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International Good Governance Norms between the Global and the Local China, Transparency, and Accountability

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We are facing uncertain and rapidly changing times. Forces of globalization have accelerated with advances in technology and communication, just as resurgent authoritarian states led by China and Russia have sought to reassert the centrality of the sovereign state. The rules-based world trading order is facing challenges from isolationist and protectionist forces spearheaded by populist leaders such as President Donald Trump in the United States. One campaign promise Trump was not slow in fulfilling was to withdraw the United States from the Trans-Pacific Partnership, a regional free trade agreement (FTA). Halfway into his term, Trump has surrounded himself with trade skeptics and toyed with the idea of prosecuting and "winning" a trade war with China.[1] The United States has also exercised its influence in the World Trade Organization (WTO) by refusing to start the appointment process for new members to the WTO's Appellate Body, the dispute settlement institution that is central to the organization's strength.[2]

The general secretary of the Chinese Communist Party (CCP), Xi Jinping, has been quick to propose a vision of China as the new leader of the global economy, stating that China supports the expansion of international trade and the further opening of the Chinese economy, first at the World Economic Forum in Davos in January 2017[3] and later at the Bo'ao Forum for Asia on April 10, 2018. His vision of "build[ing] a community with a shared future for mankind" is one that promotes trade liberalization with "Chinese characteristics" and does not include a clear

[1] Zachary Karabell, "How to Win a Trade War with China: Hint: Don't Fight It," *Politico Magazine*, April 7, 2018, https://www.politico.com/magazine/story/2018/04/07/how-to-win-trade-war-china-217830.
[2] "America Holds the World Trade Organisation Hostage: The Rules-Based System of Trade Faces Threats beyond Trump's Tariffs," *The Economist*, September 23, 2017, https://www.economist.com/news/finance-and-economics/21729462-rules-based-system-trade-faces-threats-beyond-trumps-tariffs-america-holds.
[3] "Full text of Xi Jinping's Keynote Address at the World Economic Forum," CGTN America, January 17, 2017, https://america.cgtn.com/2017/01/17/full-text-of-xi-jinping-keynote-at-the-world-economic-forum.

commitment to the rules-based order as it currently exists. In his speech at the Bo'ao Forum for Asia in 2018, Xi Jinping noted that "a Chinese philosopher recognized as early as over 2,500 years ago that one doesn't have to follow a beaten path if he wishes to benefit the people and one doesn't have to observe old conventions if he wishes to get things done."[4] While we cannot predict the outcome of what appear to be the centripetal forces tearing at the fabric of the international rules-based order for trade and investment, it is timely to examine the dynamic interaction between the international and national in the interpretation and application of core concepts. This book is concerned with good governance at both the international and regional level and as it is interpreted and applied by the Chinese state (the party-state).[5]

The concept of good governance has for decades been at the centre of academic research on global institutions, neo-liberal markets, aid and development, and the quality of domestic regulatory agencies. Is it just a catchphrase, the meaning of which is essentially indeterminate and dependent on the audience? Is it merely an accoutrement of neo-liberal economic policies? Despite the fact that the term has been subject to both critical and laudatory analysis, good governance remains a topic of importance. It is present in discussions about reforms of international institutions and domestic policies that are affected by both the transformative force of economic globalization and the increasing interconnectedness of people. Good governance has been used as a benchmark for assessing how international organizations and states manage their affairs, as a new discourse to promote a more equitable international development agenda, and as a particular political and ideological program to strengthen economic liberalization and empower public participation in policy making.[6] Programs and provisions to realize good governance can be seen in many multilateral, regional, and bilateral arrangements of sovereign states. At the

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[4] For the full text of Xi Jinping's speech at the Bo'ao Forum of Asia, see "Openness for Greater Prosperity, Innovation for a Better Future," *China Daily*, April 10, 2018, http://www.chinadaily.com.cn/a/201804/10/WS5acc515ca3105cdcf6517425.html.

[5] Throughout, we use the term "party-state" as it best captures the nature of governance in China – that is, of an authoritarian state with a single ruling party, the Chinese Communist Party (CCP) – where the CCP exercises its leadership role directly and through its control of the organs of state. Zhu Suli asserts that the "CCP's influence and control is ubiquitous" and that it, in fact, inherited the political tradition of the Kuomintang of the party-state of "party construction of the state" and where the "party [is] above the state." Zhu Suli, "Political Parties in China's Judiciary," *Duke Journal of Comparative and International Law* 17 (2007): 535.

[6] Jolle Demmers, Alex E. Fernández Jilberto, and Barbara Hogenboom, "Good Governance and Democracy in a World of Neoliberal Regimes," in *Good Governance in the Era of Global Neoliberalism: Conflict and Depoliticization in Latin America, Eastern Europe, Asia and Africa,* ed. Jolle Demmers, Alex E. Fernández Jilberto, and Barbara Hogenboom (New York: Routledge, 2005), 2–3.

international level, good governance provisions are constructed in two ways. First, they can address the internal aspect of good governance, defining the ways in which international institutions perform their basic tasks and how they interact with their membership. Second, they can be aimed externally, where international institutions set standards of governance for local decision makers in member states. In both contexts, good governance is designed to legitimize the decision making of institutions, safeguard participation by member states and their publics in institutional decision making, and ensure the public accountability of governments for decisions relating to the distribution of wealth and the use of public resources.

Nation-states also engage with good governance. First, they connect as a necessary condition for their participation with international agencies. But, just as importantly, they embrace, to different extents and in different ways, principles and techniques of good governance to build the legitimacy of their own domestic regulatory regimes, including the regulatory management of domestic economic and social reforms. Many facets of good governance, including transparency, accountability, and public participation mechanisms, were introduced into China's system of law-based governance from the mid-1990s as part of China's efforts to meet the baseline institutional requirements for entry to the General Agreement on Tariffs and Trade (GATT) (unsuccessfully) and later the WTO.[7] Principles and techniques of good governance, therefore, have international and domestic dimensions. International agencies have actively sponsored good governance initiatives by imposing good governance obligations on their member states and creating a normative framework for evaluating their own conduct as well as their member states'. The domestic dimension can be examined in the ways in which domestic laws and policies of national governments engage with principles of good governance. This volume examines both dimensions and the interplay between them.

Before describing our particular approach to good governance at the international and domestic levels, we begin by addressing governance in general as well as the core analytical concept of good governance in particular. These topics have both been the subject of varying definitions, justifications, explanations, and critiques. The scope and relationship between good governance and economic growth, though unclear, are also examined in some detail. As the scope of good governance itself is very broad, we have chosen to focus primarily (though not

[7] General Agreement on Tariffs and Trade, April 15, 1994, 1867 UNTS 187 (GATT).

exclusively) on three aspects of it: transparency, accountability, and public participation. Together, they arguably form the primary core of the attributes associated with good governance and one of its main goals: legitimacy.[8]

The concerns of this volume are not limited to describing how internally facing elements of good governance appear and are adopted in the governance of international, transnational, and domestic institutions. We also examine externally facing elements in the dynamic interactions between these institutions and governments. After examining the concepts of governance and good governance, we explain the ways in which this interaction is captured and documented as well as the methodological justification for our approach. It is possible to identify some areas where international norms and rules are adopted, transformed, or perverted at the domestic level. There are also a smaller number of examples where national governments, including that of China, have been sufficiently powerful and resolved to influence international rule making. But, in many situations, there is no straight line between the national and the transnational. Engagement and interactions between the levels, through idiosyncratic interpretations and appropriations of concepts such as transparency, accountability, and public participation, are more amorphous, but, as we argue below, still significant.

Good Governance: The Concept

The concept of governance can be traced to the Greek word "*kybernan*," which means "to pilot, steer or direct."[9] Since the 1980s, social science scholars, including those working in law and economics, have mainly focused on four meanings of governance: 1) as a structure or a system of rules or regimes (including laws, judicial decisions, administrative practices, and non-government regulatory institutions and private standards); 2) as a process of steering and coordinating norm creation, policy making, and exercising authority; 3) as a mechanism or institutionalized procedure of decision making, compliance, and control; and 4) as a strategy or "the design, creation, and adaptation of governance systems" (that is, governance in action that

[8] Dimitrov argues that well-functioning mechanisms of accountability are one of the factors contributing to the resilience of communist regimes, including China. Martin Dimitrov, "Conclusion: Whither Communist Regime Resilience?" in *Why Communism Did Not Collapse: Understanding Authoritarian Regime Resilience in Asia and Europe*, ed. Martin Dimitrov (New York: Cambridge University Press, 2013), 308.

[9] David Levi-Faur, "From 'Big Government' to 'Big Governance'?" in *Oxford Handbook of Governance*, ed. David Levi-Faur (Oxford: Oxford University Press, 2012), 8.

includes the design of governance by actors other than government institutions).[10] Good governance and the concepts of transparency, accountability, and public participation, which are our primary focus, have become ubiquitous, but they are also highly contested. In the following sections, we set out some of the background to, and controversy surrounding, the concept and role of good governance.

Globalization and Economic Theories of Growth

According to Richard Baldwin, different waves of globalization have been forces for unprecedented transformation of both states and societies.[11] Baldwin argues that states and the international community have been required to create different normative frameworks capable of facilitating global progress while also addressing national prosperity goals. The period of intense industrialization in the late nineteenth century was the beginning of what he calls "Old Globalization," which helped Western nations achieve economic and political dominance throughout the twentieth century. According to Baldwin, we currently live in a "New Globalization" phase that started in the 1990s. This phase is characterized by fast-paced technological innovations, the liberalization of international trade, the international reorganization of production into global value chains, and the emergence of new global economic powers among developing countries.[12] In particular, over the last thirty years, global institutions and states have had to fundamentally re-examine their policies in order to sustain economic growth and maintain social stability.[13] New globalization needs an institutional and normative framework capable of creating laws and standards that facilitate economic development in the circumstances of convergence and high levels of interdependency in global production carried by global value chains.[14]

The period of new globalization began when the dominant normative framework created by neo-classical theories of economic growth were being promoted in the neo-liberal politics of

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[10] Ibid., 8–9.
[11] Richard Baldwin, *The Great Convergence: Information Technology and the New Globalization* (Cambridge, MA: Harvard University Press, 2016).
[12] Levi-Faur, *supra* note 9, 8–9.
[13] Baldwin, *supra* note 11, 221. Baldwin argues that the main drivers of "new globalization" are information and communication technologies, which allow companies to render manufacturing and services offshore from developed to developing countries at low costs and to organize such denationalized production into global value chains.
[14] Ibid., 4.

Western developed states. The underlying ideas that favoured free-market expansion, the privatization of public corporations and state-owned enterprises, the limitation of state intervention in the regulation of the economy, and the efficient functioning of institutions shaped the political and economic agendas of international organizations such as the World Bank, the International Monetary Fund (IMF), and the WTO. International laws and standards enacted through negotiations between member states of international organizations reflected neo-classical assumptions that a free market and reduced government regulation provided the basis for economic growth for all states engaged in global trade.

