

# Good Governance at Home and Abroad: Global Governance Relationships in Transition

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## Introduction and Executive Summary

The general theme of the Law Commission project on ‘governing for the world’ can be seen as an inquiry into one aspect of Canada’s international role—how do we, or should we, go about making law that affects other countries? This theme requires an inquiry into how people see themselves in relation to local and international communities. I decided to frame this theme as being about the connection between good governance at home and good governance abroad in the era of globalization.

My work has a number of strands. I looked at the Law Commission’s questions in the context of the global trading system, with particular reference to one of the major themes in current discussions of global governance, the full integration of developing countries.

The second chapter presents an argument about how to model the WTO as part of the legal framework of the trading system. When officials from different countries disagree about appropriate policy, some say ‘see you in Geneva!’ meaning, see you in the dispute settlement system of the World Trade Organization (WTO). The centralist, positivist and monist assumptions about law implicit in such a response offer an empirically and normatively inadequate account of collective life in the trade regime. An alternative rooted in a constructivist legal theory sees law arising in social interaction. I first show how the model applies to such typical questions about the WTO as compliance and constitutionalism. The implications of the model then lead to a renewed awareness of the ‘compromise of embedded liberalism’ as the constitutive basis for global governance, a useful metaphor for understanding the relations between democracy and the rule of law in a pluralist conception of the WTO. If sustaining human agency is the central task of law, then the focus of analysis should be diffuse everyday interaction in the trading system not liberalization in Geneva.

In Chapter 3, I discuss the current context in the WTO, the negotiations under the Doha Development Agenda. When I ask where the WTO is going after its debacle in Seattle and its success in Doha, I find neither imminent collapse nor a new grand design. My analysis of the difference between Doha and Seattle separates the inter-linked themes of inadequate WTO procedure, the evolving trade policy agenda, and the changing role of developing countries. The first frame is the effort to make the institution *stronger* by improving internal and external transparency. The second frame is about the demands to *deepen* WTO disciplines in the era of globalization, when the

meaning of liberalization moves from border measures to domestic regulations. The third frame is about making the WTO *wider*, where the context includes debates on the meaning of ‘development’. After exploring these frames, I speculate on the prospects for the Cancun ministerial, the most obvious place the WTO is going, and on what the Single Undertaking of the Doha round might contain. I use a metaphor to simplify a complex story about the difference between bargaining in incremental time and negotiating in conjunctural time: the WTO is ‘crossing the river by feeling the stones.’

Politicians believe that the way to confront “globophobia” is to stress that trade negotiations are a way to bring Canadian values to international rule-making and raise standards in many areas of apparent importance to Canadians—environment, social protection, human rights. In order to understand more about those values, we conducted a small public opinion poll as part of this project. We concluded (see the Figures in the Appendix) that Canadians support trade liberalization, but they are ambivalent about globalization especially if it seems likely to undermine valued institutions of the welfare state.

Finally, Chapter 4 is an empirical exploration of how developed country expectations that affect the evolution of WTO rules subsequently affect governance within developing countries. The goal of my project, inadequately realized in the Conclusion, Chapter 5, is to justify a political theory of global governance relationships that is truly multilateral, and plural, thus one that would not involve the Canadian state or groups of Canadians imposing their conception of governance relationships on people in other places. Rather than adapting states to the WTO, how can the WTO become more adaptable to its Members?

Pascal Lamy, the EU trade commissioner, has a different perspective. He said earlier this year that “If we want to impose respect of our strict environmental, sanitary or phytosanitary rules on developing countries (and I think we have every right and obligation to do so), we have to offer in return better effective access for their products to our markets - including through better and more focused technical assistance to help them meet our sophisticated domestic regulations.”<sup>1</sup> Lamy’s concerns nicely illustrate the themes of our project: governance relations are in transition, and what is thought to be good at home has implications for what appears to be good governance abroad.

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<sup>1</sup> Pascal Lamy, EU Commissioner for trade “From Doha to Cancun” (speech to the Foreign Trade Association, Brussels, 5 June 2002. DN: SPEECH/02/258 Date: 07/06/2002).

I know that Canadian civil society organizations and citizens generally would share many of Lamy's concerns, but I think his proposed methods are inappropriate. He thinks it acceptable that countries can buy or coerce respect for their own governance model, and he thinks that technical assistance is sufficient to help developing countries live by EU rules. I am dubious on theoretical and practical grounds. Democracy requires mutual respect, and realism demands finding regulatory frameworks that everyone can use. When it is a case of knowing what we think is absolutely right, Canadians might think the Lamy approach is appropriate; but if we recall that we too are a small country often asked to accept rules made by others, Canadians might prefer an alternative approach to what is effectively hegemonic imposition.

