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**“GLOBAL GOVERNANCE AT WORLD TRADE ORGANISATION:
ANALYZING THE APPLICATION OF GLOBAL ADMINISTRATIVE LAW
PRINCIPLES”**

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Link to paper: <https://www.lawetjusticia.com/volume1-issue1/global-governance-at-world-trade-organisation-analyzing-the-application-of-global-administrative-law-principles>

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THE EMERGENCE OF GLOBAL ADMINISTRATIVE LAW

“Today there is more global policymaking, in more varied forms, than ever before, and the unwary student soon finds himself stumbling through a landscape of obscure acronyms that stretch endlessly into a bureaucratic haze. There are military alliances, such as NATO and WEU; intergovernmental organizations in the classic mold, from the UN to specialist agencies such as the ILO, ICAO, ICC, WHO, and GATT; regional bodies, like the Council of Europe, the European Commission, and the Organization of American and African states; post-imperial clubs, like the Commonwealth and the Organisation internationale de la Francophonie; quasi-polities like the European Union; and regular summit conferences like the G-20. Nor should one ignore the vast number of NGOs of all kinds, many of which also now play a more or less formalized role in shaping global politics”.¹

¹ MARK MAZOWER, GOVERNING THE WORLD: THE HISTORY OF AN IDEA, 1815 TO THE PRESENT (2013)

The idea expressed in the above quotation signifies the substantive expansion of international law in the recent past. With the presence of globalization and growing interdependence amongst nations in almost all aspects and sectors, the newly developed fields of international law, like international constitutional law, international administrative law, international criminal law, have come to be known to collectively be labeled as ‘global law’.² The growth of global law can be attributed to numerous factors, the most crucial ones being the necessity to develop common rules in sectors like trade and finance, promotion and protection of universal rights, regulation of global public goods and the growth of transnational regimes that involve hybridization with public law elements.³

The component of global law constituting global governance possessed an administrative law element giving birth to the concept of global administrative law (hereafter referred to as ‘GAL’).⁴ Proposing the nexus between global governance and administrative actions, (Kingsbury, Krisch, & Stewart, 2005)⁵ defined global administrative law as one that contains structures, procedures and normative standards for regulatory decision-making including the transparency, participation, review and the rule-governed mechanisms for implementation of these standards. Global administrative bodies cover formal intergovernmental bodies, informal intergovernmental regulatory networks and coordination arrangements, national regulatory bodies working in consonance with international intergovernmental regimes, hybrid public-private regulatory bodies, and some private regulatory bodies performing transnational governance functions of significant public importance.⁶ In addition to this, (Rajeshwar Tripathi, 2011)⁷ believes the lack of democratic elements in international institutions coupled with the grave implications of administrative decisions administered by these institutions has led to the need for an efficacious implementation of the GAL principles. It is also pertinent to note that (Kingsbury & Krisch, 2006)⁸ stated that the reason behind using the terminology of

² Lorenzo Casini, *The expansion of the material scope of global law*, in RESEARCH HANDBOOK ON GLOBAL ADMINISTRATIVE LAW 25-26 (Sabino Cassese ed., 2016).

³ *Id.*

⁴ Benedict Kingsbury & Nico Krisch, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17(1) THE EUROPEAN JOURNAL OF INTERNATIONAL LAW 1, 2 (2006) [hereinafter Kingsbury & Krisch, *Global Governance and Global Administrative Law*].

⁵ Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68(3-4) LAW AND CONTEMPORARY PROBLEMS 15, 17 (2005).

⁶ *Id.*

⁷ Rajeshwar Tripathi, *Concept of Global Administrative*, 67(4) LAW INDIA QUARTERLY 355, 358 (2011).

⁸ Kingsbury & Krisch, *Global Governance and Global Administrative Law*, *supra* note 4, at 5.

‘global’ as opposed to ‘international’ is significant of the fact that global administrative law encompasses an amalgamation of domestic and international regulations.

The global governance at the World Trade Organisation (WTO) proves as an excellent example to understand and explore the application of GAL principles at international organisations. The WTO applies the GAL in different contexts of three different dimensions – internally in the WTO, vertically in its member nations and horizontally by recognizing regulatory standards of other global or international institutions.

The following sections will be focusing on the internal governance of the WTO and the extent to which the GAL norms of transparency, participation, reason giving and review are applied at different bodies of the WTO while exercising rule making, rule application and decision making.

