



Institute for International  
Law and Justice

**IILJ International Legal Theory Colloquium Spring 2010**  
***The Turn to Governance:***  
***The Exercise of Power in the International Public Space***

Professors Benedict Kingsbury and Joseph Weiler

NYU Law School

Straus Institute for the Advanced Study of Law and Justice

Wednesdays 2pm-3.50pm on dates shown

Pollack Colloquium Room, Furman Hall 9th Floor, 245 Sullivan Street  
(unless otherwise noted)

(additional seminar for students et al is Thursdays 4pm-5.50pm, on GAL)

Topics are indicative and are subject to change.

January 20 Andrew Hurrell, Oxford University  
Topic: Emerging Powers, Global Order and Global Justice

**January 27 Richard Stewart, NYU Law School**  
**Topic: The World Trade Organization: Multiple Dimensions Of**  
**Global Administrative Law**

February 3 Robert Keohane, Princeton University  
Topic: The Regime Complex for Climate Change (paper with David Victor,  
UC San Diego)

February 10 No Colloquium - Postponed due to weather conditions

February 17 No Colloquium

February 24 Gianluigi Palombella, University of Parma, Law Faculty  
Topic: Rule of Law in Extra-National Governance

March 3 Joseph Weiler, NYU Law School  
Topic: On the Distinction between Values and Virtues (and Vices) in European Integration

March 10 David Kretzmer, Hebrew University/Ulster  
Topic: State Reports to the UN Human Rights Committee

March 11 Jan Klabbers, University of Helsinki  
Topic: Controlling International Bureaucracies

March 17 No Colloquium – Spring Break

March 24 Marta Cartabia, University of Milan  
Topic: Rights in Europe

March 31 No Colloquium

April 7 Grainne de Burca, Fordham Law School  
Topic: EU External Relations: Foreign Policy or Governance?

April 14 Beth Simmons, Harvard Government Department  
Topic: Effects of Investor-State Treaty Regimes and Arbitral Processes

**Thurs April 15- (SPECIAL SESSION, 4pm-5.50pm, Furman Hall 214)**

Daryl Levinson, Harvard Law School

Topic: Public Law: Constitutional and International

April 21 Benedict Kingsbury, NYU Law School  
Topic: Techniques of Global Governance

## **THE WORLD TRADE ORGANIZATION: MULTIPLE DIMENSIONS OF GLOBAL ADMINISTRATIVE LAW**

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

The World Trade Organization (WTO) presents a rich and important example of the many dimensions of global administrative law (GAL) in multilevel global regulatory governance.<sup>2</sup> It also raises fundamental generic issues about the character and role of GAL and its positive and normative foundations. This article examines these challenges in the context of Global Administrative Law (GAL) for global regulatory governance.

#### *The Rise of Global Administrative Law*

As exemplified by the WTO, we are witnessing 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.

Much of this global regulatory governance – especially in fields as trade and investment, financial and economic regulation – can now be understood as administration, by which term we

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<sup>1</sup> This article is based in part on a work, co-authored with Professor Michelle Ratton-Sanchez of the Fondation Getulio Vargas Law School, Sao Paulo, that will appear as a chapter in C. Joerges and E-U Petersmann, *Constitutionalism: Multilateral Trade Governance and Social Regulation* (2d ed.) (forthcoming). I am deeply indebted to Professor Ratton Sanchez, to, Lorenzo Casini and Euan MacDonald for extensive assistance in researching and drafting, to Anna Pitaraki and Judah Ariel for valuable research assistance, and to Professor Benedict Kingsbury and Robert Keohane for helpful comments. The generous support of the Filomen D'Agostino and Max Greenberg Research Fund of New York University School of Law is gratefully acknowledged.