Lamy's vision implies that in order to be a full participant in globalization, all states must act in similar ways, which is antithetical to the **compromise of embedded liberalism**, a pluralist metaphor that summarizes the constitutive basis for the trading system. Ruggie's conception of a compromise describes a *continuous* search for a form of international order compatible with the requirements of domestic stability. This conceptualization does not assume that the only purpose of the WTO is global economic efficiency. The GATT of 1947 was a compromise between the need to end the managed trade of the 1930s with the equal imperative to preserve the social innovation of the New Deal. In the postwar order, the liberalization of the global market was embedded in domestic society, with the result that the meaning of 'welfare state' could differ from country to country.

I think that embedded liberalism is a pluralist alternative to the centralist, positivist and monist thinking that I caricature as 'see you in Geneva'. It is a belief that all law is state law, that formal texts are the law, and that the WTO has a monopoly of trade law. The alternative recognizes that formal Canadian law can have wider implications in an era of interdependence, but so can the everyday actions of Canadians, their civil society organizations, and their firms. We are all law creating, not just law abiding. Even if we do not intend it, our actions can have legal implications for people far away, because the law in question, or governance, is embedded in a complex web of relationships. The model for a pluralist alternative to 'see you in Geneva' thinking should be able to imagine how people in different places can make their own choices (enabling agency) without thereby negating the possibility for others to make different choices. This alternative depends on an image of law as channeling self-directed human interaction rather than the image of law as coercion of self-interested individuals. I think that the Lamy approach is problematic in this perspective, and so the question should be reformulated: do changing governance relations undermine the compromise of embedded liberalism?

When a good or a service moves in international trade, people in different places are brought in to contact in new ways. International trade forces people to become more specialized, and the range of that specialization extends in time and space. Think, for example, of a running shoe. That shoe can be a bundle of new ideas and complex materials. A company can buy the best design from an individual working from a cottage in Ontario, purchase high-tech fabric in Japan, manufacture the shoe in Shanghai, and sell the result in Florida. In the distant past, one person might have performed all of these functions, but today production is fragmented. The creation of global supply chains, part of a global division of labour and increasing market integration, also fragments regulation because the discrete parts of the production process are subject to different authorities. In consequence, along with a shoe, we also import the policies embedded in how it was produced (for example, using child labour) or designed (which might raise concerns about product safety).

When governance is so fragmented, questions about governance relationships become urgent. If citizens wish to participate in the process of coming to a consensus on public action, where do they obtain information? If as consumers they do not wish to purchase a product made abroad under conditions that would be unacceptable at home, what are they to do, other than boycott the product/company? These questions lead to demands that international organizations like WTO live by the same administrative law principles that administrative agencies respect at home, and that WTO rules require administrative agencies in other countries that affect Canadians to respect our practices. But other countries have their own practices.

I decided to investigate this tension between good governance at home and good governance abroad by looking at transparency and independent regulatory agencies in the context of the WTO, both being aspects of administrative law as it applies to governance relationships. My interest is trying to understand the governance implications of WTO agreements—to what extent do countries like Canada try to externalize models that may imply governance relationships that do not exist or cannot be created in developing countries? Do our understandings of administrative law make sense when transposed to a new context? I am also interested in a basic democratic issue, the capacity of developing countries to participate, which I consider both in the context of regular WTO work and of the new round of multilateral trade negotiations, the Doha Development Agenda. To the extent that formerly “domestic” issues escape national boundaries, it obliges Canadians to think about the extent to which the concerns of other countries matter for them, and the form of collaboration they prefer. These questions reflect a deeper set of assumptions—that the trading system is not simply an economic bargain or a legal text but a set of political relations. Whose practices will dominate the new governance

relationships? Do new trade agreements that conform to governance concerns of developed countries have implications for power relations in developing countries?

The usual approach to the problems of developing countries in the trading system is to discuss whether or how to offer Special and Differential treatment, but in both cases the concern is about how developing countries adapt to the trading system either through exemption from their obligations or through technical assistance in meeting them. (Pangestu, 2000 is an excellent treatment of the topic and the background to this dimension of Doha.) The WTO is becoming one of the central institutions of governance for everyone. Few aspects of what governments do are untouched by the legal frameworks it establishes. But WTO is not an actor, it is merely a site. The rules made at the WTO arise first in the daily interaction of participants in the trading system. States constitute the WTO, just as it constitutes legitimate national trade policy. It is difficult for governments to act inconsistently with their WTO obligations, but those obligations were created and accepted by governments. Or at least, by some governments. And those governments were responsive to their citizens—or at least, to some of them.