The neo-classical economic agenda holds that a global market requires governance based on global norms and global laws.[15] Further, national markets require forms of regulation and national laws that accord with the global or transnational context.[16] In the area of international finance, national reforms started mainly from the adoption of global rules and standards created by international or global institutions (the United Nations [UN], World Bank, and IMF).[17] This style of reform shares similarities with the top-down form of lawmaking in international trade. Since the establishment of the WTO in 1994, issues concerning trade in services and trade-related intellectual property have been governed primarily by global rules.[18] As companies started operating as global value chains and trade became more interdependent with intellectual property and foreign direct investments, international trade negotiations have focused on creating global rules and standards that concern competition, labour standards, environmental protection, and investments protection – traditionally considered "beyond border issues" within national jurisdictions. This expansion is where international efforts to insist on domestic conformity to international rules has met with resistance from both developed and developing states concerned that WTO laws now encroach on areas once regulated by national parliaments and governments.

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[15] Thomas Cottier, "Trade Policy in the Age of Populism: Why the New Bilateralism Will Not Work" (Brexit: International Legal Implications, Centre for International Governance Innovation/British Institute of International and Comparative Law Paper no. 12, February 2018), 4–5.
[16] Terence C. Halliday and Bruce G. Carruthers, "The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes," *American Journal of Sociology* 112, 4 (January 2007): 1135–1202.
[17] Ibid.
[18] Since the creation of GATT in 1947, international trade in goods has essentially been governed by global laws and standards negotiated multilaterally by parties to that agreements. General Agreement on Tariffs and Trade 1947, January 1, 1948, 55 UNTS 194.

International institutions have sought to impose the goal of economic development on developing countries, based on the economic experiences of developed countries, including democratization, fiscal discipline, private property protection, and marketization (the Washington Consensus).[19] Yet, ultimately, these types of rules have raised concerns about state sovereignty and become challenging for many states to adopt.[20] The work of Douglass North expanded the framework for considering economic change and growth. North asks: "If neoclassical international trade models promote convergence among national economies, why is there still an enormous difference in their development?"[21] Rather than focus narrowly on rule making, the purview of new institutional economics theory has expanded to analyze the ongoing interaction between institutions and organizations.[22] Organizations play by the rules of the game provided by the institutional framework. According to North, law is a formal institution that is both an organization and an originator of legal rules.[23] He emphasizes that institutions (formal and informal) determine the performance of economies as much as technological innovations and that, in order to explain differences in economic performance, we need to study the ways in which institutions change.[24] Although North's framework of institutional economic does not speak directly to the impact of globalization on lawmaking at the national level, his study suggests that an assessment of the impact of lawmaking requires an understanding of how global and local institutions and organizations interact at different levels.

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[19] The term Washington Consensus, as used here, is synonymous with economic policies that were often prescribed to developing countries by international financial institutions in the 1980s rather than its original meaning, coined by John Williamson, with respect to the set of policies for development prescribed by the World Bank to Argentina in the second half of 1989. John Williamson, "What Washington Means by Policy Reform," in *Latin American Adjustment: How Much Has Happened?*, ed. John Williamson (Washington, DC: Institute for International Economics, 1990), ch. 2.

[20] Joseph E. Stiglitz, *Globalization and Its Discontents* (New York: W.W. Norton, 2002); Joseph E. Stiglitz, *The Roaring Nineties* (New York: W.W. Norton, 2003).

[21] Douglass C. North, *Institutions, Institutional Change, and Economic Performance* (Cambridge, UK: Cambridge University Press, 1990), 91.

[22] Ibid., 73. Douglass North defines "institutions" as the "rules of the game in a society" or "constraints that shape human interaction" and "organizations" as "groups of individuals bound by some common purpose to achieve" and whose functioning is influenced by the institutional framework. Institutions consist of formal (laws and regulations) and informal (norms of behaviour and voluntary codes of conduct) rules, and they enforce both. Organizations include different bodies, such as political (political parties, government bodies, regulatory agencies, and so on) and economic (companies, trade unions, family firms, and so on) bodies or social bodies (churches, clubs, athletic associations). Ibid., 5.

[23] Julio Faundez, "Douglass North's Theory of Institutions: Lessons for Law and Development," *Hague Journal on the Rule of Law* 8, 2 (2016): 373–419.

[24] North, *supra* note 21, 133.

This short discussion of the impact of theories of globalization as they implicate laws and institutions leads us back to models of governance, which are themselves oriented to supporting, even promoting, economic growth and globalization and are constructed around rules and institutions.

Governance and Development: Definitions and Debates

As with all important concepts, there is a plethora of different interpretations of the meaning and scope of governance advocated by international organizations, states, and academics, some of which are analyzed in this volume. Our starting point in this book has been to adopt the broad definition of governance proposed by John Ruggie as "the systems of authoritative norms, rules, institutions, and practices by means of which any collectivity, from the local to the global, manages its common affairs."[25] Some international organizations, including the World Bank, define governance somewhat more narrowly – as "the manner in which power is exercised in the management of a country's economic and social resources" or "the manner in which public officials and institutions acquire and exercise the authority to shape public policy and provide public goods and services."[26] Global governance is commonly defined as "govern*ance* in the absence of govern*ment*."[27] In other words, global governance is "governing without sovereign authority ... and ... doing internationally what governments do at home."[28] As such, it involves not only states and international organizations based on state membership but also non-state actors, such as businesses and groups of citizens.

In 1992, the World Bank linked governance with development.[29] In its report, the World Bank went on to define good governance as being "synonymous with sound development management."[30] Its focus was on the role that governments, not international or global organizations, play in creating sound economic policies and providing public goods. The report

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[25] John Gerard Ruggie, "Global Governance and 'New Governance Theory': Lessons from Business and Human Rights," *Global Governance* 20, 1 (2014): 5–17.
[26] Daniel Kaufmann, Aart Kraay, and Massimo Mastruzzi, "The Worldwide Governance Indicators: Methodology and Analytical Issues" (Draft Policy Research Working Paper, September 2010), http://info.worldbank.org/governance/wgi/pdf/WGI.pdf.
[27] Ruggie, *supra* note 25 at 5 (emphasis in original).
[28] Lawrence S. Finkelstein, "What Is Global Governance," *Global Governance* 1, 3 (1995): 369.
[29] World Bank, *Governance and Development* (Washington, DC: World Bank, April 1992), http://documents.worldbank.org/curated/en/604951468739447676/pdf/multi-page.pdf.
[30] Ibid., 1.

goes on to identify four areas of governance that are consistent with the mandate of the bank itself: "public sector management, accountability, the legal framework for development, and information and transparency."[31] The report states that if the public sector in question lacks the capacity to manage the economy the prospect of economic development is weak.[32] Therefore, the World Bank made several commitments to states that borrowed its funds to: 1) assist governments with technical expertise needed to identify and undertake governance reforms; 2) persuade governments of the need for reforms; and 3) craft country lending strategies that take into account the effect of governance on development performance.[33]

The World Bank emphasized that all of its activities to foster domestic governance reforms were to take place on the basis of a broadly based dialogue with its borrowers as well as with interested academics. However, the realities of the imbalances in the financial and institutional capacity of borrowers and their needs for infrastructure development resulted in the introduction of governance-reform programs, which were planned and supported by the World Bank and implemented in a top-down manner. The bank's own mandate to promote sustainable economic and social development, according to its own terms, limited its assistance to reforming the economic dimension of governance and, consequently, to emphasizing efficiency in performing government functions as a desirable norm of governance, with transparency and accountability seen as important principles to achieve this objective.

The UN and its agencies involved in development projects in member states have emphasized the democratic functioning of institutions and public engagement in government's activities as norms of governance. In this context, the rule of law and public participation are the most important principles of governance. The origins of this normative framework are in the founding documents defining the institutional goals and purposes of these bodies. The framework is rooted in the political ideas of liberal democracy and the universality of human rights that gained momentum in the 1940s, around the time when the foundations of both the UN and the World Bank were being negotiated. In particular, the principles of participation and the

[31] Ibid., 2.
[32] Ibid., 12.
[33] Ibid., 52.

rule of law were linked with key human rights enshrined in the Universal Declaration of Human Rights, which was adopted in 1948.[34]

Regardless of their institutional purpose, the policies, rules, and standards of international organizations all engage with the political and economic dimensions of governance. Our focus on lawmaking recognizes that law provides the normative and institutional framework for globalization. But the need to undertake reforms of political governance to achieve economic development is subject to debate. No consensus on this question exists between international lawmakers such as the WTO, the World Bank, international banks, and aid donors, on the one hand, and developing countries, on the other hand. In fact, the failure of the neo-classical model of development articulated in the Washington Consensus to improve the economies of developing countries and newly democratized states, and its further failure to ensure the efficient management of public resources and secure prosperity, have cast a shadow over the whole project of governance reforms. The transplantation of the Washington Consensus policy package by developing countries resulted in the state playing a more restricted role in managing economic development, the democratization of political systems, and the enhancement of individual rights, at least on the books. In practice, it failed to deliver economic growth in recipient countries. The policy model and laws to be emulated did not work efficiently in the global market, where transnational corporations and global value chains operated and crossed legal jurisdictions with considerable ease. At the same time, China, which was not subject to the conditions of the Washington Consensus, emerged as the world economic powerhouse and presented an alternative governance policy for developing countries.[35] It is in this context that Chinese promises for peaceful development, consensus, non-interference, and cooperation with win-win results offer a vague, yet tantalizing, alternative vision for economic development and prosperity.

Principles of Governance and International Agencies

[34] Universal Declaration of Human Rights, December 10, 1948, UN Doc. A/810, 1948, preamble: "[I]t is essential ... that human rights should be protected by the rule of law"; art. 17: "No one shall be arbitrarily deprived of his property"; art. 21: "Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. ... The will of the people shall be the basis of the authority of government."

[35] Bo Rothstein, "The Three Words of Governance" (Quality of Government Institute Working Papers Series, 2013), 12.

