

TRANSPARENCY IN INTERNATIONAL FINANCIAL INSTITUTIONS

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I. In search of a concept of institutional transparency in the financial world

In a public institutional context, the concept of transparency is enshrined in the broader notion of good governance or good administrative practice as one of its main components, together with other principles such as participation, reasoned decision-making, legality and accountability¹. There are close relationships between these principles, because a transparent institution will receive more inputs from interested stakeholders and will be naturally inclined to more reasoned decision-making. In parallel, in a transparent administration it will be easier to identify the persons making the decisions and to hold them accountable for the outcome. Nevertheless, both from an axiological and practical point of view, it is possible to differentiate the analysis of these principles.

In the sphere of economic institutional cooperation, the prejudice that politicians should leave the leading role to economists, to technicians, has deep roots, above all in the financial world. The apparent impartiality of economic technocracy has illustrated the activity of many international economic organizations that advise their member countries on how they should conduct their financial or trade policies. The objectivity of these international bureaucracies finds recognition in the Charter of some international financial institutions (IFIs), such as Article IV, section 10, of the IBRD Articles of Agreement².

More specifically, there is a conventional wisdom, though not universally accepted, that holds that political control of anti-inflationary or even of general monetary policy is counterproductive. The irresistible temptation is usually for politicians to push for the adoption of populist/lax monetary measures apparently effective in the short term but with negative effects in the longer term. This kind of experiences have been used to justify that democracy is ill suited to an orthodox monetary policy and to defend that central bank functions should be exercised independently of the government, and subject only to technocratic rule. In this context, the concept of “expert democracy”³ emerges to explain that citizens prefer to entrust these highly complex decisions to well formed and skilful bureaucrats that will not be distracted from the defence of the public interest, rather than to elected politicians, who are likely to waste time and resources in minor differences and demagogy.

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¹ Kingsbury, Benedict/ Krisch, Nico/ Stewart, Richard B., *The Emergence of Global Administrative Law*, IILJ Working Paper 2004/1 (available at papers.ssrn.com) 5.

² ‘The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially’. This kind of provisions seems to implement the principles of pacific co-operation among states, irrespective of the differences in their political, economic and social systems, and of non intervention in the domestic affairs of other states. Nevertheless, together with a marked idealism, these statements incorporate a great degree of hypocrisy.

³ For a sound critique of the concept of expert democracy on the basis that ‘consensus with respect to the goals of monetary institutions is a false perception’ see Freeman, John R., ‘Competing Commitments: Technocracy and Democracy in the Design of Monetary Institutions’, *International Organization* 56 (2002) 901-906.

However, in spite of this common thinking, any economic decision is a political decision, and there is no neutral or aseptic economic or monetary policy. The qualification of such decisions as ‘technical’ has not provided the most appropriate environment for transparency and has fostered the opaqueness of IFIs during the second half of the 20th century. These bodies legitimized their economic and normative output through the fulfilment of the mandate given by their member countries and were only accountable to them, in an international society which consisted of states.

The development of conditionality policies, now more stringent and detailed than in the past, led IFIs to take decisions not only on the management of capital markets, but on social policies, health, education, privatizations, sustainable energy or water strategies, and any kind of state intervention that may be affected by negotiations over budgetary policy⁴. This greater intrusiveness of IFIs has to be compensated by the establishment of elements of democratic control at an international level. Otherwise, economic globalization will contribute to impoverishing the quality of our democracies. The growing prominence of informal cooperation bodies such as the G-20 or the Financial Stability Board (FSB) in the design of the international financial architecture in recent years further increases this risk, as their activities remain largely alien to democratic checks and balances. In this context, the demand for transparency from the international financial bodies appears as an indispensable condition to control respect for the other core principles composing the concepts of democracy and good governance.

This chapter provides a comparative analysis of IFI’s transparency policies and denounces its shortcomings and excessive prudence, and in the case of less formal cooperation bodies (such as the G-20 or the FSB), the lack of attention to basic transparency concerns.

II. Transparency in the IMF

The IMF traditionally considered that discretion and confidentiality should govern its activities as a technical monetary organization that dealt with delicate financial data of member countries, and had to provide advice for the adoption of difficult measures in times of crisis. It was only in the 1980s that an External Relations Department was created and the variety of publications open to the public increased. The turning point came during the second half of the 1990s, when more documents started to appear on the IMF’s web page, and Press Information Notices (today Public Information Notices [PINs]) began to be published after Executive Board (EB) meetings. In January 2001 the Board formally adopted its first decision to implement a transparency policy through the release of a greater number of documents and a ‘Statement of Guiding Principles for the IMF’s Publication Policy’⁵. An Independent Evaluation Office (IEO) was also set up in July 2001 with a mandate ‘to systematically conduct objective and independent

⁴ Nooruddin, Irfan/Vreeland, James Raymond, ‘The Effect of IMF Programs on Public Wages and Salaries’, Jennifer Clapp/Rorden Wilkinson (Eds.), *Global Governance, Poverty and Inequality* (New York: Routledge, 2010) 90-111.

⁵ IMF, *Annual Report of the EB for the Financial Year Ended April 30 2001*, (available at www.imf.org) 33-36 and Appendix V.

evaluations on issues, and on the basis of criteria, of relevance to the mandate of the Fund⁶.

The decision that contains the present transparency policy of the IMF entered into force on March 17, 2010⁷ (Transparency Decision), and will be reviewed in 2012 in light of experience, and thereafter at intervals not exceeding five years.

We will distinguish three different kinds of transparency in order to better understand the different aspects of the IMF disclosure policy, although these concepts may overlap and are parts of a single strategy. We can differentiate documentary transparency (which gives a snapshot of the documents available to the public and the conditions in which access is granted), decision-making transparency (which makes reference to the information provided as to how the decisions are being taken, and particularly who is taking or has taken the decision and why), and operational transparency (which enables the public to check how decisions have been put into practice).

A. Documentary transparency

In its Transparency Decision, the IMF classifies its documents as regards the regime of accessibility into three categories⁸:

a) *Country Documents*. These set out the economic situation or the lending decisions with regard to a member state. Among others, we are referring to Article IV reports⁹, staff reports on Poverty Reduction Strategy Papers¹⁰ or Ex Post Monitoring and Evaluation staff reports, and staff reports or Chairman's Statements for Policy Support Instruments¹¹.

b) *Country Policy Intentions Documents*. These describe member states' economic plans and commitments. Among others, we are talking of Poverty Reduction Strategy

⁶ The IEO is independent of Fund management and staff and operates at arm's-length from the Fund's EB. For a full description of its structure, mandate and evaluations, visit its web page: <http://www.ieo-imf.org>.

⁷ This policy was established by the EB in Decision No. 13564-(05/85), October 5, 2005, that was reviewed and modified by Decision No. 14497-(09/126), adopted on December 17, 2009.

⁸ IMF Transparency Decision, § 1

⁹ Article IV reports are periodically issued (annually, except for small countries, whose reports may cover longer periods) for a specific member state analyzing its economic and monetary policies, its financial situation and other economic fundamentals, after a staff team has visited the country and discussed the information gathered with the national authorities.

¹⁰ Poverty Reduction Strategy Papers are prepared by low income member countries to explain their structural policies designed to promote growth and reduce poverty. They are reviewed in Joint Fund/World Bank Staff Advisory Notes.

¹¹ A Policy Support Instrument is a program in which the IMF provides advice to a low income country that does not ask for the Fund's financial assistance but desires to obtain its monitoring and support for certain policies.

Papers¹², Letters of Intent¹³, Memoranda of Economic and Financial Policies¹⁴, and Technical Memoranda of Understanding¹⁵.

c) *Fund Policy Documents*. Only two kinds of documents are included in this category: Fund Policy Issues Papers¹⁶ and Public Information Notices¹⁷ following EB discussions.

The 2010 reform reintroduced the ‘Transparency Principle’ in the text of the Transparency Decision¹⁸. This means that, as a general rule, publication of Country Documents and Country Policy Intentions Documents is voluntary but presumed. This presumption means that the publication of the documents occurs promptly after their consideration by the EB¹⁹ unless the Member concerned objects to the publication²⁰. In parallel, a member that requests access to the Fund resources is ‘expected to indicate that it intends to consent to the publication of the related Board documents before the Board meeting’²¹.

A special procedure has been established for some documents that may contain delicate data that could weaken the financial image of a member in times of economic fragility²². For example, the Chairman’s statement to be released after the EB has adopted a decision on the member’s use of Fund resources is handed in to the Executive Director (ED) designated by the Member to propose minor revisions and to consent to its publication. This procedure is closer to the need for express consent prior to publication than to the transparency principle²³.

¹² See *supra* note 10.

¹³ Formal letter submitted by a government to the IMF when demanding financial assistance. Typically, this document briefly describes the economic reforms envisaged by the national authorities and is accompanied by a more detailed Memorandum of Economic and Financial Policies and a Technical Memorandum of Understanding.

¹⁴ This document outlines the different economic and financial policies that the member requesting financial assistance is committed to develop, including performance criteria and structural benchmarks.

¹⁵ This document establishes the definitions, indicators and quantitative targets to which reference is made in the Memoranda of Economic and Financial Policies.

¹⁶ IMF Staff Reports on any policy issue related to the Fund’s mandate.

