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THE WORLD TRADE ORGANIZATION AND GLOBAL ADMINISTRATIVE LAW

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I. Introduction: The WTO Challenges and the Rise of Global Administrative Law

The World Trade Organization (WTO) is one of the most acclaimed and condemned of international organizations. It has enjoyed considerable success in implementing the Marrakesh accords, extending trade liberalization beyond goods, dealing with non-tariff regulatory barriers to trade, and securing intellectual property rights. Yet the WTO has also been subject to stringent criticism by civil society organizations and some members for closed decision making, an unduly narrow trade focus, domination by powerful members and economic and financial interests, and disregard of social and environmental values and the interests of many developing countries and their citizens. These divergent reactions reflect the largely successful expansion of the WTO's trade liberalization agenda, the consequent increase in the social and economic issues encompassed by its trade disciplines, the deepening penetration of those disciplines into domestic administration, and the character of the WTO's governance institutions and its interactions with other international regimes.

Administering more than 2,000 rules on international trade, the WTO has a relatively unusual tripartite governance structure, with distinct legislative, administrative and adjudicatory branches. The relatively highly legalized dispute settlement branch enjoys considerable independence, but the other two branches operate through relative closed consultation and negotiation among the member states, reflecting a "member-driven" ethos. The organization and its components are deeply challenged by twin imperatives: 1) continually adapting international trade regulatory disciplines in order to expand and secure liberalized trade 2) bolstering its institutional legitimacy against attacks by critics faulting it for secretive decision making and disregard of non-trade interests and values. This chapter examines these challenges in the context of Global Administrative Law (GAL) for multilevel regulatory governance.² It argues that the challenges faced by the WTO can be addressed by greater application of GAL decision-making mechanisms of transparency, participation, reason giving, review, and accountability to the

¹ The authors are deeply indebted to Lorenzo Casini and Euan MacDonald for extensive assistance in researching and drafting and to Anna Pitaraki and Judah Ariel for valuable research assistance. Professor Stewart acknowledges the generous support of the Filomen D'Agostino and Max Greenberg Research Fund of New York University School of Law.

² See B. Kingsbury, N. Krisch and R.B. Stewart, "The Emergence of Global Administrative Law", 68 *Law and Contemporary Problems* 15 (2005).

WTO's administrative bodies including its councils and committees and the Trade Policy Review Body. This chapter also examines how the WTO has instilled GAL disciplines in member state administration, and the potential for extending them to other global regulatory bodies as a condition of WTO recognition of their standards.

The WTO exemplifies the pervasive shift of authority from domestic governments to global regulatory bodies in response to deepening economic integration and other forms of interdependency. The growing density of regulation beyond the state enables us to identify a multifaceted global regulatory and administrative space populated by many distinct types of specialized global regulatory bodies, including not only formal international organizations like the WTO but also transnational networks of domestic regulatory officials, private standard setting bodies, and hybrid public-private entities. The ultimate aim of many of these regimes is to regulate the conduct of private actors rather than states; private actors including NGOs and business firms and associations as well as domestic government agencies and officials also play a major role in shaping the decisions of these regimes. The various bodies and actors are fragmented yet linked by manifold interactions in a complex pattern of multilevel governance.

Traditional domestic and international law legal and political mechanisms are inadequate to ensure that these diverse global regulatory decision makers are accountable and responsive to all of those who are affected by their decisions. The current reality requires a reframing of the interstate paradigm of traditional international law to a more pluralistic and cosmopolitan framework. At the same time, we believe that the divisions and differences in regimes, interests and values are too wide and deep to support, at this point a constitutionalist paradigm for global governance. Current conditions however, are compatible with and indeed call for development of a global administrative law, which can be applied to particular global regulatory bodies, and their relations with domestic administrations to enhance regulatory governance without positing an encompassing global legal order.

Much global regulatory governance – especially in fields as trade and investment, financial and economic regulation – can now be understood as administration, by which term we include all forms of law making other than treaties or other international agreements on the one hand and episodic dispute settlement on the other. Decision making authority in global bodies is increasingly exercised by bureaucracies, committees, expert groups, and networks of domestic officials and private specialists. In response to the need to ensure greater accountability and responsiveness in the exercise of regulatory authority, these bodies are increasingly being held to norms of an administrative law character, including requirements of transparency, participation, reasoned decision and decisional review. We are accordingly witnessing the rise of a Global Administrative Law (GAL).³ At this juncture, however, GAL cannot be regarded as a single

³ See *ibid*; D.C. Esty, “Good Governance at the Supranational Scale: Globalizing Administrative Law”, 115 *Yale Law Journal* 1490 (2006). The website of NYU Law School Institute for International Law and Justice’s research project on global administrative law collects a wide range of research papers and other materials on the subject (www.iilj.org/gal). See also *Global Administrative Law: Cases, Materials, Issues*, edited by S. Cassese et al. (second edition 2008) (www.iilj.org/GAL/GALCasebook.asp); Symposium, *The Emergence of Global Administrative Law*, *Law and Contemporary Problems*, Vol. 68:3-4 (Summer-Autumn 2005), pp. 1-385; Symposium, *Global Governance and Global Administrative Law in the International Legal Order*, *European Journal of International Law* vol. 17 (2006), pp. 1-278; Global Administrative Law Symposium, *NYU Journal of International Law and Politics*, Vol. 37:4 (2005). The GAL Project, jointly with leading law schools and research

universal system of well-defined norms and practices.⁴ The practices are still evolving and applied quite unevenly in different components of the global administrative space. .

The WTO offers a prime example of the most important axes of GAL: the development of mechanisms for transparency, participation, and reason-giving in the internal administrative decision-making processes of global regulatory bodies; the absorption of global administrative law norms in states' domestic administrative structures and procedures; and the legal issues presented by increasingly close linkages among different global regulatory institutions. The following three sections of this chapter analyze the current and potential future development of GAL mechanisms with respect to each of these three dimensions:

- the internal dimension of the governance of the WTO, most particularly its administrative branch;
- the vertical dimension of the relations between the WTO and its members' domestic administrations, which it regulates; and
- The horizontal dimension presented by the recognition by the WTO of regulatory standards issued by other global regulatory bodies.

This analysis is in part descriptive, examining the extent to which GAL principles and practices have been adopted in each area, and in part prescriptive, outlining the potential for GAL's further development and application in global trade regulation. A concluding section summarizes the analysis and briefly assesses its significance for legal theory in relation to the rise of global administrative law patterns, contrasting it with the alternative possibility of a constitutionalist paradigm of law for global governance.

II. Internal WTO Governance: Structure and Decision Making Procedures

This section examines the adoption and potential further application of GAL principles and practices in relation to the WTO's three organizational branches: its legislative institutions, anchored in the Ministerial Conferences; its administrative bodies, including the Secretariat, the various councils and committees, and the Trade Policy Review Body; and its adjudicatory system including dispute settlement panels and the Appellate Body. The governance arrangements for each component have an internal dynamic in relation to WTO members and an external one as to other global bodies and non-state actors.

GAL would logically govern decision making by the WTO's administrative bodies. At present, however, its application to these bodies is quite rudimentary. The basic explanation for this underdevelopment lies in the distribution of decision making authority within the WTO, which is disproportionately concentrated in the legislative and adjudicatory branches, and the historical reluctance of the members to confer independent decisional authority on the administrative

institutes in Africa, Asia, Europe and Latin America, has convened conferences in Buenos Aires, New Delhi, Cape Town, Geneva, Beijing, and Abu Dhabi. Publications and reports from these initiatives are at www.ijl.org/GAL; books are now in press from GAL symposia held in Buenos Aires (Res Publican Argentina press), Delhi (OUP), and Cape Town (Acta Juridica).

⁴ S. Chesterman, "Globalization Rules: Accountability, Power, and the Prospects for Global Administrative Law" 14 *Global Governance* (2008) 39.

bodies. In order to analyze the role in the WTO of administration, and hence of GAL, the role of the other two branches must also be examined.

The GATT relied on a system of confidential negotiations among the more powerful members to achieve mutual concessions on tariffs and quotas, limit the influence of domestic lobbies, and insulate trade issues from other issues of international relations.⁵ Many elements of the club model have persisted in the WTO -- provoking questions of transparency, participation and legitimacy -- notwithstanding that this model is functionally ill-adapted to deal with the complex and dynamic regulatory issues that have become so increasingly important in the last two decades. NGO and other critics of WTO governance have demanded greater openness and participation opportunities in the WTO, targeting its legislative and adjudicatory bodies. As a result, these bodies have in recent years become somewhat more open to outside scrutiny and input.⁶ There remains, however, a largely insulated core of intergovernmental policymaking, including notably in the various WTO administrative bodies, which continue to operate in an essentially closed and opaque manner. We maintain that the twin challenges of efficacy and legitimacy that the WTO faces should be addressed by simultaneously strengthening the law-making role of its administrative bodies and applying GAL disciplines to them. These steps would enhance the functional capacities and cosmopolitan orientation of the organization as a whole.⁷

A. The Ministerial Conference Processes for Trade Regulatory Legislation

The Ministerial Council, which consists of representatives of all members and meets every two years, is the WTO legislative body with, in official theory, the exclusive authority to create new obligations or (with limited exceptions) modify existing obligations among members (Articles IV, IX and X of the WTO Agreement). Nonetheless, the dispute settlement bodies have assumed an important lawmaking function, and even the much less powerful administrative bodies are beginning to develop an interstitial normative role, as described in the following sections.

⁵ Jens Steffek and Claudia Kissling, 'Why Cooperate? Civil Society Participation in the WTO'; in C. Joerges and E.-U. Petersmann, eds, *Constitutionalism, Multilevel Trade Governance and Social Regulation* (Hart Publishing, Oxford and Portland Oregon 2006)[hereinafter Joerges & Petersmann] p.135.

⁶ See *id.*, which provides overview and analysis of NGO participation in the WTO from an institutionalist perspective emphasizing the incentives of the various actors to accept or engage in participation. See also Mini-Symposium on Transparency in the WTO, 11(4) *J. Int'l Econ. L.* (2008); Debra P. Steger, Introduction to the Mini-Symposium on Transparency in the WTO, 11(4) *J. Int'l Econ. L.* 705 (2008); Peter Van den Bossche, NGO Involvement in the WTO: A Comparative Perspective, 11(4) *J. Int'l Econ. L.* 717 (2008); Yves Bonzon, Institutionalizing Public Participation in WTO Decision Making: Some Conceptual Hurdles and Avenues, 11(4) *J. Int'l Econ. L.* 751 (2008). See further Steve Charnovitz, Transparency and Participation in the World Trade Organization, 56 *Rutgers L. Rev.* 927 (2003-2004). For further discussion see Julio A. Lacarte, Transparency, Public Debate and Participation by NGOs in the WTO: A WTO Perspective, 7 *J. Int'l Econ. L.* 683 (2004); Peter Van den Bossche and Iveta Alexovicová, Effective Global Economic Governance by the World Trade Organization, 8 *J. Int'l Econ. L.* 667 (2005); Robert Wolfe, Decision-Making and Transparency in the 'Medieval' WTO: Does the Sutherland Report have the Right Prescription?, 8 *J. Int'l Econ. L.* 631 (2005)

⁷ For discussion of application of global administrative law to WTO governance generally, see Daniel C. Esty, Good Governance at the World Trade Organization: Building a Foundation of Administrative Law, 10(3) *J. Int'l Econ. L.* 779 (2007)

The basic and prevailing rule for decision at the Ministerial level is consensus.⁸ The number and heterogeneity of the members to the WTO multilateral trade system has increased dramatically over the past several decades. Eighteen members established the GATT, but today the WTO has more than 150 members negotiating under the same consensus rule. Further, the scope and ambition of the regulatory agenda has expanded dramatically. Negotiation in a committee of the whole on complex and controversial matters became unworkable; as a consequence, much of the real negotiation and decision-making has shifted to other mechanisms.