In the preceding discussion, we have examined how, at the most general level, the term "governance" refers to the administrative competence and capacity of regulatory authorities to formulate and implement policies.[36] The UN and the WTO are the two most prominent multilateral institutions that have adopted policies, declarations, and rules aimed at creating a particular normative framework of "new globalization," which was relevant for assessing the quality of governance of their members. Accordingly, the concept of good governance became the focus of their development strategies. In 1997, the UN Development Programme (UNDP) identified a set of important principles of good governance that were recognized almost universally by the UN members: legitimacy and voice, direction, performance, accountability, and fairness.[37] In 1998, Kofi Annan, the then secretary-general of the UN, stated that "good governance is perhaps the single most important factor in eradicating poverty and promoting development."[38]

Not only is good governance considered to be one of the most important goals promoted by the majority of development institutions and donor agencies, it is also one of the fundamental objectives set out in the UN Millennium Development Declaration (MDD), which was adopted by the UN in 2000.[39] The MDD specifically identifies the promotion of human rights, democracy, and good governance as being integral to the development efforts of all governments of the world.[40] While recognizing the differences in the "nature, modalities and responsibilities that apply to North-South and South-South cooperation," the 2011 Busan Partnership for Effective Development Co-operation (Busan Declaration) reaffirms the good governance commitments articulated in the MDD.[41] In addition, it incorporates commitments set out in the

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[36] Julio Faundez, ed., *Good Government and Law: Legal and Institutional Reform in Developing Countries* (Houndmills, UK: Macmillan Press, 1997).
[37] United Nations Development Programme (UNDP), *Governance for Sustainable Human Development: A UNDP Policy Document* (New York: UNDP, 1997); Andrea Bianchi and Anne Peters, eds., *Transparency in International Law* (Cambridge, UK: Cambridge University Press, 2013).
[38] United Nations, *Annual Report of the Secretary General on the Work of the Organization* (New York: United Nations, 1998), para. 114.
[39] United Nations General Assembly, United Nations Millennium Declaration, Doc. A/RES/55/2, September 18, 2000, http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/55/2.
[40] Ibid., ch. 5: "Human rights, democracy and good governance: ... 24. We will spare no effort to promote democracy and strengthen the rule of law, as well as respect for all internationally recognized human rights and fundamental freedoms, including the right to development."
[41] Busan Partnership for Effective Development Co-operation, Fourth High-Level Forum on Aid Effectiveness, Busan, Korea, December 1, 2011, paras. 3–4, http://www.oecd.org/development/effectiveness/49650173.pdf.

Paris Declaration on Aid Effectiveness and the Accra Agenda for Action to build effective institutions and to support the activities of the public sector in developing countries.[42] Both the MDD and the Busan Declaration focus on the concept of good governance operating externally in the context of the activities of states and governments of both developed and developing countries. Interestingly, the MDD and Busan Declaration do not address good governance within international organizations themselves.

The MDD articulates the critical role of good governance in economic development and poverty reduction as one of its eight Millennium Development Goals (MDGs). The eight MDGs were approved at the 2002 inaugural UN International Conference on Financing in Monterrey, Mexico, and heralded representing "a global partnership for development." The MDD called on developing countries to improve domestic governance and pursue deeper market and governance reforms and urged developed countries to provide support and financial assistance for these changes.[43] In effect, developing countries were advised to embrace measures to improve governance that were either imposed in a top-down manner by the international organizations they joined or transplanted using legal systems of developed countries as a model for domestic governance reform. In practice, the provision of assistance by developed countries to developing countries has often been conditional on adopting the governance model of the development aid donors. These transplanted models of governance not only include institution building in the area of economic development but also human development and the administration of justice in accordance with the principles of liberal democracy and public participation in governance.

The WTO governs or manages trade in the world market with the objective of "raising standards of living, ensuring full employment and a large and steadily growing volume of real income ... while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development ... in a manner consistent with [the parties'] needs and concerns at different levels of economic development."[44] In other words, the WTO purports to

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[42] Ibid., para. 19. See Organisation for Economic Co-operation and Development (OECD), "The Paris Declaration on Aid Effectiveness (2005) and the Accra Agenda for Action (2008)," https://www.oecd.org/dac/effectiveness/34428351.pdf. For more on the Paris Declaration on Aid Effectiveness and the Accra Agenda for Action, see OECD, "Paris Declaration and Accra Agenda for Action," http://www.oecd.org/dac/effectiveness/parisdeclarationandaccraagendaforaction.htm.

[43] For more on the Millennium Development Goals and governance for economic development, see Shalendra D. Sharma, *Achieving Economic Development in the Era of Globalization* (New York: Routledge, 2008).

[44] Agreement Establishing the World Trade Organization, April 15, 1994, 1867 UNTS 154, preamble.

govern global trade and economic development for the benefit of all of its very diverse members. But the diversity of the WTO's membership does not translate into governance diversity, according to scholars such as Dani Rodrik. He argues that WTO governance is compatible with the governance model of members with a well-functioning market economy but that it does not reflect the circumstances of developing countries.[45]

Gregory Shaffer further argues that WTO rules directly impact on the national regulatory governance of its members by enhancing market liberalization and promoting the administrative state.[46] WTO governance rules change the boundaries between the market and the state. By "promoting bureaucratized and judicialized governance," they change the institutional architecture of the state; an instance of which is the need to involve more lawyers in regulatory governance that ultimately seeks to enhance the professional expertise of the member states. Finally, by enforcing the ideology of market liberalism based on the WTO's norm of non-discrimination, the WTO changes the normative frames and accountability mechanisms in the national administration of its members. As a result, the incorporation of the WTO rules, as a consequence of their multi-dimensional nature, has implications for national economic, political, and social policies as well as impacts on processes and techniques used by state and non-state agencies at all levels of governance. In this context, the concept of good governance has been criticized as a means to promote the neo-liberal values associated with the economic and political interests of developed countries.[47]

What Is "Good" Governance? Definitions and Debates

The dominant understanding of the concept of good governance in the UN is that it represents a set of political and institutional processes necessary for human development.[48] Alternatively, the World Bank defines it as "the manner in which power is exercised in the management of a

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[45] Dani Rodrik, "The Global Governance of Trade As If Development Really Mattered" (United Nations Development Program Background Paper, July 2001), 12, https://wcfia.harvard.edu/files/wcfia/files/529_rodrik5.pdf.
[46] Gregory Shaffer, "How the World Trade Organization Shapes Regulatory Governance," *Regulation and Governance* 9, 1 (2015): 1–15.
[47] See, for example, B.S. Chimni et al., "Global Governance: Institutions," *Leiden Journal of International Law* 16, 4 (December 2003): 897–913.
[48] Office of the UN High Commissioner for Human Rights, "Good Governance and Human Rights," http://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/GoodGovernanceIndex.aspx; see also UNDP, *supra* note 37.

country's economic and social resources."[49] Some studies suggest that the principle of good governance at the international level is an amalgam of principles of transparency and accountability that are embedded in the administrative laws of developed countries.[50] Despite these intuitively appealing general descriptions, a concrete definition of good governance remains elusive. One study of the Organization for Economic Co-operation and Development (OECD) from 2009 found seventeen different definitions of good governance used by international organizations.[51] And since providing a uniform definition of the concept of good governance has been a difficult normative exercise, international organizations have shifted their focus to describing its scope and finding some common denominators for assessing the quality of governance. The scope of the concept of good governance is often understood to include interlinked attributes such as the rule of law, transparency, responsibility, accountability, public participation, responsiveness to the needs of the people, and even fundamental human rights.[52] For example, the World Bank recognizes the main indicators of good governance to be the rule of law, the control of corruption, government effectiveness, regulatory quality, political stability, and the absence of violence as well as voice and accountability.[53]

The IMF promotes good governance without defining it.[54] Instead, the IMF defines governance as "all aspects of the way a country is governed, including its economic policies and regulatory framework" and proposes many initiatives that promote good governance, transparency, and accountability of institutions in all areas of the public sector.[55] Such a regulatory framework clearly includes not only economic components of good governance but also political ones. The WTO agreements and various bilateral and regional international trade and investment agreements do not define the concept of good governance but, instead, contain

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[49] See respectively World Bank, *Governance: The World Bank's Experience*, Doc. 13/34, May 1994, xiv, http://documents.worldbank.org/curated/en/711471468765285964/pdf/multi0page.pdf; World Bank, *Strengthening Bank Group Engagement on Governance and Anticorruption*, March 21, 2007, http://documents.worldbank.org/curated/en/426381468340863478/Main-Report.
[50] Demmers, Jilberto, and Hogenboom, *supra* note 6.
[51] For a summary of discussions related to the lack of common definition and the clarity of the concept of good governance, see Rachel M. Gisselquist, "Good Governance as a Concept, and Why This Matters for Development Policy" (United Nations University WIDER Working Paper no. 2012/30, 2012), 3.
[52] Ibid.
[53] "Worldwide Governance Indicators," World Bank, http://info.worldbank.org/governance/wgi/index.aspx#home.
[54] "IMF and Good Governance," International Monetary Fund, http://www.imf.org/en/About/Factsheets/The-IMF-and-Good-Governance.
[55] Ibid.

provisions that demand that participating states comply with different principles and attributes of good governance such as transparency, participation, procedural fairness, and "reasonable and impartial administration of measures."[56] Since the scope of these attributes overlap, it is not surprising that international agreements sometimes treat them as interchangeable and apply them to quite different circumstances and with different results. Regardless of their scope and specific meaning, each of these attributes provides a basis to challenge the behaviour of states and to conceptualize what constitutes bad behaviour of both state and non-state actors that can be corrected by application of good governance principles.

Critics of the concept of good governance point to its negative aspects, such as the lack of a common definition, the vague terminology associated with its main components, and its incoherent theoretical underpinning, which make it impossible for multilateral institutions, such as development banks and individual donors, to develop workable tests to determine the quality of governance in recipient countries. They question whether financial aid should be conditional on satisfying good governance criteria.[57] Finally, some critics question the whole good governance project, arguing that there is no empirical evidence demonstrating the correlation between "good governance" and economic development.[58]

Principles, Components, and Mechanisms of Good Governance

Since the concept of good governance still lacks coherence, despite its importance, the focus of many international organizations that require good governance reforms has been to determine the components that can be used for assessing the quality of reforms. In 2012, Rachel Gisselquist analyzed the working definitions of good governance used by major international organizations and individual donors and identified seven common components:

1. democracy and representation
2. human rights

[56] Andrew D. Mitchell, Elizabeth Sheargold, and Tania Voon, "Good Governance Obligations in International Economic Law: A Comparative Analysis of Trade and Investment," *Journal of World Investment and Trade* 17, 1 (2016): 10.
[57] For the summary of definitions of good governance, see Gisselquist, *supra* note 51, 6–8, Table 1: Working Definitions of Good Governance from Selected Multilaterals.
[58] Ibid., 18.

3. the rule of law
4. efficient and effective public management
5. transparency and accountability
6. developmentalist objectives
7. a varying range of specific economic and political policies, programs, and institutions.[59]

Her study confirms that these items comprise the common denominators that often form the basis of an assessment of the quality of governance in both domestic and international governance institutions. Similarly, Megan Donaldson and Benedict Kingsbury's study of forty-six international organizations, including multilateral development banks (MDBs), found that international organizations most often use transparency as one of the specific components of good governance when assessing performance.[60]

While the focus of this volume is primarily on transparency, accountability, and public participation, which are discussed in more detail below, its chapters are not limited to these elements alone, and they also engage with other elements of Gisselquist's definition of good governance. In Chapter 4, Moshe Hirsch's discussion of fair and equitable treatment (FET) in international investment law addresses the promotion of foreign investment by providing a stable and certain regulatory environment and the liability of states that violate the legitimate expectations of investors to operate in a stable legal environment. FET is a principle that incorporates many elements of the concept of good governance, including basic rule-of-law principles to make administrative decisions in non-discriminatory ways 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.

