

## Who Are the Important Actors in Shaping Good Governance, Transparency, and Accountability Principles?

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Commonly held ideas and aspirations of good governance, as comprised by transparency, accountability, and public participation, create a potential point of conversation between the national and the supranational. The chapters in this book have explored the ways in which these key ideas are given shape and operate at both the level of international institutions and corporations and at the national level. Interactions between these levels have a number of dimensions. The first level concerns the ways in which international institutions and corporations operate: Are their decision-making processes accountable and transparent? The ways in which principles of good governance and transparency are given form within the international institutions themselves is seen as being key to improving the quality of engagement with member states and ultimately contributing to the legitimacy of their decision making. Ljiljana Biuković suggests in Chapter 2 of this volume that the governance structure and transparency policies of the Asian Infrastructure Investment Bank (AIIB) and the New Development Bank (NDB) modestly contribute to developing countries' goal of reforming international financial institutions' governance and correspond well with China's attempt to strengthen its role in the functioning of the global financial system.

Both banks better represent developing and emerging economies in their governing bodies and establish more simplified processes for granting loans than the World Bank and other multilateral development banks. They also have adopted a "no strings attached" lending policy that coincides with China's foreign policy and its development finance principle of non-intervention in other states' internal affairs. Therefore, the two banks have not developed policies that allow these institutions to require that borrowers undertake national good governance reforms. Neither bank has created internal governance regimes and transparency rules that are more rigorous than those of the World Bank. The AIIB's Environment and Social Framework addresses the environmental and social risks of the funded projects and provides a framework for the disclosure of environmental and social information relevant to

the project and for public consultation.<sup>1</sup> It requires information disclosure about environmental and social risks and the impact of the projects in the project area by borrowers (clients) and the bank (AIIB).<sup>2</sup> It also provides for a consultation process between borrowers and public. However, monitoring and reporting on compliance by borrowers and the AIIB with these obligations is the responsibility of the AIIB and the borrowers themselves rather than the responsibility of an independent third party. Moreover, the AIIB has not yet established its own oversight mechanism that could provide people with access to redress if the bank itself fails to comply with the framework. The NDB is yet to adopt its Environment and Social Framework. Without an adequate duty of borrowing states and the banks to disclose relevant information about the impact of projects in the project area to the public in a timely manner, and without meaningful inputs by the public and civil society in the decision-making processes, these banks are not capable of addressing concerns about the lack of transparency and accountability in their simplified loan-granting processes.

The second level concerns the ways in which international institutions and corporations impose standards of good governance (including transparency and accountability) as conditions of aid, funding, and investment in individual countries. At this level, we see highlighted the controversial level of indeterminacy of the core ideas of transparency and accountability. If these are the conditions for investment and provision of funds, then are they too vague to be applied fairly? Or are they too vague to operate either as a condition for funding and investment or as a mechanism for improving governance in the domestic jurisdiction? Provisions for fair and equitable treatment (FET) in bilateral investment treaties (BITs) determine how states interact with public international law when their domestic regulatory measures, which are designed to protect the public interest, compete with the state's international commitments to protect foreign investments and the interests of foreign investors. Moshe Hirsch argues in Chapter 4 of this volume that FET is the key concept in international investment law that imposes principles of good governance and transparency on host countries and facilitates foreign investments by guaranteeing a stable and certain regulatory environment. However, Hirsch contends that the scope of the FET principle is not clearly defined in either BITs or public international law, which raises concerns for foreign investors claiming that states' regulatory actions violate their legitimate

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<sup>1</sup> Asian Infrastructure Investment, "Environment and Social Framework," February 2016, [https://www.aiib.org/en/policies-strategies/\\_download/environment-framework/20160226043633542.pdf](https://www.aiib.org/en/policies-strategies/_download/environment-framework/20160226043633542.pdf), art. 5: Objectives of the Environmental and Social Framework.

<sup>2</sup> *Ibid.*, arts 57, 58.

expectation to operate in a stable legal environment and for states exercising their legislative power to control foreign investments.