The Uruguay Round was a clear example of these difficulties. Its negotiation process was highly criticized for its opaque rule-making process and recourse to the Green Room system for deciding on the main and most controversial issues under negotiation.⁹ As a result, the Doha mandate included a section on organization and management of the work program, with the purpose of promoting access to and engagement of all members, and, to a more limited degree, non-members.¹⁰ Trade negotiations committees were established on specific topics¹¹. Yet, the five main players in this round – EC, US, Japan, Brazil and India – have coordinated a series of informal mini-ministerial meetings with a limited number of members, primarily those leading countries that have had a direct impact on the Doha negotiation meetings. Further, the chairs of trade negotiation committees have been criticized for being too domineering in organizing the activities of the committees, ignoring many members' views and opportunity for input, and pushing their own agendas.¹² The deficit of access and participation in the ministerial process has put in question the internal legitimacy of the negotiation outcomes as well as of the organization itself and its external dimension.¹³ NGOs and other civil society have, sought a

⁸ The exception of Articles IX and X establishes other decision methods, such as voting and qualified voting of either two-thirds or three-fourths majorities. However critics characterize this new rule-making system as “cumbersome” and even “impossible” to use, e.g., the supermajority of 3/4 of the Members required in the vote under Article IX.2 is very difficult to reach in meetings that often have a level of attendance below the simple majority quorum (See Marco C.E.J. Bronckers, ‘Better Rules for a New Millennium: A Warning against Undemocratic Developments in the WTO’ (1999) 2 JIEL 547). As a consequence presumed consensus has continued to be followed as the norm for decision (with a simple majority of members required to establish a quorum, as provided by Rule 16 of WTO - WT/L/161 - Rules of procedure for sessions of the Ministerial Conference and meetings of the General Council, issued on 25 July 1996).

⁹ Richard Blackhurst and David Hartridge, “Improving The Capacity Of WTO Institutions To Fulfill Their Mandate,” *Journal of International Economic Law* (2004), 7:3, 705-716; Global Economic Governance Programme: “A Governance Audit of the WTO: Roundtable Discussion on Making Global Trade Governance Work for Development”; Ernst-Ulrich Petersmann, “Challenges to the legitimacy and efficiency of the World Trading System: democratic governance and competition culture in the WTO – introduction and summary”, *J. of Int’l Econ. L.* (2004), 7:3, 585-603.

¹⁰ See par. 45 and ff. of the Doha Declaration, adopted on 14 November 2001. Available at: <http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm#organization> (April 2009).

¹¹ Besides the Trade Negotiations Committee (TNC), which is under the authority of the General Council, two subsidiary groups were created to handle individual negotiating subjects: market access and WTO rules (anti-dumping, subsidies, regional trade agreements). Others may be created by the TNC, however, the remaining issues and their preparatory work for new agreements has been incorporated in the agenda of work of the existent councils, committee, and other WTO bodies.

¹² Gregory Shaffer, “The role of Director-general and Secretariat: Chapter IX and Sutherland Report”. *World Trade Review* (2005), 4: 3, 429-438.

¹³ “South Center”: “Some thoughts on the process of the on-going WTO mini-ministerial negotiations of July 2008”, available at: http://www.southcentre.org/index2.php?option=com_docman&task=doc_view&gid=910&Itemid=69 (April 2009).

more transparent and participatory decision-making process, including access to agendas and the right to speak.

Far-reaching changes have been discussed, especially by academics, to change the consensus rule and make other changes in and impel the WTO Agreement to move beyond the diplomatic club model and establish a more open and “democratic” legislative system.¹⁴ While no basic structural changes have been made through the WTO agreements or otherwise, certain measures have been undertaken – mainly by the Secretariat – to respond to criticisms of the ministerial process. For example, issues in the ministerial process are discussed in the councils and committees meetings facilitating, along with capacity building initiatives, the participation and contribution of developing countries with limited resources and small delegations. Externally the Secretariat has taken steps under Article V.2 of the WTO Agreement (to promote limited forms of openness to and engagement by non-members, including NGOs, in the ministerial processes).¹⁵ These steps have helped to ventilate the WTO’s treaty negotiation processes and promote engagement with outside constituencies.¹⁶ Nonetheless, many elements of the club model persist. Many less developed countries and the NGOs still have a very limited role in the ministerial processes, especially when compared to similar processes in many other international organizations.¹⁷ Non-state actors must register and have their application approved for each Ministerial, and may not make oral presentations during sessions. Many southern countries and NGOs claim that their views are systematically underrepresented.¹⁸

B. The WTO Administrative Bodies and Global Administrative Law

¹⁴ Andreas R. Ziegler and Yves Bonzon, *How to Reform WTO Decision-Making? An Analysis of the Current Functioning of the Organization from the Perspectives of Efficiency and Legitimacy*, NCCR trade regulation, Swiss National Center of Competence in Research, Working Paper No. 2007/23, May 2007. Claus-Dieter Hermann and Luther Erring, *The Authoritative Interpretation Under Article IX:2 of the Agreement Establishing the World Trade Organization: Current Law, Practice and Possible Improvements*, *J Int’l Econ. L.*, December 2005; 8: 803-824.

¹⁵ Procedures were established by the Secretariat to register such representatives, provide them with briefings after member delegates meetings, and also provide them with facilities for public meetings and debates. Other initiatives have included an annual meeting in Geneva for NGOs and delegates about WTO issues (the WTO Public forum); the creation of discussion groups to confer with the Secretariat and the Director General, such as the informal committees created by the Director-Generals Mike Moore, in 2001, and Supachai Panitchpakdi, in 2003. See WTO Press/236 (2001), and an open invitation for position papers to be posted on the WTO website (the NGO Forum section). Cf. WT/INF/30 (2001). WTO Secretariat Activities with NGOs, 12 April.

¹⁶ See Steve Charnovitz, *Transparency and Participation in the World Trade Organization*, 56 *Rutgers L. Rev.* 927 (2003-2004). Insert Mini-Symposium on Transparency in the WTO, 11(4) *J. Int’l Econ. L.*, 2008

¹⁷ Steve Charnovitz, “Two centuries of participation: NGOs and international governance”, *Michigan Journal of International Law* (1997), 18:2, 183-286; Jan Aart Scholte, Robert O’Brien and Marc Williams, “The WTO and Civil Society”, CSGR Working Paper n. 14/98, Centre for the Study of Globalization and Regionalization, July 1998. For additional views, see J.L. Dunoff, *The Misguided Debate Over NGO Participation at the WTO*, 1 *J. Int’l Econ. L.* 433 (1998); Daniel C. Esty, *Non-governmental Organizations at the World Trade Organization: Cooperation, Competition, or Exclusion*, 1 *J. Int’l Econ. L.* 123 (1998)

¹⁸ Steve Charnovitz, “WTO Cosmopolitics”, *International law and politics* (2002), 34, 299-354; Saif Al-Islam Alqadhafi, “Reforming the WTO: Toward More Democratic Governance and Decision-Making”, Gaddafi Foundation for Development, 2007 (available at <http://www.wto.org/english/forums_e/ngo_e/posp67_gaddafi_found_e.pdf>, June 2009).

While episodic Ministerial Conferences and associated processes are responsible for high level rule-making, the daily life of the organization is carried out by the Director General and Secretariat, a few councils, and a large number of committees, which together compose the WTO's administrative component. The General Council holds an overall supervisory authority over Councils for Trade in Goods, Trade in Services and TRIPS. It deals with the internal budget and administration of the organization, defines the distribution of competencies among the other councils and the committees, and coordinates cross-cutting issues. The three specialized councils, in turn, oversee various committees relating to their own particular parts of the various multilateral and plurilateral agreements. In addition, the important Trade Policy Review Body (TPRB) monitors members' performance in implementing agreements, addresses questions of application that arise, and facilitates improved implementation of the agreements.

The most important functions of the specialized councils, committees and the TPRB, pursuant to Article III of the WTO Agreement, are to review, supervise and promote transparency and accountability in members' domestic trade and trade-related regulatory policies and administration. The Secretariat is responsible for supporting these bodies' activities, gathering information on members' trade policies and measures. In addition, many WTO agreements require members to notify specified WTO administrative bodies of relevant changes in domestic measures that may affect other members. For example, the Anti-Dumping Committee receives notifications about all new investigation processes and measures adopted by members; the notifications are compiled and publicly available at WTO's website.¹⁹ The TPRB is even more proactive in exercising its reviewing function. The Secretariat not only gathers information for the TPRB regarding member practices but prepares a draft of a report on each member under evaluation (after consultation with that member); the draft is available to all other members. The value of the TPRB process in providing evaluation and guidance is reflected by the fact that many members affirmatively requested that the TPRB review measures which they adopted in response to the 2008 financial crisis, rather than simply notifying the measures to the respective committees and councils.²⁰ The Director-General and Secretariat have also launched initiatives on the international trade regulatory implications of the financial crisis and domestic measures reflecting the increasingly proactive of WTO administrative bodies.

The administrative functions carried out by the councils, committees and TPRB include significant normative components. For example, the General Council and the Councils on Trade in Goods, Trade in Services, and TRIPS are authorized to grant, under certain conditions, time-limited waivers from otherwise applicable WTO disciplines.²¹ But for the most part, the

¹⁹ See <http://www.wto.org/english/tratop_e/adp_e/adp_e.htm> (June 2009).

²⁰ *Missão do Brasil em Genebra (Brazilian Mission in Geneva)*, Carta de Genebra, ano VIII, n. 1, maio de 2009, p. 17. References are made to formal and informal meetings in which the issue was discussed, and members' positions about it. See also Joost Pauwelyn and Ayelet Berman, *Administrative action in the WTO: the WTO's Initial Reaction to the Financial Crisis* (forthcoming). The authors named the informal initiative embraced by the Director General as an "administrative action" undertaken by the managerial arm of the WTO (the Secretariat and the DG).

²¹ See Isabel Feichtner, *The Waiver Power of the WTO: Opening the WTO for Political Deliberation on the Reconciliation of Public Interests*, Jean Monnet Working Paper 11 (2008) (contending that decisions on waivers should be a forum to confront and resolve conflicting interests and norms). One example among many is the authority of the Council of Goods to waive the most-favored nation clause (Article I:1 of GATT-1994) so as to enable developed country members to grant under certain conditions duty-free or preferential treatment to goods from least developed regions and countries.

administrative bodies lack power to make decisions with authoritative legal effect. Nonetheless, their review and supervision of members' implementation of the agreements will necessarily involve discussions of the meaning and application of provisions in the WTO agreements, efforts at clarification, and development of working mutual understandings of the most appropriate way of implementing members' commitments in particular contexts, including issues of domestic institutional structure and procedure as well as substantive norms. The administrative bodies also provide technical assistance to developing country members in implementing their WTO commitments and in participating in international standard setting bodies. This assistance will inevitably involve exemplars of good practice, blending in some cases into interpretation and application of governing legal norms. Taken together, these activities involve a range of normative practices that have appreciable practical significance and influence.

All WTO members have a seat on these administrative bodies. Many smaller and less developed country members with small delegations in Geneva complain that they have serious difficulties in keeping abreast of the increasing number of administrative activities, much less actively participating in all of them.²² Decisions are taken by consensus through a process of information-sharing, discussion, and negotiation. Each body has its own internal rules of organization and procedure regulating such matters as meetings, meeting agendas, who may attend (including in some cases observers), decisional rules, and other matters.²³ The activities of the committees are subject to review by their respective councils, and in turn by the General Council, which issues an annual report compiling the activities and main decisions reached by all of its subordinate bodies.

These processes of internal administrative review has implications beyond simple compilation of the activities undertaken by the subordinate bodies. As acknowledged in recent annual reports by the General Council, through the General Council review process statements made by members in informal meeting, such as TNC meetings,²⁴ became public, increasing transparency, both internally and externally. In addition, during the review process the supervising council acts as a second level of decision when it evaluates the discussions and decisions in the body being reviewed, which it can approve or disapprove. This process has occurred, for example, with respect to the implementation of sensitive matters to be accomplished within certain deadlines; when the deadline was not met, the General Council was called upon to decide on extensions and in doing so reviewed the work of the subordinate body. Examples can be found in discussions on the Transparency Mechanism for Regional Trade Agreements and the Protocol amending the TRIPS Agreement.²⁵ Thus, administrative review increases transparency among WTO administrative bodies as well to members and even the public, promoting GAL objectives.

