

---

# *The Hidden World of WTO Governance: A Reply to Andrew Lang and Joanne Scott<sup>†</sup>*

Richard H. Steinberg\*

In 'The Hidden World of WTO Governance', Andrew Lang and Joanne Scott rightly identify WTO committees as an understudied site of WTO governance. Their analysis deploys frameworks based largely on the sociology of global technocracy, lenses which bring into focus WTO behaviour not usually given much consideration, yet their description and analysis are incomplete, for they miss the central role of states as principals directing the activities of their representatives on the committees, as well as the power politics within and around WTO committees. Only by also considering the state, state interests, the relative power of states engaged in committee deliberation, and WTO committee participants as government representatives can we more fully understand and assess WTO committees as sites of governance.

Section 1 of this article distils the authors' 'descriptive' claims and critiques them. Section 2 distils and critiques the analytic claims. Section 3 elaborates and applies an interest-based intergovernmental framework to analysis of WTO committee behaviour. The conclusion notes ontological differences between the interest-based intergovernmental framework and the frameworks advanced by Lang and Scott, showing that consideration of the former approach enables us more fully and accurately to understand how WTO committees operate and to see the tight political constraints on committee participants, limiting the committees' independent effect on outcomes.

## **1 The Case Study 'Descriptions'**

Lang and Scott begin by describing what WTO committees do, based on case studies of the Services Council (and its subsidiary bodies) and the SPS Committee. They argue that the committees perform three functions. First, they are a site for information exchange, generating and

<sup>†</sup> Lang and Scott, 'The Hidden World of WTO Governance', 20 *EJIL* (2009) 575, <http://ejil.oxfordjournals.org/cgi/reprint/20/3/575>.

\* Professor of Law, UCLA School of Law; Visiting Professor of International, Comparative and Area Studies, Stanford University; and Director, The Sanela Diana Jenkins Human Rights Project. Email: [steinberg@law.ucla.edu](mailto:steinberg@law.ucla.edu).

disseminating information, helping all members learn more about each others' systems. They argue that WTO committees have been deeply involved in the processes by which collective knowledge about the global services economy is being produced.<sup>1</sup> Secondly, the committees facilitate technical assistance and regulatory learning, particularly by participants from smaller countries. Thirdly, and most crucially, they are a site of norm elaboration, contributing to the emergence of interpretive communities which serve to elaborate open-ended norms. The committees develop 'common frameworks for describing and making sense of problems, on the basis of which a range of alternative available viewpoints as to how to address them can be expressed'.<sup>2</sup> Often, they generate a 'usable analytical framework' for negotiations.<sup>3</sup>

While the authors claim that the case studies are 'deliberately descriptive' so that they 'simply speak for themselves, without trying to force them into a particular narrative or normative frame',<sup>4</sup> the case studies are limited by the universe of data considered and the frameworks that the authors eventually use to analyse the data. The data appear to be derived exclusively from WTO documents – WTO agreements and minutes of meetings. No interviews are cited in the footnotes; no first-hand observations are reported in the text. Moreover, the data selected from the minutes are those which would be needed to operationalize the three analytic frameworks employed later in the article, so the empirical observations derived from the

case studies are skewed to paint a particular picture – to the exclusion of other possibilities. Crucially, there is very little, if any, description of what kinds of countries push particular positions and there is no empirical inquiry into the relationship between committee participants and the governments they represent.

This bias of information sources and data selection in the case studies leads to incomplete, subtly distorted description and leaves conclusions less sharp than they could be. For example, the information exchange function is treated largely as an honest effort by all committee participants to produce and analyse information. The possibility that committee representatives may be strategically providing incomplete or incorrect information is not considered. Moreover, the description is incomplete in so far as it does not emphasize that big countries usually have more complete information than smaller countries: information on a topic is usually provided to big country representatives before committee meetings by their ministries and trade associations, which are eager to educate their delegates about foreign market closure. Hence, the important elements of financial services information provided to the Services Council and committees<sup>5</sup> surely would have been known, before the committees met, by well-funded US financial services trade associations, the US Treasury Department, and the US representative on the relevant WTO committees. Similarly, most of the important information generated through the Trade Policy Review Mechanism (cited by Lang and Scott) is known already to the EU Commission and the US government, is less

<sup>1</sup> Scott and Lang, 'The Hidden World of WTO Governance', 20 *EJIL* (2009) 575, at 584.