THE ADMINISTRATIVE FUNCTIONS OF WTO AND GAL: AN ANALYSIS

Despite its various successful initiatives like extending trade liberalization beyond goods, dealing with non-tariff regulatory barriers to trade, and securing intellectual property rights, the WTO has often been subjected to criticism on the grounds of its decision making process, domination of powerful members and their economic and financial interests, disregard of developing countries, their interests and their citizens, and ignorance of social and environmental factors. In this regard, (Stewart & Badin, 2011)⁹ opined that though the GAL may not be able to solve such problems stemming from politics and conflict of interest, its application will certainly strengthen the WTO’s administrative branch. As (Mitchell & Sheargold, 2009)¹⁰ further explained, the GAL provides a system of checks and balances on transnational regulatory bodies like the WTO to help ensure accountability, legitimacy, transparency and a certain level of democratic participation in the development of global regulations. Therefore, it is imperative to analyse the extent of applicability of these norms at

⁹ Richard B. Stewart & Michelle Ratton Sanchez Badin, *The World Trade Organization: Multiple dimensions of Global Administrative Law*, 9(3-4) INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 556, 559 (2011) [hereinafter Stewart & Badin, *Multiple dimensions of Global Administrative Law*].

¹⁰ Andrew D. Mitchell & Elizabeth Sheargold, *Global Governance: The World Trade Organization's Contribution*, 46 ALBERTA LAW REVIEW 1061, 1066 (2009).

the WTO and the subsequent changes required to improve the functioning of this international organisation.

The application of GAL at the WTO can be categorized into the following aspects:

- the internal working of the WTO, i.e., the administrative branch;
- the vertical aspect, i.e., the relations between the WTO and its members' domestic administrations, which it regulates; and
- The horizontal aspect i.e., recognition of regulatory standards issued by other global regulatory bodies by the WTO.¹¹

INTERNAL GOVERNANCE AT THE WTO

The WTO's organizational structure can be broken down as follows – legislative institutions including the Ministerial Conferences; administrative bodies including the Director-General, the Secretariat, and various other councils and committees; and the Trade Policy Review Body, and its adjudicatory dispute settlement system including dispute settlement panels and the Appellate Body.¹² (Stewart & Badin, 2009)¹³ stated that since there is a disproportionate concentration of decision making power in the legislative and adjudicatory bodies at the WTO as members are unwilling to provide the administrative bodies with independent decision making authority, in order to study GAL at the WTO, the legislative and adjudicatory bodies also must be studied to perhaps reason out the rudimentary presence of GAL in the administrative bodies of WTO.

Legislative Body

The Ministerial Council, consisting of representatives of all members meets every two years, constitutes the official legislative body of the WTO with exclusive powers to create or modify obligations among members of the WTO.¹⁴ Decisions taken at the ministerial council still traditionally follow the principle of negotiations and consensus as followed by the GATT (The General Agreement on Tariffs and Trade).¹⁵ Since such

¹¹ Richard B. Stewart & Michelle Ratton Sanchez Badin, *The World Trade Organization and Global Administrative Law*, IILJ WORKING PAPER 2009/7 (Global Administrative Law Series) 1, 3 (2009).

¹² Stewart & Badin, *Multiple dimensions of Global Administrative Law*, *supra* note 9, at 561.

¹³ Stewart & Badin, *World Trade Organization and Global Administrative Law*, *supra* note 11, at 6.

¹⁴ Ministerial Conferences, WORLD TRADE ORGANISATION, https://www.wto.org/english/thewto_e/minist_e/minist_e.htm.

¹⁵ *Id.*

negotiations were difficult to carry out, trade negotiation committees on specific topics were established but in vain as the chairs of the committees were criticized on grounds of dominance, ignorance of members' views and limited opportunities for members to provide input.¹⁶ Therefore, it can be stated that the adequate standard of ensuring transparency is not fulfilled by the body while exercising its rule making powers.

Administrative Body

In contrast with the high level decision making powers conferred upon the Ministerial Council, the administrative bodies, consisting of Director General and Secretariat, a few councils, and a large number of committees, carry out the day-to-day functioning of the organisation.¹⁷ Despite not having the powers to make high level decisions, the administrative body of the WTO holds great significance owing to its normative functions to perform interpretation and application of WTO agreements in the backdrop of rapidly changing circumstances and demands that call for regulation and a legislative wing that is ineffective in coping up with these changes.¹⁸ The most function performed by the administrative councils and committees is to promote transparency and accountability in trade related policies and members' domestic trade through review and supervision.¹⁹

Three of the important administrative bodies at the WTO are Councils for Trade in Goods, Trade in Services and TRIPS. These supervise several other administrative councils on their respective subject matters and are themselves supervised by the General Council. The activities performed by each administrative committee is subject to review by its corresponding council and subsequently by the General Council. Moreover, the General Council also issues an annual report containing all the activities and decisions taken by its subordinates.²⁰ The implication of these practices of administrative review is increased transparency among the WTO bodies thereby inducing well-reasoned decisions at the lower levels in terms of rule-making, rule application as well as decisions.

