

WORLD TRADE ORGANIZATION AND GLOBAL ADMINISTRATIVE LAW: DEVELOPING COUNTRIES PERSPECTIVE

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1. Introduction

The World Trade Organization (WTO) is one of the most acclaimed as well as condemned International Organization. On the one hand WTO is succeeded in extending Trade Liberalization beyond the goods, securing stronger Intellectual Property Right and so on. On the other hand the same organization was criticized by the Developing Countries and Civil Society for not allowing the developing countries to participate in the Decision Making process¹. In this aspect this paper focuses on the Global Administrative Law (GAL) principles such as Participation, Accountability, and Transparency involved in the WTOs activity and the implications for developing countries. The paper also critically analyses whether the application of GAL in the administration of WTOs protects the interest of the developing countries or in the name of GAL norm western country protect their interest.

I divided this Term Paper in to Six Parts, part II focusing on what is Global Administrative Law and its Significance or Importance today in terms of emerging global multifaceted regulation. Part III, what is the relation between WTO and GAL and how they work hand in hand in their day to day activity in relation to decision making, administrative, and adjudicatory function of WTO. In IV, part focusing on Application of GAL norm in domestic jurisdiction of member state of WTO, part V, critique of GAL from the developing countries perspective, in this part my critique is not directly against GAL norms, my argument is that in order to secure more transparent, participatory, and accountability in WTO first it is necessary to find solutions to the problem facing by the developing countries in these three aspect, if it fails to find the solutions than in my view GAL has no meaning. VI, Part will be a Conclusion and Suggestion.

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¹ <http://www.twinside.org.sg/latestinfo.htm>

2. Emerging Global Administrative Law and its Importance

Before going in to the detail discussion of GAL and its importance one has to understand what is GAL. This body of law is not at present unified, it is not yet an organized field of scholarship or of practice² it still in the process of Evolving at global level³, now the New York School of Law's Global Administrative law Research project is trying to codify this law. The next question what is the importance of GAL today. when the authority of National Government shifted to global regulatory body, and growing density of regulation beyond the state enables us to find GAL principles⁴ these interdependence forms of global regulation in the field such as financial regulation, law enforcement, environmental protection, telecommunication, trade in product and services, intellectual property, labor standards, cannot address directly by the national regulatory and administrative measures as a result of this or to find solution for this problem various transitional system of regulation have been established through international treaties and informal intergovernmental network of co-operation. Apart from this some of the regulation not directly deals through treaties or co-ordination. For example formal International Organization like the WTO, decision of this organization implemented directly in the national measure. This situation creates accountability, transparency, and participation, in global regulation. In addition to this Intergovernmental Standard Setting bodies adopting GAL norms through giving participatory right to developing countries NGOs. For example, Codex Alimentary Commission. The commission was established in 1963 by the Food and Agriculture Organization (FAO) and World Health Organization (WHO) this commission was designed to promote International Standard Setting in food safety⁵. Unlike the other international standard setting organization the codex provides more opportunity NGOs to participate and also it allow NGOs to apply for observer status.

² Benedict Kingsbury, Nico Krisch and Richard B. Stewart,(2005) "The Emergence of Global Administrative Law" *Law and Contemporary problems*, 68(15) :15

³ *Ibid*, In this article authors try to define what is Global Administrative Law "GAL is comprising the mechanism, principles, practices and supporting social undersigns that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards' of transparency participation, reason decision, and legality, and by providing effective review of the rules and decisions they make. And these global administrative bodies include formal intergovernmental bodies, informal intergovernmental regulatory network and coordination arrangements, and national regulatory bodies operating with reference to international intergovernmental regulatory network hybrid public private regulatory bodies exercising transnational governance functions of particular public significance.

³ Article IV, IX, and X of the WTO agreement

⁴ Stewart, Richard b.and Ratton Sanchez Badin, Michelle (2009), "The World Trade Organization and Global Administrative Law " *New York University Public Law and Legal Theory Working Papers* Paper 166

⁵ <http://www.codexalimentarius.net>

3. WTO Governance and GAL Norms.

In This part I will be examining The Application of GAL principles and practices in relation to the WTO's three organizational branches: these are Legislative Mechanism which are called Ministerial Conference, Administrative Bodies: including Secretariat, the various Councils and Committees and the Trade Policy Review Body , and its Adjudicatory System: including Dispute Settlement Panel and Appellate Body.