<sup>2</sup> *Ibid.*, at 582.

<sup>3</sup> *Ibid.*, at 582.

<sup>4</sup> *Ibid.*, at 576.

<sup>5</sup> *Ibid.*, at 578–580.

complete than the information they have, and is not as well prioritized for understanding measures which domestic industry finds most significant.<sup>6</sup> In short, by not taking seriously the committee participants' positions as representatives of particular states, the authors do not make the sharper claim that WTO-compiled information is more 'valuable'<sup>7</sup> to smaller than to larger members.

Similarly, the authors' description of the norm elaboration function seems biased by the practically stateless analytic narratives they later embrace. Their narratives treat the committee participants more like global technocrats than government representatives. Hence, the authors conclude correctly that WTO committees may sometimes develop a 'usable analytical framework' for negotiation, but their description does not show that proposed frameworks are usually contested; the usable frameworks themselves usually result from a negotiation; and the resulting frameworks are often so broad and vague (in the interest of reaching agreement on them) that they are not very helpful in solving negotiating deadlocks.

The authors conclude that their 'descriptive' case studies show that committee discussions 'can over time help to build common conceptual frameworks and shared ideas' and that these discussions have the 'ability to command practical adherence'.<sup>8</sup> Yet the authors offer no

evidence that WTO committees generate agreement on or adherence to ambiguous treaty provisions – or that they build shared ideas of any significance. Their prime example illustrates the opposite: GATS committee negotiations generated 'discussion' over ambiguous rules, but those discussions were 'inconclusive' and served merely to highlight and reinforce the ambiguities and a difference of views over them.<sup>9</sup> They then offer less significant 'other examples' in the services committees, which include an agreement to disagree on whether the imposition of different tax treatment by sub-federal units constitutes discrimination,<sup>10</sup> agreement that there is no ambiguity over whether spectrum management measures are limited by GATS obligations, and a 'preliminary' view on an even more highly technical point. The examples of 'norm elaboration' in the SPS Committee are limited to agreement on 'essentially procedural' matters.<sup>11</sup> There is no evidence offered of agreement being reached on new or clarified rights or obligations, just multiple examples of hortatory exhortations of what members 'should' do or 'seek' to do, and proposals about what might be done, peppered in one example with an emphatic assertion that they 'neither add to, or detract from, the existing rights and obligations'.<sup>12</sup> There are also 'relationships' with standard-setting bodies and professional organizations, which are 'thin', but 'may' nonetheless help promote awareness of international standards and some 'see the potential for it to develop further'.<sup>13</sup>

<sup>6</sup> E.g., compare the country reports issued pursuant to the TPRM with country analyses in the *National Trade Estimate Report on Foreign Trade Barriers* issued annually by the Office of the United States Trade Representative, and to the European Commission's *Annual EU Trade Barriers Reports*.

<sup>7</sup> Scott and Lang, *supra* note 1, at 585.

<sup>8</sup> *Ibid.*, at 588.

<sup>9</sup> *Ibid.*, at 587.

<sup>10</sup> *Ibid.*, at 587.

<sup>11</sup> *Ibid.*, at 598.

<sup>12</sup> *Ibid.*, at 599.

<sup>13</sup> *Ibid.*, at 589.

In short, the examples offered do not support the claim of significant norm elaboration through the committees. They would better exemplify different claims: that committee discussions do not lead to shared views on ambiguous provisions when countries start with opposing views; and shared views are reached only when they mirror terms already settled in underlying WTO agreements. Indeed, the examples offered by Lang and Scott demand explanation of why all this talk does not lead to far more agreement on trade norms.