¹⁷ PINs offer summaries of the dialogue and the decisions taken in the EB, but without identifying the positions of each ED. When they refer to a specific country, they are only published with the consent of the country (or countries) concerned.

¹⁸ The IMF had established in 2001 a presumption of disclosure for some Country Policy Intentions Documents, so that members had to expressly notify the Fund if they wanted to prevent their publication. In 2003 the IMF came back to a presumption of non-disclosure, as the member’s explicit consent was requested before these documents were made accessible to the public (Global Transparency Initiative, *Transparency at the IMF. A Guide for Civil Society on Getting Access to Information from the IMF*, September 2008 (available at ifitransparency.org) 5).

¹⁹ Or the date of adoption of a decision to which that document relates on a lapse-of-time basis.

²⁰ IMF Transparency Decision, § 2b and d. Those documents that are circulated for information only, such as the Poverty Reduction Strategy Papers or the Reports on Observance of Standards and Codes may be published immediately after circulation to the EB (§ 17).

²¹ IMF Transparency Decision, § 2c. Besides, the Managing Director will not recommend the approval of some programs for low income countries (namely Poverty Reduction and Growth Facility arrangements or Policy Support Instruments), or a request to obtain exceptional access to the Fund’s general resources, if the countries concerned do not consent to the publication of certain related documents (§ 3).

²² I.e., waivers for nonobservance, or of applicability, of performance criteria are mentioned in the factual statement section of the press release containing the Chairman’s statement.

²³ IMF Transparency Decision, § 10.

The IMF handles other documents related to specific countries that are not mentioned in the Transparency Decision although sometimes it publishes them²⁴. They require a specific authorization for publication, and in some cases, as with the Side Letters for the use of Fund's resources, they are simply placed outside any transparency obligation, as they must be treated 'with the utmost confidentiality by management, Fund staff, and EDs'²⁵.

As can be seen, member countries can always avoid the publication of the documents related to them, although the rate of disclosure has significantly improved in recent years²⁶. There is a strong expectation that the documents related to the authorization of the use of Fund resources will be released, although some of the commitments made by the borrower can be kept secret, and the modification on the conditions of lending or the content of the advice and support of the IMF may be kept out of the public scrutiny.

The Transparency Decision also establishes that the publication of the Fund Policy Documents is conditioned to a positive decision of the EB to that effect. In particular, this organ will not allow publication when it may undermine 'the Fund's decision-making process', without any specification of what this may mean²⁷. Additionally, Board Papers concerning IMF income, financing or budget are often published²⁸, except when the Fund staff considers that they contain 'market sensitive information'. Reports dealing with other internal or administrative matters are neither covered by the Transparency Decision nor usually published.

When a request to obtain documents is rejected by the IMF, there is no appeal procedure to question the confidentiality criteria used in that specific case²⁹.

²⁴ For example, Technical Assistance Reports require the explicit consent of the recipient country (IMF, *Operational Guidance on Dissemination of Technical Assistance*, April 6, 2009 available at imf.org). On the contrary Safeguard Assessments are considered confidential documents, and even the EB receives only a summary (See IMF, *Guidance Note on the Fund's Transparency Policy*, December 23, 2010, Appendix V, available at imf.org).

²⁵ IMF Decision No. 12067-(99/108), September 22, 1999, § 1. Side Letters are defined in this Decision as "a letter or other written communication from a member's authorities to Fund management or staff containing confidential policy understandings complementary to or elaborating upon those in new or currently applicable letters of intent supporting a request for the use of Fund resources", and they usually contain the most controversial and sensitive government plans related to the IMF financing.

²⁶ In 2010, 92% of Article IV and Use of Fund Resources Reports were published, with a rate that varied according to economic and regional characteristics: advanced economies (100%), emerging markets (90%) and developing countries (89%) (IMF, *Key Trends in the Implementation of the Fund's Transparency Policy*, July 6, 2011, at 4, available at imf.org).

²⁷ In practice the decision is taken on the basis of the IMF staff recommendation. It is considered that the Board consents to publication if no Director objects to the staff proposal in that sense (IMF, *Guidance Note ... 2010*, § 26-27). The Fund published 90% of its policy papers in 2010 (IMF, *Key Trends... 2011*, at 3).

²⁸ Article XII, Section 7a, of the Articles of Agreement indicates that 'The Fund shall publish an annual report containing an audited statement of its accounts, and shall issue, at intervals of three months or less, a summary statement of its operations and transactions and its holdings of special drawing rights, gold, and currencies of members'.

²⁹ 'Access to Fund documents classified as "Secret" or "Strictly Confidential" as of March 17, 2010, will be granted only upon the Managing Director's consent to their declassification. (...) For restricted documents prior to March 17, 2010, Board Decision No. 11192-(96/2) adopted January, 1996 and a subsequent Board document passed in February 1996 are applied where the Managing Director delegates authority to Heads of Departments and Offices to grant declassification to records originating from their business units and for other documentary records, the Office of the Secretary' (IMF, Archives of the IMF, available at <http://www.imf.org/external/np/arc/eng/archive.htm>).

B. Transparency in Decision-making

1. A first preliminary question would be to ask what the role is of each of the different actors participating in the decision-making process within the IMF: management, staff, the EB, and the member states³⁰.

IMF staff directly negotiates with governments, establishing conditions, terms of agreement and providing advice on the economic decisions that governments have to make, especially when the country is asking for the Fund's financial assistance. There is no way to have access to such discussions from the IMF and only if the country concerned so decides, may external interested stakeholders obtain this information from national administration sources. Staff and management also control the information flow between the countries that require financial help or counsel and the EB.

In this context, the most important decisions are really taken before the EB meeting by negotiations between the staff/senior management and the most powerful member states. The position of many EDs does not allow them to exercise a real influence in the decision-making. The discussions and alternatives considered during the drafting of the texts that are proposed to the EB are not reflected in the final documents, leaving the EDs with few opportunities to introduce coherent amendments or different proposals³¹. The need to take speedy decisions in times of crisis works further against the capacity of the EDs to constructively challenge the proposals presented to them.

The few member countries that are able to negotiate and influence the staff and the management, because of their voting powers and their human resources (their EDs are supported by national civil servants with deep knowledge of IMF work) may have an interest in this deficient flow of information within the Board because this model keeps its enhanced capacity of influence in the Fund's decisions and policies³². Moreover, it makes the taking of decisions more agile. And there is an additional consequence of this situation: as the EB approves most of the decisions taken by management/staff, the responsibility of decision-making shifts from the real authors to the EDs that employ too much time dealing with executive and operational issues, instead of concentrating on a supervisory role over the management and on the design of strategic policies³³. Thus, to a great extent, it is justified to qualify the IMF as an organization driven by the staff³⁴ and a de facto directorate of the most powerful member countries³⁵.

³⁰ Although the Board of Governors is formally the highest decision-making body of the IMF, it has delegated most of its powers to the EB, which is the real decision-making organ of the Organization. In any case, all the considerations made here with regard to the distribution of quotas and voting power in the EB are equally applicable to the Board of Governors. The latter retains competence to elect or appoint the EDs, approve the admittance or the compulsory withdrawal of members, increases in IMF quotas, and amendments of the IMF Articles of Agreement and By-Laws. Most of its important decisions require an 85% supermajority or a 70% majority.

³¹ Woods, Ngaire, 'Making the IMF and the World Bank More Accountable', *International Affairs* 77 (2001) 83-100.

³² Ghazi, Bahram, *The IMF, the World Bank Group and the Question of Human Rights* (Ardsley N. Y.: Transnational Publishers, 2005) 291.

³³ The IMF Independent Evaluation Office has proposed to redefine the role of the International Monetary and Financial Committee in order to establish 'a ministerial-level governing body' that got involved more actively 'in setting broad strategic goals and in overseeing performance' (IMF Independent Evaluation Office, *Governance of the IMF: An Evaluation* (Washington D. C.: IMF, 2008) 19.

³⁴ Harper, Richard H.R., *Inside the IMF, An Ethnography of Documents, Technology and*

2. The relative weight of member countries in the decision-making process is a second element conditioning IMF transparency.

In spite of its quasi universal membership, most countries are in fact excluded from the decision-making in the IMF. The number of votes in the institution determines the capacity of influence, and most of the voting power is concentrated in the hands of a few members. Previous discussions in the discreet G-7 have traditionally shaped the posterior policy decisions in the IMF. In particular, the capacity of the United States to influence the decisions in the IMF is clearly lopsided, and as a single country it enjoys a veto power over the most important decisions of the EB³⁶. The IMF has always been sensitive to the position of the US Congress, not only because its headquarters is placed in Washington, but as a consequence of its relevance in the adoption of the most significant decisions in the Organization³⁷.

When voting, EDs take into account the positions and interests of the countries that form the constituency which they represent. This is even more so in the case of the EDs appointed by a single state that directly receive instructions from the country's government on how to act. Within this context, any request to the EDs to act with absolute impartiality, attending only to 'technical economic considerations', has to be qualified as naïve³⁸.

The quota reforms agreed in 2008 did not satisfy the emerging countries who kept demanding a more comprehensive reform of the voting system³⁹. However, the doubling of quotas and the realignment of quota shares approved by the Board of Governors in December 2010 involves an unprecedented shift in the voting power inside the IMF and can be considered as a significant step towards the multilateralization of decision-making in this Organization⁴⁰. Nevertheless, the US

Organisational Action (London: Academic Press, 1998) 284-285.