In Chapter 5, Alison Yule's case study of the Canada-Colombia Free Trade Agreement points to the ways limited government capacity can undermine a transparent monitoring process whose objective is to improve human rights protection. Here, we see how the good governance

[59] Ibid., 2.
[60] Megan Donaldson and Benedict Kingsbury, "The Adoption of Transparency Policies in Global Governance Institutions: Justifications, Effects, and Implications," *Annual Review of Law and Social Science* 9 (2013): 119–47.

principles of democracy, human rights, and rule of law depend not only on the establishment of rules and monitoring mechanisms but also on institutional capacity and the political will of the host state (Colombia). This case study demonstrates how easy it is for the transparency and monitoring requirements of a FTA to fail to promote the goal of substantively protecting the human rights of workers and for the human rights objectives to come adrift from the commercial aspects of the arrangement.

Moving beyond the engagement between international and national actors, Lesley Jacobs in Chapter 3 examines the judgments made by non-state actors about conformity by states with standards of good governance and the protection of human rights in evaluating their own investment decisions. As Jacobs discusses, important investment and disinvestment decisions are influenced by the legal consciousness of transnational corporations in their insistence on good governance practices by the host state. The second principle articulated in the UN Guiding Principles on Business and Human Rights – that is, that corporations have the responsibility to respect human rights – highlights the capacity of human rights principles to inform judgments about good governance in practical ways.[61] But the systemic impact of these corporate-imposed standards is limited by the requirement that corporations must internalize these values and insist on them.

Transparency, Public Participation, and Accountability

In considering the quality of governance, transparency, public participation, and accountability can be identified as common denominators. Although transparency is frequently measured,[62] we find that the concepts of transparency and accountability are rarely defined in clear terms.[63] Broadly speaking, the principle of transparency in governance relates to "the degree of clarity and openness with which decisions are made"[64] and "the basis on which information held by the organization will be made available or not."[65] This principle has been recognized as one of the

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[61] Guiding Principles on Business and Human Rights, implementing the United Nations Protect, Respect and Remedy Framework, Doc. A/HRC/17/31, 2011.
[62] See Gisselquist, *supra* note 51, 2; Donaldson and Kingsbury, *supra* note 60; Bianchi and Peters, *supra* note 37.
[63] Jonathan Fox, "The Uncertain Relationship between Transparency and Accountability," *Development in Practice* 17, 4–5 (2007): 665.
[64] Overseas Development Institute, "Governance, Development and Aid Effectiveness: A Quick Guide to a Complex Relationship" (briefing paper, March 2006), 2.
[65] Donaldson and Kingsbury, *supra* note 60, 121.

fundamental qualities of Western culture, as an essential principle of democratic societies, and as a fundamental human right.[66] Transparency may also attract the attention of academia and international organizations as it is seen as a principle that is linked to, and generates, accountability.[67]

Transparency has been applied to the international legal system as one of the norms of global administrative law and as a reflection of the legitimacy and effectiveness of international organizations.[68] Transparency requirements apply to the workings of international institutions themselves, as well as to the workings of national and sub-national level governments. This demand for transparency moved from the domestic to the international sphere following "demands for publicity or transparency in national and subnational government, particularly in democratic states, coupled with the increasing subjection of national policy making to influence in or through these international institutions."[69] The concept of transparency is seen to strengthen good governance by enhancing the accountability of international organizations and changing not only the relations between international organizations and state members but also the relations between state members and non-state actors who are impacted by international decision-making processes. In other words, demands that international organizations be transparent, as well as demands by international organizations that states behave in a transparent manner, have raised public expectations of improved internal accountability at all levels of governance.

Although as a formal institutional policy, transparency has been considered a component of good governance policies by almost all international organizations (including the UN, the WTO,[70] the UNDP, and major international financial institutions, including development banks), Donaldson and Kingsbury have found that many of these organizations do not make those transparency policies publicly available.[71] The primary MDBs such as the Asian

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[66] Bianchi and Peters, *supra* note 37, 3–4.
[67] Fox, *supra* note 63, 665.
[68] Bianchi and Peters, *supra* note 37, 5.
[69] Donaldson and Kingsbury, *supra* note 60, 127.
[70] Terry Collins-Williams and Robert Wolfe, "Transparency as a Trade Policy Tool: The WTO's Cloudy Windows," *World Trade Review* 9, 4 (October 2010): 551.
[71] Among those without publicly available transparency policy are the World Health Organization, the World Intellectual Property Organization, the United Nations Educational, Scientific, and Cultural Organization, the Food and Agriculture Organization, and UN programs and funds such as the United Nations High Commissioner for Refugees and the United Nations Commission for Trade and

Development Bank, the African Development Bank, the Inter-American Development Bank, and the European Bank for Reconstruction and Development have made their transparency policies publicly available.[72] Donaldson and Kingsbury examined the publicly available transparency policies of over twenty international organizations and found six formal features of transparency:

1. comprehensive application
2. open mechanisms for request of information
3. the presumption of disclosure
4. the discretion to withhold
5. the discretion to release
6. an institutionalized review of the decisions made.[73]

Donaldson and Kingsbury found that these formal transparency policies apply to all or almost all documents held by banks and include a presumption of disclosure, a mechanism to support requests for disclosure by the public, and one or two levels of appeal from decisions on disclosure.[74] They argue that, while the transparency policies of MDBs are driven by developments in both national (public and administrative) laws and public international law, national laws have been the more important factor in MDBs' decisions to introduce sophisticated norms of transparency.[75]

Accountability is as fluid a concept as transparency. Similar to transparency, it is rooted in Western academic and political ideas about the nature of public administration and the requirement that the exercise of public power be subject to external scrutiny.[76] Therefore, it is often used in the sense of the responsibility of public administration to citizens.[77] It is defined by

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Development, and regional organizations (the Association of Southeast Asian Nations, the Caribbean Community, and the African Union). Donaldson and Kingsbury, *supra* note 60, 123.

[72] Ibid., 123, Table 1.

[73] Ibid., 125, Table 2.

[74] Ibid., 143.

[75] Ibid.

[76] Robert D. Behn, *Rethinking Democratic Accountability* (Washington, DC: Brookings Institute Press, 2001).

[77] Richard Mulgan, "'Accountability': An Ever-Expanding Concept?," *Public Administration* 78, 3 (Autumn 2000): 557.

two dimensions: the capacity or the right to demand answers and the capacity to sanction.[78] In practice, its scope has been expanded to apply to the conduct of public officials and institutions beyond these two core functions, including: professional or personal accountability; control over the actions of democratic governments through the institutional system of checks and balances (accountability as "control"); the responsiveness of the government and its agencies to the needs of its citizens (accountability as "responsiveness"); and public questions and answers through which government officials interact with citizens to whom they are responsible (accountability as "dialogue").[79]

There are many ways in which transparency may be linked, or contribute to, improved accountability. Archon Fung, Mary Graham, and David Weil propose three generations of transparency that move from the right to know, to increasing elements of public participation and accountability, and, finally, to citizens in policy and decision making. They developed this analytical model through their study of the evolution of transparency policy and the disclosure of information to the public by private and public authorities in the United States.[80] Their work demonstrates the links between some forms of transparency (what they call "targeted" and "collaborative") and increased public participation, which they argue facilitates government responsiveness to the public in policy formation and implementation and strengthens accountability.

According to the authors, the first generation of transparency evolved as a set of right-to-know policies that required governments to provide information about their activities and make their reports open to public review. This first stage of transparency not only involved creating an open government that improved public access to information but also had the effect of increasing costs of governance in making this information available. The second generation – targeted transparency – emerged as a set of disclosure policies used by government to standardize the information open to public review. Targeted transparency policies required private market actors to collect and release certain information to the public. Such standardized forms of disclosure lowered the costs of transparency policies and enabled governments to expand disclosure standards. At the same time, they also ran the risk of disengaging the public, especially if people

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[78] Fox, *supra* note 63, 665.
[79] Mulgan, *supra* note 77, 556.
[80] Archon Fung, Mary Graham, and David Weil, *Full Disclosure: The Perils and Promise of Transparency* (Cambridge, UK: Cambridge University Press, 2007).

could not use disclosed information to achieve their own economic goals, including obtaining remedies from companies for losses caused by their failure to properly disclose information and requesting governments to strictly enforce the duty to disclose. Similar to the right to know, targeted transparency is also very much a government-centred policy.

The third generation of transparency – so-called collaborative transparency – overcomes limits of the first two generations by utilizing new information technology as a means of public participation in governance. This technology significantly lowers government disclosure costs in two ways. It enables governments to provide the public with instant and accurate information about administrative activities. It also relies on the public collection of information, coupled with voluntary disclosure and cooperation between individuals and private parties and government agencies. Collaborative transparency, empowered by new information technologies, also improves the scope and content of disclosure by enabling broad public participation in information collection and, ultimately, in policy drafting. In this way, the third generation of transparency shifts accountability and responsibility for the accuracy of information from governments to the public, organizations, and individuals. It ultimately leads governments to share their authority to govern with the public and civil society. In its openness and decentring of government policy formation, it provides a model of governance that may not be attractive to authoritarian regimes or strongly centralized political systems.

These three generations of transparency provide a useful analytical tool for understanding transparency in international organizations and domestic governments. In Chapter 2, Ljiljana Biukov

multilateral development banks as well a significant shareholder in many international banks, including the NDB and AIIB. This chapter asks an important question: Can MDB rules limit the impact of their largest shareholders and the strongest economies on decisions to distribute financial aid to developing countries? In searching for an answer, this chapter explores the similarities and differences in the governance and transparency rules of the World Bank, older MDBs, and the NDB and AIIB.

Good Governance as an Interplay between the International and the Domestic: Conceptual Approach

This volume critically examines the interplay between global and local forms of good governance, particularly transparency, accountability, and public participation. We start by first examining the ways in which transparency and accountability mechanisms are incorporated or reflected in international and bilateral trade, finance, and investment regimes and how these principles impact domestic regulatory regimes. The chapters in Part 1 reflect this trajectory – from international to domestic or what Terence Halliday calls an outside-in perspective.[82] In Part 2, we start at the national level with an examination of the ways in which the Chinese regulatory regime engages with these international and transnational norms and principles, which Halliday calls an inside-out perspective.[83] Our starting hypothesis is that the principles of governance, transparency, public participation, and accountability are shaped by the political, economic, and constitutional traditions of the countries in which they are implemented and by competitions between different interested actors. Thus, the concepts at stake are not merely "applied" but also are constituted and reconstituted by the agencies and governments seeking to incorporate or impose them.