## 2 The Analysis and Its Limitations

The authors argue that three frameworks may show the significance of the committee functions they describe. First, they suggest using a transgovernmental narrative, which would allow us to see how WTO committees drive policy largely independently of direction by states. In this model, the committee participants are substate actors who are ‘professional regulators’;<sup>14</sup> they operate in a ‘hidden world’ of ‘secret deliberations’,<sup>15</sup> which shelter them from accountability to domestic institutions and interests. This is expressly distinguished from the more ‘traditional’ view of the committees as ‘government networks within international organizations’.<sup>16</sup> The authors claim that their case studies exemplify ways in which activities of WTO committees are ‘more often associated with newer forms of transgovernmental regulatory networks [which] have begun to emerge

in and around the international trade regime’.<sup>17</sup>

Secondly, the authors suggest the relevance of global administrative law, which shows how substantive rules and procedures increase the transparency of global technocratic activity and hold states accountable for their behaviour, thereby helping to address concerns over the legitimacy of that activity. The authors conclude that their services case study ‘attests to the emergence of global administrative law’,<sup>18</sup> arguing that the WTO committees establish processes which enhance the accountability of ‘Member States’,<sup>19</sup> and that the model may be extended to show how reflexivity emerges as a ‘key feature of the committee’s approach’.<sup>20</sup>

Thirdly, Lang and Scott argue that managerialism ‘also provides a useful framework for interpreting WTO committee activity’. This is a ‘movement towards technocratic, expert-oriented forms of governance through the transnational consolidation of global professional cultures’ and the ‘hollowing out of the traditional political processes we normally associate with international institutions’.<sup>21</sup> The WTO committees may be usefully depicted

<sup>17</sup> *Ibid.*, at 604.

<sup>18</sup> *Ibid.*, at 614

<sup>19</sup> *Ibid.*, at 607.

<sup>20</sup> *Ibid.*, at 609. The authors’ proposal to reconceptualize global administrative law to incorporate a reflexivity norm deserves extended consideration which is beyond the scope of this article. I note here only that the proposal is problematic. They argue that without it ‘global administrative law may seem complacent in the face of established power’ (at 609). Yet to permit reflexive adaptation of established rules and principles by quasi-independent agents risks undermining accountability, substituting their judgements for those of more legitimate and authoritative policy-makers.

<sup>21</sup> *Ibid.*, at 610.

<sup>14</sup> *Ibid.*, at 602.

<sup>15</sup> *Ibid.*, at 606.

<sup>16</sup> *Ibid.*, at 602.

as epistemic networks in which power is exercised on the basis of professional or scientific techniques and works primarily through persuasion and the use of information via cultures of rationality; political contest is marginalized in favour of cooperation by experts.<sup>22</sup> In this view, politics is downplayed. Expert communities of economists, political scientists, and lawyers provide data and interpretation of them for committee members, who present them to negotiators and policy-makers; the committees thereby act as venues in which government delegations are exposed to the knowledge produced by experts and come to share some of their precepts.<sup>23</sup>

To the extent that WTO committees perform only a weak accountability function, the usefulness of the global administrative law framework to explain what WTO committees do is limited. As the authors acknowledge, the WTO *Shrimp/Turtle* Appellate Body decision is a poster child for the global administrative law framework;<sup>24</sup> that decision exemplifies the utility of global administrative law not only because it helped to define arbitrariness in the trade context, but also because WTO dispute settlement panelists and Appellate Body members enjoy significant independence from the members. In terms of principal-agent theory,<sup>25</sup>

some may view these jurists as agents for the WTO members (the principals), who have charged them with an authoritative adjudicative function – yet these are agents who have been given significant slack (i.e., independence) in deciding each individual case. Indeed, some global administrative law theorists argue that WTO Appellate Body members enjoy so much agent slack that the principal-agent image does not hold well. Agent slack is what enables WTO dispute settlement to render state accountability – a key element in global administrative law. Moreover, for purposes of demonstrating accountability, WTO dispute settlement is an excellent fit because it enjoys a compliance rate of about 90 per cent.<sup>26</sup>

By comparison, WTO committees offer weak accountability. Unlike Appellate Body members, Committee participants do not enjoy significant agent slack: they are state representatives, agents whose behaviour is tightly constrained by their principals. And while committees may generate information about state behaviour, followed by inconclusive debate about whether the information evinces compliance, the authors offer no reason to believe that committee activity induces compliance with obligations – and the committees have no legal authority to induce compliance. Increased transparency at best; but expansive accountability no.