³⁵ In a survey among mission chiefs made by the IMF IEO, 7% declared that their technical judgement regarding support for a Use of Fund Resources Report had been overridden by political pressures "frequently" or "always", while 48% affirmed that they had experienced strong political pressure only "occasionally" or "sometimes" (IMF IEO, *Evaluation of prolonged use of IMF resources*, (Washington D. C.: IMF, 2002) 64).

³⁶ Beatti, Alan, 'Germany asks US to Give up its IMF Veto', *Financial Times*, September 15, 2010. Other countries, when acting together, also enjoy this veto capacity, as for example the BRICS (Brazil, Russia, India and China), or the European Union countries.

³⁷ Broz, J. Lawrence, *The United States Congress and IMF Financing, 1944-2009*, January 10, 2011 (available at <http://147.142.190.246/joomla/peio/files2011/papers/Broz%2021.01.2011.pdf>).

³⁸ Some authors have established a link between temporary Security Council membership and the probability of receiving IMF loans, as the major IMF shareholders, mainly the United States, may use their voting power to harden or soften the lending conditionality to a needy borrower country depending on their political behaviour (Dreher, Axel/Sturm, Jan-Egbert/Vreeland, James Raymond, 'Global Horse Trading: IMF Loans for Votes in the United Nations Security Council', *European Economic Review* 53 (2009) 742-757).

³⁹ Woods, Ngaire, 'Global Governance after the Financial Crisis: A New Multilateralism or the Last Gasp of the Great Powers?', *Global Policy* 1 (2010) 56. After the reform, the share of voting rights of the most benefited countries were: China (3.81%), India (2.34%), Brazil (1.72%), and Mexico (1.47%). For a critique of the lack of transparency of the formula used to allocate the voting power to each member country see Leech, Dennis/ Leech, Robert, *Reforming IMF and World Bank Governance: in Search of Simplicity, Transparency and Democratic Legitimacy in the Voting Rules*, Warwick Economic Research Papers, No 914, September 2009.

⁴⁰ The voting rights share for major emerging economies will represent 6.07% (China), 2.63% (India), 2.58% (Russia), 2.2% (Brazil).

would still retain its veto capacity with 16.5% of the votes after the reform becomes effective, and apart from the emerging economies which have increased their voting power, for a great majority of the developing countries their scarce capacity of influence remains unchanged⁴¹. The fact that the Board of Governors has supported a reform of the Articles of Agreement so that all EDs will be elected (no EDs would be appointed by individual members) does not modify substantially the decision-making process as the major shareholders are expected to be represented by an ED that will continue to defend their interests as in the past⁴², above all when taking key decisions on the main IMF policies or cases⁴³.

3. Some procedural rules inhibit the transparency of the EB meetings.

While the transparency presumption governs the publication of Country Documents and Country Policy Intentions Documents, the Fund adopts a more restrictive approach towards its own Policy Documents because a specific decision of the EB is required to allow for their public release⁴⁴. Moreover, the fact that documents related to decision-making can only be published after their consideration by the EB⁴⁵ clearly contributes to the protection of this process from outside interference. External actors are thus prevented from influencing or even giving an opinion on what is to be debated with a documentary basis⁴⁶.

The debate that takes place in the EB is rather opaque. Of course, these meetings are held behind closed doors. The ‘Gray Statements’ issued by individual EDs proposing changes to the Board papers under discussion are not immediately released, though they may introduce significant modifications in some cases⁴⁷. These gray papers, together with the Board minutes and the record of votes are only available after five years. Therefore, accessibility to these documents is designed more for historical analysis rather than for transparent decision-making. The summing up of the Board meetings

⁴¹ Bénassy-Quéré, Agnès/ Béreau, Sophie, ‘Rebalancing IMF Quotas’, *The World Economy* 34 (2011) 223-247; Chowla, Peter/Oatham, Jeffrey/Wren, Claire, *Bridging the Democratic Deficit: Double Majority Decision-making and the IMF*, Bretton Woods Project, 2 February 2007 (available at www.brettonwoodsproject.org). However, after analysing the process of consensus building in the EB, Van Houtven concludes that “experience has amply demonstrated that with good arguments and good tactics the developing countries turned many Board debates and decisions in their favour”, above all when they elected strong and experienced personalities to defend their interests in the Board (Van Houtven, Leo, *Governance of the IMF. Decision-making, Institutional Oversight, Transparency, and Accountability*, IMF Pamphlet Series No 53 (Washington D. C.: IMF, 2002) 67-68).

⁴² IMF, *IMF Quota and Governance Reform-Elements of an Agreement*, October 31, 2010, Annex II § 15-22 (available at imf.org).

⁴³ Kahler has argued that an institutional reform that tried to insulate the EB from major shareholder’s foreign policy considerations ‘might reduce the engagement of the most powerful governments and ultimately the effectiveness of the organization’ (Kahler, Miles, ‘Internal Governance and IMF Performance’, in Edwin M. Truman (Ed.), *Reforming the IMF for the 21st Century* (Washington, D. C.: Institute for International Economics, Special Report 19, April 2006) 260-261).

⁴⁴ IMF Transparency Decision § 13.

⁴⁵ IMF Transparency Decision § 17.

⁴⁶ The EB Calendar is now published in the IMF web page seven days in advance. Although this organ’s work program is published every three months, it is only the Board Calendar that enables us to know the specific subject on which decisions are to be made.

⁴⁷ Lamdany, Ruben/ Martinez-Diaz, Leonardo (Eds.), *Studies of IMF Governance: A Compendium*, IMF Independent Evaluation Office (IMF: Washington D. C., 2009) 222. Some inconvenient statements in the staff report are usually softened at the suggestion of EDs. This has led to the introduction of a rule (§ 15) in the IMF Transparency Decision stating that staff proposals in a report shall not be modified for its publication, though it will be clearly indicated which proposals the EB did not endorse.

that appears in the Public Information Notices published promptly after its reunions are drafted in a codified language⁴⁸ that does not allow the individual positions of each of the EDs during the debate to be identified, a situation which is exacerbated by the practice of consensus, that is the most common way of decision-making in the EB. Here we find a clear need for improvement, as there is no acceptable reason why immediate information on the EDs votes and minority viewpoints should not be clearly and regularly explained in the PINs.

In this context, the only way to obtain information in a timely manner (but always after the EB meeting) on the positions of each ED in the EB debates is through the national administration that he/she represents. However, the success of this initiative will depend on the degree of transparency of each national administration (only some few states give this information) and on the constituency of the ED (those EDs representing a large number of countries may provide vague information in order to avoid frictions among them).

4. The role of civil society in decision-making.

In spite of its bad reputation for lack of transparency, the IMF keeps regular contacts with civil society organizations and releases more information than many national governments⁴⁹. The IMF jointly with the WB organize a Civil Society Policy Forum in parallel with the Annual and Spring Meetings of the IMF and World Bank, and the IMF staff hosts or attends seminars and other meetings with NGOs, the financial industry and other stakeholders. However, in a recent survey of the IMF IEO with Civil Society Organizations, most of them complained of the lack of a formal procedure for consultation (the IMF only consults when it wishes, and may suspend talks at any time), and denounced that contacts usually take place after the decisions have been taken (to explain them) and not before, when some influence in the outcome could have been expected⁵⁰.

Some authors submit that in democratic countries where there are swift mechanisms to channel the opinion of civil society groups towards the state position in the IMF, the above-mentioned lack of popular participation in decision-making can be somehow mitigated⁵¹. However, when there is no possibility to influence the position of the national government internally, the international institution may provide the only way to lobby the outcome. And NGOs perspective will normally enrich the decision-making process⁵², as their view of concepts such as the socialization of losses or the conditions

⁴⁸ The IMF itself publishes in its web page a list of ‘qualifiers’ used in the summings up of its EB meetings. ‘Some’ means 5-6 Directors, ‘many’ 10-15, ‘most’ 15 or more, etc.

⁴⁹ Apart from very opaque political regimes, or countries that lack resources to provide constantly updated information, the release of financial data is seen by many states as problematic because they fear that it might cause economic instability or show weaknesses that they would prefer to hide. For a strong defence of the argument that multilateral organizations generally improve standards of transparency and justification by reason-giving in decision-making, specifically in policy areas central to the world economy, see Keohane, Robert O./ Macedo, Stephen/ Moravcsik, Andrew, *Democracy-Enhancing Multilateralism*, Global Administrative Series, IILJ Working Paper 2007/4, 29-34.

⁵⁰ ‘Several CSOs viewed the IMF’s approach to CSO relations as one-sided and, at times, “patronizing”, rather than one of partnership’ (IMF IEO, *Governance of the IMF...*, 2008, Annex 3).

⁵¹ Bradlow, Daniel, ‘Assessing international financial reform’, in Julio Faundez/Celine Tan (Eds.), *International Economic Law, Globalization and Developing Countries*, (Massachusetts: Edward Elgar, 2010) 87.

⁵² Kelly, Claire R., *Financial Crisis and Civil Society*, (2010) 45-49, available at works.bepress.com.

for the use of public resources in the rescue of banks will most likely differ from that of the financial industry (the latter disposing of more means to promote its positions).