<sup>2</sup> An overview of GAL: and the issues that it presents is found in See B. Kingsbury, N. Krisch and R.B. Stewart, "The Emergence of Global Administrative Law", 68 *Law and Contemporary Problems* 15 (2005).

provisionally include all forms of law making other than treaties or other international agreements on the one hand and episodic dispute settlement on the other. As illustrated by the global trade regime, decision making authority in global bodies is increasingly exercised by bureaucracies, committees, expert groups, and networks of domestic officials and private specialists. 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. In order to fill the gap, these administrative bodies are increasingly being held to procedural norms of an administrative law character, including requirements of transparency, participation, reasoned decision and review in decision making. We are accordingly witnessing the rise of a Global Administrative Law (GAL) as an important component in the reframing of the inter-state paradigm of traditional international law to a more pluralistic and cosmopolitan framework.<sup>3</sup> The GAL approach and framing provide important contrasts with various notions of global constitutionalism; an overview is provided in the Appendix. At this juncture, however, GAL cannot be regarded as a single system of well-defined norms and practices.<sup>4</sup> The practices are still evolving and applied quite unevenly in different components of the global administrative space, as exemplified by the WTO regime complex analyzed in this article.

### *The WTO and GAL*

The development of GAL in relation to the WTO must be examined in relation to the WTO's unusual governance structure, its notable successes as an organization, and the deep challenges that it currently faces. 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 a relatively closed "club" diplomatic model of consultation and negotiation among member representatives, dominated by the more powerful members.<sup>5</sup>

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<sup>3</sup> 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](http://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](http://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 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.iilj.org/GAL](http://www.iilj.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).

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

<sup>5</sup> On the club model of global regulatory governance, see R. Keohane and J. Nye, *The Club Model of Multilateral Cooperation and the Problem of Democratic Legitimacy*, in Robert Keohane, *Power and Governance in a Partially Globalized World* (2001). On the diplomatic ethos in the WTO, see J. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, in R. Porter, ed. *Equity, Efficiency, Legitimacy: The Multilateral Trading System at the Millennium* (2001)

The WTO regime displays several different dimensions of global regulatory governance that present different institutional contexts for the application of GA. These include:

- the internal governance of the WTO, including the Ministerial Councils, the Dispute Settlement Body, most particularly its administrative bodies, where GAL is barely developed;
- the WTO regulatory disciplines for domestic administrative decision making by the WTO members states, where GAL procedures are quite fully developed
- The horizontal relation between the WTO and other international standard setting bodies, where GAL is largely.
- The relations between the WTO's organs and civil society, where GAL procedures are followed unevenly in different contexts..

The next three sections of this article address these components in relation to the current practice and potential future development of GAL norms and mechanisms for transparency, participation, reason-giving and review.

These governance arrangements must be examined in relation to the overall performance and trajectory of the global trade regulatory regime. The WTO 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 organization 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 criticisms are fueled by the WTO's very successes -- the largely successful expansion of its trade liberalization agenda, the consequent increase in the social and economic issues encompassed by its trade disciplines, and the deepening penetration of those disciplines into domestic administration.

Currently, the WTO is 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. These challenges have been compounded by the collapse of the Doha Round, the deep divisions between developed and developing countries, and the rise of China, Brazil, India, South Africa and other emerging economies as global powers.

GAL cannot solve the WTO's most difficult challenges, which are driven by deep conflicts of interests and values in the realm of high politics. But strengthening the WTO's internal administrative branch while simultaneously subjecting it to GAL norms can promote its trade liberalization goals, ameliorate aspects of its legitimacy deficit, and relieve some of the current decisional overload on the other two branches. The analysis also shows how the WTO has instilled GAL disciplines in member state administration, and the potential for extending those disciplines to other global regulatory bodies as a condition of WTO recognition of their standards.