Similarly, the main shortcoming of using transgovernmental or managerial frameworks in the WTO committee context is that those frameworks apply best to international institutions in which the relevant actors attain considerable independence from states; that is not the case

<sup>22</sup> *Ibid.*, at 611.

<sup>23</sup> *Ibid.*, at 612.

<sup>24</sup> *Ibid.*, at 607.

<sup>25</sup> This conceptualization of the principal-agent relationship is drawn from Moe, who argues that 'the principal-agent model is an analytic expression of the agency relationship, in which one party, the principal, considers entering into a contractual relationship with another, the agent, in the expectation that the agent will subsequently choose actions that produce outcomes desired by the principal': Moe, 'The New Economics of Organization', 28 *American J Political Science* (1984) 739, at 756.

<sup>26</sup> Steinberg, 'Judicial Law-Making at the WTO: Discursive, Constitutional, and Political Constraints', 98 *AJIL* (2004) 247.

in WTO committees, and so the approaches lead to incorrect predictions. The authors conjecture that their case studies show ‘clearly’ occasions on which transgovernmental networks export policy ideas to the trade community, and they suggest that the latter may take on some characteristics of networks as sites of learning and socialization.<sup>27</sup> The authors are unclear as to which side of the line representatives on WTO committees fall (part of the network or part of the trade community), but either way they lose some or all of their identity as representatives of states (assuming they ever had such an identity): if they are part of the transgovernmental network, then they are depicted as essentially stateless free agents; if they are or were part of the trade community, they are socialized to be more like the transgovernmental actors. The resulting image is of globalized technocrats earnestly sharing and interpreting information, often agreeing on what is reliable information and how best to organize and interpret it, reaching understandings about what is appropriate state behaviour (rather than considering the consequences of those understandings for their country),<sup>28</sup> and passing on those understandings to their trade ministers, who accept it. But why, then, are there no examples in the article of shared understandings of new substantive rights or obligations agreed to by the committee members?

In trying to explain behaviour in WTO committees, managerialism suffers from

the same problem. Committee participants in this framework are seen as managerial agents largely free of interest-based politics. Contrary to the image conjured by this narrative, WTO committee participants are not scientists and professionals operating in their own world, generating data and interpretation for trade negotiators. In fact, committee participants are also trade negotiators – low level perhaps, but state representatives nonetheless – who argue for data and interpretations which favour their state’s interests. When information is provided by stateless ‘experts’ from secretariats of international organizations, WTO committee representatives may critique, disregard, embrace, or reframe it to fit the interests of the state they represent. Contrary to the expectations of managerialism, at the WTO most information and interpretation of it flows not primarily *to* trade ministries from committee technocrats operating with free agency, but *from* trade ministries through their state representatives on WTO committee, where it is subject to debate among participants. And any ‘scientific frame’ which becomes an accepted basis for discussion must be one which is not opposed by the most powerful states.

Both transgovernmental and managerial actors could survive only by operating in a secret world which is hidden from the state and particularistic interests. But that does not describe WTO committees. After each meeting, representatives from advanced industrialized countries typically send reporting cables about what transpired back to their capitals. WTO meeting minutes are published – the very ones cited throughout the article by the authors – which let government officials and trade associations oversee what their representatives are doing in the committee meetings.

<sup>27</sup> *Supra* note 1, at 605.

<sup>28</sup> March and Olsen underscore the chasm between approaches to the study of international organizations based on a logic of appropriateness versus a logic of consequences: March and Olsen, ‘The Institutional Dynamics of International Public Orders’, 52 *Int’l Org* (1998) 943.

And eventually these issues get kicked up to assistant ministers, the deputy ministers, and the ministers themselves, who would not be pleased to learn that their staff members were engaged in stateless managerial exercises in opposition to the interests they are supposed to represent.