Nevertheless, there are many important obstacles for an enhanced role of NGOs in the IMF. The Articles of Agreement do not give them any capacity of representation, and indeed their legitimacy can in many occasions be questioned; moreover, some countries with scant weight in financial institutions have expressed fears that the little amount of time available for decision makers in these bodies will be consumed by western countries' NGOs, thereby reducing their already insignificant capacity of influence⁵³. On the other hand, if the NGOs cooperate with the IMF they usually become less militant and maybe accused of collaborationism⁵⁴ and failure to represent civil society! Although there are important and respected NGOs in the international financial sphere, the world of civil society organizations is ample and heterogeneous, and an excessive participation of these entities could slow decision-making and generate important obstacles to consensus building⁵⁵.

Taking into account all these arguments, it is difficult to foresee how NGOs could increase their very modest role in IMF decision-making. As happens in the national political process, when NGOs are not able to transfer their demands to the political actors (the states in the IMF), their capacity to influence will logically be modest⁵⁶. While increased transparency would undoubtedly enhance their power to influence through persuasion and public image projection, the establishment of a wide and formal consultancy procedure (even if not applicable in crisis situations) still seems far away in the IMF.

C. Operational Transparency

By operational transparency we refer to the IMF disclosure policy in the application of its rules, and particularly, in the exercise of its surveillance role and its advisory functions. The surveillance of member countries' financial policies is periodic, and becomes especially strong when it is developed in the course of a lending operation. The IMF advisory task also concerns the entire membership of the Organization, although it has more relevance for those member states with less means (human and technical) in the financial area that ask for technical assistance. Both activities may have a normative outcome in the form of national legislation.

⁵³ As most NGOs originate from developed countries, they may be seen as an additional instrument to increase western influence in international financial institutions (Woods, Ngaire/Narlikar, Amrita, 'Governance and the limits of Accountability: the WTO, the IMF, and the World Bank', *International Social Science Journal* 53 (2001) 581-582).

⁵⁴ There is a common accusation of more radical NGOs about more institutionalised civil society organizations that often cooperate with the Fund in the sense that they are used to improve its public image while not having any significant influence in the modification of the IMF 'ultraliberal' recipes for financial stabilization.

⁵⁵ Kelly, *Financial Crisis and Civil Society*, 2010 at 49.

⁵⁶ The IMF adopted in 2003 a *Guide for Staff Relations with Civil Society Organizations* (available at <http://www.imf.org/external>) that instructs the IMF staff to meet CSOs 'early enough in policy processes that the consultation is meaningful'. However, the Guide establishes a clear limit to this relationship when it warns that 'contacts with CSOs must not go so far that they interfere with the IMF's primary relationship with the national government. Discussions of policy alternatives with CSOs should not generate an impression that the Fund is negotiating with CSOs rather than the government'.

The IMF IEO is currently studying this issue, as the Fund's staff has mixed feelings about operational transparency. While it is generally recognized that transparency has substantially improved in recent years, there appear inevitable 'tensions between the IMF's surveillance obligations, which carry with them enhanced disclosure requirements, and the attractiveness of the IMF as a source of advice on sensitive issues, which depends on confidentiality'⁵⁷. Confidence is seen as a key factor to strengthen the role of the IMF as an advisor in the designing of member countries' economic and financial policies. Informal and candid dialogue between the IMF staff and the member countries is essential to build up the role of the IMF (and its capacity) to provide technical assistance. Thus, exceptions to the obligations of disclosure are seen by the staff as essential not to adversely affect the keenness of member countries to seek the IMF's advice on delicate issues⁵⁸. In the Fund's view, transparency obligations should be linked mainly to its surveillance functions, while its advisory role would need to be covered by confidentiality.

It has to be noticed that with regard to the information gathered or the advice given to a specific member country it is usually the government of such a country that desires to limit the outreach of the Fund's delegation work. With the notable exception of some PRGF-eligible countries (and a few eastern European countries), which were more open to the dissemination of the Fund's work in recent years to help them to build national consensus towards structural reforms, most advanced and emerging economies felt uneasy about policy-related outreach of IMF delegations in their country, either for the potential negative repercussions in the media or because of the unpopularity that any IMF initiative would meet due to its past bad reputation (linked to austerity programs and social cuts)⁵⁹. However, in the case of advanced economies, this is somehow compensated by their general acceptance of the publication of their Country Documents. For many non-transparent developing countries, the IMF country papers provide the most reliable independent source of information concerning government revenue and expenditure and economic statistics and future trends.

On the other hand, a more extensive disclosure of policy advice would facilitate the accountability of IMF staff and management for the recommendations given on behalf of the Organization. Again, this could be a double-edged sword, because it may reduce the sincerity and spontaneity in the dialogue with member states⁶⁰.

D. Conclusions on IMF Transparency

⁵⁷ IMF Independent Evaluation Office, *The Role of the IMF as a Trusted Advisor*, Issues Paper for an Evaluation by the IEO, (Washington D. C.: IMF, October 17, 2011) 2.

⁵⁸ Van Houtven has warned against the damage that would be caused to the IMF functions by its conversion into a sort of supranational state rating agency (Van Houtven, *Governance of the IMF...*, 2002, at 61).

⁵⁹ IMF Independent Evaluation Office, *IMF Interactions with Member Countries*, (Washington D. C.: IMF, 2009) 20-22.

⁶⁰ The IMF IEO has stressed the convenience of establishing a clearer accountability framework for the Fund's management. This would involve the setting up of performance criteria and mechanisms to translate outcomes into incentives. However, the IMF IEO considers that these assessments would need to be confidential to avoid undermining the credibility of the management vis-à-vis the membership at large (IMF Independent Evaluation Office, *Governance at the IMF: An Evaluation*, (Washington D. C.: IMF, 2008) § 70-72), something that would be difficult to achieve once the evaluation had been circulated to all the EDs.

The IMF has substantially improved the transparency of results, although it still preserves to a great extent the confidentiality of its decision-making process. This is likely to continue and any attempt to foster transparency in such a process will face strong opposition from the Organization's staff and from some member countries, as they feel that the present degree of transparency is very high and has sometimes prejudiced the Fund from effectively achieving its goals⁶¹. The exigencies of an efficient and agile administration also impose constraints on the disclosure policy that should not be underestimated. The IMF acts as a firefighter in times of crisis and a complex and balanced decision-making procedure might be unworkable in such circumstances. The use of market-sensitive information also imposes some degree of confidentiality, especially in relation to financial markets, where hysterical behavior is so common and insider information could discriminate between economic operators.

The distinction between supervisory and advisory functions, linking the more stringent disclosure obligations to the former, seems a reasonable way to make compatible the role of the IMF as a trusted advisor and its obligation to supervise member states economic and financial policies. However, when both functions have to be exercised at the same time dialectic problems will arise that cannot be easily solved in the abstract, and the Fund should enjoy a certain margin of appreciation. However, basic demands of accountability would advise the ex-post disclosure of all these activities after a short period of time.

Interaction and consultation with NGOs is necessary and provides valuable inputs for the fulfillment of IMF functions, but they play (and will continue to play) a very limited role in the decision-making process.

III. Transparency in the World Bank

Like other financial institutions, the World Bank⁶² behaved with a great degree of opaqueness during its first 40 years of activity. Pressure from NGOs began to produce changes in 1985 and 1991, when the WB took its first steps towards transparency accepting, among other things, to publicize environmental assessments before approving the financing of certain projects; additional pressure from the US Congress led to the formal adoption of a disclosure policy in 1993. This policy has been reviewed and widened in 2001, 2005, and 2010 (Access to Information Decision, hereinafter AID)⁶³. The WB was already one of the IFIs with a better rate of disclosure and, in spite of its shortcomings, the 2010 reform has placed the WB as the most transparent IFI.

⁶¹ Cottarelli describes three possible drawbacks of transparency in the IMF: a negative market reaction (speculative attack) that could have been avoided by making reforms if the government had been given enough time; the disruption of the conditionality process for a disproportionate reaction of markets to failures to comply that the IMF would have been willing to waive; and the impossibility to implement necessary measures by giving time for the creation of negative coalitions (Cottarelli, Carlo, *Efficiency and Legitimacy: Trade-Offs in IMF Governance*, IMF Working Paper WP/05/1107, June 2005, 16-17).

⁶² In this contribution, when we use the term World Bank we refer to the International Bank for Reconstruction and Development and to the International Development Association, as they share a common disclosure policy.

⁶³ WB, *World Bank Policy on Access to Information*, Policy Paper No. 54873, July 1, 2010. This is the date when the new policy took effect. Although the WB has periodically reformed its transparency policy, and it publishes implementation progress reports, there is no commitment for a regular review in a concrete timeframe.

As we did with the IMF, we will distinguish between documentary, decision-making and operational transparency.

A. Documentary transparency

In what the WB itself qualified as a ‘paradigm shift’, the general principle of the AID (section 6) is that the Bank will allow ‘access to any information in its possession that is not on a list of exceptions’. The WB abandoned its previous practice of issuing a ‘positive list’ of documents (the presumption of non-disclosure applied to the rest of the Bank’s documents) to a general presumption of disclosure, unless the document is placed on the list of exceptions. Furthermore, Section 1 of the AID contains one of the strongest discourses in favor of transparency in the world of financial institutions⁶⁴.