²² See Constantine Michalopoulos, "Developing countries' participation in the World Trade Organization, World Bank Policy Research Working Paper No. 1906, march 1998; Håkan Nordström, Participation of developing countries in the WTO, mimeo, 2006 (available at < www.noits.org/noits06/Final_Pap/Hakan_Nordstrom.pdf>, June 2009).

²³ Most councils and committees follow the provisions of the General Council Rules of Procedure (WT/L/28), sometimes with amendments on matters such as attendance at meetings or decision-making processes.

²⁴ See, e.g., WTO-WT/GC/117- General Council Annual Report (2008), 19 January 2009; WTO-WT/GC/114- General Council Annual Report (2007), 21 January 2008.

²⁵ See WTO-WT/GC/114- General Council Annual Report (2007), 21 January 2008; WTO-WT/GC/M/112- General Council – Minutes of the meeting held on 18 December 2007, 4 March 2008.

Nonetheless, from the external perspective the WTO administrative bodies operate in a relative opaque and closed fashion, notwithstanding the broader normative significance of their activities. The administrative law-making functions carried out by these organs are eminently suitable and ripe for application of GAL procedures for transparency, participation, reason giving, and review, yet, in practice; such procedures are almost wholly absent. Transparency is still limited. While the WTO has adopted general rules for the automatic publication of internal documents, there is an exception for the minutes of council and committee meetings – the bodies in charge of the daily activities of the WTO - which are restricted from public circulation for 45 days.²⁶ The WTO administrative bodies have not taken further steps to improve the participation or effective engagement by non-members in their work, unlike administrative bodies in many other international organizations.²⁷ There are no legal provisions for the WTO administrative bodies to state public reasons for their actions, nor is there any established system for publicity and review of specific interpretations and guidances. The decision making norm is seen as one of discussion and negotiation solely among member representatives.

Demands by NGOs and other outsiders for greater openness by the WTO administrative bodies have been sparse.²⁸ This may reflect the circumstance that these bodies exercise considerably less authority than the WTO's other branches. They have a relatively low level of independence from members' short-term political strategies, and shy away from contentious topics, such as the rules of origin regulation and the regional trade agreements exception which have been postponed indefinitely with no foreseeable resolution.²⁹ While the legislative and adjudicatory branches exercise binding legal authority, the normative output of the administrative bodies is informal and interstitial, although nonetheless significant in the aggregate.

We submit that the WTO could appreciably promote both its effectiveness and its legitimacy by undertaking two related initiatives. First, encouraging the administrative bodies to assume a more explicit law making role, including by giving the norms that they generate greater weight within the WTO regime. Second, applying GAL norms of transparency, participation and review to the administrative decisional processes. The Director General and the Secretariat would play an important role in these transformations. The Appellate Body could also play an important role. There has already been one case in which a recommendation of a WTO committee has been used as an applicable legal norm to guide interpretation by a dispute settlement panel of a WTO Agreement.³⁰ The Appellate Body could accord significant deference to the administrative

²⁶ Since 2002, all WTO documents are unrestricted and posted on the WTO website unless a member or a constituent WTO body requests otherwise, in which case the document is restricted for from 60 to 90 days. Cf. WTO Decision WT/L/452, Procedures for the Circulation and Destruction of WTO Documents - Decision of 14 May 2002.

²⁷ See Steve Charnovitz, Peter Willetts, and Jan Aart Scholte, Robert O'Brien and Marc Williams (footnote 11).

²⁸ A couple of proposals for amendments on the dynamics of councils and committees are related to non-state actors' claims for participation in their session, with the right to speak; to participate in the TPM proceedings. HOEKMAN and MAVROIDIS sustain that this kind of participation could increase of effectiveness of WTO agreements), cf. HOEKMAN, Bernard and MAVROIDIS, Petros (2000). "WTO dispute settlement, transparency and surveillance", World Economy, v. 23, n. 4, April, pp. 527-41.

²⁹ See WTO Annual Report, 2008. Trade in a Globalizing World. Available at: http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report08_e.pdf (April 2009).

³⁰ See *EC-Antidumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WTO Doc. WT/DS219/R, 7 Mar 2003, 7.321, where the Panel refers to the *Recommendation Concerning the Periods of Data Collection for Anti-Dumping Investigations*, G/ADP/6, adopted 5 May 2000 by the Committee on Anti-Dumping Practices. More

bodies' interpretations of the WTO agreements, but do so on the condition that they afford notice and opportunity for public input to their decisions and provide reasoned justifications for their interpretations in relation to materials generated by the decisional processes. This is the general practice followed by U.S. federal courts, pursuant to the *Chevron* doctrine, in determining whether or not to accord strong deference to interpretations by federal administrative agencies of statutes that they administer.³¹ In addition to promoting transparency, participation, and reason giving, Appellate Body scrutiny of the substantive interpretations and views generated by administrative bodies as well as their decision making procedures would provide review, another key component of GAL, and promote reasoned decision making and accountability. These steps would enhance the independence and authority of the WTO administrative bodies.

Strengthening the lawmaking authority of the WTO's administrative bodies would enable the organization to discharge its regulatory functions more effectively by adapting trade regulatory norms to new conditions and issues, rather than relying on the protracted Ministerial process or the hazard of case-by-case litigation. Almost all other major international regulatory organizations have developed strong administrative capacities to that ensure regulatory norms are systematically developed, updated and implemented by specialized officials exercising an important authority and substantial degree of independence. If the WTO were to emulate this practice, it would achieve a better institutional balance among its three branches, relieve some of the excess demands on the Ministerial and dispute settlement processes, and help ensure that WTO trade disciplines are systematically updated and adjusted. Adopting GAL procedures for transparency, participation and reason giving would enhance both efficacy and legitimacy by ensuring that the administrative development and application of trade regulatory norms is informed by a wider range of evidence, analysis, and interests. It would promote the more effective engagement of WTO norms with other social and economic values embedded in trade regulation. Such innovations would encounter resistance from members, including the emerging economies that are rapidly acquiring political power in the organization commensurate with their burgeoning economic power. Yet, such a shift, which could be undertaken in gradual stages, seems essential for the long-run health of the organization.

C. The WTO Adjudicatory System

The 1994 changes in the WTO's dispute settlement process gave the adjudicatory branch significantly greater independence and authority and a significantly more judicialized character. The Dispute Settlement Understanding (DSU) set clear procedures and deadlines for the settlement of disputes, established a standing Appellate Body, and made the Dispute Settlement Body (DSB) decisions presumptively (and practically) authoritative. This more legalized system of dispute settlement has attracted a large volume of business and elevated the WTO dispute settlement system into a position of leadership among international courts and tribunals. Since its establishment, members have brought 390 cases to the DSB, resulting in 124 approved panel reports and 76 Appellate Body reports. In 88% of the cases at least one violation of the WTO Agreements was found. The creation of the appellate mechanism together with the publication of

generally, see I. Van Damme, "Jurisdiction, Applicable Law, and Interpretation", in *The Oxford Handbook of International Trade Law*, quoted, p. 298 ff.

³¹ See *Chevron, Inc. v. NRDC*, 467 U.S. 837 (1984)

reports has helped to transform the dispute settlement process from one of diplomatic facilitation to one of reasoned adjudication of a high quality. It has promoted clarification of trade regulatory norms including through stimulating an epistemic community of lawyers and academics, and thereby furthered their implementation. A careful empirical study of GATT and WTO dispute settlement found that the WTO system has been used more frequently than the GATT system and has also been more successful in the implementation phase including by reducing the number of cases where members take the law into their own hands by using non-authorized trade sanctions³²

The contentious and protracted Ministerial process for legislation and the underdeveloped normative functions of the WTO administrative branches has required the dispute settlement system to take on the principal burden of updating WTO trade disciplines and addressing relevant non-trade norms including those reflected in other international agreements and international law generally as well as in domestic law. These circumstances have helped push the dispute settlement process from a purely bilateral and reciprocal system of episodic dispute settlement³³ towards a multilateral system with a regulatory character.³⁴ This evolution is only partial, and a more traditional approach is reflected in many panel and Appellate Body opinions. But the method and jurisprudence of the Appellate Body has often sought to promote an orderly and transparent system of global trade law to structure the practices of members and the expectations of global economic actors.³⁵

The enhanced authority of the DSB as well as the WTO's deepening engagement with environmental, health, safety, and other social issues that have become intertwined with global trade regulation has meant that the DSB must increasingly deal with sensitive issues, including the relation between trade and social issues and regional questions, that the members have been unable to resolve by consensus. This development in turn has accentuated questions of access and participation in DSB decision processes. Many less developed countries lack the resources and capacities to play an effective role in these processes. At the same time, NGOs representing affected social interests have demanded to make submissions in the decision of cases. In 1997, an amicus curiae brief was filed by a group of environmental NGOs with the panel in Shrimp-Turtle; the following year the Appellate Body recognized NGOs procedural right to submit such briefs and the authority of panels to accept and consider them³⁶. EC-Asbestos later defined the

³² A. Helmedach and B. Zangl: *Dispute Settlement under the GATT and WTO: An Empirical Inquiry into a Regime Change*, Joerges and Petersmann, 85, 101-105.

³³ See Joost Pauwelyn, *Conflict of norms in public international law*, Cambridge, CUP, 2003, p. 54; Chios Carmody, "A Theory of WTO law" in *Journal of International Economic Law*, 2008, 11 (3), pp.527-557.

³⁴ The multilateral, systemic, tendency of the WTO adjudicatory process is evident in cases involving environmental measures, see – e.g. WT/DS2 – *United States: Standards for Reformulated and Conventional Gasoline* (Complainant: Venezuela), 24 January 1995 (holding that US regulations violated national treatment requirement); WT/DS332 – *Brazil: Measures Affecting Imports of Retreaded Tyres* (Complainant: European Communities), 20 June 2005 (finding violation of MFN requirements). The same tendency is evident in intellectual property cases, see e.g. WT/DS28 – *Japan: Measures Concerning Sound Recordings* (Complainant: United States).

³⁵ Debra Steger, "The culture of the WTO: why it needs to change", in William Davey and John Jackson, *The future of international economic law*, Oxford, OUP, 2008, pp. 45-57; Joel Trachtman, "Regulatory jurisdiction and the WTO", in William Davey and John Jackson, *Op. cit.*, pp. 193-213.

³⁶ 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

procedures for acceptance of amicus briefs³⁷. These and later decisions have opened the door to submission of amicus briefs by non-state actors on a variety of trade regulatory issues. Proposals have been made to amend the DSU to explicitly provide for amicus briefs.³⁸ Many developing country members, however, remain strongly opposed to amicus briefs as diminishing member sovereignty and opening the door to undue influence by NGOs espousing developed country positions on environmental, labor, and other social issues.³⁹

In addition, non-state actors have demanded that panel and Appellate Body oral hearings be conducted in public. Such hearings are normally limited to the parties and third parties; even members that are not parties may not attend. However in US/Canada-Continued Suspension, the Appellate Body hearing was opened to members of the public registering in advance with the Secretariat because the parties consented to it⁴⁰. There have been requests by non-state actors for open hearings in other cases, but these have been rejected by at least one of the parties.⁴¹

The current dispute settlement system represents an uneasy hybrid of the bilateral paradigm aimed at settling specific disputes (with a strong element of the closed pre-WTO processes) and a more legalized, regulation-oriented and cosmopolitan approach. The latter approach would be strengthened if, as discussed above, panels and the Appellate Body were to review and accord deference to interpretations of agreement by the WTO administrative bodies that followed GAL procedures. For that very reason, such a step would be resisted by some developing country members and perhaps by powerful developed country members as well. This resistance is likely to limit the ability of the dispute settlement bodies to exercise a stronger role in building a systemic body of trade regulatory law that is responsive to the demand on the organization, reinforcing the case for empowering the WTO's administrative bodies to assume a larger normative role.

sufficient flexibility so as to *ensure high-quality panel reports while not unduly delaying the panel process.*" (WT/DS58/AB/R, par.105). For discussion, see Gabrielle Marceau and Jenifer Morrissey, *Trade and agriculture: negotiating a new agreement?* (2001), p. 143-194 ; Ernesto Hernandez-Lopez, (2001). "Recent trends and perspectives for non-state actor participation in the World Trade Organization disputes", *Journal of World Trade*, v. 35, n. 3, pp. 469-98.