The concluding section addresses the implications of the WTO study for GAL generally, including the reasons for the very uneven development of GAL within the different components of WTO trade regulatory governance, the problems in applying the concept of “administration” and the tools of administrative law to global regulatory governance, and the role of GAL norms and practices in relation to regulatory decision-making modes based on political bargain, expert judgment, and networked interaction. It also examines, from the perspective of positive analysis, the factors that promote or impeded the adoption of GAL in WTO administration; the normative dimensions of GAL including its relation to accountability; and the jurisprudential status of GAL

## **II. Internal WTO Governance: Structure and Decision Making Procedures**

This section examines GAL in relation to the WTO’s three organizational branches: its legislative institutions, anchored in the Ministerial Conferences; its administrative bodies, including the Director-General, the Secretariat, the various councils and committees, and the Trade Policy Review Body; and its adjudicatory dispute settlement 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.

Although GAL would logically govern decision making by the WTO administrative bodies, its application to these bodies is at present quite rudimentary. This condition reflects the persistence in the WTO of the GATT “club” model of decision making through confidential diplomatic negotiations among members,<sup>6</sup> notwithstanding this model’s limitations in dealing with the complex and dynamic trade regulatory issues that have become increasingly so important.

The underdevelopment of GAL is also linked to the concentration of decision making authority in the legislative and adjudicatory branches and the relatively weak role of the administrative bodies. In the last two decades, NGO and other critics have demanded greater openness and participation opportunities in the decision making of the WTO, legislative and adjudicatory bodies., which in recent years become somewhat more open to outside scrutiny and input.<sup>7</sup>

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<sup>6</sup>On the “club” model, see sources cited note 5 supra. 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 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.

<sup>7</sup> 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

There remains, however, a largely insulated core of intergovernmental policymaking, in the various WTO administrative bodies, which continue to operate in an essentially closed and opaque manner. 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.<sup>8</sup>

#### *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. Although the number of members has increased from the 18 that founded the GATT to more than 150 and the scope and ambition of the trade regulatory agenda has also expanded dramatically today, the Council still follows a basic rule of consensus for decisions. Because negotiation in a committee has become unworkable, much of the real negotiation and decision-making has shifted to other mechanisms

The Uruguay Round negotiation process was sharply criticized for its opaque rule-making process and recourse to the Green Room system for making important decisions.<sup>9</sup> 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.<sup>10</sup> Trade negotiations committees were established on specific topics<sup>11</sup> But the committee chairs were criticized for being too domineering in organizing the activities of the committees, ignoring many members' views and opportunity for input, while much of the real negotiation shifted to mini-meetings organized by the EC, US, Japan, Brazil and India.<sup>12</sup> In response to criticism by many developing countries and also by NGOs, certain measures to increase openness have been taken, primarily by the Secretariat. 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-

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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)

<sup>8</sup> 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)

<sup>9</sup> 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.

<sup>10</sup> 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](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm#organization)> (April 2009).

<sup>11</sup> 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.

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

members, including NGOs, in the ministerial processes.<sup>13</sup> These steps have helped to ventilate the WTO's treaty negotiation processes and promote engagement with outside constituencies.<sup>14</sup> Nonetheless, many elements of the club model persist, in contrast with development in many other global regulatory bodies.<sup>15</sup> Many southern countries and NGOs claim that their views are systematically underrepresented.<sup>16</sup> Proposals by academics and NGOs for far-reaching structural changes to establish a more "democratic" legislative system<sup>17</sup> have scant realism in light of the Doha round collapse and the need to negotiate high level agreement by the most powerful developed and developing members on a way forward.

## *B. 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 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

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<sup>13</sup> 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.

<sup>14</sup> 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

<sup>15</sup> 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)

<sup>16</sup> 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", Gaddaffi Foundation for Development, 2007 (available at <[http://www.wto.org/english/forums\\_e/ngo\\_e/posp67\\_gaddafi\\_found\\_e.pdf](http://www.wto.org/english/forums_e/ngo_e/posp67_gaddafi_found_e.pdf)>, June 2009).

<sup>17</sup> 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.