The arguments about how IMF conditionality imposes policy models on developing countries that may be inappropriate are familiar (James, 1998; Pauly, 1999); less familiar are the arguments that WTO agreements might have similar effects. I do not mean the generalized complaints that the WTO is biased against the poor (Oxfam, 2002); I do mean that few people have looked hard at the governance implications. Hoekman, English and Matoo (2002) observe that “Multilateral negotiations on nonborder policies, administrative procedures, and domestic legal regimes have proved much more complex than talks on traditional market access. Because it is more difficult to trade “concessions,” the focus tends to be on the identification of specific rules that should be adopted. Given the disparities in economic power and resources among countries, the outcome often reflects the status quo in high-income countries.” This focus creates two problems. First, the western models may be conceptually inappropriate, which is our concern in this report. Second, Finger and Schuler (2000) have shown that adopting new WTO rules, whether or not they are conceptually appropriate, can be fiscally irresponsible for a developing country. Stegemann (2000, p. 1246) found, for one example, that “The [TRIPS] Agreement requires only minor changes in the intellectual property regimes of the United States and other Western developed countries, whereas the developing countries, newly industrialised countries and transitional countries had to make radical and costly concessions.”

What is the WTO for? This generic conceptual problem has expensive implications for developing countries. Does the WTO serve to increase trade

flows, to increase prosperity, to foster development, or to ensure the harmonious evolution of the trading system? A response of ‘all of the above’ is right, but not helpful: which comes first matters. Developing countries in particular can find themselves asked to do things in the context of ‘trade’ that make no sense in the context of ‘development’. Similarly, what is the value of the Trade Policy Review Mechanism? Does it serve merely a transparency role (helping trading partners understand what is going on), or does it serve a technical assistance role? It can be both (WTO, 2001a; WTO, 2001b), but is the technical assistance role to help the country: a) to meet the transparency obligation, b) to better understand the WTO through preparing the report, or c) to ‘mainstream’ trade into its development plan? The more limited objectives can be facilitated by the WTO, but the more ambitious model requires the active engagement of the World Bank. Must the WTO serve the same role for Canada as for Uganda? Can it be more than one thing at a time?

When thinking of sectors for closer examination I looked at domains where technological and commercial change alters the legal and institutional setting. In the sectors chosen, new rules must be seen in the dual context of efforts by the trading system to accommodate domestic regulation, and efforts by society to accommodate the trading system. I decided to pick one sector illustrating the new issue of trade in services, and a sector illustrating trade in goods. I chose trade in telecommunications under the GATS and food safety standards under the Agreement on Sanitary and Phytosanitary Standards—SPS. I chose four countries in addition to Canada (South Africa, Uganda, Brazil, Thailand).

With regard to telecommunications, it seems that administrative law travels fairly well. There are undoubtedly degrees of transparency and independence, but from the evidence it appears as if 3 of the 4 countries have established an independent regulator, competitive safeguards, and made licensing requirements and decisions publicly available as required by the Reference Paper. The difficulty seems to lie in providing consumers and producers with the ability to comment on proposed regulations and licensing decisions. Questions also remain about the true independence of some of the regulatory agencies. Overall, however, convergence in governance models seems easier and more prevalent than I expected.

On SPS however, regulatory convergence is much less evident. First, the level of international involvement by developing countries is limited in comparison to Canada, for reasons ranging from budgetary constraints to a lack of infrastructure and skill shortages. One result is that developing countries have trouble ensuring that the rules evolve in a compatible direction, which simply accentuates their difficulties in living with the results. Unlike telecommunications regulations, which involves large corporations, SPS involves a plethora of small to large sized industries where the levels of



management varies as much as the products they sell. Regulating in this environment is obviously more problematic, especially in a developing country where street vendors are numerous and pose serious food safety concerns. They cannot do it our way any time soon, which will require effort to find ways of governing food that keep everyone healthy while allowing all to prosper.

To conclude, I understood the challenge from the Law Commission to be asking about how Canadians should conceive of their own governance relationships in a global context. I tried to think about how Canadians might want to work through the WTO to contribute to the evolution of legal structures that allow Canadians and people in developing countries to live the sorts of lives both desire. The purpose of thinking in plural terms about the WTO (or any other such site of human interaction) is to imagine how people in different places can make their own choices (enabling agency) without thereby negating the possibility for others to make different choices. If embedded liberalism is reciprocal, we need coherence between how we imagine good governance at home and good governance abroad.