States are not merely recipients of international or global rules and standards but also engage with these rules in the performance of their treaty obligations.[84] As Shaffer argues,

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[82] Terence C. Halliday, "Legal Freedoms: Struggle in the Theory of Legal Change in Asia," *Asian Journal of Law and Society* 5 (2018): 240.
[83] Ibid., 240.
[84] Pitman B. Potter, *Assessing Treaty Performance in China: Trade and Human Rights* (Vancouver: UBC Press, 2014), 9; Terence C. Halliday and Gregory Shaffer, *Transnational Legal Orders* (Cambridge, UK: Cambridge University Press, 2015). Halliday and Shaffer use the term "transnational law" rather than "international law" or "global law" to refer to law created by (private and/or public) non-state actors regardless of the geographic reach of that law. In this volume, most studies refer to international law as "law created by international organizations created and driven by state members." At least one chapter

"states promote, appropriate, resist, hybridize, and transform WTO norms that recursively feed back into WTO decision making."[85] This engagement is framed in the process of interpreting international laws and standards by local communities; it is affected by the extent to which local communities support the adoption of international standards, and it depends on complementarity between the underlying norms and purposes of international rules and standards as well as on local policy objectives.[86] Potter frames these local responses to international treaties as patterns of selective adaptation of international standards.[87] He argues that episodes of China's conflicted and "paper compliance" with the WTO trade standards indicate that there are tensions between the norms underlying international standards that have been adopted in China, on the one hand, and the norms of local interpretative communities, on the other hand. These tensions, continues Potter, eventually result in a lower level of support for international normative principles in China and the modification, or even rejection, of these norms by local communities.[88]

Halliday argues that domestic legal reform to incorporate international standards is not a simple case of adoption and application but, rather, one of recursive episodes of interconnected lawmaking at the local, national, and international levels.[89] He describes these reform episodes proceeding from a beginning to an end with a final settling of the changes.[90] A beginning is precipitated by a problem that requires addressing. One example might be where a state confronts an economic or social problem that its national legislation has failed to resolve and

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(Chapter 3 by Les Jacobs) refers to transnational law as a set of standards created and distributed by non-state actors – that is, by transnational corporations.

[85] Shaffer, *supra* note 46, 12.

[86] Ibid., 90. Potter, *supra* note 84, 40–43.

[87] Potter, *supra* note 84, 39. Potter identifies three factors of selective adaptation of international standards and their contextualization to local conditions. The first factor is perception, "a largely unconscious process," by which local interpretive communities "encounter, interrogate and interpret non-local and local standards by reference to their own existing psychological and socio-cultural norms" (10). The second factor is complementarity as "the structural and substantive relationships between local and non-local standards and norms," which potentially influences the extent of the engagement of local communities with outside systems (10). In simple terms, the WTO transparency standards could be embraced by China not because these standards ensure that every market actor – public or private, domestic or foreign – has a right to know what the government policies and standards are but, rather, because it allows the central government to re-enforce its authority over all market actors and all levels of government through the enforcement of the duty to disclose. Finally, the factor of legitimacy "describes the extent of local community support for the purposes and consequences of engagement with non-local standards" (11).

[88] Ibid., 38–39.

[89] Halliday, *supra* note 82, 1–14.

[90] Ibid., 6.

decides to refer to an international law or standard as a possible inspiration for a legal reform. Or it may be that for entry into an international institution, domestic legal institutions must be made to comply with international standards. Enacting new legislation that meets the international standard might end one cycle of reform, but it does not solve the problem, especially where different actors understand the problem in different terms, where actors responsible for implementing reforms are not invested in supporting the reforms, and where the law is vague. The reform ends not only when the state passes a new law (or incorporates an international rule or a standard) but also when a new practice in compliance with a new law settles down.[91] Halliday and his collaborators thus describe an ongoing process involving many cycles of reform that may well fail to resolve a problem (possibly because there is no consensus on the diagnosis of the problem) or where legislative and regulatory reform cannot be consistently implemented because there is a lack of cooperation between lawmakers and those responsible for the law's implementation.[92]

In areas of trade and commercial laws, changes most often begin with the adoption of international or global laws and norms by states following their accession to international treaties and conventions. Potter, Halliday, Shaffer, and Bruce Carruthers each argue that the path of these reforms depends on interactions between the international/global and national/local levels at which laws are made, implemented, and applied.[93] National reforms are affected by the indeterminacy of law as well as by the disparities between global and local circumstances and priorities (or contradictions between global and local ideologies and policies).[94] In an effort to trace the contours of engagement (or lack of engagement) and elucidate the elements of recursivity between the international or global level and the national level, this volume adopts both an outside-in and an inside-out perspective in framing its analysis. While this approach may be an uncommon one, we believe it provides an opportunity to approach this complex topic from a range of vantage points and to engage with a plurality of perspectives in more than just a token way. It is a methodological rebuttal of the approach that asks merely whether a particular jurisdiction has implemented its international obligations or not, without falling to the other

[91] Ibid., 6–7.
[92] Halliday and Shaffer, *supra* note 84, 38–39.
[93] Potter, *supra* note 84; Holliday and Shaffer, *supra* note 84, 40; Halliday and Carruthers, *supra* note 16.
[94] Halliday and Carruthers, *supra* note 16, 1189.

extreme of countenancing (what we consider to be tendentious) claims of national exceptionalism.

From outside-in analyses, we see not only that the meaning and impact of various components of good governance in international, regional, and bilateral agreements are contested and plural in nature but also how they have shaped engagement with states and the development of policies and laws in those states. Starting at the level of the state yields different types of insight. Adopting the inside-out perspective requires focusing on a single jurisdiction; in the case of this volume, it is China. At one level, it provides the detailed analysis needed to determine if the state has adopted and implemented the international standard in domestic regulation and how domestic regulation diverges from international standards. At another level, a detailed analysis of domestic law and policy helps identify the elements of domestic law and policy that have been adopted in, or have shaped, international rule making. At yet another level, it allows us to build a clearer picture of the scope, objectives, and components of governance and the concept of good governance as they are constructed domestically.

Why focus on China? While acknowledging that an examination of the domestic regulatory regimes of different countries would yield different insights into domestic forms of engagement with principles of good governance, we think that the Chinese example is important for a number of reasons. The first reason is that China has started to exercise increasing influence in international fora. China is actively participating in all major international organizations while also creating new international organizations to, in China's own words, "supplement" the existing ones. For example, China has been participating in the WTO dispute settlement process as frequently as the European Union (EU), the United States, and Japan and more frequently than any other emerging country, including Brazil, Russia, India, and South Africa (the other members of BRICS).[95] Many agree that China's success in arguing cases before the WTO panels and the Appellate Body is already making an impact on the development of WTO law in the form of new important precedents and interpretative standards emerging from litigation.[96]

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[95] According to the recent WTO data on dispute settlement, China acted as a complainant in seventeen cases, as a respondent in forty cases, and as a third party in 142 cases. "Dispute by Member," World Trade Organization, https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm.

[96] Henry Gao, "China's Ascent in Global Trade Governance: From Rule Taker to Rule Shaker, and Maybe Rule Maker?" in *Making Global Trade Governance Work for Development*, ed. Carolyn Deere-Birkbeck (Cambridge, UK: Cambridge University Press, 2011), 153–80. Henry Gao and Gregory Shaffer recently argued that by wining some high profile cases against the European Union (EU) and the United

Others argue that the ability of Chinese legal experts to serve as WTO panelists and Appellate Body members opens the door for China to have further impact on WTO rule making.[97] China's large negotiating team has the capacity and knowledge to impact on the agenda of future WTO negotiations. For example, from 2005 to 2008, China made almost 200 submissions and proposals on various issues during the Doha Round of the WTO negotiations, and it relentlessly lobbied for support for its submissions among many other developing countries.[98]

China's membership initiated renewed discussions about the need for new WTO regulations of economic activities of state-owned enterprises (SOEs), which are more critical to the Chinese economy than the market economies of other WTO members.[99] The status of SOEs is explicitly addressed in China's WTO Protocol of Accession[100] but not in earlier WTO legal texts. Shaffer and Henry Gao argue that the WTO panels and the Appellate Body have been called on to examine if China's treatment of its SOEs violates WTO rules – in particular, the Agreement on Subsidies and Countervailing Measures (SCM Agreement) – and to define criteria by which to establish if an enterprise is under government control for the purposes of the SCM Agreement.[101] Another recent illustration of China's increasing influence on the development of

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States, China created new precedents regarding the WTO assessment of the legality of the EU and US anti-dumping and countervailing duty methodologies. Gregory Shaffer and Henry Gao, "China's Rise: How It Took on the US at the WTO," *University of Illinois Law Review* 1 (2018): 136. Other scholars argue that China negatively impacts the WTO by cheating the system and avoiding full compliance with the WTO decisions, especially with respect to trade remedies. Timothy Webster, "Paper Compliance: How China Implements WTO Decisions," *Michigan Journal of International Law* 35, 3 (2014): 525–77. WeiHuan Zhou, "Implementing WTO Rulings: Fifteen Years of China in the WTO," *University of New South Wales and China International Business and Economic Law Blog*, April 21, 2017, accessed May 2, 2018, http://www.cibel.unsw.edu.au/cibel-blog/implementing-wto-rulings-fifteen-years-china-wto.

[97] Pasha L. Hsieh, "China's Development of International Economic Law and WTO Legal Capacity Building," *Journal of International Economic Law* 13, 4 (2010): 1026.

[98] Henry Gao, "From Doha Round to China Round: China's Growing Role in WTO Negotiations," in *China in the International Economic Order: New Directions and Changing Paradigms*, ed. Lisa Toohey, Colin B. Picker, and Jonathan Greenacre (Cambridge, UK: Cambridge University Press, 2015), 94.

[99] Robert Wolfe, "Sunshine over Shanghai: Can the WTO Illuminate the Murky World of Chinese SOEs?" *World Trade Review* 16, 4 (2017): 713–32.

[100] Philip I. Levy, "The Treatment of Chinese SOEs in China's WTO Protocol of Accession," *World Trade Review* 16, 4 (2017): 635–53. Accession of the People's Republic of China, WTO Doc. WT/L/432, November 23, 2001.