Nevertheless, the high merit of this principle rests upon the existence of a strict negative list where only those documents whose disclosure could cause harm to well-defined interests were placed. However, the long and sometimes vague list of exceptions⁶⁵ provided by the WB falls short of this well-intentioned ambition. The AID does not include a list of documents that will ordinarily be disclosed⁶⁶, and the mere presence of data that could fall under the exceptions in an otherwise disclosable document may justify its concealment. Besides, ‘under exceptional circumstances’ the Bank reserves its prerogative to restrict access to information that it would normally release ‘if it determines that such disclosure is likely to cause harm that outweighs the benefits’ (section 19, AID)⁶⁷. The wide phrasing of this statement may frustrate reasonable attempts to obtain documents as it will be really difficult for a potential petitioner to argue against a negative decision of the management or the Board without basic material information.

An additional limitation of the transparency presumption is found in section 14 of the AID where it is said that the WB will not grant access to information provided in confidence by member countries or third parties without their express permission. As it refers to ‘information’ and not to ‘documents’, the mere presence of information qualified as confidential by a member state may cause the non disclosure of a document that otherwise would have been routinely released. To strengthen this third party veto

⁶⁴ Transparency is ‘critical for enhancing good governance, accountability, and development effectiveness. Openness promotes engagement with stakeholders, which, in turn, improves the design and implementation of projects and policies, and strengthens development outcomes’ (Section 1, AID).

⁶⁵ The exception of ‘corporate administrative matters’ includes, ‘but is not limited to’ corporate expenses, procurement or real estate, and maybe interpreted in an overly inclusive way (section 15, AID). The ‘financial information’ or the ‘deliberative information’ exceptions are also very widely drafted (sections 16 and 17, AID). The ‘Attorney-Client Privilege’ exception covers all external or in-house legal advice, without establishing a harm test or other nuances that could soften this severe provision (section 11, AID). See some critical comments in Global Transparency Initiative, *Comments on Toward Greater Transparency Through Access to Information: The WB’s Disclosure Policy: Revised Draft*, November 3, 2009, 20-21 (available at <http://www.ifitransparency.org>). Until now a great majority of the denials of information have been based on the deliberative information policy exception (WB, *Access to Information Annual Report FY 2011* (WB: Washington D. C., 2012), 13-14).

⁶⁶ Although there was a list of core documents and information that should be routinely posted on the WB’s external website in the preparing documents (WB, *Toward Greater Transparency through Access to Information. The Bank Disclosure Policy, Operations, Policy and Country Services* (WB: Washington D. C., October 16, 2009) Annex B).

⁶⁷ Section 18 of the AID, in the opposite sense, also establishes the Bank’s prerogative to disclose certain types of restricted information.

capacity, this confidential information is not eligible for declassification after a lapse of time (sections 32 and 41, AID). A black hole is thereby constructed for external information that should have been nuanced by the WB⁶⁸.

This external confidentiality is further complemented by the rule that governs the disclosure of country-specific documents. They will be released to the public only if they are on the list of documents prepared or commissioned by a member whose disclosure is a condition for doing business with the WB (section 20c, AID) or when the documents are prepared by the Bank and not routinely discussed with the country (section 20b, AID). Apart from this positive list, the curtain may be closed: for country-specific documents routinely discussed with the member country/borrower, a negotiation procedure on their content is laid down and, in any case, the aide-mémoire of the operational missions cannot be publicly released without the county/borrower's agreement⁶⁹ (section 20a, AID); for other documents prepared by member countries/borrowers, disclosure is conditional on obtaining the country/borrower's written consent (section 20d, AID). Thus, it has to be recognized that, despite the paradigm shift proclaimed in the AID, external actors still enjoy ample room for opaqueness in this publicly owned Bank⁷⁰.

Board records and Board papers are routinely posted on the WB's web page at the end of the deliberative process, unless they are classified as confidential (section 23, AID). However, there are a few exceptions of increased transparency: Board papers that involve consultations with stakeholders are normally released before the Board discussion⁷¹, and Board papers distributed just for information are published upon distribution (section 23b, AID). On the dark side, it has to be stressed that those Board documents more suited to demand the EDs' accountability are kept confidential for a disproportionate time (10 or 20 years [section 33, AID])⁷².

Where the 2010 AID shows the most positive and outstanding elements is in its procedural and institutional novelties that place the WB as the leading institution in the context of IFIs' transparency guarantees: a formal procedure to request information is established, an Access to Information Committee (AIC) is created, and an appeal

⁶⁸ E.g., the WB Bank could oblige its business partners to disclose financial information if it does not damage legitimate economic interests.

⁶⁹ The need for a formal agreement between the Bank and the country for the publication of the aide-mémoires has provoked inconsistencies in the past, as sometimes the WB denied access to aide-mémoires and loan contracts that were disclosed by the national government concerned (Musuva, Catherine, *Behind Closed Doors. Secrecy in International Financial Institutions*, (Cape Town: Global Transparency Initiative, 2006) 6, available at <http://www.ifitransparency.org>).

⁷⁰ McElhinny, Vince, *Program for Results System Assessment Criteria. Key Areas Requiring Clarification and Disclosure Prior to World Bank Board Consideration*, Bank Information Center, October 10, 2011, 8-9 (available at <http://www.p4rcomments.org>).

⁷¹ This is true in certain conditions for operational policy papers and sector strategy papers. However, consent for that early disclosure by the member country concerned is required for the important Country Assistance Strategy papers, Project Appraisal Documents (which provide the full description of the projects) and Program Documents.

⁷² E.g. 10 years for the verbatim transcripts of Board meetings and the Statements of EDs and staff in that context or the reports to the Board from its Committees (Green Sheets), and 20 years for the Minutes of the Executive Sessions of the Board or the communications and memoranda originating in the ED's offices.

procedure before an independent Appeals Board⁷³ is set up to review the denials of information⁷⁴. Sections 24 to 27 of the AID lay down the procedure to guarantee the right to access disclosed information, with short timelines for responding requests (normally 20 working days), and the reasons why a request would be qualified as ‘unreasonable’ or ‘unsupported’⁷⁵ and so refused. The internal WB procedure for the processing of these requests is not established in the AID⁷⁶, but when a request is rejected, the notice to the requester has to specify the reasons⁷⁷. When a document contains information that falls under one of the exceptions to disclosure, it has to be classified as such by the staff⁷⁸, so that the time and discretion needed to respond to information requests is reduced to the minimum.

The AIC reviews proposals to disclose information that is on the list of exceptions, and receives and rules on appeals under the AID because it has power to uphold or reverse prior decisions to deny access, with the exception of decisions made by the Bank’s Board⁷⁹. It is to be expected that the AIC will unify the doctrine to avoid past inconsistencies of the disclosure policy⁸⁰. In its first months of existence, that AIC has relevantly contributed to the disclosure of restricted information under section 18 of the AID⁸¹. However, it has rejected the eight appeals lodged against the WB’s decision to

⁷³ The Appeals Board comprises three outside experts nominated by the President of the WB and endorsed by the Bank’s Board of EDs. The WB has been the first IFI to create an independent body with this kind of competence.

⁷⁴ The WB set up an Inspection Panel in 1993 (IBRD Resolution No.93-10) to receive complaints from people harmed by the Bank’s funded projects. Designed as an independent body, it comprises three members with competence to investigate whether the WB has violated its policies or procedures (if the Board of EDs approves the investigation) and to make related findings of harm. However, this body is ill-suited as an instrument to question ordinary denials of access to documents. The importance of the claim has to be high to attain the initiation of an investigation that takes time, is burdensome, and ends up with a mere recommendation, which is sent to the management and the Board (the latter taking the final decision). See Ghazi, *The IMF, The World Bank Group ...*, 2005, at 217-221. For a more general comparison, see Daniel D. Bradlow, ‘Private Complaints and International Organizations: A Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions’, *Geo. J. Intl. L.* 36 (2005) 403.

⁷⁵ The use of the term ‘unsupported’ (that did not appear in the draft policy document) seems to make reference to the need of showing a legitimate interest in the disclosure of information when lodging a request. However, the common explanation of the terms ‘unreasonable or unsupported’ in the AID does not establish such a condition and the WB does not identify the requesters in practice.

⁷⁶ The draft policy document included some specifications on the processing of requests, but they have not been incorporated to the AID (WB, *Toward Greater Transparency...*, 2009 at 39). Instead, it is established that the AI Committee issues guidelines to staff on policy implementation (section 35, AID).

⁷⁷ Section 40, AID.

⁷⁸ The World Bank rule on *Information Classification and Control Policy* was updated (AMS 6.21A) and a handbook with the revised classification policy has been distributed to all the WB staff to facilitate its correct implementation (WB, *WB Policy on Access to Information Progress Report, November 2009 through September 2010*, 11-12 [available at <http://www-wds.worldbank.org>]). Nothing is said in the AID about the possibility of declaring documents partially confidential when only a minor part of their content could be considered as such.

⁷⁹ Section 35, AID.

⁸⁰ Musuva describes how the same document was released in some cases and considered confidential in others (depending on the country involved) with the excuse in the denials that the documents were part of the Board proceedings and supposed to have a deliberative nature. Another usual concealment technique is the mutual referral of the information request from the government agency to the IFI and from the latter to the government (Musuva, *Behind Closed Doors...*, 2006, at 3-5).

