national Environmental Protection law requires that the competent administrative department of environmental protection under the State Council establish monitoring systems, constitute monitoring criteria, organize monitoring networks with related departments, and strengthen management of environmental monitoring. The competent administrative departments of environmental protection under the State Council, provincial and municipal governments shall regularly publicize environmental status reports.¹⁵

Article Ten of the Chinese State Council's Decision on Several Issues Related to Environmental Protection encourages public participation in environmental regulation and defines an important role for the news media in publicizing actions that damage the environment.¹⁶ These examples indicate receptivity to the idea not only of the public's right to environmental information, but also of targeted disclosure to achieve behavioral changes.¹⁷

Furthermore, local experimentation with disclosure-based regulation appears to be expanding, as noted in a prominent World Bank study.¹⁸ More recently, environmental authorities are looking to draw on the new Open Government Information regulations to move in the direction of greater environmental disclosure. The OGI rules require all government agencies to develop their own implementing measures. The first to take up the challenge was the Ministry of Environmental Protection, which issued Measures for Open Environmental Information (for Trial Implementation) (OEI) on 1 May 2008. The Open Environment Measures do not yet add up to a full-fledged targeted disclosure policy, but they do begin to develop the basis for one with the requirement for reporting on emissions. Information to be disclosed includes, for example, "major pollutants, method, content and total volume of emission, information on emission that has surpassed the standards or total emission that has surpassed the prescribed limits; information on the construction and operation of environmental protection facilities; and emergency plans for sudden environmental pollution accidents."¹⁹ The Measures also note that enterprises cannot refuse to

13. Kathuria 2006.

14. Powers et al. 2008.

15. China Environmental Protection Law 2010.

16. China State Council's Decision on Several Issues Related to Environmental Protection 2010.

17. Wang et al. 2002.

18. World Bank 2005.

19. State Environmental Protection Administration of China 2007, 6.

disclose environmental information using confidentiality of trade secrets as a justification.

Although it is too soon to know whether these Measures will lead to significant impact, a recent update noted that they have at least served to clarify who is in charge of granting access to environmental information. The update also notes that “MEP’s progressiveness on issuing OEI measures is not surprising, for the environmental sphere has been one of the most progressive in China—both in terms of policy experimentation and activism. Moreover, these measures potentially serve to help empower environmental agencies.”²⁰

However, the existence of disclosure policies is one thing—implementation is another. Here the record is mixed. One recent assessment found considerable variation in local implementation of disclosure policies. A few cases stand out, such as the release by the city of Hangzhou in Zhejiang Province and the province of Qinghai of lists of companies polluting and violating relevant environmental laws, or Zhuzhou city’s (Hunan Province) new requirement for a monthly Corporate Open Day, on which enterprises must open production process, operation status, and environment-related information to the public. Elsewhere, however, localities have been far less responsive to the approach.²¹

Multinational corporations operating in China also have a mixed record on disclosure. A recent Greenpeace assessment of pollutant emissions disclosures by 28 of global top 100 companies that have business operations in China found that “only 6 of the 28 companies under investigation have disclosed information on pollutants emissions on their official websites; 13 companies released information on pollutants emissions in other countries or regions abroad, but not in China.”²²

The experiences of China indicate a key aspect of governance by transparency, i.e. that efficacy of targeted disclosure approaches to environmental regulation depends heavily on the existence of intermediary groups that can channel community responses to the disclosed information. Such groups tend to be civil society organizations, a sector that is notably under-developed in China but one that is beginning to grow, particularly in the environmental area. One environmental group, the Institute of Public and Environmental Affairs (IPE) has explicitly set itself up to serve as an intermediary between governmental disclosure requirements and the public. It states with regard to its activities that:

Our organization (. . .) is refining our water and air pollution database so that we can update our corporate discharge datasheet after the measures come into effect. This new data can make IPE’s database more comprehensive, and it will eventually allow users to compare the volume of discharge by listed polluters. Besides making disclosure mandatory for listed polluters, the measures also encourage other companies to voluntarily share pollution

20. Kaiser and Liu 2009, 1.

21. Kaiser and Liu 2009.

22. Greenpeace China 2008, 3.

data with the public. IPE believes that it will make far more sense to the public if the data disclosed by companies could be published in a consistent and cross-comparable way. To facilitate a more standardized disclosure, IPE has created a discharge data disclosure form, which it has distributed to local and multinational companies.²³

Its approach is an example of what may be an important development in the realm of transparency and the role of intermediaries therein in Chinese environmental governance.

Across other national contexts, countries ranging from Korea to Mexico have, for example, developed pollutant release and transfer registries, in keeping with a global trend in this direction.²⁴ These developments and many others highlight the spread of domestic targeted transparency measures as a tool of environmental governance, opening up an important research frontier relating to whether desired governance aims are being accomplished.