[101] Shaffer and Gao found that the Appellate Body in *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, Appellate Body Report, WTO Doc. WT/DS379/AB/R, March 11, 2011, accepted Chinese submission and ruled against the United States when it established that, in order to show that an enterprise is a public body for the purpose of the Agreement on Subsidies and Countervailing Measures, one not only has to establish that an enterprise is majority owned by a state but also that an enterprise is exercising a government function. Shaffer and

international law is the UN Human Rights Council's adoption on June 22, 2017, of China's proposed Resolution on the Contribution of Development to the Enjoyment of All Human Rights, which incorporates the rhetoric from Xi Jinping's speeches to "build a community of shared future for human beings" and reflects the adoption of China's long-standing efforts to place the state's right to development at the heart of international human rights.[102] As the discussion in Chapter 2 by documents, in the area of international trade and investment, not only is China an active participant in global governance institutions, but it also actively promotes its own governance practice in countries participating in the Belt and Road Initiative (BRI) (China's main foreign policy mechanism for the twenty-first century) through bilateral trade, investment, and financing arrangements. China has also expanded its economic governance model through the lending policies of the NDB and AIIB – its policy banks – as well as through the Silk Road Fund and its outbound state-driven investment strategies such as international capacity cooperation.[103]

The second, related reason is that the Chinese economy has become so huge that its domestic regulation has significant direct impacts on foreign investment and trade as Chinese enterprises trade and invest in foreign jurisdictions and vice versa. The third reason (and there may be more) is that Chinese modes of governance have important indirect ramifications, particularly in relation to human rights and the environment, both within China and beyond its borders. It is undeniable that China's model of state-centred governance is as critically inward facing at domestic regulation as it is outward looking to China's economic and political relations. But these two objectives do not result in two discrete and different modes of governance. The time of China adopting two sets of legal regulations – one foreign related and one domestically focused – has now passed. Thus, the mode and elements of governance that comprise China's statist model are not only relevant to understanding domestic regulation, but they also form the

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Gao, *supra* note 96, 173. Agreement on Subsidies and Countervailing Measures, April 15, 1994, 1869 UNTS 14.

[102] Andrea Worden, "With Its Latest Human Rights Council Resolution, China Continues Its Assault on the UN Human Rights Framework," *China Change*, April 9, 2018, https://chinachange.org/2018/04/09/with-its-latest-human-rights-council-resolution-china-continues-its-assault-on-the-un-human-rights-framework/.

[103] Tristan Kenderdine and Han Ling, "International Capacity Cooperation: Financing China's Export of Industrial Overcapacity," *Global Policy* 9, 1 (February 2018): 41–52.

conceptual toolkit on which the Chinese Party-state draws as it seeks to influence international, plurilateral, and bilateral agreement making.

The "Outside-in" Approach: From the International and Transnational to the National

Part 1 of this volume explores the international rules and standards of good government, particularly transparency and accountability, embedded in international trade and investment regimes. As we argued earlier in this chapter, global governance norms are created not only by global institutions such as the UN or the WTO but also by MDBs and networks of regional and bilateral agreements signed between developed and developing states. In Chapter 2, focuses on the practice of international banks. She compares the institutional structure and the operating principles of the two banks with those of other MDBs, including the World Bank. She finds that, while good governance and transparency rules are important factors in enhancing the legitimacy and accountability of international banks, their capacity to affect governance practices in individual countries when introduced in a top-down manner may be limited. This is because the rules of good governance – in particular, transparency – are created through recursive episodes of lawmaking and practices at different levels of governance. At the international level, various MDBs cooperate in providing financial assistance but often develop slightly different international laws and standards of transparency. Then national lawmaking and the practices of local actors challenge the adoption of these international standards into the national laws of their borrowers.

The impact of preferential trade agreements (PTAs), including bilateral and plurilateral regional agreements, on the global governance of international trade and multilateral trade negotiations has been debated for decades by academics, politicians, and civil society (and by Yule in Chapter 5). For some, these agreements are stumbling blocks to multilateralism that fragment global rules and standards of trade and deepen the normative divide between developed and developing countries, while, for others, they are the building blocks of global trade governance contributing to the coherency of the system.[104] In 2011, the WTO acknowledged in its *World Trade Report* that the proliferation of PTAs requires action from WTO members in

[104] For a survey of these debates, see Richard Baldwin and Caroline Freund, "Preferential Trade Agreements and Multilateral Liberalizations," in *Preferential Trade Agreement Policies for Development: A Handbook*, ed. Jean-Pierre Chauffour and Jean-Cristophe Maur (Geneva: World Bank, 2011), 121–41.

order to achieve coherence between the PTAs and the multilateral trading system.[105] The report also reveals that PTAs cover a range of regulatory issues beyond tariffs that govern much deeper economic integration between the parties of the PTAs. In particular, the report states that the so-called North-South PTAs between developed and developing countries include provisions regarding "the institutional framework, competition policy, the product and labour-market regulations, infrastructure development, and other areas."[106] The PTAs signed by the EU and the United States with developing countries have a tendency to include provisions that go beyond tariff reduction.[107] Sometimes, developing countries see these PTAs as an opportunity to "import regulatory systems that are 'pre-tested' and represent 'best practices' without having to pay the costs of developing them from scratch," but, at other times, these regulations and standards are imposed top-down by developed countries to protect their own interests in developing countries.[108]

Legal scholars (including Hirsch in Chapter 4) consider investor-state arbitration (ISA) to be a form of global governance structure, and they see arbitral decisions as part of global administrative law.[109] Arbitral tribunals are established on the basis of the provisions of international trade and investment agreements, such as North American Free Trade Agreement (NAFTA), or bilateral investment treaties (BITs), such as the China-Canada Foreign Investment Promotion and Protection Agreement, to decide specific individual disputes.[110] However, their decisions are far reaching, especially through the interpretation of particular international customary laws and international rules and standards, such as those related to good governance. Due to the lack of clarity in customary international law and in the provisions of BITs, such interpretation guides tribunals deciding subsequent cases. It is noteworthy that the standard of

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[105] WTO, *2011 World Trade Report* (Geneva: WTO, 2011), 196, https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report11_e.pdf.
[106] Ibid., 111.
[107] Ibid., 107.
[108] Ibid., 114.
[109] Benedict Kingsbury and Stephan Schill, "Investor-State Arbitration as Governance: Equitable Treatment, Proportionality and the Emerging Global Administrative Law" (New York University Public Law and Legal Theory Working Paper no. 146, 2009), http://lsr.nellco.org/nyu_plltwp/146.
[110] North American Free Trade Agreement, December 17, 1992, 32 ILM 289, 605 (1993) (NAFTA); Agreement between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments, Canada and China, September 9, 2012, http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/china-chine/fipa-apie/index.aspx?lang=eng.

FET interpreted by ISA tribunals is also considered by national courts in the process of review or enforcement of arbitral decisions and sometimes by considering different normative principles linked to good governance, including transparency, stability, the predictability of the legal framework, reasonableness, and proportionality. It is possible for the two bodies of jurisprudence to end up with a different interpretation of the same standard that is particularly troubling when the provisions at the centre of divergent interpretations are related not only to the right of states to regulate for the benefit of the public and interfere with foreign investor's rights on the basis of international law but also to the quality of states' regulatory governance.

For example, in *Metalclad v Mexico*, a claim by an American company that Mexico had violated the FET of investors in article 1105(1) of NAFTA by failing "to ensure a transparent and predicable framework for Metalclad's business planning and investment" first triggered the ISA's decision[111] and, subsequently, the Supreme Court of British Columbia's decision regarding transparency and its review of the arbitration's statements regarding fair and equitable treatment.[112] The Canadian court found that the arbitrators had exceeded their jurisdiction in interpreting the states' obligations under article 1105 too broadly, including transparency. The theory of recursivity of law helps us to understand the subsequent developments in NAFTA jurisprudence. Although both the international arbitral tribunal and the Canadian court applied international law (NAFTA) to resolve a dispute between a state (Mexico) and a US private foreign investor (Metalclad), their divergent interpretations, in practice, revealed indeterminacy and diagnostic struggles in the process of settling transparency norms. Subsequent to the *Metalclad* decisions by arbitration and the court, the NAFTA Free Trade Commission, an international body created by the NAFTA parties (Canada, Mexico, and the United States) to oversee the implementation of the treaty and to resolve disputes regarding its interpretation or application,[113] issued the Notes of Interpretation of Certain Chapter Eleven Provisions aimed at clarifying minimum standards of treatment (FET) under article 1105.[114]

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[111] *Metalclad Corporation v United Mexican States*, ICSID Case no. ARB(AF)/97/1, Award (NAFTA), August 30, 2000, para. 99.
[112] *United Mexican States v Metalclad Corporation*, 2001 BCSC 1529, para. 76.
[113] NAFTA, *supra* note 110, art. 2001(2).
[114] Notes of Interpretation of Certain Chapter Eleven Provisions (NAFTA Free Trade Commission, July 31, 2001), http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/NAFTA-Interpr.aspx?lang=eng.

In addition to using PTAs and BITs to promote economic growth and to redesign domestic good governance regimes, developing countries also establish free trade zones (FTZ) within their jurisdiction as trade policy instruments for enhancing export, attracting foreign investors, and, as explained by Wang Haifeng in Chapter 6, for testing new domestic governance policies. China has concluded over 140 BITs[115] and about twenty PTAs[116] and has used special economic zones for over thirty years to attract foreign investors in China.[117] While China has followed, or transplanted, developed countries' models of PTAs and BITs, it has emerged as the leader in designing special economic zones. Starting in 2013 with the pilot FTZ established in Shanghai, China is planning to use eleven new FTZs to test new governance models to manage market reforms designed by the central government for these geographic areas.[118] According to Julien Chaisse and Mitsuo Matsushita, China also established 118 special economic zones in over fifty states, and seventy-seven of these zones and twenty-three of these states are within the geographic boundaries of the BRI.[119] China's unprecedented economic development since the country joined the WTO in 2001 is led by the CCP, framed as a socialist market economy with Chinese characteristics and the strong presence of SOEs. China's model of economic governance or socialism with Chinese characteristics has been variously labelled by Western scholars as

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[115] Not all of them are in force, and some were terminated. "Bilateral Investment Treaties," Investment Policy Hub, http://investmentpolicyhub.unctad.org/IIA/CountryBits/42.

[116] Some of them are in force and some are still under negotiation. "China's Free Trade Agreements," China FTA Network, http://fta.mofcom.gov.cn/english/fta_qianshu.shtml.

[117] "China's Special Economic Zones; Experience Gained," World Bank, http://www.worldbank.org/content/dam/Worldbank/Event/Africa/Investing%20in%20Africa%20Forum/2015/investing-in-africa-forum-chinas-special-economic-zone.pdf. Free trade zones are defined by the WTO as "defined areas, also called export processing zones, normally located near transport nodal points and designated by governments for the duty-free import of raw materials or manufacturing components intended for further processing or final assembly and their re-export otherwards. ... Countries establishing free-trade zones usually are characterised by non-competitive domestic industries and regulatory frameworks, and this is one way in which they gain access to foreign investment and markets." Walter Goode, *Dictionary of Trade Policy Terms*, 4th ed. (Cambridge, UK: Cambridge University Press, 2003), 146.

[118] "China Approves 7 New Free Trade Zones in a Bid to Open Economy," *Reuters*, March 31, 2017, https://www.reuters.com/article/china-trade-ftz/update-1-china-approves-7-new-free-trade-zones-in-bid-to-open-economy-idUSL3N1H83RM. The article states that after the establishment of the Shanghai Pilot Free Trade Zone in 2013, the state initiated three additional zones in 2014: Guangdong, Fujian, and Tianjin. The new seven zones announced in 2017 will be established in Liaoning, Zhejiang, Henan, Hubei, Chongqing, Sichuan, and Shaanxi.