### 3 Bringing Back the State: Intergovernmental Bargaining in WTO Committees

A powerful framework for assessing the operation of WTO committees sees them as composed of low level representatives of member governments. These staff-level bureaucrats hail from the trade ministries of their respective governments. They behave strategically and tactically, offering information to others on the committee, organizing and interpreting information, interpreting rules, and proposing rule application to state behaviour – all in ways intended to advance the interests of the state they represent. Those state interests are driven by domestic politics: export-oriented firms (operating globally efficient sectors) which want to open foreign markets and import-competing interests (operating globally inefficient sectors) which want to protect the home market.<sup>29</sup> These low-level negotiators rarely reach agreement in committee on con-

tested norms; resolution of those issues needs intervention by those with far more authority.

We may see transgovernmentalism as either an alternative framework or one which could be combined with transgovernmentalism and managerialism in a two-level game<sup>30</sup> approach to understanding WTO committees. From such perspectives, how would we sharpen Lang and Scott's claims as to the functions WTO committees perform?

#### *Information and Interpretation of It, Mainly for Smaller Countries*

Powerful members, such as the EU and the United States, get less information from WTO committees than smaller countries. The large, wealthy bureaucracies of powerful members and the well-developed system of political representation by unions and trade associations within their territories provide their delegations with information and data which are often more complete, more usefully organized (e.g., emphasizing barriers to exports), and more accurate than the information they receive in committees, where information is often strategically withheld by members or organized by the secretariat in ways which are the result of political compromise. Hence, smaller, poorer countries benefit disproportionately from the information 'exchange' which takes place in WTO committees.<sup>31</sup>

<sup>29</sup> This image of domestic sources of state interests in trade is well pedigreed. See, e.g., E.E. Schattschneider, *Politics, Pressures and the Tariff: A Study of Free Enterprise in Pressure Politics as Shown in the 1929–30 Revision of the Tariff* (1935); R.A. Bauer, I. de Sola Pool, and L.A. Dexter, *American Business and Public Policy: The Politics of Foreign Trade* (1963); and Goldstein and Martin, 'Legalization, Trade Liberalization and Domestic Politics: A Cautionary Note', 54 *Int'l Org* (2000) 603.

<sup>30</sup> Putnam, 'Diplomacy and Domestic Politics: The Logic of Two-Level Games', 42 *Int'l Org* (1988) 427.

<sup>31</sup> Powerful members may be willing to participate in such a system as a way of assuring weaker members that their commitments are credible. For more details on this argument see Goldstein and Gowa, 'U.S. National Power and the Post-War Trading Regime', 1 *World Trade Review* (2002) 153, at 158–164.

The Secretariat plays a role in information collection and distribution, as well as brokering compromises over how the information may be framed, but it has little independence from the members. The WTO is a 'member-driven' organization, and powerful members do not give much slack to the Secretariat.<sup>32</sup>

### ***Cuing Up Decisions: Generating Alternative Solutions for Dispute Resolution and Trade Round Negotiations***

Committee representatives usually share those clear understandings which are set out in trade agreements concluded in years past, but where there are ambiguities or gaps in law and associated trade disagreements of consequence, the ministry staff which serve as representatives on the committees engage in constant negotiations which they can rarely resolve. These representatives lack the authority to make decisions of consequence; moreover, unlike those of deputy ministers or ministers, their portfolios are not broad enough to make the kinds of horse-trades across issues which often resolve important disagreements. Try as they may to advance their state's position, committee delegates usually deadlock with opposing states.

In that process WTO committees become a site for fleshing out alternative views, norms, interpretations, and identifying which states hold them. Lang and Scott observe that the committees generate 'a range of alternative available viewpoints as to how to address them can be expressed'.<sup>33</sup>

This helps frame the matter for the dispute settlement process or negotiations by diplomats with more authority. It also clarifies the political parameters of what is possible for the diplomats who may try to negotiate a resolution (and who are interested in zones of agreement<sup>34</sup>) and dispute settlement jurists (who try to fashion rulings which members will be politically able to implement<sup>35</sup>).