Ministerial Conference: The ministerial council, which consist of representative of all member of the WTO and meet every two years, the council have executive authority to create new obligation or modify the existing obligation among members⁶ in addition one of the important rule of the Ministerial Conference is decision making by consensus, not on the basis of one member one vote system. Further when the member of the WTO increases day by day its working pressure also increased, in order to solve this problem negotiation and decision making has shifted to other mechanisms. This development leads to the other kind of problems. It includes negotiation at the ministerial conference severely criticized by developing countries as well as civil society groups because they argues that there was no participation opportunity for developing countries and civil society's in the negotiation process and it allows for green room system in decision making. This deficit of access and participation in the ministerial process challenge the internal legitimacy of ministerial decision making process.⁷ NGOs and other civil society organization sought a more transparent and participatory decision-making process, including access to agendas and the right to speak.⁸ Responding to the criticism of NGOs and Civil Societies certain measures have been taken by the Secretariat it includes, issues in the ministerial process which are discussed in the council in addition to this allows the participation of developing countries through small delegation. And also allow Non Member and NGO in the ministerial process. In sum one can say that the principles of GAL such as participation accountability developed in the decision making process under the WTO. Even though some development took place in the ministerial conference, still NGO and civil societies secured limited role in the ministerial process because non state actors must register and their application has to approved for each ministerial session and also they may not make

⁶ Article IV, IX, and X of the WTO Agreement

⁷ South Center "Some thoughts on the process of the on-going WTO mini-ministerial negotiation of July 2008" available at <http://www.southcenter.org>

⁸ Steve Charnovitz (2000) "Opening the WTO to Non-Governmental Interests" *Fordham International Law Journal* , 24, 174

oral presentation during the session. Many southern countries argued that voice of NGO and developing countries systematically underrepresented⁹

WTO Administrative Bodies: The daily life of the organization carried out by the Director General and Secretariat, a few Council and large number of Committees, which together compose the WTO Administrative Body. The most important function of the Specialized Council, Committees and Trade Policy Review Body under the Article III of the WTO agreement, is to review, supervise, and promote transparency and accountability in members' domestic trade and trade related regulatory policies and administration. In addition many WTO agreement require members to notify specified WTO bodies of relevant changes in domestic measure that may affect other member, for example, the Anti Dumping Committee receive notification about all new investigation process adopted by members: and these notification completely available at WTO Website¹⁰. From the above matter it proved that Transparency, Participation, and Accountability existed in administrative function of the WTO. But critics argue that the Administrative Bodies have not taken any step to improve the participation or effective engagement by non-member in their work and there are no legal provisions for the WTO administrative bodies to state public reason for their action.

From the above analysis what can be derived that the WTO could appreciably promote both its effectiveness and its legitimacy by taking into account two related initiative. First, encouraging the administrative bodies assume a more explicitly law making role, including by giving the norm (GAL) that they generate greater weight within the WTO regime. Second, applying GAL norm of transparency participation and review to the administrative decisional processes.

The WTO Adjudicatory System: The adjudicatory system under WTO called Dispute Settlement Panel and Appellate Body, the application of GAL principal in the dispute settlement body started when the enhanced authority of the dispute settlement body in the deepening engagement with environmental, health, and other social issues that have become intertwined with the global trade regulation has meant that panel and appellate body increasingly deal with the sensitive issues¹¹. This development leads to accession and participation in the dispute settlement body. One of the important developments of GAL norm

⁹ Safi Al- Islam Alqadhafi "Reforming the WTO; Toward More Democratic Governance and Decision Making. Gadaffi foundation for development Available at http://www.wto.org/english/forums_e/ngo_e?posp67_gaddafi_found_e.pdf>,

¹⁰ <http://www.wto.org>

¹¹ Andrew Mitchell AND Elizabeth Sheargold(2009) "Global Governance :The World Trade Organizations' contribution", *Albert Law Review* 46:4, P-6

in the dispute settlement is, giving participation to NGO through the amicus curiae brief in *Shrimp-Turtle* case¹². In 1997, an Amicus Curiae brief was filed by group of NGOs with the panel in *Shrimp-Turtle*, the following year the appellate body recognized NGOs procedural right to submit such brief and the authority of the panels to accept and consider them¹³ further in the *EC-Asbestos* case define the procedure for acceptance of amicus briefs. Later decisions open the door to submission of amicus briefs by non-state actors by variety of trade regulatory issues¹⁴ even though dispute settlement body make effort to allow the non-state actor panel and appellate body still not immune from criticisms because many developing countries strongly oppose to amicus curie brief because they argues that developed countries NGO take more benefits than developing countries in WTO dispute settlement. In addition non state actors have demanded that panel and appellate body oral hearing is conducted in public. Such hearings are limited to the parties and third parties.