[119] Julien Chaisse and Mitsuo Matsushita, "China's 'Belt and Road' Initiative: Mapping the World Trade Normative and Strategic Implications," *Journal of World Trade* 52, 1 (2018): 172.

"revived state capitalism"[120] and "adaptive authoritarianism,"[121] which does not adopt a Western liberal market model or general norms of good governance. Instead, China gives priority to those aspects of good governance and international obligations that support the stability of its political system. China's "going-out" policy affirms its intention to take an active role in global governance, regional economic integration, the further opening of markets, and infrastructure building.[122]

While the impact of the United States, the EU, and Japan on developing countries' economic development and governance reform has been widely studied, not much has been said about Canadian practice. Canada developed its model of a BIT called a foreign investment promotion and protection agreement, but it does not have a standard model of a FTA.[123] Global Affairs Canada indicates that, similar to the United States' and the EU's practice, "many of Canada's FTAs also go beyond 'traditional' trade issues to cover areas such as services, intellectual property and investment."[124] Yule's chapter examines the human rights impact assessment provisions in the Canada-Colombia Free Trade Agreement. These provisions are intended to operate as a transparency mechanism designed to enhance human rights in circumstances where the government does not exercise effective control in some regions of the country. Yule's chapter raises a key issue of institutional capacity and its relationship to good governance in the interaction between domestic governance mechanisms and bilateral trade and human rights regimes. Where government capacity is limited, to what extent can principles of good governance and the requirement to monitor good governance have a positive impact on entrenched problems of inequality, organized violence against labour activists, and the disregard of labour rights in Colombia? Yule argues that the international standard of good governance is

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[120] Matteo Dian and Silvia Menegazzi, *New Regional Initiatives in China's Foreign Policy: The Incoming Pluralism of Global Governance* (Cham, Switzerland: Palgrave Macmillan, 2018), 62.
[121] Jonathan R. Stromseth, Edmund J. Malesky, and Dimitar D. Gueorguiev, eds., *China's Governance Puzzle: Enabling Transparency and Participation in a Single-Party State* (Cambridge, UK: Cambridge University Press, 2017), 279.
[122] President Xi Jinping, *Report to the 19th National Congress of the Communist Party of China*, October 18, 2017, accessed May 22, 2018, http://www.chinadaily.com.cn/china/19thcpcnationalcongress/2017–11/04/content_34115212.htm; President Xi Jinping, Keynote Speech to the Meeting of the 13th National People's Congress First Session, March 20, 2018, accessed May 22, 2018, http://eng.chinamil.com.cn/view/2018–03/22/content_7980317.htm.
[123] Global Affairs Canada, "Agreement Types," http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/agreements_type-type_accords.aspx?lang=eng#fipa.
[124] Ibid.

being translated into the domestic context through the FTA concluded by Canada and Colombia. Arguably, the assessment process built in to that agreement provides a mechanism for monitoring the state's compliance with its human rights obligations.

In Chapter 3, Jacobs adds a non-governmental dimension through a study of corporate social responsibility as the second revolution in international human rights discourse. He also provides an example of the implications of corporate disclosure rules for the transparency, not only of the conduct of private actors but also of governments. This chapter engages with the new governance scholarship to argue that interactions between development, business, and human rights are best regulated by a bottom-up and polycentric model of governance. Such a model would facilitate the engagement of states with other actors through a variety of processes including legislation, open consultations, and private-public partnerships.[125] It argues that non-state actors such as multinational corporations have become "increasingly central to global governance" and are important actors in international economic law. This argument is developed through an analysis of investor-state dispute settlement and the impact of corporate social responsibility policies on human rights. In the case of multinational corporations, the regulatory form of good governance is not an international treaty signed between two states but, rather, the regulatory conduct of private actors, which can have broad international implications. The adoption of good governance and transparency principles is in fact voluntarily applied by corporate actors as "soft law." Transparency here is analyzed as a function of corporate accountability to all stakeholders for breaches of human rights and as a component of the good governance policy of corporate boards and managers. Good governance is analyzed as a private regulatory standard that can go beyond mandatory domestic legal requirements and achieve compliance with non-mandatory international standards.

The "Inside-out" Approach: Shifting the Discourse of Reforms from Global Governance to Local Conditions

Our earlier discussion of the development of global governance rules and standards institutionalized by international organizations shows how they have been derived from norms originating in Western states with liberal market economies. Despite the growing influence of

[125] John Gerard Ruggie, "Global Governance and 'New Governance Theory': Lessons from Business and Human Rights," *Global Governance* 20, 1 (2014): 8–9.

China, these developed states and their agencies remain involved in the development of global governance rules and standards not only by influencing the decision making of international organizations but also by negotiating individual treaties with other (developing) states and providing these states with financial aid and the technical assistance needed to implement legal reforms. Even though all 164 members of the WTO have the same voting power, the United States and the EU – the founding members of the WTO – remain more capable of influencing the functioning of the organization and its lawmaking process than any other members. They also impact WTO lawmaking by engaging in regional and bilateral trade negotiations with other states to create international trade rules that go beyond WTO-regulated areas of trade. An illustration is the well-rehearsed impact on national lawmaking of the inclusion in preferential trade agreements and bilateral investment agreements by the United States and the EU of provisions related to the regulatory cooperation of government agencies, the operation of competition authorities, the establishment of environmental and labour standards, the protection of human rights, and the enhanced protection of intellectual property rights.[126]

In Part 2, we move from an examination of the functioning of principles of transparency and accountability in international, regional, and bilateral agreements to an exploration of the ways in which accountability and transparency principles are given shape and meaning in the Chinese legal system. In addition to rules governing specific areas of regulatory conduct such as intellectual property rights, states such as China have been required to introduce fundamental changes to the way their legal systems operate in order to accommodate the regulatory principles set out in GATT article X. When China first stated its intention to participate in GATT in 1986, the Chinese economy remained heavily controlled by the state, and the Chinese legal system was marked by secrecy in rule making, the non-standard application of rules, the preference for administrative over legal modes of regulation, and the lack of systems to challenge decision making, to obtain reasons, or to hold decision makers to account. As Sarah Biddulph and Wang

[126] Lorand Bartels, *Human Rights Conditionality in the EU International Agreements* (Oxford: Oxford University Press, 2005); Ermias Tekeste Biadgleng and Jean-Cristophe Maur, "The Influence of Preferential Trade Agreements on the Implementation of Intellectual Property Rights in Developing Countries: A First Look" (UNCTAD Issue Paper no. 33, November 2011); Emilie M. Hafner-Burton, *Forced to Be Good: Why Trade Agreements Boost Human Rights* (Ithaca, NY: Cornell University Press, 2013); Axel Marx, Nicolás Brando, and Brecht Lein, "Strengthening Labour Rights Provisions in Bilateral Trade Agreements: Making the Case for Voluntary Sustainability Standards," *Global Policy* 8, S3 (May 2017): 78–88.

Haifeng document in Chapter 7 of this volume, the lack of transparency was an issue in negotiations at this time.[127]

The path taken by China's accession negotiations was long and arduous. Since 1986, when China first sought to resume its seat in GATT, its planned economy and the secretive nature of governance presented significant obstacles. GATT rules imposed requirements regarding transparency, consistency in administration, and availability of independent channels for complaints against government decision making, which, in turn, served as a model for the reform of the Chinese legal system.[128] In fact, many argue not only that transparency is a foreign concept but also that it was imposed on China as a condition of accession.[129] But, in addition to the direct impact of negotiations for accession on domestic law reform (in the requirement to adopt laws to implement the provisions of GATT article X), these negotiations also provided an impetus for broader administrative law reform. As discussed in Chapter 7, responding to WTO-imposed requirements led not only to the introduction of legal reforms but also to the adoption of fundamental changes in China's economy, which, in turn, required changes in governance.

The first experimentation with ideas of government openness ( ) can be traced back to the brief period in the late 1980s when Party General Secretary Zhao Ziyang championed political reform (raised in March 1988 at the second plenary session of the thirteenth Central Committee of the CCP). These reforms to separate the sphere of Party action from the day-to-day business of government included a discussion of consultative dialogue ( ) (in Zhao Ziyang's report to the thirteenth Party Congress in 1987)[130] and government openness at the

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[127] Mary Power, "China and GATT: Implications of China's Negotiations to Join GATT," *Asian Studies Review* 18, 2 (1994): 11–12.

[128] David Blumental, "'Reform' or 'Opening'? Reform of China's State-Owned Enterprises and WTO Accession: The Dilemma of Applying GATT to Marketizing Economies," *Pacific Basin Law Journal* 16, 2 (1998): 201.

[129] Chunying Xin, ed., *WTO and the Reform of Chinese Administrative Law* (Beijing: Social Sciences Academic Press, 2005), 274; Liu Anwei, " — WTO " ["Transparent Government, Transparent Administration: Professor Zhang Ning of the National School of Administration Talks about the WTO Principle of Transparency"], *Biweekly of Administration for Industry and Commerce* 8 (2002): 25; Wang Conghu, " " ["China's Strategy of Building a Transparent Government after Entry into the WTO"], *Journal of Beijing Administrative College* 5 (2002): 28.

[130] See http://cpc.people.com.cn/GB/64162/64168/64566/65447/4526369.html.

village level.[131] After Zhao's purge in 1989, political reform stalled. It was not until September 1997 that these ideas re-emerged when Jiang Zemin supported a broader embrace of the policy of governance according to law in his report at the fifteenth Party Congress.[132] This iteration of governance reforms took place in the context of the WTO's accession demand for the major reform of SOEs, which required transformation of the role of government from that of owner to regulator. According to the law, programs of governance administration were roped into the service of the "socialist market economy" and included legislation that enacted the elements of GATT article X. Transparency, accountability, and public participation in Chinese domestic regulation are all, directly or indirectly, examples of foreign transplants. Indeed, as the chapters in Part 2 of this volume document, they are transplants into rocky soil.

Picking up after China's accession to the WTO in 2001, Biddulph and Wang's chapter traces the numerous significant reforms that moved the extraordinarily opaque Chinese system of governance towards increasing openness in both policy and lawmaking beyond trade-related areas. Implementing the reforms required for compliance with the provisions of GATT article X obliged the Chinese authorities to apply broad-ranging changes to the legal system as a whole. In addition to an examination of the specific reforms to the legal system required by accession to the WTO, Biddulph and Wang also consider the impact of the ideology underpinning the WTO rules on the Chinese model of law-based governance more broadly. The purpose of the trade rules of the WTO, with their emphasis on non-discrimination, transparency, and accountability, is to establish a rule-based regime that minimizes state intervention in international trade and investment. If there is state intervention, then the rules are designed to ensure that it is transparent and does not favour certain economic actors over others. This is essentially a neo-liberal agenda that seeks to draw a clear distinction between the market regulated by law, on the one side, and by the state, on the other side. It seeks to limit the role of the state in economic life to the privatization of state-owned industries, the deregulation of economic markets, the facilitation of free trade policies, and governing in an economically efficient manner.[133]

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[131] In 1987, the Village Committee Organisation LawCunwei Zuzhi Fa] introduced the notion of "openness in village affairs" (cunwu gongkai).