Generally, the FET is considered to be a principle that incorporates many elements of the concept of good governance, including a duty of host states to respect the legitimate expectations of investors, to make administrative decisions in a non-discriminatory way and in compliance with the principles of transparency and good faith, and generally to refrain from acting in bad faith. In other words, a stable and transparent legal environment is an important element of both principles of good governance and FET. An unstable legal environment in a host state harms an investor's interests, but the inability to make regulatory changes harms host states. Hirsch argues that the ultimate determination of FET's impact on the regulatory flexibility of states is made by international tribunals on a case-by-case basis when they are called upon to resolve disputes between states and foreign investors and award remedies. Hirsch's case studies reveal that, although tribunals have found the link between a stable legal environment and the FET principle, they have established that regulatory changes of the host system alone do not constitute a breach of the investor's legitimate expectations protected by the FET principle. This is because the concept of a stable legal environment is complex and multi-layered and because it consists not only of the host regulatory measures in force at the time when the investment is made but also of contractual and semi-contractual arrangements between investors and states as well as unilateral promissory statements made by states. The implications of this lack of a common definition of the concept of FET in BITs could be very significant, especially given the number of arbitral awards that deal with the standard of protection of investors and the rights of governments to regulate foreign investments on a case-by-case basis.

The case study of the Canada-Colombia Free Trade Agreement, provided by Alison Yule in Chapter 5 of this volume, suggests that the human rights monitoring provision of this agreement is of limited efficacy in prompting domestic reforms where the national government has limited capacity.<sup>3</sup> In these cases, it is easy for the human rights requirements of the agreement and monitoring arrangements to come adrift from the commercial aspects of the arrangement. Yule correctly points out that it is only when these two aspects become inextricably interconnected that the virtues of a transparency monitoring process can feed back into the substantive objective of improving human rights protection.

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<sup>3</sup> Canada-Colombia Free Trade Agreement, November 21, 2008, <http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/fta-ale/background-contexte.aspx?lang=eng>.

Another form of engagement between the international and national level occurs when principles of good governance are applied by non-state actors in evaluating their own investment decisions. As Lesley A. Jacobs discusses in Chapter 3 of this volume, important investment and disinvestment decisions are influenced by the legal consciousness of transnational corporations in their insistence upon good governance practices by the host state. The second of the principles articulated in the United Nations Guiding Principles on Business and Human Rights – that corporations have responsibility to respect human rights – can indeed be given effect on a case-by-case basis.<sup>4</sup> However, as Chapter 3 and Chapter 9 (by Sarah Biddulph) both illustrate, this form of corporate social responsibility requires that corporations have internalized the value of respecting human rights. While these values are reflected in the decisions of individual corporations (for example, the case of Talisman Energy discussed in Chapter 3), they cannot be completely disassociated from the institutional and public values of the countries of influence to these corporations. The failure of corporate social responsibility initiatives in China to spread beyond multinational corporations, whose supply chains are subject to intensive consumer scrutiny, cannot be disassociated from the values reflected in domestic governance and enforcement priorities (see Biddulph’s discussion in Chapter 9).

The third dimension of good governance is the national level. We examine the ways in which international good governance principles are given practical effect, with a focus on the Chinese domestic regulatory environment. We also consider the ways in which Chinese adaptations, often through recursive cycles of reform, have modified both the interpretation and effects of the principles of good governance. In some cases, China is now exporting its own interpretations of good governance back into international fora. We live in a world where the relationship between the national and the transnational remains in flux. The rise of powerful nation states such as China and its willingness to act as a concept entrepreneur is illustrated by both (Chapter 2) and Wang Haifeng (Chapter 6). In these discussions, we see a movement from the local to the international. China is increasingly influencing both the centrality and interpretation of norms of good governance, including transparency and accountability, through its influence in shaping international financial institutions such as the AIIB and the NDB and through its many bilateral and plurilateral investment treaties as well as the expanding reach of the Belt and Road Initiative (BRI). Biu argues in Chapter 2

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<sup>4</sup> Guiding Principles on Business and Human Rights, implementing the United Nations Protect, Respect and Remedy Framework, Doc. A/HRC/17/31, 2011.

that the absence of adequate disclosure policies, limited appeal mechanisms, and the lack of an outside overview and public participation in the decision-making processes of the two new development banks promoted by China raise concerns about their accountability both to their members and to civil society. The legitimacy of these banks rests on the actions of China and that country's ability to align the lending policies of these two international banks with its own BRI, which prioritizes the infrastructure development between China and Asian and European countries.