We need to recognize that law comes from human interaction: increasingly our law will come from interaction in places that are not especially “Canadian”, which will not necessarily make us citizens of the world. Citizenship is rooted in a community. Canadian law can best serve its citizens who have a global perspective by ensuring that what we want for ourselves, for example with respect to our administrative state, is what we want for others. We can insist upon the “inner morality” of global law as discussed in Chapter 2, and we can seek to enlarge the moral community, the message Fuller derives from the parable of the good Samaritan—our neighbours should be defined neither by territorial proximity nor shared interests alone but by shared aspirations. But in thinking in such cosmopolitan terms, Canadians should be careful to ensure that in being responsible for our own law, we do not use the coercive power of access to our markets to limit the governance choices that people elsewhere will make for themselves.

The only way any country can be an effective participant in the WTO is to have an open, transparent and efficient public administration based on a broad consultative process. Most developing countries have difficulty making effective policy, which limits their integration into the world economy more than any rules emanating from the WTO. WTO is designed for democracies, but democracy between states can undermine or support democracy within states, and vice versa. If WTO imposes alien regulatory ideas, contra whatever arises in local interaction, it may undermine the development of democracy. Canadians should proceed warily when imagining what good governance abroad requires.

Nevertheless, transparency is not merely instrumental—it is a good in itself, it is about the quality of governance. How the WTO goes about its work is an essential part of democratic global governance. All Members have to be able to participate, and the public has to feel implicated in the process. Negotiators cannot find an appropriate rule if they do not engage the people who will have to live with it. People who do not understand or who were not engaged are unlikely to be able or willing to reproduce the rule in their daily life. Since WTO law at best creates guidelines rather than commands for participants in the trading system, and since it is not really ‘enforceable’, new rules that participants do not understand may not be worth the time spent on negotiations.

The general policy implication of this report is that Canada should not look for grand designs at WTO, but we should continue to see the trading system as a framework applicable to all, one consistent with the compromises of embedded liberalism. The metaphor of “crossing the river while feeling the stones” is meant to recall that law emerges slowly, in interaction, and that the important sources of WTO law are not in Geneva.

The general implication of my case studies is that general implications are hard to draw with respect to administrative law regimes. In telecoms where the numbers of players are few and the stakes large, independence and transparency are increasingly prevalent. In food safety, where there are millions of players, and the resources available for regulation can be limited, meeting international standards let alone Canadian standards can be hard. It is well understood that the Uruguay Round bargain left developing countries having to implement new regulatory frameworks that might cost more than they are worth. Less well understood is that the frameworks may be inappropriate. To be concrete: how does the normative framework created by the CFIA interact with local administrative law? In order to address this question about internormativity, we need to know more about administrative law regimes in developing countries. Such studies would also help us to understand the difference between elites that do not want to meet WTO obligations, and societies that cannot adapt alien models quickly. We should also be interested in nternormativity between international regimes, also known as “coherence”. What principles will decide which matters to leave to the WTO, and which to assign to the ILO?

The WTO cannot regulate the world, and cannot dictate what regulators do. Pascal Lamy is wrong to want to try, and wrong to think that the problem is merely one of resource transfers. A better way to square the circle he identifies will be to look for more Reference Papers, which is an analog of looking for a way to think about how good administrative law principles apply in a specific domain, and to do it in a language understood by regulators in that domain.

Contra centralism, the legal pluralism approach recognizes the trading system as a political space where states as actors (the traditional domain of international relations theory and international law) are joined by international organizations, firms, NGOs, and others. The state is not the only source of law, and maintaining the rule of law does not require the creation of a uniform supranational order. Contra positivism, therefore, it is never easy to know what the law is a priori in a given context, but the fact of a written treaty is not determinative; and contra monism, the WTO has no monopoly of law in its domain. It is not helpful to define WTO law in terms of its texts, and its evolution in terms of disputes, for that is to define the thing by breaches not by adherence to its normative order. WTO law should instead be understood as the grammar of the trading system without which participants do not understand each other. The law reform task is to ensure that everyone can deploy this grammar.

Telecoms people see themselves in the Reference Paper. It allows countries to implement the new framework in their own way while creating a basis for countries to talk about their mutual obligations. The objective is ensuring that administrative law regimes meet certain norms for multilateral compatibility, not that they be the same. It is important to create ways for the Ugandan and Canadian administrative law regimes to talk to each other. In specific domestic domains, what are the principles that we would wish to defend? Canadians cannot long defend the instrumental detail of our health and education systems, let alone our odd conception of ‘cultural industries’, but we can defend our essential principles. Defending our administrative state is consistent with our values, and with embedded liberalism. This search for a legal grammar that Canadians will recognize and that Ugandans can deploy will not result in hierarchical norms nor in institutions that are necessarily “accountable” to Canadians alone, but it is one way to strive for good governance at home and abroad.



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