¹⁶ Stewart & Badin, *Multiple dimensions of Global Administrative Law*, *supra* note 9, at 561.

¹⁷ Stewart & Badin, *World Trade Organization and Global Administrative Law*, *supra* note 11, at 6.

¹⁸ Stewart & Badin, *Multiple dimensions of Global Administrative Law*, *supra* note 9, at 564.

¹⁹ WTO Agreement, Art. III.

²⁰ Stewart & Badin, *World Trade Organization and Global Administrative Law*, *supra* note 11, at 8.

In the external perspective, though the GAL principles can be applied to the functions carried by these bodies, yet there exists a gap in their implementation, resulting in almost no transparency of WTO when viewed externally. An example of the same can be seen in the practice of publication of internal documents wherein the GAL principle of transparency has been selectively to carve out an exception in the form of restricting the publication of minutes of meetings for a period of forty-five days.²¹ Further, there is no provision that requires these administrative bodies to provide public reasons for the actions taken or publicly release or review their interpretations.²² Moreover, no evident steps have been taken by the WTO to remedy this situation.²³

Adjudicatory Body

In 1994, the changes brought in the dispute settlement process added to the independence and authority of the adjudicatory component of the WTO and accorded it a greater judicial character. The new Dispute Settlement Understanding (DSU) clearly established procedures and deadlines for the settlement of disputes through the establishment of a standing Appellate Body and also made the decisions of the Dispute Settlement Body (DSB) authoritative. This development has also deepened WTO's involvement in issues concerning environment, health, safety and other such social issues that were earlier difficult to resolve through consensus.²⁴ In addition to this, the right of NGOs to represent social interests and file a case before the Appellate Boards has also been recognized post the Shrimp-Turtle case.²⁵

The deficiencies in the legislative and administrative branches imposed a burden on the adjudicatory branch which has been successfully handle as evident from its comparison

²¹ WTO Decision WT/L/452, Procedures for the Circulation and Destruction of WTO Documents - Decision of 14 (May, 2002).

²² Stewart & Badin, *World Trade Organization and Global Administrative Law*, *supra* note 11, at 9.

²³ Steve Charnovitz, *Nongovernmental Organizations and International Law*, 100(2) THE AMERICAN JOURNAL OF INTERNATIONAL LAW 348-372 (2006).

²⁴ Stewart & Badin, *World Trade Organization and Global Administrative Law*, *supra* note 11, at 10.

²⁵ WT/DS58 – United States: Import Prohibition of Certain Shrimp and Shrimp Products (Complainants: India; Malaysia; Pakistan; Thailand), filed on 8 October 1996. The Appellate Body held that panels had inherent authority to accept non-party submissions including those by non-members, stating that “*panel procedures should provide sufficient flexibility so as to ensure high-quality panel reports while not unduly delaying the panel process.*” (WT/DS58/AB/R, para.105).

with the previous dispute settlement system under GATT.²⁶ This system has transformed the functions of adjudicatory branch from one of diplomatic facilitation to that of high quality reasoned adjudication through inculcation of the GAL principles of transparency, reasoned decisions, legality and review while exercising the power to make decisions.

CONCLUSION AND SUGGESTIONS

The WTO faces a serious challenge in terms of legitimate and efficient application of the GAL principles in its internal governance. This underdevelopment of GAL can be majorly attributed to the concentration of the decision-making authority in the hands of the legislative and adjudicatory branch of the WTO and the relatively weak role of the administrative bodies. Further, the limited application of GAL in the legislative body calls for an immediate reform to make the functioning of the body more transparent and inclusive by participatory decision-making process. The adjudicatory wing of the WTO presents a relatively better legalized, transparent and result-oriented approach. The administrative branch too exhibits well-implemented GAL disciplines in the internal context with transparency inducing reasoned decisions, legality and review. But, in the external context its selective application gives rise to a considerable amount of opaqueness. Moreover, the lack of reforms despite various movements undertaken by NGOs in this regard represents the lackadaisical approach of the WTO towards external transparency.

In my opinion, it is imperative for the WTO to take note of this irregular application of the GAL principles and bring about regulatory reforms to inculcate these principles in their truest sense to increase the efficacy of the functioning of WTO. Moreover, the concentrated power with the legislative wing must be dispersed to the other branches of the WTO to avoid arbitrary decision-making processes that favours only certain specific nations. As a substitute to dispersion of legislative power, the WTO could ensure stringent implementation of the GAL principles in the legislative bodies to promote a transparent decision-making process involving negotiations and inclusion of all nations.

²⁶ A. Helmedach & B. Zangl, *Dispute Settlement under the GATT and WTO: An Empirical Inquiry into a Regime Change*, JOERGES AND PETERSMANN, 85, 101-105.