⁸¹ According to the *Access to Information Annual Report FY 2011 2012*, at 16-17, the AIC decided to disclose restricted information in 10 out of the 20 requests received.

deny access to information⁸². This reveals the limited scope of the appeals procedure, where only WB organs intervene to define public interests that could take priority over exceptions to disclosure⁸³. No second level appeal has yet been filed before the new Appeals Board.

A different alternative to obtain information on the WB's decisions and activities is asking the country-partner in the project. National law may provide stronger legal tools to guarantee the right to access such information, and even establish sanctions against the administration for violating this right. However, as we have seen, member states have a great capacity to condition the disclosure policy of the WB with regard to their country specific documents, and it is common that those countries putting most obstacles to the disclosure of their business with the Bank also have the weakest national legislation on freedom of information⁸⁴.

B. Transparency in Decision-making

Most of the comments made with regard to the decision-making process in the IMF could be extrapolated here, as the organic structure of both institutions is similar and, more particularly, the practice of consensus in the Board of Directors, and the weighting of votes assigned to each of the EDs depending on the Bank's capital share of the countries that he/she represents⁸⁵ (which is based on the quotas assigned in the IMF). Thus, reference will be made just to some specificities of the WB⁸⁶.

The introduction to the AID stresses the WB's commitment towards transparency, promoting the 'engagement with stakeholders' in 'the design and implementation of projects and policies'. However, this statement is seriously questioned by the scope of the disclosure policy exception to protect the deliberative process. While the Bank acknowledges its responsibility to make publicly available its 'decisions, results and agreements', it considers it necessary to protect the confidentiality of the processes that lead to these decisions in order to preserve 'the free and candid exchange of ideas'

⁸² Nevertheless, in one of these cases, after ruling that the requested documents were 'covered by the "Deliberative Information" exception under the AI Policy and, thus, there was no violation of the Policy, the AIC decided to exercise the Bank's prerogative to disclose certain documents' under section 18 of the AID (WB, *WB Policy on Access to Information Progress Report, January through March 2011*, 13-14 [available at <http://www-wds.worldbank.org>]).

⁸³ Appeals before the AIC can be based on two grounds: a) the violation of the AID, or b) the existence of a public interest that would advise overriding certain policy exceptions. For appeals of the latter kind, the decision of the AIC is final. It is only in the cases where the requester has alleged that the WB has violated the AID (and the AIC has upheld the initial decision to deny access) that a second level appeal can be lodged before the Appeals Board (sections 36-38, AID).

⁸⁴ In a case study that compared the implementation of freedom of information acts in emerging economies with regard to their commitments with the WB and other IFIs, Musuva concludes that the rate of information that could be obtained from the European countries was considerably higher than the rate of disclosure in Africa or Latin America (Musuva, *Behind Closed Doors...*, 2006, at 6-7).

⁸⁵ Rigo Sureda, Andrés, 'Informality and Effectiveness in the Operation of the IBRD', *J. Int. Economic Law* 6 (2003) 565-596.

⁸⁶ Like the IMF, the WB has also recently approved a reform of the distribution of the voting power within the Organization that gives 47.19% of the votes to developing and transition countries. This represents for them a total shift of 4.59 percentage points since 2008 (WB, *World Bank Group Voice Reform: Enhancing Voice and Participation of Developing and Transition Countries in 2010 and Beyond* (DC2010-0006), available at <http://siteresources.worldbank.org>).

during its internal deliberative process (section 16, AID)⁸⁷. This means the exclusion from disclosure of many draft reports⁸⁸, statistics or analysis prepared to inform the decision-making process. Key documents such as Country Assistance Strategies⁸⁹ or Project Appraisal Documents⁹⁰ continue to be routinely released only after the Board discussion and approval (their draft version is only made public at the same time that it is distributed to the Board with the country's consent)⁹¹. Therefore, a strong wall continues defending the decision-making process in the WB from external interference⁹², above all when the country-borrower does not wish to be exposed to public scrutiny, and even though the Board Calendar is published three months in advance. NGOs, national parliaments, and affected communities are thus prevented from controlling the executives' decisions in many cases, because access to the background reports represents an important element of this supervisory activity⁹³.

It is true that relevant social and environmental information (e.g. Environmental Assessment Reports⁹⁴) is released before consultations take place and that this has allowed in certain cases movements capable of influencing the final decision of the Bank⁹⁵. However, although the WB has engaged in discussions with civil society stakeholders⁹⁶ and has kept open channels of communication with interest groups concerned by its lending activity⁹⁷, there is no coherent policy of previous consultation with those affected by its projects⁹⁸. In this context, the capacity of civil society organizations (other than those directly involved in the implementation of the projects funded by the Bank) to influence decision-making on financial issues remains in general

⁸⁷ See also the definition of Principle 3: 'Safeguarding the Deliberative Process' in WB, *Toward Greater Transparency...*, 2009 at § 7 and 10.

⁸⁸ Section 29 of the AID states that 'Draft papers are treated as deliberative documents'.

⁸⁹ This document reflects the three-year strategic business plans of the WB for a country. They have been released sometimes in their draft form in the past when they required consultations with civil society partners, but it has not been a consistent practice.

⁹⁰ They provide the complete description of a project, including the structural reforms that the recipient country has assumed as a condition for the loan.

⁹¹ For a complete description of the availability and the timing of release of almost all WB documents, see Bank Information Center, *Unlocking the World Bank's Access to Information Policy. Your Key to the Vault*, 2011, 6-22 (available at <http://www.bicusa.org>).

⁹² 'This approach seems to place a premium on reaching final internal consensus before public engagement, which may close off important alternative approaches to development issues' (GTI, *Comments on Toward Greater Transparency...*, 2009 at 9).

⁹³ The WB tries to solve the problem in its new transparency policy by granting access to documents qualified as 'key process milestones', that convey the results of its deliberations, and that should be distinguished from other documents considered 'truly deliberative' (WB, *Toward Greater Transparency...*, 2009 at 6).

⁹⁴ Document prepared by the borrower country that explains the possible environmental impact of the project and the measures envisaged to reduce the potential harm.

⁹⁵ Brown, L. David/Fox, Jonathan, *Transnational Civil Society Coalitions and the World Bank: Lessons From Project and Policy Influence Campaigns*, December 1999, available at <http://papers.ssrn.com>.

⁹⁶ 600 NGOs representatives participated in the 2011 IMF-World Bank Annual Meeting, a number constantly increasing since 2005. In the previous Civil Society Policy Forum over 50 policy sessions were held on a wide range of topics. As part of the program, NGOs representatives held a roundtable with 20 EDs from the IMF and the WB. A Civil Society Team, created in 2004, serves as the institutional focal point for the whole World Bank Group's engagement with civil society.

⁹⁷ WB, *Guidance Note on Bank Multi-Stakeholder Engagement*, Board Report No. 49220, June 1, 2009.

⁹⁸ Bradlow has submitted that by repeatedly recurring to public consultation the WB has created an 'implicit rule-making procedure that involves disclosure of policy drafts, opportunities for public comment (...) and explanations of how the public comments have been addressed' (Bradlow, Daniel D., 'The Reform of the Governance of the IFIs, A Critical Assessment', *The World Bank Legal Review* 3 (2011) 44).

slim⁹⁹. In other aspects of its policies, as for example the drafting of the AID, the WB was engaged in a dialogue with expert NGOs that could be considered as fruitful.

The deliberative exception also covers the Verbatim Transcripts of Board Meetings, the Statements of EDs in those meetings or the Green Sheets submitted to the Board for discussion. As has been explained before, it is only after ten years that access is granted to these documents (and only in the case that they do not contain information not eligible for declassification), while Communications and Memoranda originating in the ED's offices are made public after twenty years. These time-limits are so long that they may clash with national freedom of information laws¹⁰⁰. From the WB's perspective 'if the view of each ED is immediately known to the public, it may put undue pressure on EDs, and could also politicize the Bank's decision-making process', above all for those ED's that represent several constituencies¹⁰¹. Thus, apparently, lack of transparency and unaccountability (even towards the ED's own constituencies) is the price to be paid for a consensual and speedy decision-making process in the WB¹⁰². This excessive precaution ought to be abandoned as the core elements of the principles of transparency and accountability would call for much shorter periods for the disclosure of the Board debates, and the positions taken by each ED. With the present system, the suspicion remains that major shareholders can use their influence to condition the WB's lending policy for the promotion of their political interests¹⁰³, in spite of the impartiality obligation imposed by Article IV, section 10, of the IBRD Articles of Agreement¹⁰⁴.

C. Operational Transparency

⁹⁹ However, Head considers that Multilateral Development Banks have made a reasonable effort to take into account the point of view of less confrontational NGOs (Head, John W., *The Future of the Global Economic Organizations: An Evaluation of Criticisms Leveled at the IMF, the Multilateral Development Banks, and the WTO*, (Ardsley/New York: Transnational Publishers Inc., 2005) 146-150).