³⁷ See WT/DS135/AB/R, par. 50: "(...) we recognized the possibility that we might receive submissions in this appeal from persons other than the parties and the third parties to this dispute, and stated that we were of the view that the fair and orderly conduct of this appeal could be facilitated by the adoption of appropriate procedures, for the purposes of this appeal only, pursuant to Rule 16(1) of the *Working Procedures*, to deal with any possible submissions received from such persons."

³⁸ See, e.g., TN/DS/W/1 – Contribution of the European Communities and its member states to the improvement of the WTO Dispute Settlement Understanding; TN/DS/W/38 Dispute Settlement Body - Special Session - Contribution of the European Communities and its Member States to the Improvement and Clarification of the WTO Dispute Settlement Understanding - Communication from the European Communities. This proposal would legislate the procedures defined by the Appellate Body in EC-Asbestos.

³⁹ See, e.g., see WT/GC/38 (2000) (Uruguay), TN/DS/W/15 (2002) (Kenya representing an African group), TN/DS/W/18 (2002) (Cuba, India, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe) e TN/DS/W/25 (2002) (Taiwan, Penghu, Kinmen and Matsu).

⁴⁰ See WT/DS320 – United States: Continued Suspension of Obligations in the EC — Hormones Dispute (Complainant: EC), 8 November 2004; WT/DS 321 – Canada: Continued Suspension of Obligations in the EC — Hormones Dispute (Complainant: EC), 8 November 2004.

⁴¹ An example is WT/DS332 – Brazil: Retreated Tyres case, in which neither Brazil nor the EC accepted a public hearing of their oral statements. Brazil - Measures Affecting Imports of Retreaded Tyres - Report of the Panel 12/06/2007 (WT/DS332/R).

III. GAL and WTO Trade Regulatory Governance: The Vertical Dimension

The WTO imposes extensive GAL requirements of transparency, participation, reason giving and review on decision making by members' domestic administrative bodies in order to ensure even-handed treatment of domestic and foreign private economic actors and prevent disguised protectionism. These requirements constitute what is probably the most highly developed and profoundly transformative administrative law program of any global regime. Due to the clarity and strength of these requirements, the WTO's near-universal membership, and its compulsory dispute resolution mechanisms, the WTO has played a key role in the emergence of global administrative law in multilevel governance.

The seminal source of this development is Article X of GATT 1947, which remained unchanged in GATT 1994.⁴² This provision basically requires the rule of law in trade regulation: transparency of trade measures, uniform and impartial administration, and review. Interestingly, it was originally proposed by the US Government and drew clear inspiration from the 1946 U.S. Administrative Procedure Act.

There are few better examples of the "administrative law turn" in WTO disciplines than the marked shift in Article X practice and jurisprudence before and after the creation of the WTO in 1994. Before 1994, the few panel decisions involving Article X explicitly regarded it as "subsidiary" to the other "substantive" provisions of the GATT agreement.⁴³ In the decade and a half since the inception of the WTO, violations of Article X have been claimed in no fewer than twenty disputes, and no longer are they proposed or treated as subsidiary considerations. This development comports with the shift from GATT to the WTO and the evolution of a regulation-centered regime that looks to the expectations of market actors. Further, almost all of the new

⁴² Article X: Publication and Administration of Trade Regulations

1. Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party pertaining to [exports or imports], shall be published promptly in such a manner as to enable governments and traders to become acquainted with them.

...

3. (a) Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.

(b) Each contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review and correction of administrative action relating to customs matters.

For an excellent detailed account of the history, evolution and case-law of Article X, see Padideh Ala'i, *From the Periphery to the Center? The Evolving WTO Jurisprudence on Transparency and Good Governance*, 11(4) *J. Int'l Econ. L.* 779 (2008), which examines Article X and its emergence from obscurity to a trade regulatory norm of "fundamental importance." The brief account of the jurisprudence offered in the text is drawn from that article.

⁴³ See e.g. GATT Panel Report, *Canada – Import Restrictions on Ice Cream and Yoghurt (Canada – Ice Cream and Yoghurt)*, L/6568 (adopted 5 December 1989); GATT Panel Report, *Republic of Korea – Restrictions on Imports of Beef – Complaint by the United States (Korea – Beef (US))*, L/6503 (adopted 7 November 1989). In *European Communities – Selected Customs Matters (EC – Selected Customs Matters)*, WT/DS315/AB/R (adopted 11 December 2006), the sole claim advanced by the US was an Article X claim.

WTO agreements contain either a reference to Article X or, more usually, their own version of its requirements, often making more detailed provisions for the regulation of domestic administrative decisions. These provisions can operate to the benefit of local citizens as well as foreign nations and economic actors.

The General Agreement for Trade in Services (GATS), for example, contains a more detailed set of transparency requirements in its Article III (including not only the publication of measures, but also an obligation to establish “enquiry points” and to respond to requests for information promptly).⁴⁴ The Agreement on Sanitary and Phytosanitary (SPS) Measures, Articles 7 and 8 (as complemented by Annexes B and C respectively), includes specific obligations on members to publish SPS regulations, to leave a reasonable period of time between publication and entry into force, and to provide a notice-and-comment procedure for any measures not based on an international standard. It also requires prompt application of SPS requirements, establishment of enquiry points, access to information, and independent review of decisions taken. The Agreement on Technical Barriers to Trade (TBT) contains many similar provisions in Arts. 2.11-2.12, 5-9, and 10 and Annex 3, including detailed access to information requirements and a “Code of Good Practice for the Preparation, Adoption and Application of Standards”, including notice and comment, publication and consultation requirements; and requirements for timely and impartial administration and for review.

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) contains numerous important administrative law provisions, particularly in relation to procedures for the enforcement of intellectual property rights. Article 41, for example, provides that such procedures shall be fair and equitable; that they shall be written, reasoned and only based on evidence in terms of which both parties have had a right to be heard; and that there shall be a possibility for review. Articles 41-2, 49 and 62 impose regulatory due process requirements for acquisition and enforcement of intellectual property rights, including a right to review. Articles 54-58 stipulate a number of notification and review requirements, particularly where customs authorities refuse to release goods suspected of violating the Agreement. Article 62 deals with procedures for the acquisition of intellectual property rights, including reasonable time-limits and a right to review, while Article 63 contains a general transparency requirement.⁴⁵

Dispute settlement panels and the Appellate Body have regularly enforced these requirements. For example, violations of Article X GATT were found in *Argentina – Hides and Leather*, *Dominican Republic – Import and Sale of Cigarettes*, and *US – Customs Bond Directive and EC*

⁴⁴ Article VI to broadly echo the requirements of GATT Article X relating to “reasonable, objective and impartial” administration and the establishment of review tribunals. See Panagiotis Delimatsis, “Due Process and ‘Good’ Regulation Embedded in the GATS: Disciplining Regulatory Behaviour in Services through Article VI of the GATS”, 10 *Journal of International Economic Law* (2006) 13.

⁴⁵ Many of the texts referred to above contain other administrative law provisions dispersed throughout the Agreement. The same is true of other Agreements. The Agreement on Rules of Origin (Arts. 2(g) and 3(e) and the Agreement on Safeguards (Art. 3) explicitly require that measures and activities be in conformity with GATT Article X; while Articles 12 and 13 of the Anti-Dumping Agreement, which are mirrored in Articles 22 and 23 of the Agreement on Subsidies and Countervailing Measures, make detailed provisions for public notice and reasoning, and for judicial review, of determinations. Most if not all of the WTO Agreements contain some form of vertical global administrative law obligations.

– *Selected Customs Matters*.⁴⁶ In *Japan – Agricultural Products II*, the Appellate Body found a violation of the transparency requirements of Article 7 of the SPS Agreement,⁴⁷ while in *Canada – Patent Term*, the Panel held that the due process requirements of Article 41 of the TRIPS agreement had not been respected.⁴⁸ In *Argentina – Poultry Anti-Dumping Duties*,⁴⁹ the Panel found a violation of the public notice provisions of Article 12.1 of the Anti-Dumping Agreement; whilst in *Guatemala – Cement II*, the Panel held that the Article 6.2 obligation to provide to all interested parties in an anti-dumping investigation “a full opportunity for the defence of their interests” – which in its view constituted a “fundamental due process provision” – had been violated.⁵⁰

Especially striking is the Appellate Body’s creation of general norms of regulatory due process in the *Shrimp/Turtle* case, involving a US ban on imports of shrimp that were not harvested in compliance with US regulatory requirements to protect endangered sea turtles..⁵¹ It decided that the measures were not justifiable exceptions under GATT Article X because they offended in particular the *chapeau* requirements that such measures not be “applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination”. The Appellate Body effectively read into the *chapeau* of Article XX a number of due process requirements of notice and opportunity for hearing for the benefit of foreign states and economic actors, indicating that GATT Article X embodies broadly applicable principles of regulatory due process.⁵² The decision is a vivid illustration of the potentially expansive juris-generative role of the Panels and Appellate Body in the continuing emergence of global administrative law – even if there is some

⁴⁶ In *EC – Selected Customs Matters*, para. 200, the Appellate Body overturned the traditional interpretation of Article X, which limited its application to the administration of laws, holding instead that it could be applied to the “the substantive content of a legal instrument” if it itself “regulates the administration of a legal instrument.”

⁴⁷ WTO Appellate Body Report, *Japan – Measures Affecting Agricultural Products (Japan – Agricultural Products II)*, WT/DS76/AB/R (adopted 19 March 1999).

⁴⁸ WTO Panel Report, *Canada – Term of Patent Protection (Canada – Patent Term)*, WT/DS170/R (adopted 12 October 2000).

⁴⁹ WTO Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil (Argentina – Poultry Anti-Dumping Duties)*, WT/DS241/R (adopted 19 May 2003),

⁵⁰ WTO Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico (Guatemala – Cement II)* WT/DS156/R (adopted 17 November 2000). See para. 8.179 of the Report. The Panel also found that the anti-dumping investigation had a number of other procedural deficiencies under Article 6 of the Anti-Dumping Agreement.

⁵¹ WTO Appellate Body Report, *United States-Import Prohibition of Certain Shrimp and Shrimp Products (US – Shrimp)*, WT/DS58/AB/R (Oct. 12, 1998). For a commentary on this case from a global administrative law perspective, see, e.g., Sabino Cassese, “Global Standards for National Administrative Procedures”, 68 *Law and Contemporary Problems* (2005) 109; see also Giacinto Della Cananea, *Beyond the State: the Europeanization and Globalization of Procedural Administrative Law*, 9 *European Public Law* (2003) 563.