4. The Application on GAL in WTO members Domestic Jurisdiction

The WTO imposes GAL principles on its members such as Transparency Participation Reason giving and reviews on decision making in the domestic administrative bodies in order to ensure Democracy and prevent Protectionism¹⁵. Due to this development WTO move forward to become universal membership, and its compulsory dispute settlement mechanisms, play a key role in the emergence of global administrative law in multilevel governance,

One of the important provision under GATT is article X, this provision basically require the Rule of Law in trade regulation, transparency of trade measure, uniform and impartial administration, and review¹⁶. And this provision remains unchanged in WTO. In addition to this almost all of the new WTO agreement contain either a reference to article X or, usually

¹² Dushyant Manocha (2008) "The Emergence of Global Administrative Law and International Institutions The World Trade Organization as an Example" *Foreign Trade Review* , 52

¹³ United States; Import prohibition of certain shrimp and shrimp product (Complainant: India Malaysia Pakistan Thailand) filed on October 1996. The appellate body held that panel had inherent authority to accept non party submission 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 processes" (WT/DS58/AB/R, par 105)

¹⁴ Stewart see supra 2

¹⁵ Stewart see supra 4

¹⁶ Mitsuo Matsushita, Thomas J Schoenbaum ,and petros C Mavroidis, (Second edition)(2006) , THE WORLD TRADE ORGANISATION Law, Practice, and Policy , OXFORD UNIVERSITY PRESS

their own version of its requirement, in addition to this I will be highlighting some of the agreements' which invoke detail provision of GAL norms.

The General Agreement for Trade in Goods (GATS), contain a more detailed set of transparency requirement in its Article III, this provision not only includes publication of measures but also an obligation to establish "enquiry points" and to respond to the request for information promptly.

The Agreement on Sanitary and Phytosanitary (SPS) measure include specific obligation of members to publish SPS regulation, to leave reasonable period of time between publication and entry into force, and to provide a notice and comment procedure for any measure not based on an international standard, it also require prompt application of SPS requirement, establishment of enquire point, access to information, and independent review of decision taken

The Agreement on Trade Intellectual Property Right (TRIPS) contains many important administrative law provisions, particularly in relation to procedure for enforcement for Intellectual Property Rights. For example Article 41 provides that such procedure shall be fair and equitable, that shall be written, reasoned and only based on evidence in term of which both parties have a right to be heard and there shall be a possibility for review. Article 41, 42, 49 and 62, impose regulatory due process requirement for acquisition and enforcement of Intellectual Property Rights, including a right to review¹⁷. Article 54-58 mentioned a number of Notification and review requirements¹⁸, Article 62 deals with procedure for the acquisition of intellectual property¹⁹ including reasonable time limit and a right to review, article 63 contain general transparency requirement.

The Agreement on Technical Barrier to Trade (TBT) also contain similar provision it include detail access to information requirement and a code of good practice for the preparation, adoption and application of standards, including notice and comment, publication and consultation requirement ,and requirement for impartial administration²⁰.

In order to give effect to this provision under WTO agreements and Article X GATT, the Dispute Settlement Panel and Appellate Body regularly enforce these requirements. For

¹⁷Matsushita see *supra* 11 , P -736

¹⁸ *ibid* 707

¹⁹ *Ibid* 732

²⁰ *Ibid* 486

example violation of Article X GATT found in Argentina- hides and leather, Dominican Republic –import and sale cigarettes, and US-customs bond directive and EC- Selected custom matters. In addition Japan – Agricultural product II the appellate body found a violation of the transparency requirement of article 7 of the SPS Agreement, in Canada patent term case, the panel held that the due process requirement of Article 41 of the TRIPS agreement had not been respected. In Argentina-Poultry Antidumping Duties, the panel held that the Article 6.2 obligation to provide an all interested parties in an antidumping investigation “a full opportunity for the defense of their interests²¹”

Shrimp Turtle case: the Shrimp Turtle is one of the important cases from the GAL perspective, this case involves the United Nation ban on the import of shrimp that were not harvested in compliance with US regulatory requirement to protect endangered sea turtle, the appellate body held that the measure taken by US not justifiable because decision is arbitrary and unjustifiable, US has not given the notice or opportunity for hearing for the benefit of the opponent state witch enshrined under the *chapeau* of article XX, of the GATT/WTO. In Sum from the above analysis derived that WTO imposing more transparent requirement from domestic countries, in my view this development is one side beneficial in terms of democratizing the international trade. On the other side burden for developing countries.