¹⁰⁰ The AID does not include a very problematic paragraph of its draft policy paper in which it was pointed out that papers produced or received by EDs' offices in the conduct of their official duties should be viewed as Bank records and were thus covered by the confidentiality obligation of the Bank's disclosure policy. The question was troublesome because the text reminded the member states that Article VII, section 5 of the Articles of Agreement provides that the archive of the Bank shall be inviolable, while Article VII, section 8 states that EDs are immune from legal process with respect to acts they perform in their official capacity. The inference of this reasoning was that governments receiving information from their EDs were under the obligation to respect the confidentiality of the documents in spite of their freedom of information legislation (WB, *Toward Greater Transparency...*, 2009 at § 45). The fact that the paragraph is not included in the AID does not mean that the problem cannot arise, involving complex national legal proceedings that may affect constitutional rights.

¹⁰¹ WB, *Toward Greater Transparency...*, 2009 at § 11.

¹⁰² Although Board Minutes are routinely posted on the WB web page promptly after the meetings, they just notify the decisions taken, and normally only inform of the vote of those EDs that wish to be recorded as opposed to or abstaining from a specific decision. Many Summaries of Discussion of the Board meetings are also routinely posted on the WB's web page, but they are very brief, do not give notice of the ED's individual position, and there are meetings or subjects whose Summary is not published (McIntosh, Toby, *World Bank Releases Few Summaries of Meetings*, October 15, 2010, available at <http://www.freedominfo.org>).

¹⁰³ Dreher, Axel/Sturm, Jan-Egbert/Vreeland, James Raymond, 'Development Aid and International Politics: Does Membership on the UN Security Council Influence World Bank Decisions?', *Journal of Development Economics* 88 (2009) 1-18. These authors provide statistical evidence that lead them to conclude that temporary Security Council membership significantly increases the average of WB projects that a country receives.

¹⁰⁴ Article IV, section 10 of the IBRD Articles of Agreement (identical to Article V, section 6 of those of IDA) is in theory applicable to the EDs, but it has no relevance in practice because they often receive instructions from the countries that they represent on the Board, above all when they are appointed by a single member (Ghazi, *The IMF, The World Bank Group ...*, 2005, at 88-92).

Traditionally, the activity of supervision, completion and audit of the projects financed by the WB was rather opaque, as it could lead to frictions with borrower countries and question the Bank's wisdom when deciding to fund a concrete project. Although the WB had already enhanced the transparency of these activities in recent years, the AID has brought more light to this part of its decision-making. In any case, some *chiaroscuros* remain.

The numerical and statistical part of the Implementation Status and Results Reports¹⁰⁵ are now routinely published ten days after the report approval, but their second part, which includes the staff and management comments and ratings, is not made public (it is considered deliberative information). The Audited Annual Financial Statement of Projects¹⁰⁶ (for those projects negotiated after July 2010) is now released when received by the WB, and the Implementation Completion Report¹⁰⁷ is published after its distribution to the Board. However, the aide-mémoire of operational missions¹⁰⁸ cannot be made publicly available without the country/borrower's consent.

Even if they were not involved in the design of a project, NGOs and interested stakeholders have a great interest in the data and operational decisions taken during its development. They may denounce corrupt practices or provide input to the Bank about the best implementation possibilities. Therefore, transparency at the operational level may be as relevant as in the drawing up of the project. However, we see again that when circumstances become uncomfortable for the borrower country it can always keep its dialogue/debate with the WB outside public scrutiny. In theory, this is so to facilitate agreements that allow for the projects' completion.

D. Conclusion on WB Transparency

It has to be recognized that the WB is the IFI which has most often been involved in consultations with civil society organizations, and at the same time has developed the most transparent access to information policy. As a development institution, the WB receives more added value from transparency than other financial institutions because the design and implementation of its policies will receive input from local communities that will make its projects better adapted to the conditions in the field and thus more effective.

However, as happens with the IMF, IFIs can only be as open as their member countries are prepared to accept, and some of them do not share the culture of transparency and accountability. Before the dilemma of abandoning these countries or establishing a minimum of disclosure acceptable to them, the WB chooses the latter and hopes that the

¹⁰⁵ These Reports contain information on the status of implementation and the degree of achievement of the objectives established.

¹⁰⁶ It is a formal financial statement by the country/borrower giving notice of all the transactions that it has made with the funds received from the Bank.

¹⁰⁷ Evaluation by the WB staff of the results of a program or project after its completion.

¹⁰⁸ This document reflects the decisions and recommendations that a WB mission on the spot has transmitted to the country/borrower and the Bank's management after an evaluation of the project's implementation. The cooperation of the country/borrower is necessary for a fruitful visit, and the drafting of this document may involve some degree of negotiation.

general trend towards openness¹⁰⁹ will progressively soften those most obdurate. In these blurred circumstances, the most powerful countries continue to enjoy a margin of maneuver to defend their political interest in certain projects and on key policy decisions.

IV. Transparency in the G-20

G-20 takes decisions on the basis of consensus. There are no formal votes or voting shares on the basis of economic output, population or any other criteria. No pre-established formal procedure governs decision-making, which results from a permanent process of ‘open and constructive discussion’¹¹⁰. In spite of its limited membership, this involves a great deal of negotiations and redrafting because we find around the table very different countries with diverse (and sometimes confrontational) interests and dissimilar backgrounds.

The absence of a formal Secretariat enhances the lack of information about decision-making processes. The country chairing the Group creates a temporary Secretariat for the duration of its term, coordinates the work and organizes the meetings with great discretion and with the only limits imposed by the other members. The G-20’s web page administered by the presiding country just publishes the communiqués with the decisions taken after the summits and a general work program. This is made on a voluntary basis as there is no legal obligation to perform this commitment.

Aware of the criticism that this lack of transparency has attracted, the G-20 leaders have decided in the Cannes Summit of November 2011 to ask their Sherpas to develop ‘working practices’ for the G-20, and to encourage their engagement with non-members, international organizations and ‘civil society’¹¹¹.

Nevertheless, the high level of the discussions and their political nature do not provide the ideal environment for transparency. In this context, the open exchange of ideas and the quick adoption of decisions have been clearly prioritized over any kind of disclosure requirements¹¹². The desire to preserve the informality of the decision-making process explains the widespread opposition to the creation of a permanent Secretariat among the members and shows the difficulties that any attempt to establish real transparency obligations in the functioning of the G-20 will find. Although several possibilities have been submitted among commentators to provide for the participation of non G-20 countries, members of national parliaments, business, trade unions or civil society in the G-20 meetings¹¹³, the extension of the number of participants could negatively affect the efficacy of the Group in its decision-making and thus seems very problematic.

¹⁰⁹ For a review of freedom of information laws, adopted in a progressively increasing number of countries visit <http://www.freedominfo.org>.

¹¹⁰ G-20’s web page (http://www.g20.org/about_what_is_g20.aspx). In this page, it is also said that ‘the influence a country can exert is shaped decisively by its commitment’.

¹¹¹ G-20 Cannes Summit Final Declaration § 92 (available at <http://www.g20.org>).

¹¹² Moschella, Manuela, *Delegation to and Discretion for the Financial Stability Board and the G20: Transaction Costs or Legitimacy Concerns?*, GARNET Working Paper No. 75/10, February 2010, 25-26 (available at <http://www.garnet-eu.org>).

¹¹³ Carin, Barry/Heinbecker, Paul/Smith, Gordon/Thakur, Ramesh, *Making the G-20 Summit Process Work: Some Proposals for Improving Effectiveness and Legitimacy*, CIGI G-20 Papers, No. 2, June 2010, 12-13 (available at <http://www.cigionline.org>); Cooper, Andrew F./Bradford, Colin I., *The G-20 and the Post-Crisis Economic Order*, CIGI G-20 Papers, No. 3, June 2010, 11-13 (available at

The establishment of a permanent Secretariat that could create a system of classification and identification of documents, and that could be used as an intermediary between civil society at large and the decision-makers, appears a necessary step to foster transparency within the G-20. The lack of accountability mechanisms and the changing and itinerant nature of its tiny bureaucracy do not make possible the establishment of a reliable disclosure policy.

V. Transparency in the Financial Stability Board

The FSB finds its origin in the creation in 1999 of the Financial Stability Forum (FSF). The G-7 mandated Hans Tietmeyer, then President of the Bundesbank, to draft a report to make proposals in order to reduce systemic risk in the international financial system. The fragmentation of financial supervision and regulation throughout the world contributed to the instability of financial markets and the lack of efficacy of public regulatory policies. Although there existed several international standard setting bodies and various IFIs there was insufficient coordination among them, and among the different national authorities. This made financial crises more unpredictable and fostered their spill-over across frontiers. The Tietmeyer Report (February 1999) proposed the establishment of a new body to address these challenges.

The FSF was born as a network with a little Secretariat and a limited membership. It brought together IFIs, central banks, transnational regulatory bodies, and national regulatory and supervisory authorities. The objective was to create a tool that would be better suited to prevent global systemic risks and imbalances by integrating the microeconomic and macroeconomic analysis of financial risks in a transversal perspective across market sectors and countries. After the financial crisis of 2007-2008 the G-20 decided to re-found this body (renaming it FSB) and turn it into an institution with enlarged membership and competencies¹¹⁴. However, it continues to be a network and not an international organization¹¹⁵. Its Charter is a non-binding Memorandum of Understanding signed by its members that ‘is not intended to create any legal rights and obligations’ (Article 16).