⁵² The Appellate Body stated that: “Provisions of Article X:3 of the GATT 1994 bear upon this matter (...). Inasmuch as there are due process requirements generally for measures that are otherwise imposed in compliance with WTO obligations, it is only reasonable that rigorous compliance with the fundamental requirements of due process should be required in the application and administration of a measure which purports to be an exception to the treaty obligations...” *US – Shrimp*, loc. cit. n. 21, at para. 182. As a number of commentators have noted, this passage and others like it render unclear whether the Appellate Body’s due process rulings should be regarded as a means of implementing a prohibition on “arbitrary or unjustifiable discrimination” in the *chapeau* of Article XX, or whether they represent norms of general applicability. See e.g. Gráinne de Búrca and Joanne Scott, “The Impact of the WTO on EU Decision-Making”, in Gráinne de Búrca and Joanne Scott, eds., *The EU and the WTO: Legal and Constitutional Issues* (2001) 1, at pp. 16-22.

suggestion that, in its more recent jurisprudence, the Appellate Body has begun to move away from a broad due process reading of Article XX's *chapeau*.⁵³

The WTO's administrative bodies also play an important role in clarifying and elaborating the GAL norms surveyed above and supervising their implementation by members. The TBT Committee, for example, has developed a set of rather detailed recommendations and decisions regarding the notification of draft technical regulations, and regarding procedures for assessing conformity with regulations already in force. These include a standardized form for making notifications; recommendations relating to the timing of such notifications ("when amendments can still be introduced and taken into account"); a recommended time-limit to responding to requests for information (usually five working days); a recommendation on the translation of documents; a recommendation relating to the length of time to be left for comments (normally 60 days); and recommendations relating to the receipt and handling of comments. The TBT Committee has further set out detailed recommendations on information exchange, which include developing brochures on national enquiry points; and information on what types of requests such enquiry points should be prepared to answer (including a definition of what constitutes a "reasonable" request).⁵⁴

Similarly, the SPS Committee is developing a set of procedures "to enhance transparency of special and differential treatment in favor of developing country members".⁵⁵ They include provisions relating to national enquiry points; detailed recommended procedures for the notification of new proposed SPS measures and handling comments thereon; and further specification on the SPS publication requirements.

The recommendations and decisions of the SPS and TBT Committees are not legally binding – the SPS Committee's draft recommendations on transparency explicitly state that "[t]hese guidelines do not add to nor detract from the existing rights and obligations of Members under the SPS Agreement nor any other WTO Agreement", and that they do not "provide any legal interpretation or modification to the SPS Agreement itself".⁵⁶ Yet it would blink reality to regard them as altogether lacking normative significance. It is difficult to imagine that a Member State would be found to be in violation of, for example, the notification requirements under the SPS or TBT Agreements if they had followed closely the procedures recommended by the respective Committees. Further, the committees' specifications and recommendations are bound to have a highly persuasive influence on members' practices and on mutual understandings regarding applicable disciplines. In this way, the administrative bodies can be viewed as "sources" of global administrative law.⁵⁷

⁵³ For an account of the development of WTO jurisprudence on Article XX subsequent to the *US – Shrimp* decision, with a focus on the trade-environment nexus, see Geert van Calster, "*Faites Vos Jeux*: Regulatory Autonomy and the World Trade Organization after *Brazil Tyres*", 20 *Journal of Environmental Law* (2001) 121.

⁵⁴ All of the decisions and recommendations of the TBT Committee can be found in one consolidated document: *Decisions and Recommendations adopted by the Committee since 1 January 1995*, G/TBT/1/Rev.8 23 May 2002

⁵⁵ See Committee on Sanitary and Phytosanitary Measures, *Recommended Procedures for Implementing the Transparency Obligations of the SPS Agreement (Article 7)*, G/SPS/7/Rev.3 (20 June 2008).

⁵⁶ *Ibid.*, at para. 3.

⁵⁷ See Sabino Cassese 'Global Standards for National Administrative Procedure, 68 *Law and Contemporary Problems* (2005) 109.

On paper at least, the vertical aspect of the WTO is generating an extensive system of multilevel global administrative law. How do these requirements translate into member state practice? While anything like a sustained analysis of this issue is beyond the scope of this Chapter, the accession of China to the WTO in 2001 provides an important case study., particularly as many of the administrative law provisions of WTO law, drawn from the Anglo-Saxon tradition, lack structural analogies within the Chinese administrative system, which would be required to undergo an extensive transformation.⁵⁸ These challenges included the complexity of the Chinese administrative system; the broad discretion usually afforded to officials in implementing the law; the widespread use of unpublished “normative documents” in place of fully transparent laws and regulations; the almost total lack of notice and opportunity for comment, and the doctrine of “separation of functions”, which prevented courts from interfering in administrative governance.⁵⁹

Notwithstanding these challenges, the general assessment of China’s progress in implementing WTO administrative law norms is one of (cautious) optimism. For example:

In the course of applying for WTO membership, China embarked on a series of in-depth administrative law reforms. These reforms sought to establish competent and accountable governments at the central, provincial, and municipal levels. Furthermore, the reforms sought to bring about transparent, simplified and consistent procedures that would enable legal persons to challenge laws, regulations, and decisions, and to enforce their legal rights before administrative agencies.⁶⁰

Some have even referred to China’s Accession Protocol as “the most transformative legal instrument in history.”⁶¹ There is evidence that the GAL norms are being translated into concrete if uneven practice, with significant steps to introduce, for example, a right to comment and to publish procedures relating to the granting of administrative permits⁶² and right to meaningful judicial review of trade-related administrative decision making.⁶³ Moreover, there seems to be some evidence that the Chinese courts are themselves starting to apply the GAL procedural norms more broadly, outside the trade area.⁶⁴ A general regulation on trade-related administrative review cases has stipulated that where there are conflicting possible interpretations of Chinese law in this field, courts are to prefer that which accords with China’s international treaty commitments.⁶⁵ Although it remains difficult to assess concrete progress, it appears that the global administrative law of the WTO is having a beneficial impact upon the Chinese domestic administrative and court system beyond trade-related matters, potentially

⁵⁸ Sylvia Ostry, “China and the WTO: The Transparency Issue”, 3 *UCLA Journal of International Law and Foreign Affairs* (1998) 1, at p. 2.

⁵⁹ *Ibid.*, at pp. 12-13. China’s Accession Protocol requires the establishment or use of independent review tribunals, whereas Article X:3(c) allows for the use of local substitutes for independent review tribunals under certain circumstances.

⁶⁰ Ljiljana Biukovic, “Selective Adaptation of WTO Transparency Norms and Local Practices in China and Japan”, 11 *Journal of International Economic Law* (2008) 803, at pp. 821. For a general account of these developments, see *ibid.*, at pp. 819-824. Biukovic also examines the impact of WTO transparency measures on administration in Japan.

⁶¹ Chien-Heui Wu, “How Does TRIPS Transform Chinese Administrative Law?”, 8 *Global Jurist* (2008), at p. 5, p. 10 (quoting Ernst-Ulrich Petersmann).

⁶² *Ibid.*, at pp. 17-19. See also Julia Ya Qin, “Trade, Investment and Beyond: The Impact of WTO Accession on China’s Legal System”, 191 *The China Quarterly* (2007) 720, at p. 735; Biukovic, *loc. cit.* n. 31, at pp. 819-824.

⁶³ Qin, *loc. cit.* n. 33, at p. 736; see also Wu, *loc. cit.* n., 32 at p. 19.

⁶⁴ Wu, *loc. cit.* n. 32, at pp. 21-23; Qin, *loc. cit.* n. 33,

⁶⁵ *Ibid.*, at p. 17.

benefitting Chinese citizens.⁶⁶ Of course, there is no way that a few case studies in one or a few other jurisdictions can hope to be conclusive; yet there is sufficient to suggest the transformative and overall positive potential of the global administrative law of the WTO in domestic administration and governance.

The extension of GAL requirements of transparency, participation, reason giving and review is celebrated by many commenters as promoting accountability and the rule of law. But this benign view is also strongly contested. It has been argued, for example, that administrative law itself is a “Western” construct, developed in a particular setting and it inherently structurally biased towards certain interests.⁶⁷ When operationalized in the trade regulatory context, any such structural biases could serve to entrench the already dominant position of Western corporations. Allegations of precisely this sort have, of course, been made against the TRIPS Agreement and its many administrative law provisions.⁶⁸ It has also been suggested that the GATS provisions for transparent non-discrimination in government procurement may impair the ability of developing country governments to engage in forms of affirmative action to promote the economic development of local ethnic groups.⁶⁹ In a somewhat different perspective, Chimni has also warned that a focus on putatively value-neutral, procedural aspects of administrative law can, in certain circumstances, serve to legitimate substantively unjust procedures and outcomes.⁷⁰

Acknowledging legitimate scope for contestation, we nonetheless view the striking progress, surveyed in this section, of the WTO in developing and promoting the adoption by domestic administrative of GAL norms and practices as a positive development in ensuring the fair and even handed treatment of political outsiders and promoting the rule of law more generally.

⁶⁶ One commenter has concluded as follows: “During the years leading up to and following the accession, the government and academia engaged in an unprecedented scale of public education on the WTO, portraying the WTO as mostly a progressive force for China. As a result, WTO principles and concepts, such as nondiscrimination, transparency, due process and judicial review, have gained wide acceptance in China as the norms for good governance in a modern society.” Qin, *loc.cit.* Bukovic finds that the WTO administrative law disciplines have had a positive general effect on administration in Japan as well as in China. See also Andrew Green, *Trade Rules and Climate Change Subsidies*, 5 *World Trade Rev.* 377, 411 (2006) (discussing local benefits of WTO procedural requirements such as notice and comment and reasoned decision making).

⁶⁷ See C. Harlow, “Global Administrative Law: The Quest for Principles and Values”, 17 *European Journal of International Law* (2006) 187, at p. 207.

⁶⁸ For a detailed account of the genesis of the TRIPS Agreement within the WTO, and of the strong Western support for it in the face of developing country opposition, see J. Braithwaite and P. Drahos, *Global Business Regulation* (2000) ch. 7.

⁶⁹ Christopher McCrudden and S.G. Gross, *WTO Government Procurement Rules and the Local Dynamics of Procurement Policies: A Malaysian Case Study*, 17 *Eur. J. Int'l L.* 151 (2006). 151-85.

⁷⁰ See B.S. Chimni, “Co-Option and Resistance: Two Faces of Global Administrative Law”, 37 *New York University Journal of International Law and Politics* (2005) 799, 805. Rather than seeing the first *Shrimp/Turtle* decision as a victory for the developing countries challenging US regulation of their fishing practices or as a progressive step for global administrative law more generally, Chimni notes that the second *Shrimp/Turtle* decision enable the US to maintain such regulation making only a few largely procedural adjustments; B.S. Chimni, “WTO and Environment: Legitimation of Unilateral Trade Sanctions”, 37 *Economic and Political Weekly* (2002) 133. Chimni also argues, global administrative law was here used to subvert basic principles of state sovereignty and legitimate unilateral adoption by developed countries of “green protectionism” measures highly damaging to developing country interests – via the back door.. See also G. Shaffer, *Power*, “Governance and the WTO: A Comparative Institutional Approach”, in M. Barnett and R. Duvall, eds., *Power and Global Governance* (2004) 130-61.

IV. WTO Recognition of Other Global Bodies' Regulatory Standards: The Horizontal Dimension of Global Administrative Law

A further dimension of GAL is presented by the WTO's relations with other global regimes, specifically in the context of decisions by WTO authorities whether or not to recognize and thereby give legal significance within the WTO system to regulatory standards adopted by other global bodies. Should the WTO require or at least consider observance by these other global bodies of GAL norms in deciding whether to recognize their standards? The WTO has yet to squarely address this question, which has major potential for the further spread of GAL in the global administrative space.