Similarly, Wang's study of China's foreign investment policy in Chapter 6 reveals that country's evolution from a rule taker in international trade and investment to a rule maker capable of imprinting its national strategies into the governance of foreign investments in China as well as its compliance with international treaty commitments in its outwards investments. China's reforms of domestic administrative and foreign investment laws were not only aimed at complying with the WTO rules but were also made in response to domestic policy imperatives such as the regulatory governance reforms mandated by the China Communist Party (CCP). Thus, the CCP's 2014 decision to reform governance and to improve the efficiency and accountability of government institutions at all levels has been at least as significant in influencing the governance of foreign investment-related matters in the Shanghai Pilot Free Trade Zone (SHPFTZ) as has China's commitments to the implementation of international trade and investment treaties. China's embrace of transparency in the domestic foreign investment regime through its adoption of the negative list for the SHPFTZ can be understood not only as a sign of China's acceptance of international standards but also as a pilot for domestic administrative reform. These domestic reforms transfer some autonomy for economic decision making to local authorities but, at the same time, increase their accountability for these decisions to the central government (rather than to the public). Indeed, the oversight of the SHPFTZ's governance by the central government remains significant. The local government of the pilot zone proposed its own method of implementing the negative list, but that proposal had to be approved by the authorities of the central government. Information disclosure obligations imposed on the zone's management authorities by the State Council's Plan for Further Deepening the Reform and Opening-up of China (Shanghai) Pilot Free Trade Zone allows not only investors but also the central government to review all local laws, regulations, documents, policies, and

procedures, including the notes of meetings, by simply visiting an official website of the zone.<sup>5</sup>

The case studies examining how transparency (Chapters 7 and 10), accountability (Chapters 7 and 9), and public participation (Chapter 8) are given shape in China's domestic regulatory environment, all illustrate how these concepts and the relationship between them are reshaped and reconstructed at the local level. These chapters help us to gain a fuller picture of how the Chinese domestic regulatory environment has been influenced, and reworked, by these basic principles of good governance. We asked to whom should information be made available and for what purpose? In the case of environmental information, He Weidong argues in Chapter 10 that the public is the intended recipient, with the stated intention being that the public and civil society should thus be able to fulfill its role in environmental protection. However, we have also seen the gulf between the rhetoric of openness and responsibility and the persistence of state-led modes of enforcement and its culture of secrecy.

An analysis of the mechanisms for accountability of government officials by Biddulph and Wang in Chapter 7 highlights the importance of accountability to higher political and administrative levels and their role in achieving the political objective of strengthening governance capacity. It shows how the international precedence given to judicial review and administrative review as mechanisms for accountability have been subordinated to bureaucratic systems of agency control. An analysis by Biddulph in Chapter 9 of the form of legal empowerment of the agencies responsible for the enforcement of workplace health and safety law and its interactions with accountability mechanisms highlight the unintended consequences of these forms of regulation. Bureaucratic inertia is certainly a problem that is not unique to China, but this study alerts us that forms of empowerment and accountability might interact to defeat the ultimate objectives of protecting citizens' rights and interests. Similarly, increasing public participation in official decision making requires detailed scrutiny before we can claim that its outcome is to increase transparency and the democratic objective of increasing reciprocity between government and the governed. Biddulph's study of public participation in housing expropriation and development decisions in Chapter 8 shows that public participation, managed and closely

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<sup>5</sup> Plan for Further Deepening the Reform and Opening-up of China (Shanghai) Pilot Free Trade Zone [Guowuyuan Jinyibu Shenhua Zhongguo (Shanghai) Ziyou Maoyi Shiyangu Gaige Kaifang Fang'an], April 8, 2015, [http://www.gov.cn/zhengce/content/2015-04/20/content\\_9631.htm](http://www.gov.cn/zhengce/content/2015-04/20/content_9631.htm).

directed, can be made to serve objectives of enhancing stability and order and, perversely, of reducing citizen claim making and the scope of citizen engagement in decision-making processes that public participation, in theory, is intended to facilitate.

These case studies did not engage in the explicit comparison with regulatory systems of other nation-states because of a lack of resources and space. However, the focus on China is certainly not an argument about Chinese exceptionalism. In fact, each of the conclusions we draw about the different interpretations and impacts of transparency, accountability, and public participation could readily be applied in other jurisdictions. The precise ways in which these principles operate in different jurisdictions would most certainly differ, but the general principle remains that each of these mechanisms (transparency, accountability, public participation, and good governance) are mutable. They are given different form in different regulatory environments (even within jurisdictions, there may be different factors at play), and the ways in which each of these mechanisms interacts requires specific attention. What might be shared is the recursive processes by which international ideas and norms are brought in (grafted, transplanted, or imposed) to a national regulatory system. The fact that principles of good governance including transparency, accountability, and public participation are difficult to pin down in terms of a definition, as [Biddulph](#) and [Biddulph](#) discuss in Chapter 1, does not undermine their value. Rather than seeing them as set principles to be applied, we might productively see them as a guide to thinking about how both international and domestic regulation might strive to promote forms of governance that are fairer and more just and that place greater value on the protection and promotion of human rights.

Notes

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