From a regulatory perspective, the FSB is assigned important tasks in Article 2 of its Charter. It advises and monitors best practice in meeting regulatory standards, reviews and coordinates the work of the international standard setting bodies (SSBs), and sets guidelines for supervisory colleges¹¹⁶. It is true that the G-20 establishes in broad terms

<http://www.cigionline.org>); Subacchi, Paola/Pickford, Stephen, *Legitimacy vs Effectiveness for the G-20: A Dynamic Approach to Global Economic Governance*, Chatham House Briefing Paper IE BP 2011/01, October 2011 (available at <http://www.chathamhouse.org>).

¹¹⁴ For a review of the membership and competencies of the FSB, see Lombardi, Domenico, *The Governance of the Financial Stability Board*, Brookings Institution Issues Paper, September 2011, 5-9 (available at <http://www.brookings.edu>); Helleiner, Eric, *The Financial Stability Board and International Standards*, CIGI G-20 Papers, No. 1, June 2010, 3-8 (available at <http://www.cigionline.org>).

¹¹⁵ The staff of the FSB’s Secretariat amounts to 20 people. Most of them are temporarily on loan from other IFIs or member countries.

¹¹⁶ From a normative perspective, the FSB adopts reports, principles, standards, recommendations and guidance (Article 7(c) of the Charter), and may even issue warnings to its members (in collaboration with the IMF –Article 2(h) of the Charter). It also performs a monitoring function of members’ regulatory standards and of SSBs’ work (Article 2(d) and (e) of the Charter). For a discussion on the nature of the FSB’s normative role, see Backer, Larry C., ‘Private Actors and Public Governance beyond the State: The

the key elements of the FSB's agenda, and that this body is ultimately accountable to the G-20 for its performance, but the bulk of its work relies on the input from its membership. The FSB provides the place and the environment for the exchange of ideas and information between national authorities, SSBs and IFIs so that cross-cutting issues and transversal problems can be analysed more coherently from a systemic point of view. Thus the more general perspective of the FSB helps each of its members to better understand the externalities of its norms and to design regulations better adapted to the systemic context (and therefore more effective). In consequence, the FSB is more a coordinating centre than a decision-making body: it provides the diagnosis and its membership drafts the treatment.

Formally, the Plenary is the decision-making organ of the FSB and it decides by consensus (Article 7 of the Charter). This organ meets at least twice a year and has 64 members. This downplays the fact that some countries are given one, two or three seats depending on the size of their financial markets and their financial stability. The Plenary decides on the composition of the Steering Committee¹¹⁷ and may create Standing Committees and Working Groups. In fact, it is the Steering Committee that conducts the activity of the FSB. It also decides by consensus, though this is not explicitly established in the Charter. Neither the FSB's Charter nor its web page offer any explanation on how the Steering Committee is accountable to the rest of the membership or on the kind of information that it has to provide to the Plenary or the rest of the membership¹¹⁸, in a context widespread flexibility and discretion¹¹⁹. Thus, no strong mechanism of accountability compensates for the lack of transparency.

It may be argued that the limited membership and its homogeneous background as financial regulators/supervisors facilitate the flow of information better than any transparency and reporting requirements¹²⁰. While this might be true from an internal point of view, the problem of external transparency remains unaddressed. The fact that the FSB performs more a coordinating role than a legislative one does not justify the overall absence of a disclosure policy. While it is easy to understand that quick and efficient decision-making procedures are necessary to confront systemic risks in times of crisis, and that some economic discussions or the handling of certain delicate financial information may require an important degree of confidentiality, the establishment of a clear and comprehensive transparency policy by the FSB should not be deferred. As the recent reforms in the IMF and the World Bank have shown, the high degree of technicality of its work does not pose an insurmountable obstacle.

Multinational Corporation, the Financial Stability Board, and the Global Governance Order', *Indiana Journal of Global Legal Studies* 18 (2011), 785-791.

¹¹⁷ There are no objective criteria to determine the composition of this organ beyond the very general reference in Article 12 of the Charter to the need to ensure a 'balanced representation in terms of geographic regions and institutional functions'. The FSB is currently debating to modify the composition of this Committee.

¹¹⁸ Article 13(4)(c) of the Charter simply states that the Steering Committee ensures effective information flow to all members.

¹¹⁹ The FSB's web page just gives notice of the composition of these organs. The Chair enjoys ample discretion in the performance of its functions. Besides, the chairs of Standing Committees are selected from and appointed by the Plenary at the Chair's recommendation and membership in Standing Committees and working groups is decided by the respective chairs in consultation with the Chair (Article 11 of the Charter).

¹²⁰ Moschella, *Delegation to and Discretion for the Financial Stability Board and the G20* 2010, at 18-20.

In spite of the mandate of Article 3 of the FSB's Charter to engage in wide consultations with stakeholders including private sector and non member authorities, this body has not established a comprehensive policy of public engagement with interested stakeholders or NGOs in the development of its activities¹²¹. The small size of its Secretariat and the ambience of 'central bank discretion' that pervades its work explain this fact. Nevertheless, the FSB has launched some public consultations on policy measures¹²², and it relies indirectly on that kind of interactions when it receives input from its membership (who also engages in consultations eventually). However, apart from these sporadic initiatives, only powerful interested stakeholders capable of successfully lobbying FSB's members can exert some influence in the output and that of course out of the public scrutiny.

With regard to its relation with non members, the FSB has tried to offset its limited membership and to increase the outreach of its work approving in July 2011 the establishment of six Regional Consultative Groups in which it expects to involve 70 non member countries. Only the future will tell whether this initiative brings more legitimacy and projection to the FSB's work, but it will be a complex process that requests a considerable increase of the FSB's resources. In any case, the present lack of transparency in the FSB's decision-making process appears a serious hindrance to non-member countries' interest in becoming effectively involved in these regional groups, unless they are given a real chance to influence its results.

VI. Final remarks

This study shows that a higher degree of institutionalization calls for a more coherent and open transparency policy, as more structured institutions have at their disposal the appropriate resources and are more easily subject to pressure by the civil society. The IMF and the WB are clearly more transparent than informal cooperation fora such as the G-20 or the FSB. As a development institution, the WB gets more benefits from transparency and it has achieved a remarkable level of procedural guarantees that could be set as an example for other IFIs, including the IMF. However, in practice, even in the WB there is excessive latitude for opaqueness.

It has to be recognized that some expert NGOs¹²³ have developed an impressive effort in lobbying towards increased IFIs transparency. They may not have a great influence in policy design but their very high quality technical work has made a substantial contribution towards the improvement of IFIs' transparency policies. Today, the IMF and the WB are more transparent than most of the international organizations.

Despite its significant improvement, IFIs AI policies are very complex and that is in itself an important barrier to transparency. The language used is often vague, deliberately leaving a great discretion to the institution. If confidentiality is clearly justified on some occasions, general policies or loans conditionality should always be disclosed and subject to public scrutiny, as the design of the monetary and budgetary

¹²¹ Lombardi, *The Governance of the FSB* 2011, at 18-19.

¹²² FSB, *Effective Resolution of Systemically Important Financial Institutions. Overview of Responses to the Public Consultation*, 4 November 2011 (available at <http://www.financialstabilityboard.org>).

¹²³ We refer to NGOs such as Global Transparency Initiative, Bank Information Center and Freedominfo.org.

policy or the configuration of a country's financial markets cannot be qualified as a mere 'technical decision'.

We should not underestimate the worries of IFIs staff about the damage that excessive transparency could cause to the effectiveness of their mandate. Negotiations on the regulation of financial markets, spending cuts, or budgetary priorities cannot succeed without free exchanges of ideas and a certain degree of pressure that would not be feasible with a constant public exposure. Thus, an excessive degree of disclosure would likely transfer the most sensitive negotiations to less formal and more opaque forums and would seriously hamper the role of IFIs as trusted advisors. Nevertheless, the analysis made in this chapter shows that there is scope for more openness in IFIs policies without harming their functions. Opaque member countries pose the main obstacle for a positive evolution of these policies.

As regards less formal cooperation bodies, the implementation of a coherent transparency policy in the FSB would entail an increase in its tiny resources and some degree of institutionalization. The desire to make efficacy prevail over legitimacy or good administration explain its present institutional design. While the severe limitations to transparency in the G-20 may be easier to understand due to the high level of the discussants, the political nature of the bargaining and the very general character of the commitments assumed, the FSB should take its problem of opaqueness more seriously. Its involvement in the work of SSBs that is afterwards transformed into national legislation with little room for manoeuvre raises important concerns about the democratic control of the regulation of financial markets and the policy options behind the technical measures proposed to govern them.

The important repercussions that IFIs decisions have over the life conditions of millions of people call for greater transparency. IFIs human resources are of course limited, but for the information not posted on the IFIs web pages there should be a request procedure, strict time-limits for the response¹²⁴, denials of information should be accompanied by a statement of reasons, and an appeals procedure should offer the opportunity of independent review of the judgment of the staff most directly involved. Only the WB approaches this standard albeit with serious limits.

Financial markets are global and therefore global and transparent IFIs should govern them. Opaqueness does not protect the independence and objectivity of public regulators from the excessive influence of the financial industry, as the latter always find ways to lobby in favour of its interests. Lack of transparency normally works against the interests of the average citizen.

¹²⁴ Unfortunately, mute refusals of information (lack of response) continue to be common in the world of IFIs.