The WTO is engaged in a dense and complex network of interactions with other global bodies. For example, more than 100 organizations have observer status within the WTO, and it itself is an observer in as many institutions.⁷¹ Relations between the WTO and other global regulatory bodies assume specific legal significance under the SPS and TBT Agreements, which provide that where member states have based domestic regulatory standards on relevant international standards, the domestic standards are presumptively shielded from legal challenge. These "borrowing" arrangements allow the WTO to take advantage of the expertise and decisional capacity of other global bodies in specialized areas of regulation. They also, and at the same time, relieve WTO panels and the Appellate Body of the burdens of having to plumb substantive regulatory issues on which they have little familiarity or capacity. Moreover, by according domestic measures based on international standards presumptive WTO validity, the agreements could stimulate development and adoption of international standards, promoting potentially beneficial regulatory harmonization, although commentators have warned about the risks of suppressing local regulatory autonomy through invocation of international standards that may lack public legitimacy.⁷² Beyond these formal mechanisms for giving legal effect under the WTO to other global bodies' standards, the WTO administrative bodies cooperate with many other global regulatory authorities in specific fields in the development of regulatory standards, and may accordingly be in a position to influence decision making practices.⁷³

Most important for purposes of this chapter, these borrowing arrangements potentially mark an additional pathway, horizontal in nature, for the development of global administrative law. WTO dispute settlement bodies or WTO administrative bodies could well take the view that standards adopted by other global bodies would be recognized by the WTO only if generated through transparent procedures affording rights of participation and based on reasons supported by the decisional record. These procedures would help ensure that the resulting standards would embody a fair consideration of all affected interests on the basis of public reason, and thereby

⁷¹ See <http://www.wto.org/english/thewto_e/coher_e/coher_e.htm>. For example, pursuant to GATS Annex on Telecommunications, para. 6, the WTO and the International Telecommunication Union (ITU) (GATS Annex on Telecommunications, para. 6): the two organizations participate as observers in each others' meetings and collaborate at the staff level on such activities as research, publications, conferences and workshops

⁷² See Robert Howse, "A New Device for Creating International Legal Normativity: The WTO Technical Barriers to Trade Agreement and 'International Standards'", in *Constitutionalism, Multilevel Trade Governance and Social Regulation*, p. 383 ff.

⁷³ See Steve Charnowitz, "International Standards and the WTO", quoted, p. 19-20, in which there is chart showing the cooperation between WTO and other organization in setting standards.

justify the WTO in giving such standards legal effect and endorsing them for domestic adoption by its members. Scrutiny by WTO authorities of other bodies' procedures would also promote GAL by introducing a mechanism of review.

The SPS Agreement provides that “Sanitary or phytosanitary measures which conform to international standards, guidelines or recommendations shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994” (art. 3.2).⁷⁴ In Annex A (para. 3), it is further clarified that this provision refers, (a) with regard to food safety, to the standards, guidelines and recommendations established by the Codex Alimentarius Commission (CAO); (b) with regard to animal health and zoonoses, to the standards, guidelines and recommendations developed under the auspices of the International Office of Epizootics (OIE); (c) with regard to plant health, to the international standards, guidelines and recommendations developed under the auspices of the Secretariat of the International Plant Protection Convention in cooperation with regional organizations operating within the framework of the International Plant Protection Convention (IPPC); and (d) with regard to matters not covered by the above organizations, to appropriate standards, guidelines and recommendations promulgated by other relevant international organizations open for membership to all WTO members, as identified by the SPS Committee.

In other words, whenever states adopt SPS measures in conformity with international standards, guidelines, and recommendations established by the three “sister organizations” (i.e. CAO, OIE, IPPC)⁷⁵ or by other international organizations identified by the SPS Committee,⁷⁶ those measures are presumed to be consistent with the WTO agreements.⁷⁷ This arrangement is one of the most striking instances at the global level of “delegation of regulatory authority”⁷⁸.

A similar mechanism is provided by the TBT agreement, which provides that: “Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued ...” (Article 2.4). In

⁷⁴ Under article 3.1 of the SPS Agreement, instead, “a Member may choose to establish an SPS measure that is based on the existing relevant international standard, guideline or recommendation. Such a measure may adopt some, not necessarily all, of the elements of the international standard. The Member imposing this measure does not benefit from the presumption of consistency set up in Article 3.2.

⁷⁵ J. Scott, *the WTO Agreement on Sanitary and Phytosanitary Measures, A Commentary*, Oxford, Oxford University Press, 2007, p. 246 ff. See also the Note by the WTO Secretariat G/SPS/GEN/775 15 May 2007 (07-1004), *Relationship with Codex, IPPC and OIE*.

⁷⁶ Although the SPS Committee is authorized by Annex A (Article 3.d) of SPS Agreement to extend recognition to standards of other international standardizing bodies, it has not done so to date, nor has a proposal to do so been submitted to the Committee. See T. Bütke, “The Globalization of Health and Safety Standards: Delegation of Regulatory Authority in the SPS Agreement of the 1994 Agreement Establishing the World Trade Organization”, 71 *Law and Contemporary Problems* (2008) 219, here 226). This might happen in the future, for instance with respect to standards adopted under the Cartagena Protocol on Biosafety, although the consensus required for Committee decisions might make difficult to reach an agreement. (see J. Scott, *The WTO Agreement on Sanitary and Phytosanitary Measures, A Commentary*, quoted, p. 245).

⁷⁷ See Appellate Body Report on *EC — Hormones* para. 170 ff..

⁷⁸ See T. Bütke, “The Globalization of Health and Safety Standards: Delegation of Regulatory Authority in the SPS Agreement of the 1994 Agreement Establishing the World Trade Organization, quoted.

addition, “Whenever a technical regulation [...] is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade” (art. 2.5).⁷⁹ The TBT agreement, however, does not indicate any specific institutions whose standards must be recognized.⁸⁰ It provides generic criteria for recognition and contains a broader concept of “standard.”⁸¹ The TBT thereby allows for recognition of standards adopted not only by international organizations but also by hybrid or private bodies, such as the International Standards Organization (ISO) and NGOs that adopt standards on subjects such as sustainable forestry and fishing methods. This arrangement creates the possibility of requiring WTO authorities to choose among competing standards issued by different organizations in new or rapidly changing fields of regulation such as software standards or carbon footprint labeling and other climate related standards, where a variety of private or hybrid public-private standard-setting organizations compete.⁸²

Also, the TBT Agreement does not specify which WTO bodies have competence to make recognition decisions. In accordance with the discussion in the previous section, we believe it appropriate that the TBT Committee make this decision in the first instance, subject to panel and the Appellate Body review. In such cases, it would be appropriate for these authorities to take into account the respective standard-setting organizations’ decision making processes, including the degree of openness, participation, reasons-giving and review. These GAL norms would help ensure that the standards were adopted through an open process allowing for fair consideration of affected interests and on the basis of reasoned justification.

The arrangements for WTO recognition of other global bodies’ standards are of growing significance due to the growing role of international regulatory standards in the WTO system and the proliferation of international standard setting bodies, many of which compete in issuing standards in the same field. Examples of the latter include ISO and rival organizations issuing software standards and various private and hybrid bodies developing standards for carbon

⁷⁹ Regarding the definition of “relevant international standards”, see Appellate Body Report on *EC — Sardines*, para. 227. For discussion of the role of international standards under the GATS Agreement, see Panagiotis Delimatsis, “Due Process and ‘Good’ Regulation Embedded in the GATS -- Disciplining Regulatory Behavior in Services Through Article VI of the GATS”, 10 *Journal of International Economic Law* 13 45-47 (GATS VI:5(b) requires WTO adjudicating bodies to take “due account” of any international standards of relevant international organizations, but does not establish a presumption of compliance).

⁸⁰ Instead, the TBT offers a definition of what constitutes a “standard” in Annex 1, para. 2: “[A] [d]ocument approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method.” Annex 1 of TBT Agreement mentions specifically the International Organization for Standardization (ISO) and the International Electrotechnical Commission (IEC), but states only that: “Standards as defined by ISO/IEC Guide 2 may be mandatory or voluntary.”

⁸¹ For discussion of the issues raised by the provision for recognition of international standards under the TBT Agreement, see R. Howse, *op. cit.*; H. Schepel, “The Empire’s Drains: Sources of Legal Recognition of Private Standardization Under the TBT Agreement”, in *Constitutionalism, Multilevel Trade Governance and Social Regulation*, quoted, p. 397 ff.; C.S. Gibson, “Globalization and the Technology Standards Game: Balancing Concerns of Protectionism and Intellectual Property in International Standards”, 22 *Berkeley Technology Law Journal* (2007) 1403.

⁸² For discussion of private standard setting on environmental and social issues by market-based NGOs, see Steven Bernstein and Erin Hannah, *Non-State Global Standard Setting and the WTO: Legitimacy and the Need for Regulatory Space*, 11(3) *J. Int’l Econ. L.* 575 (2008).

footprint labeling and certification of carbon offsets.⁸³ Especially in cases of competing standards, it would be appropriate for WTO authorities to consider the respective organizations' decision making processes in making recognition decisions.

A number of respected commentators have argued that the WTO should require such bodies to follow basic GAL-type norms of regulatory due process in their decision-making in order for their standards to be recognized,⁸⁴ and that the DSB should exercise a form of judicial review over these procedures⁸⁵. While no WTO case has dealt directly with this issue, the Appellate Body in *Sardines* considered a claim by the EU that a Codex standard should not be recognized as a "relevant international standard" under the SPS Agreement because it was not adopted by consensus and therefore assertedly violated Codex's own procedural requirements.⁸⁶ In that case, the Appellate Body stated that it was not for it to decide whether an international standardization body should or should not require consensus for the adoption of its standards. However, the decision may have been conditioned by the fact that involved the Codex, one of the sister organizations specified in the SPS Agreement. Under the TBT Agreement, especially in cases in which regulatory competition exists, the Appellate Body could well be more willing to review decision making-processes, including conformance with the norms of regulatory due process enunciated in the vertical context in *Shrimp Turtle*, in determining whether to accord recognition.

As noted, the WTO's administrative bodies could also appropriately play a significant role in the horizontal development of global administrative law. The TBT Committee has already adopted a Decision on "Principles for the Development of International Standards, Guide and Recommendations" with relation to articles 2, 5 and Annex 3 of the Agreement", in which principles and procedures are provided in order to, inter alia, further transparency, openness, and impartiality and address the concerns of developing countries in the elaboration and adoption of international standards, guidelines and recommendations⁸⁷.

With regard to transparency in international standard setting, for instance, the TBT Committee's Decision provides that all essential information regarding current work programmes, as well as on proposals for standards, guides and recommendations and the final decision, should at a minimum be made easily accessible to all interested parties in the territories of all WTO Members, and that procedures should be established in order that adequate time and

⁸³ See J. Pauwelyn, "Non-Traditional Patterns of Global Regulation", quoted, p. 209. The World Standard Services Network (WSSN) lists more than 40 international standardizing bodies (R. Wolfrum, P.-T. Stoll, A. Seibert-Fohr (eds.), *WTO – Technical Barriers and SPS Measures*, quoted, p. 203-204).

⁸⁴ J. Scott, "International Trade and Environmental Governance: Relating Rules (and Standards) in the EU and WTO", 15 *EJIL* (2004) 307, at 311-312.

⁸⁵ M.A. Livermore, "Authority and Legitimacy in Global Governance: Deliberation, Institutional Differentiation, and the Codex Alimentarius", 81 *NYU Law Review* (2006) 766. See also M. Masson-Matthee, *The Codex Alimentarius Commission and Its Standards*, The Hague, T.M.C. Asser (2007), p. 188, who observes that "unfortunately, the decision of Appellate Body in EC-Sardines does not provide sufficient room for future panels to examine the validity of Codex measures" under the SPS agreement.

⁸⁶ Appellate Body Report on *EC — Sardines*, para. 227: a criticism is in H. Horn, J.H.H. Weiler, "European Communities – Trade Description of Sardines: Textualism and its Discontents", in H. Horn and P. Mavroidis (eds.), *The WTO Case Law of 2002*, Cambridge, Cambridge University Press (2005), p. 248 ff. Regarding the SPS, see also *EC-Hormones*, WT/26/R/USA (1997) 5 (part II: 15), and 177 (part VIII:69) (Report of the Panel).

⁸⁷ See "Decisions and Recommendations adopted by the WTO Committee on Technical Barriers to Trade since 1 January 1995", WTO TBT Committee, G/TBT/1/Rev. 9, 8 September 2008, p. 37 ff.; S. Charnowitz, "International Standards and the WTO", quoted, p. 21-22.

opportunities are provided for written comments on proposed standards. It also provides that information on these procedures should be effectively disseminated⁸⁸. Similarly, as to participation, the Decision clarifies that membership of an international standardization body should be open on a non-discriminatory basis to relevant bodies of all WTO members including participation at every stage of the development of the standards in question.⁸⁹ The TBT Committee Decision thus seems to extend to international standardization bodies the procedural requirements for domestic standard setting bodies contained in the Code of Good Practice for the Preparation, Adoption and Application of Standards annexed to the TBT Agreement.⁹⁰ Moreover, the Code contains provisions addressed to regional standardizing bodies in order to avoid overlap and duplication of standards. This example illustrates “the potential of WTO to prescribe rules extrajurisdictionally”⁹¹ to other global bodies.