This function is particularly important during a trade round. WTO committees (like GATT committees before them) often develop negotiating texts which are eventually hashed out by the ministers or deputy ministers. The process starts with white papers and may evolve into competing negotiating texts which are proposed by a state or states with a particular set of interests they hope to advance. In this way, alternative discourses are generated – but they come mostly from the capitals to the committees. Efforts to broker a compromise or horse-trade within the committee, whether from the Chair, the Secretariat, or a member representative, must be carefully vetted first to ensure that a critical mass of countries, particularly powerful ones, will at least accept a proposed text as a basis for negotiation. Points of disagreement, signified by brackets around contested text, are rarely resolved in the committee. Where the committee members cannot agree, ministers and deputy ministers may horse-trade, offer side payments, or otherwise cut the deals that break deadlock. In some cases, ministers from powerful countries simply impose the result.<sup>36</sup>

<sup>32</sup> Goldstein and Steinberg, 'Negotiate or Litigate? Effects of WTO Judicial Delegation on U.S. Trade Politics', 71 *L and Contemporary Problems* (2008) 257, at 261.

<sup>33</sup> Scott and Lang, *supra* note 1, at 582.

<sup>34</sup> Steinberg, 'In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO', 56 *Int'l Org* (2002) 339.

<sup>35</sup> Steinberg, *supra* note 27.

<sup>36</sup> Steinberg, *supra* note 35.



## 4 Conclusion: Competing Ontologies and Identities

In legislative settings where authority to set the agenda (that is, formulate proposals which are difficult to amend) rests with a formally specified agent, the process of agenda-setting explains outcomes better than plenary voting power.<sup>37</sup> Lang and Scott's version of transgovernmentalism and managerialism and the intergovernmental approach outlined here each depict WTO committees as agenda-setters.

Intergovernmentalism may be seen as differing from the first two approaches, however, in its ontological footing. In the intergovernmentalist approach, the identity and interests of WTO committee participants may be seen as given, driven by their position as government representatives and by material forces within their country. In the transgovernmental and managerial approaches advanced by Lang and Scott, the identity and interests of committee participants lack such a defined material footing: their identities and interests are driven by the sociology of the committee, such as norms of professionalism in a continuing dialogue with other committee members. This soft constructivist ontology may be useful in explaining some areas or parts of international life, but it gets limited traction and mileage in understanding trade.

Alternatively, even if we assume the same ontological footing – that identities and interest are shaped by the group – to what group do WTO committee participants belong? Where does their socializa-

tion take place: in the state or in the WTO committee? Is the US representative to the Services Council an 'American' or a 'global manager'? She is both. But first and foremost, she is an American. She was probably brought up in the United States, is a career civil servant, lives most of her life in Washington, participates in US government inter-agency meetings weekly, and flies to Geneva for a few days to attend meetings of the Services Council. If she lives in Geneva, she will probably reside there for only a few years, then move back to Washington to resume her career there. It is hard to see her advancing an agenda which deviates far from that of the United States of America.

Hence, in understanding the behaviour of government representatives on WTO committees, it is misleading to treat discourse as having much life of its own, disconnected from the material interests of the states represented. Imagining these state representatives as unconstrained free agents building a new discourse leads to vague explanations and false predictions. Committee delegates are highly constrained.

There is a material basis for competing vocabularies and frameworks at the WTO. The discourse is not entirely plastic. It is based in large measure on hard, cold cash. Trillions of dollars. Any framework which ignores that fact in trying to explain WTO committee activities is a story which removes a critical element of politics from governance and is disconnected from a deeper, more complete understanding of the organization. Hence, while Lang and Scott are right that committees do play a role in WTO governance and are under-studied, it is hard to see how the committees have as substantial and independent an effect on outcomes as managerialism and transgovernmentalism alone would suggest.

<sup>37</sup> See, e.g., Baron and Ferejohn, 'Bargaining in Legislatures', 83 *American Political Science Rev* (1989) 1181; and Garrett and Tsebelis, 'An Institutional Critique of Intergovernmentalism', 50 *Int'l Org* (1996) 269.