[132] See http://cpc.people.com.cn/GB/64162/64168/64568/65445/4526289.html.

[133] Andrew Lang, *World Trade Law after Neoliberalism: Reimagining the Global Economic Order* (Oxford: Oxford University Press, 2011), 2.

Transparency and accountability mechanisms are designed to protect individual actors against state overreach and interference.

However, developments in China's model of the rule of law, including legal structures to promote transparency and accountability, do not reflect these values. It is true that governance reforms and strengthening the rule of law have become increasingly central political issues, particularly under the leadership of Xi Jinping. The third and fourth decisions of the eighteenth Central Committee of the CCP, in 2013 and 2014 respectively, are explicitly directed at improving governance capacity and using the rule of law to achieve this objective. The decision of the Central Committee's fourth plenary session of the eighteenth National Congress of the CCP in October 2014 focuses exclusively on "governing the Nation According to the Law" (*yifa zhiguo*).[134] This decision makes it clear that, in order for the practice of governing according to law to be considered effective, the leadership of the CCP must be strengthened. This position is set out in the decision of the fourth plenary session of the eighteenth Central Committee of the CCP in 2014 entitled Some Major Questions in Comprehensively Promoting Governing the Country According to Law, which stated that its central concerns were to improve the Party's ability to govern as well as its quality of governance.[135]

The need to strengthen governance capacity has not only been applied to the relationship between government and the governed but also to strengthening the CCP's control over officials. Xi Jinping's "Four Comprehensives" make this connection clear.[136] These comprehensives include strengthening not only the rule of law but also the Party's discipline. An ongoing anti-corruption campaign has been waged in the name of the latter, but it also uses the rhetoric of the former. Increased legal transparency and accountability mechanisms have enabled central political authorities to strengthen their capacity to investigate and prosecute corrupt local

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[134] "CCP Central Committee Decision Concerning Some Major Questions in Comprehensively Moving Forward Governing the Country According to the Law," *Copyright and Media*, October 23, 2014, https://chinacopyrightandmedia.wordpress.com/2014/10/28/ccp-central-committee-decision-concerning-some-major-questions-in-comprehensively-moving-governing-the-country-according-to-the-law-forward/.

[135] Ibid.

[136] The "Four Comprehensives" are: building a well-off society; deepening reform; governing the nation according to law; and strengthening Party discipline. They were formally adopted as official doctrine in February 2015. "China's Xi Jinping Unveils New 'Four Comprehensives' Slogans," *BBC News*, February 25, 2015, http://www.bbc.com/news/world-asia-china-31622571.

authorities.[137] Thus, in contrast to the neo-liberal model of the rule of law envisaged by the WTO rules, which sees the rule of law as a mechanism to separate the state from the market, the image of the rule of law in China acts as a tool to strengthen direct Party leadership in all aspects of governance, including the market. A consideration of transparency and accountability mechanisms in China must therefore take into account this different ideological stance. As discussed in Chapter 9, strengthened Party discipline and legal accountability mechanisms can combine to produce unintended consequences and contribute to the chronic failure to perform official duties.

It is not surprising that the reforms in China to embrace transparency, predictability, and accountability in rule and decision making have faced stiff resistance from many sectors, not least of which has been that of the government agencies directly affected. For example, even though the Administrative Litigation Law of the People's Republic of China was passed in April 1989, it was not promulgated to come into effect until October 1990, which is evidence of the enormous resistance to such a law by the administrative agencies.[138] Using Halliday's language of recursivity, many cycles of reform to the system of administrative litigation have been required since 1990 due to diagnostic problems (conflicts over the nature of the problem and how it should be addressed) and actor mismatch (legislation passed that was not supported by, but, in fact, actively opposed by, those implementing and affected by it).

If we acknowledge that governance reforms to enhance transparency, accountability, and public participation, as well as to control official corruption, have been motivated by state-managed economic reforms, rather than a neo-liberal market model, we also need to consider the nature of the relationship between these different concepts. For example, does transparency have a causal relationship to accountability? Indeed, Jonathan Fox suggests caution in our approach to examining both transparency and accountability as components of good governance.[139] We need to ask, rather than assume, to whom should information be made available. Is information to be made available in order to empower civil society actors and the public, or are corporate and

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[137] For a discussion of the anti-corruption objectives of transparency, see Jonathan R. Stromseth, Edmund J. Malesky, and Dimitar D. Gueorguiev, *China's Governance Puzzle: Enabling Transparency and Participation in a Single Party State* (Cambridge, UK: Cambridge University Press, 2017), 26–59.
[138] Administrative Litigation Law of the People's Republic of China [Zhonghua Renmin Gongheguo Xingzheng Susong Fa], April 4, 1989 (effective October 1, 1990, as amended November 1, 2014, and June 27, 2017, with amendments to take effect from July 1, 2017).
[139] Fox, *supra* note 63.

higher-level government and political agents the primary beneficiaries of these policies? Similarly, we need to examine accountability mechanisms closely, as well as place them in their broader political context, to address questions of accountability to whom and for what. While transparency is commonly associated with increased accountability, we need to consider whether this is the case and, if so, how it works. The chapters in part 2 of this volume seek to explore these questions through an examination of reforms and practices to improve the public's right to know, to encourage public participation in policy and decision making, and to uncover the nature of accountability mechanisms and their impact on enforcement priorities and motivations. These chapters seek to unpack some of the different senses of transparency and accountability as they are manifest in different regulatory regimes in China. Together, they provide a way of understanding the many and varied meanings of these important concepts. And, like many other concepts such as the rule of law and human rights, transparency and accountability may not be deployed inevitably to promote the development of liberal-democratic modes governing trade and investment.

Biddulph and Wang's chapter provides an overview and context for understanding reforms to develop transparency and accountability mechanisms as required by GATT article X. Over time, the Chinese government has introduced a range of measures to increase the amount of government information available to the public. The system of open government information and the explosion of litigation seeking to require the disclosure of information held by government bodies have created widening cracks in the administrative system previously characterized by secrecy. Similarly, the government has acted to introduce mechanisms of accountability for administrative decision making. While GATT article X might suggest a focus primarily on judicial and administrative review, these mechanisms play a comparatively limited role in the Chinese system in making officials accountable for their decision making. This chapter documents how administrative litigation and review act as complements to other more powerful, bureaucratic, and political mechanisms of accountability. Instead of orienting transparency and accountability mechanisms towards the public, their primary objective has been to increase the capacity of higher-level agencies to oversee the conduct of lower-level agencies.[140]

[140] Stromseth, Malesky, and Gueorguiev, *supra* note 137, 26–59.

<unnumbered footnote to appear at the beginning of Chapter 2 Notes>

Another innovation to increase public participation in policy and decision making is discussed in Chapter 8 by Sarah Biddulph. Rather than describe the broad contours of public participation, this study explores the ways in which the Shanghai government has implemented the 2011 regulations governing housing expropriation, demolition, and compensation, an area where there is a concentration of local government power and interest and where there has been serious conflict between citizens and state agencies. These regulations provide for public consultation at a number of stages in housing expropriation and demolition: at the planning stage, at the point where properties are valued and modes of negotiating and agreeing on compensation are decided, and at the point where demolition is the only option in the absence of agreement on the matter. This chapter finds that the practice of public participation in this sector is targeted and tightly managed to reduce the potential for conflict, to constrain the scope of matters that can be disputed, and, ultimately, to protect social order. This chapter sheds light on the limits to public participation as a mechanism to promote democratic engagement and how ideas of participation have been repurposed to serve efficiency and stability goals.

It would be a mistake to see the Chinese state as an entity with unlimited power and action. Biddulph's discussion in Chapter 9 explores one of the unintended consequences of transparency and accountability mechanisms in the area of workplace health and safety. It identifies a problem in the reluctance of government officials to perform their functions – in a timely manner or at all – and thus to seek to avoid liability for decision making. While not new, this problem has become so serious that the CCP's Central Committee has identified "lazy governance" ( ) as a key problem, the origins of which are many and overlapping. Previously, a major cause of government inaction has been the instability of politics and the fear of being purged for adopting the wrong political line. Today, this has again become a significant issue. But, in an environment where law-based governance defines and regulates the use of administrative power, political uncertainty and the fear of being exposed in an anti-corruption investigation is one of numerous factors at play. One set of issues arises from the administrative systems of individual responsibility (by the person exercising the function), the responsibility of the head of the bureau or office for the adverse consequences of action or inaction on the part of that office, and the items included in its annual performance appraisal. Another arises from the poor coordination between the different pieces of legislation that blurs the boundaries between the powers and responsibilities of three state agencies (the State Administration of Work Safety,

the Ministry of Human Resources and Social Security, and the National Health and Family Planning Commission). Together, these factors have created a perfect storm of inaction. This chapter points out the paradox of embracing accountability mechanisms in pursuit of good governance in such a way that it produces the opposite result.

In Chapter 10, He Weidong documents recent initiatives to strengthen environmental governance in China. One of those initiatives has been the strengthening of the public's right to know through the provision of environmental information and public participation, including the expansion of the role that citizens can play in the enforcement of environmental legislation. These reforms exist against a backdrop of widespread concern that environmental legislation is not translating into improved enforcement outcomes and public dissatisfaction with severe environmental pollution, fuelling demands for more effective pollution control and mitigation. In its analysis of transparency in environmental protection, this chapter finds that these reforms are largely directed at expanding the types of information that should be publicly available. Transparency here is primarily the right to know – the first generation of transparency. This chapter also points out that in this area the gap between law and practice is wide. One of the difficulties identified with enforcing environmental regulation is poor legislative drafting. The chapter goes on to investigate and evaluate differing perceptions about how well environmental legislation is being implemented and the reasons for poor enforcement, comparing the views of local enforcement officials and environmental law academics. It finds that the latter, with inputs into the drafting process, have different perceptions and priorities for environmental legislation from the former, who are responsible for its implementation. Thus, the question is raised of whether this divergence may contribute to problems in legislative drafting.

Each of the chapters in Part 2 document some of the different ways in which international norms of transparency, accountability, and public participation have been given institutional form in China. But, in doing so, they also look at how these norms have become disconnected from their original objectives. Even to reach this point, there have been many recursive cycles to overcome entrenched modes of administration and to change habitual attitudes to status and power relations in exercising state functions. Transparency mechanisms primarily aid internal governance controls and secondarily provide information to citizens. Accountability mechanisms also seek to make local government actors more responsive to Party policy and to preserve social stability, with individual citizen redress being a subsidiary concern. Public participation has

become a form of management. It is also apparent from these chapters that the reforms have not yet "settled down," so we could well see further cycles of reform in the future.

Notes

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