These norms have a significant influence on international standard setting bodies, as illustrated by the case of ISO, which treats the TBT’s committee decision on Principles for the Development of International Standards, Guide and Recommendations as obligatory in order to ensure both that ISO standards are applied globally (Principle D. “Effectiveness and Relevance” of the TBT Committee’s decision) and that developing countries play an appropriate role in the standard setting process (Principle F. “Development dimension” of the TBT Committee’s decision).⁹² Further, there has been one case in which a recommendation of a WTO committee has been used as an applicable legal norm to guide interpretation by a dispute settlement panel of a WTO Agreement.⁹³ If panels and the Appellate Body were to extend this practice, it could have the salutary effect of strengthening the administrative capacity of the WTO.

The administrative law norms established by the TBT Committee decision may thus have a persuasive influence on other bodies’ decisional practices and could also appropriately inform review of those practices by the Committee and by dispute settlement panels and Appellate Body in determining whether to recognize such body’s standards pursuant to the TBT Agreement.⁹⁴ The SPS Committee could also apply GAL norms to evaluate other global regulatory bodies’ decisional procedures in deciding whether or not to extend recognition to their standards under the SPS Agreement.

⁸⁸ G/TBT/1/Rev. 9, 8 September 2008, p. 37, point 3 ff.

⁸⁹ G/TBT/1/Rev. 9, 8 September 2008, p. 38, points 6-7.

⁹⁰ G/TBT/1/Rev. 9, 8 September 2008, p. 38, points 6-7.

⁹¹ S. Charnowitz, “International Standards and the WTO”, quoted, p. 9.

⁹² See, for instance, ISO Technical Management Board (TMB) policy statement and implementation guide on “Global Relevance of ISO Technical Work and Publication” or the ISO Code of Ethics adopted in 2004. On these aspects, see E. Shamir-Borer, *The Evolution of Administrative Law-Type Principles, Mechanisms and Practices in the International Organization for Standardization (ISO)*, Paper presented at the Hauser Colloquium on Globalization and its Discontents, NYU School of Law, Oct. 4, 2006.

⁹³ See *EC-Antidumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WTO Doc. WT/DS219/R, 7 Mar 2003, 7.321, where the Panel refers to the *Recommendation Concerning the Periods of Data Collection for Anti-Dumping Investigations*, G/ADP/6, adopted 5 May 2000 by the Committee on Anti-Dumping Practices. More generally, see I. Van Damme, “Jurisdiction, Applicable Law, and Interpretation”, in *The Oxford Handbook of International Trade Law*, quoted, p. 298 ff.

⁹⁴ In addition, the TBT Agreement itself establishes, albeit indirectly, a norm for international standardizing bodies concerning participation: “Members shall take such reasonable measures as may be available to them to ensure that international standardizing bodies and international systems for conformity assessment are organized and operated in a way which facilitates active and representative participation of relevant bodies in all Members, taking into account the special problems of developing country Members” (Article 12.5).

Extending GAL norms to the decisional processes of other global standard-setting bodies in conjunction with WTO decisions to recognize their standards rather than giving them automatic effect is, we believe desirable. Providing incentives for adoption of GAL principles and procedures can partially and indirectly but nonetheless significantly address concerns over factional capture, tunnel vision, and lack of accountability with respect to global regulatory bodies' decision making.⁹⁵ Accordingly, we conclude, the Appellate Body and the relevant WTO committees should welcome this opportunity. One reason that they may be reluctant to do so is that applying GAL norms to decisions by other global bodies would create reciprocal pressures on the WTO to follow them in its own decisional processes. In our view, however, such a development would be welcome.

V. Conclusions and Reflections

The WTO provides a rich case study in the different dimensions and applications of global administrative law and its key elements of transparency, participation, reason giving and review. Their actual or potential application to the WTO's internal governance, to the domestic administrative practices of its members, and to the WTO's relations with other global standard setting bodies illustrate some of the various ways in which largely procedural GAL norms can be flexibly and productively applied to different elements of the fragmented global regulatory system.

In the WTO's internal governance, decision making by its administrative bodies -- the Secretariat, councils, committees and Trade Policy Review Board -- remains largely closed and inaccessible to non-members including NGOs and other non-state actors. In order to meet the twin challenges of efficacy and legitimacy, the WTO should strengthen the normative authority of these administrative bodies and at the same time secure transparency, participation and reason giving in their decision making. These steps would establish a more effective balance among the WTO's three branches and better enable the organization to adapt trade regulatory norms to changing circumstances, such as the current financial crisis and the steps taken by governments to protect their industries, and to non-trade interests and values impacted by trade disciplines.. The development by other major international organizations of significant administrative law making capacities suggests that the effort by WTO members to micromanage implementation of trade regulatory norms is in the longer run dysfunctional and counterproductive. At the same time, if the organization's administrative bodies obtain more authority and independence; they need to be disciplined by GAL accountability mechanisms for the benefit both of members and of non-member interests.. The Appellate Body should encourage this evolution by according substantial deference in to the administrative bodies' interpretations of the WTO Agreements, provided those interpretations are reached through decision making procedures that allow opportunity for outside input and are supported by sound reasons.⁹⁶ Such an institutional

⁹⁵ G. De Búrca, "Developing Democracy Beyond the State", 46 *Columbia Journal of Transnational Law* (2008) 221, at 233-234. Regarding the Codex Alimentarius Commission, see R. Afonso Pereira, "Why Would International Administrative Activity Be Any Less Legitimate? – A Study of the Codex Alimentarius Commission", 9 *German Law Journal* (2008) 1693, and M. Masson-Matthee, *The Codex Alimentarius Commission and Its Standards*, quoted.

⁹⁶ Moreover domestic courts, which have until now generally deferred to the political branches on issues involving implementation of global trade law, may come to require a similar procedural pedigree for WTO norms. See R.B.

transformation would require a shift in strategy by members from seeking to maximize immediate gains through decision making by ad hoc bargain in favor of longer term gains flowing from a more effective WTO that enjoys broader legitimacy. The members, including the most powerful, accepted a similar institutional bargain in creating the WTO dispute settlement system.

As regards the vertical dimension, the WTO has imposed strong requirements of transparency, participation, reason giving and review on members' domestic administrative bodies in order to protect foreign nations and economic actors against local regulatory protectionism and to secure intellectual property rights. These domestic bodies form the distributed administration of the global trade regime. These GAL requirements, constituting what is probably the most highly developed set of global procedural norms, have had significant impact on domestic administration in many countries. They have served not only secure implementation of the substantive norms of liberalized trade but also promote broader goals including open administration, even-handed treatment of foreign citizens, and the rule of law. Notwithstanding the burdens on developing countries associated with these disciplines, and their potential to be exploited by well-organized economic actors they appear on balance to have improved domestic trade regulatory governance and contributed to the more general development of administrative law with benefits to local citizens.

The horizontal dimension for GAL finds potential for development in the WTO TBT and SPS Agreements, which provide a presumptive legal "safe harbor" for member states against challenges to domestic regulatory measures that have been based on international standards adopted by other global bodies. Here GAL issues are at present only incipient, yet potentially significant. If the WTO, through its administrative and dispute settlement bodies, were to condition recognition of other global bodies' regulatory standards upon their observance of GAL norms of transparency, participation, and reason giving, that would help to ensure that the standards to be accorded recognition are well informed and reflect a fair consideration of the interests at stake. Such a development, which would involve horizontal review by one global regulatory body of another's standards and procedures, would manifest the "inter-public" character of global administration and law and create a platform for the further diffusion of GAL norms throughout the global administrative space.⁹⁷ This approach does not exclude the possibility of recognizing more than one international standard to govern a particular matter, which would enhance the ability of states to choose standards appropriate for their circumstances.

As regards a normative assessment, the adoption of GAL practices by global regulatory bodies, including those examined in this chapter, serves overall to ensure that public authority is exercised through open processes with opportunity for input by affected interests on the basis of public reasons, thereby promoting accountability and responsiveness to a broader range of affected interests and a more cosmopolitan normative perspective. By promoting these decisional procedures and norms in lieu of bargain and ad hoc expediency, GAL seeks to provide

Stewart, U.S. Administrative Law: A Model for Global Administrative Law? 68 *Law & Contemp. Probs.* 63 (2005) (examining "bottom up" approach to development of GAL).

⁹⁷ The "inter-public" concept and its relation to GAL is developed in B. Kingsbury, "The Concept of 'Law' in Global Administrative Law", 20 *European Journal of International Law* 23 (2009).

safeguards against abuse of power, counter factional capture, and temper the tunnel vision of specialized regulatory bodies. In the specific case of domestic regulation, GAL disciplines helps cure political externalities by protecting foreign citizens and firms against local discrimination and exploitation, and may have a more general beneficial effect on domestic administration and law

Notwithstanding, critics, especially in developing countries, have challenged any such optimistic assessment by contending, with some evidence in support, that may work to the benefit of private financial interests and other well-organized actors. However, the opportunities that GAL provides for NGOs and social interests generally, which are often otherwise entirely shut out of closed processes of bargain among the powerful, and the largely successful use of those procedures at both the international and domestic levels, warrants a more optimistic conclusion.

Ultimately, the performance and normative implications of GAL cannot properly be assessed across the board. GAL's operation and consequences must be analyzed in relation to particular types of regimes, issues, and applications. The types of the decisional body in question (international organization, global network, global private or hybrid, domestic), its function, its founders and governance arrangements, and the ability of different relevant players to use GAL tools are all relevant. Further, major global regulatory bodies must now operate in a highly charged political environment. The WTO faces far ranging challenges, including the rise of large emerging developing country economics, the rise of bilateral and unilateral agreements, systems of preferential tariffs, and the growth of new political constellations of opposition to liberalized trade.⁹⁸ Dealing with these changes may require fundamental strategic and structural changes in the global trade regulatory regime. Nonetheless, based on the analysis in this chapter, we nonetheless conclude that in the case of the WTO the net impact of GAL on domestic (distributed) administration and law is quite positive. We further conclude that GAL's application to the WTO's administrative bodies and as a criterion for recognition of international standards adopted by other global bodies will be also be beneficial, albeit for reasons particular to each context.

Finally, in terms of legal theory, we submit that GAL promises to be a more suitable and productive framework for addressing the legal issues posed by global regulatory governance than the alternatives. They include, on the one hand, the traditional doctrinal categories of domestic, international, and transnational law, and, on the other, constitutionalist concepts.⁹⁹ The

⁹⁸ See, e.g., Thomas Cottier, Preparing for Structural Reform in the WTO, 10 J. Int'l Econ. L. 497 (2007); Joost Pauwelyn, New Trade Politics for the 21st Century, 11(3) J. Int'l Econ. L. 559 (2008); Debra P. Steger, The Culture of the WTO: Why it Needs to Change, 10 J. Int'l Econ. L. 483 (2007).

⁹⁹ An ambitious attempt to frame global governance in terms of public law is presented by A. von Bogdandy, P. Dann and M. Goldmann, "Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities", 9 *German Law Journal* 1375 (2008), The authors propose a "public law approach" based on a "combination of the three main existing internal approaches to global governance phenomena: constitutionalization, administrative law perspectives, and international institutional law. All of them formulate important insights for a public law approach: that constitutional sensibility as well as comparative openness to administrative law concepts should inform the analysis of the material at hand, and that international institutional law should be the disciplinary basis for further inquiries" (p. 1390).

Further, as Nico Krisch notes, there are also a variety of other less ambitious approaches, invoking the language of constitutionalism, "which empathize human rights, legalization, and judicial review in international institutions

fragmented character of global regulation, its many specialized and quasi-autonomous components, the multiplicity of public and private actors that populate the global administrative space and the complex relations among all these elements can hardly be understood within the traditional doctrines. At the same time, these elements are too diverse, fluid and unruly, and reflect too many deep differences in interests and values, to support a constitutional order.