5. WTO, GAL, and Developing Countries

Hear need to understand the emergence of GAL from the perspective of developing countries because whether the developing countries really get benefit from the emerging GAL or in the name of GAL developed countries continuing their imperialism²². I argued that the emerging GAL principles like participation accountability and transparency in the WTO is a sign of democratizing the WTO²³. In addition many western countries argue that now the developing countries and nongovernmental organization have enough opportunity to participate in all activities of the WTO. Hear we need to ask ourselves does the developing countries really involved in all the activities (decision making, administration and adjudication) of WTO? In my view answer is no because developing countries facing numerous problem witch leads to

²¹ Stewart see *supra* 2

²² B S Chimni (2005) Co- option and resentment: Two Faces of Global Administrative Law, *Journal of International Law and Politics* 37. p 806

²³ Steve Charnovitz “ Transparency and Participation in the World Trade Organization , *the George Washington University Law School Public Law and Legal theory Paper no 142,*

continuingly restrict the ability of developing countries from participating in WTO. On the other hand developing countries are unable to protect their interest because WTO agreement in the name of accountability transparency expecting more obligation from the member countries. for example countries has to bring a notice to various trade councils with regard to what are the changes they have taken in their domestic jurisdiction, further I will explain what are the problems of developing countries;

Participation in Decision Making under WTO: my critic hear is that even though GAL norms talks about participation, developing countries failed to take advantage of this because in the WTO, decision not taken on the basis of majority voting instead by consensus. Problem here is that even the developing countries participate in the decision making they cannot argue in front of the western countries instead they remain silent²⁴ in addition developing countries facing the lack of experts problems which is another disadvantage for developing countries, because the agenda of WTO has expanded increasingly in technical matter, to negotiate these technical issues effectively expertise in this area are necessary, usually it only developed countries that are able to fly Geneva for negotiation, developing countries even if present at the meeting they remain silent, in sum instead of solving all these problem how the GAL Principles helps developing countries or how WTO become more democratic.

Transparency under WTO Agreement : most of the WTO agreements require transparency requirement from the member state, for example in the TRIPS and GATS agreement WTO impose several obligation like transparent review of domestic action taken by country so that it impair the ability of developing countries government engage in form of affirmative action to promote their the economic development. In Sum this is one kind of hegemony, in my view WTO is dominant by the western countries it continually dominating developing countries in the name GAL principles, in addition concept of transparency accountability itself is a western concept developed in particular setting and continuing to protect western interest.

Unjustified Act Legalized by Appellate Body: the shrimp- turtle case is the best example from both side, on the one hand this case cause for development of GAL norm in adjudicatory system of WTO, on the other side this case is the example in the name of GAL norms how the western countries protecting their interest, the appellant body in this case legitimize the

²⁴ South Center, "WTO Decision-Making and Developing Countries", *Working Papers 11* , also see B S chimni,(2006) " The World Trade Organization, Democracy and Development : a view from the south, *Journal of World Trade* 40(1) p 13.

unilateral action taken by US through linking it to the consultative process²⁵. In addition to this allowing NGOs in panel and appellate body also more possibility of disadvantage to developing countries because in developed countries NGOs are more powerful than Third World countries NGOs, Therefore obviously developed countries NGO will take more advantage in dispute settlement under WTO.

From the above Three argument clarifies that The GAL principles such as participation accountability and transparency onside its good because at list some positive improvement seen in the decision making, administration and adjudication under WTO on the other side GAL emerging through a imperial character because of this developing countries are still facing more problems .

6. Conclusion

Unlike the other international institution the WTO has special role in global regulation, decision of the this organization have grater implication not only on members of the WTO but also on non-members, in order to questioning the legitimacy of decisions there is no substantive law in global level like domestic administrative law or there is no international treaty between member countries, in my view GAL solve this lacuna through application of participation accountability and transparency. In addition to this, these GAL principles should also necessitate to find solution for developing countries problem. My suggestions are

I. Way of improving GAL norms facilitating a more *active* engagement of developing countries.

II.The GAL must address the financial, technical, legal expertise problem in developing countries, unless solving this problem there is no meaning for developing Countries participation in WTO decision making.

III. The GAL must address procedural reform, for example instead of consensus, one member one vote in decision making under WTO. This procedural reform may assist developing countries in dealing with the substance of the negotiation

IV. Finally, some of the Least Developing Countries (LDC) Still they don't have experience or they have not participated either in decision making or in dispute settlement, or in any other activities of the WTO. It doesn't mean that they don't have any problem; Reason for not

²⁵ B S Chimni (2002) "WTO and ENVIRONMENT Legitimization of Unilateral Trade Sanctions, Economic and political weekly 133

participating is that they are facing numerous problem for them GAL is doing nothing. Therefore, to solve the problem of democracy deficiency at the WTO trough the GAL, it is required to modify the existing legal regime.