Conclusion: Local Context Matters

Global measures of environmental regulation by revelation are meant to help compensate for the large and growing gap between the need to regulate economic activities and the capacity and willingness of national governments to play such a role. Clearly, however, such measures will fare far better in societies that are hospitable to the idea of transparency and that are familiar with its practice. Thus, examining the promise of global initiatives needs to be done in parallel with studies of specific national contexts.

The drivers behind the extensive shift toward greater transparency at the national level are many and varied, so much so that understanding the causes, and the likely consequences, of the shift becomes a significant challenge. Democratic transitions play a role in some countries—such as Korea and Mexico—but are not a factor in already democratic India or authoritarian China. Imperatives of economic development and neoliberal ideology provide an impetus for disclosure of economically salient information, with international financial institutions pushing hard to induce member governments to release fiscal, monetary, and trade data.

Moreover, the variety of countries that are disclosing information represent an extraordinary range of regime types, not just advanced industrialized democracies. Until recently open government, or more broadly open governance, was a Western and particularly American ideal. The two countries discussed here—China and India—have taken very different paths towards transparency. China's approach is driven by the leadership's desire to "informationize" the

23. Jun 2008. The independent Institute for Public & Environmental Affairs Internet based, publicly accessible and interactive pollutant emission register for China is available at: <http://air.ipe.org.cn/en/wrydt.jsp?ssqybh?0>

24. Korea 2009; and "Mexico Mandates Pollutant Release and Transfer Registry," EIA Track, 10 June 2004. Available at: http://www.eiatrack.org/r/480&ls_News?0, accessed 3 December 2009.

Chinese economy, part of a larger effort to transform China into an economic great power. India's law arose, on the other hand, from a grassroots movement of impressive staying power.

It is important to keep these distinctions in mind in considering how transparency policies might work in diverse national contexts. For example, to the extent that private voluntary transparency codes aim to attract "green" investors, national capacity to provide reliable economically salient data will be a crucial factor. In contrast, global transparency initiatives that aim to empower citizens need to examine national approaches to citizens' general right to know and/or targeted disclosure policies, in order to evaluate how receptive government officials and businesses operating in specific countries are likely to be to such initiatives.

Notwithstanding these distinctions, the general picture painted here might indicate a rosy future for disclosure-based approaches to environmental governance. Despite factors pushing in the direction of greater disclosure, however, transparency also faces substantial counter-pressures. Bringing about a meaningful increase in transparency always involves a power struggle. Those who are currently enjoying the benefits of obscurity (rent-seeking or just avoiding the hassles of accountability) are loath to renounce the privileges. There are also legitimate reasons for secrecy under many circumstances—national security concerns, corporate proprietary data, and individual privacy concerns all require a careful balancing of the right to know with the public interest in some degree of protection of secrecy. Given lack of broadly agreed principles about where the boundaries of disclosure should lie, transparency policies can also ping-pong with changes in the domestic political climate.

Even when governments or other actors wish to implement disclosure policies, they may find it difficult to do so. Disclosure can be costly and complex, requiring archiving of materials, training of staff, changes to bureaucratic procedures, and availability of on-going financial and human resources.²⁵ Moreover, transparency can only disclose information that has been collected by someone. Hence a key challenge to effective transparency policies is that, in many cases, relevant information is not collected or does not exist.

In conclusion, transparency is fast spreading but it is far from being a universal norm. Some 86 countries now have freedom of information laws—but the majority of the world's roughly 200 countries lack any such law. And even where transparency is nominally embedded, rhetoric frequently outstrips reality. Despite the rapid spread of freedom of information laws around the world, as well as new disclosure policies aimed at intergovernmental organizations and the growing number of voluntary and mandatory disclosure systems covering the private sector, many fundamental issues about transparency remain far from consensual, both within countries and across borders, as also evident from the global initiatives examined in this issue.²⁶

25. Neuman and Calland 2007.

26. Gupta 2010 highlights some of these aspects in the introduction to this special issue.

In particular, as globalization and privatization shift ever more information of public concern into the hands of the private sector, questions of who has the right to access what information will become ever more significant. In the absence of any systematic debate on, much less consensus about, what constitutes a public function that the public is entitled to know about (even if the function is being handled by a private entity), we are currently making do with a hodgepodge of voluntary standards and occasional mandatory disclosure requirements. This raises a question central for the study of governance by disclosure: how far beyond governments should disclosure obligations extend? A few national laws, notably India's, do address the private sector but most do not. That more systematic debate, within and across countries, is long overdue.

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