Proposals for a constitutionalist legal frame for global government have widely varying conceptual and normative formulations. Given the compass of this chapter, we focus on two prominent representatives. The most ambitious version of constitutionalism is global and fundamentalist. It is universal in its ambition, positing an encompassing global legal order that allocates decisional competence and procedures among institutions, secures universal human rights, and provides authoritative arrangements to resolve conflicts among competing interest and values¹⁰⁰. As analyzed by Nico Krisch, this fundamentalist model would “seek to give the current, largely unstructured, historically accidental and power-drive order of global governance a rational, justifiable shape in which the powers of institutions and their relationship with one another are clearly delimited.”¹⁰¹ This conception is fundamentalist in that it would replicate at the global level the essential features of liberal democratic constitutional systems in advanced liberal democracies.¹⁰² Given the global fragmentation of political authority and deep divisions in values and worldviews among nations and peoples, attempting to achieve such an order would be highly infeasible and equally undesirable, an invitation to the most powerful states to entrench their power and interests.

A more circumscribed and far more plausible “post-national” version of constitutionalism would focus on development of a constitutional order for particular regimes that were established by states to promote joint national interests in given sectors but which have since gained substantial autonomy. This model rejects the global fundamentalist vision as beyond reach, although in some versions it is seen as an intermediate stage in the eventual emergence of a single global legal order. As part of the “turn to constitutionalism” in WTO scholarship, a number of writers have found postnational constitutional elements in the global trade regulatory regime. This order

with aspiring to an encompassing global order or paradigmatic public law structure for the exercise of power. Nico Krisch, *Global Administrative Law and the Constitutional Ambition*, LSE Law Society and Economy Working papers 10/2009. These approaches might be termed “constitutionalism lite.”

¹⁰⁰ The concept of global constitutionalism is favored by many European scholars who seek to extrapolate the successful experience of Western states and of Europe with democratic constitutional forms of government, including liberal democratic norms and constitutional courts, to the global stage. See B. Fassbinder, “The United Nations Charter as Constitution of the International Community”, 36 *Colum J. Transnational L.* 529 (1998); E.-U. Petersmann, “How to Reform the UN System? Constitutionalism, International Law, and International Organizations”, 10 *Leiden J. Int’l L.* 421 (1997); E. de Wet, “The International Constitutional Order”, 55 *Int’l and Comp. L. Q.* 51 (2006).

¹⁰¹ *Ibid* at 9

¹⁰² See Nico Krisch, *The Pluralism of Global Administrative Law*, 17 *European Journal of International Law* (2006) 247; *Global Administrative Law and the Constitutional Ambition* LSE Law Society and Economy Working papers 10/2009. . For examples of the fundamentalist approach, see David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Palo Alto, Stanford University Press 1995); Bardo Fassbinder, “The United Nations Charter as Constitution of the International political Community,”: 36 *Columbia Journal of Transnational Law* (1998) 529; Erika de Wet, *The International Constitutional Order*, 55 *International and Comparative Law Quarterly* (2006) 51.

is formulated with varying degrees of ambition.¹⁰³ Professor Petersmann advocates the most far-reaching version, proposing the WTO as a system of “multilevel constitutionalism” to explicitly include human rights norms, separation of powers, general principles of substantive law and “international participatory democracy.” in a legal order with direct effect in domestic law.¹⁰⁴ The project of post-national constitutionalism for particular regimes and sectors is, at least in its less ambitious versions, more feasible and potentially more suitable for the current and foreseeable future of governance beyond the state than the global, fundamentalist notion yet it raises important problems. Without a global meta-order, there is no means of resolving uncertainties or conflicts among the subsystems’ different norms and competencies.¹⁰⁵ This problem is likely to be exacerbated by legal constitutional “hardening” of the different fragmented sectoral regimes. Also, the strongest states and sector regimes may exploit the constitutionalist project to extend and entrench their power. For example, enlarging and deepening the WTO’s competence and authority to resolve and enforce a wide range of trade-related regulatory issues in the name of constitutionalism risks fostering a trade-centered global hegemony dominated by the most powerful states.¹⁰⁶ Interests potentially threatened by such developments should resist the constitutionalist enterprise.

GAL, by contrast to constitutionalism, proceeds at “retail” rather than “wholesale”. As this WTO case study indicates, administrative law concepts and tools derived from domestic or supranational practices can be tailored and suitably adapted to the circumstances of different global regulatory bodies and complexes in order to make incremental but nonetheless significant progress in improving governance. Understanding much global governance as administration allows us to develop a more rigorous conceptual schema of the various institutional structures and relations involved in the notoriously slippery notion of global governance. It does so by focusing the question of accountability in the more precise terms of administrative law, providing us with a set of basic tools for transparency, participation, reason-giving application of these tools can be suitably adapted for application in a wide variety of global institutional settings without insisting on any single design or order.. Because courts in the administrative

¹⁰³ See Jeffrey Dunoff, *Why Constitutionalism Now?: Text, Context and Historical Contingency of Ideas* 1 J. Int’l L & Int’l Rel. 191 (2004-2005) (analyzing literature and rejecting notion of a WTO constitutional order); Deborah Cass, *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy and Community in the International Trading System*; J.H. Jackson, *Restructuring the GATT System* (London, Royal Institute of International Affairs, 1990); J.H. Jackson, *The WTO ‘Constitution’ and Proposed Reforms: Seven ‘Mantras’ Revisited*, 4 J. Int’l Econ. L. 67 (2001); E.-U. Petersmann, sources cited infra note 103.

¹⁰⁴ See, e.g., E.-U. Petersmann, *Multilateral Trade Governance in the WTO Requires Multilevel Constitutionalism*, in C. Joerges Petersmann, p. 5, 45-54; E.-U. Petersmann, *Multilevel Judicial Governance of International Trade Requires a Common Conception of Rule of Law and Justice*, 10 J. Int’l Econ. Law 529 (2007); E.U. Petersmann, *The WTO Constitution and Human Rights*, 3 J. Int’l Econ. L. 19 (2000); E.-U. Petersmann, *The transformation of the World Trading System through the 1994 Agreement Establishing the World Trade Organization*, 6 *European J. Int’l L* (1995). This version can be understood as an instantiation in a particular regime of universal legal norms, thus bridging the global and post-national approaches to constitutionalism.

¹⁰⁵ For discussion of the resolution of WTO and non-WTO global norms, see J. Pauwelyn *Non-Traditional Patterns of Global Regulation: Is the WTO “Missing the Boat”?* in Joerges & Petersmann 199 ff; J. Pauwelyn, *Conflict of Norms in International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge, Cambridge University Press, 2003).

¹⁰⁶ See R. Howse and K. Nicolaidis, *‘Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step Too Far.’* In RB Porter et al. *Efficiency, Equity, Legitimacy: The Multilateral Trading System at the millennium* (Washington D.C. Brookings Institution Press 2001) 227. See also Deborah Cass, *The constitutionalization of the WTO* (Oxford, OUP, 2005)

context are often much more comfortable with imposing procedural disciplines rather than substantive overruling, GAL more readily engages both domestic and international courts in reforming global regulatory governance. The willingness of courts to impose procedural checks is especially strong where individuals face sanctions or deprivations as a result of decisions by global bodies such as the Security Council 1267 Committee, but is also increasingly evident in the much more typical situation involving general regulatory norms. Also, the rather technical character and more limited ambition of GAL may enable it to win growing acceptance in a variety of institutional contexts. . For these reasons among others, GAL allows us to make incremental but real progress in promoting more accountable and response governance by specific institutions, rather than diverting attention and energy on more ambitious but often infeasible or unduly risky constitutionalist projects.

GAL's reliance on the procedural elements of administrative law, its focus on particular regimes and relations between them rather than the more general system, and its bracketing of larger issues of global democracy are, however, not without their own difficulties. The GAL tools are derived primarily from domestic administrative law in advanced democracies, which operates against the background of a democratic constitutional order with strong mechanisms of electoral representation and political as well as legal accountability; these are absent in the global setting. Also, judicial review is much more episodic in the global than the domestic context. Procedural mechanisms alone may be relatively ineffective in overcoming disparities in power and the biases of specialized mission-oriented organizations. Also, powerful states and well-organized and financed interested are well equipped to use procedural mechanisms to advance their interests.¹⁰⁷ By taking institutions largely as it finds them and relying on procedural disciplines to improve their governance, GAL risks providing a patina of legitimacy without effecting any basic change, and may divert attention from the need for more fundamental reform.¹⁰⁸ Further, too much reliance on legal mechanisms to achieve governance goals may end up sapping political accountability rather than compensating for its deficits.¹⁰⁹

Further, in deploying procedural tools to promote accountability and responsiveness, GAL must confront the question of accountability and responsiveness "to whom"? The answer will shape the procedures selected, their design and accessibility. The answers can include the entities (states, international organizations, NGOs, firms, groups of such entities) that found and govern the global body in question; domestic constituencies; the international community of nations, or (in a cosmopolitan vision) individuals or social and economic interests worldwide. The potentially open-ended character of accountability entails uncertainty and invites contestation. But these circumstances may well be strength rather than a weakness, given the fluid evolving circumstances of global regulatory governance and the dangers in attempting to lock in a global meta-order or to constitutionalize specific sectoral regimes.¹¹⁰

¹⁰⁷ The history of the Basel II capital adequacy standards tends to support this conclusion.

¹⁰⁸ See Chimni, *op.cit.* Procedural formalities may lend the trappings of legitimacy to decisions driven by power. G. Shaffer 'Power, Governance and the WTO: A comparative Institutional Approach,' in M. Barnett and R. Duvall, eds., *Power and Global Governance* (Cambridge, CUP 2004) 130.

¹⁰⁹ C. Harlow, "Global Administrative Law: The Quest for Principles and Values' (2006) 17 *European Journal of International Law* 187.

¹¹⁰ See Krisch, *Pluralism op cit .at 275.*

The normative ambitions of global administrative law are more limited than those of constitutionalism, yet they are by no means insignificant.¹¹¹ Subjecting traditional processes of power and bargain to the rule of law and securing transparency and participation for a greater range of affected interests is an important goal and achievement. Even accounting for the differences in context, domestic experience suggests that the regular practice of transparency, participation reason giving and review in administrative decision making often has beneficial systematic effects including promoting adherence to legality. GAL may also foster a degree of normative integration, especially if, as is already emerging, courts through deciding individual cases not only common procedural principles but also general substantive norms such as rationality, proportionality, legitimate expectations, and protection of human rights.¹¹² To the extent GAL procedures enable a broader range of social and economic actors and interests, especially those that tend to be disregarded, to more effectively scrutinize and have input to decisions, and also foster broader discussion and debate, they may also promote a democratic element in global regulatory governance.¹¹³

Ultimately, however, we should not draw too sharp a contrast between GAL and post-national versions of constitutionalism applied to particular regimes or sectors. The GAL disciplines, especially to the extent that they systemically promote adherence to the principle of legality and spawn reviewing court development of common substantive as well as procedural norms, can potentially encourage and support the growth of more ambitious legal foundations for given components of global governance. And, by focusing on the decisional linkages between regimes and the procedural criteria for inter-regime norm recognition, GAL can counter the sectoral fragmentation which post-national constitutionalism might exacerbate.

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As this chapter has illustrated, the WTO provides an especially rich context for application and explication of GAL, and for its further development and contribution to global regulatory governance. Besides being a useful lens for examining the current operation of the WTO GAL theory also provides constructive normative references for critics and for institutional changes to promote more effective and responsive trade regulation in an increasing complex global scenario of competing values engaging a wide variety of constituencies.

¹¹¹ B. Kingsbury, “The Concept of ‘Law’ in Global Administrative Law”, cit.

¹¹² See G. della Cananea, op. cit.; S. Casesse {LC to supply}

¹¹³ Cf. P. Nanz, *Democratic Legitimacy in Transnational Trade Governance: A view from Political Theory*, in Joerges and Petersmann, p.59 ff..