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 sanctions<sup>18</sup>

The breakdown of the Ministerial process for legislation and the underdeveloped normative functions of the administrative branches has required the WTO dispute settlement system to take on the principal burden of updating WTO trade disciplines and determining the addressing their relation to non-trade norms, including those reflected in as well as domestic law. These circumstances may partially explain the growth in the case load under the WTO relative to that of the GATT.<sup>19</sup> They have also helped push the dispute settlement process from a purely bilateral and reciprocal system of episodic dispute settlement<sup>20</sup> towards a multilateral system with a regulatory character.<sup>21</sup> This evolution is only partial, and a more traditional “member driven” approach reflected in many opinions. But in other cases the Appellate Body has 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.<sup>22</sup> To this extent, the dispute settlement system has assumed a regulatory and even an incipient administrative character.

The enhanced authority and role 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 demands for wider 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. The AB decisions in *Shrimp-Turtle* and *EC-Asbestos*<sup>23</sup>.<sup>24</sup> These and later decisions have

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<sup>18</sup> 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.

<sup>19</sup> 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.

<sup>20</sup> 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.

<sup>21</sup> 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).

<sup>22</sup> 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.

<sup>23</sup> WT/DS58 – *United States: Import Prohibition of Certain Shrimp and Shrimp Products* (Complainants: India; Malaysia; Pakistan; Thailand), filed on 8 October 1996. The Appellate Body held that panels had inherent authority to accept non-party submissions including those by non-members, stating that panel procedures should provide sufficient flexibility so as to ensure high-quality panel reports while not unduly delaying the panel process.” (WT/DS58/AB/R, par. 105); 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

opened the door to submission of amicus briefs by non-state actors on a variety of trade regulatory issues. In addition, some dispute settlement hearings have been opened to non-members by consent of the parties.<sup>25</sup> Many developing country members, however, remain strongly opposed to amicus briefs and open hearings on the ground that they diminish member sovereignty and open the door to undue influence by NGOs espousing developed country positions on environmental, labor, and other social issues.<sup>26</sup> The current dispute settlement system accordingly 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.

### C. *The WTO Administrative Bodies and Global Administrative Law*

The work of the WTO's administrative bodies --- the Director General and Secretariat, the General Council, the Councils for Trade in Goods, Trade in Services and TRIPS, the Trade Policy Review Body and a large number of committees -- is less prominent than the episodic Ministerial Conferences and the output of DSB decisions, but cumulatively of very considerable importance in the development and implementation of the global trade regime. The administrative bodies, composed of member representatives, exercise a significant but largely interstitial normative function in the interpretation and application of the WTO agreements that has grown in relative importance as the WTO's legislative capabilities have atrophied even as the need for regulatory adaptation to changing circumstances and interests have intensified. This normative function is discharged through a variety of low viability mechanisms involving information sharing, discussion, negotiation and review by member representatives in Geneva.

In some cases the administrative bodies can make authoritative law through formal instruments. 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.<sup>27</sup> But for the most part, they lack power to make decisions with authoritative legal effect. Instead, operating through rather closed processes of discussion,

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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." 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.

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<sup>25</sup> 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.

<sup>26</sup> 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).

<sup>27</sup> 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.

consultation, and review, they issue guidelines or recommendations, or interpret and clarify WTO law as applied to specific circumstances and problems.=.

In a recent study of WTO administrative bodies operating under the GATS and SPS agreements, Andrew Lang and Joanne Scott<sup>28</sup> identify a number of characteristic functions that they perform, including exchanging information on domestic practices and problems and discussion, contestation, and elaboration of trade regulatory norms. The GATS Council and its committees collect data and serve as fora for information exchange among members on experience with regulation and liberalization of financial and other services, thereby assisting members, especially developing country members, in carrying out their domestic regulatory programs and in making negotiation decisions on services liberalization agreements under the GATS. These bodies also host member negotiations for producing new general rules for financial services; while not successful in this goal, the discussions have promoted clarifications and shared understandings regarding existing GATS provisions by fostering and “interpretive community” and thereby providing a “mechanism by which certain kinds of expert knowledge come to shape and inform legal interpretation.”<sup>29</sup> The SPS Committee operates as a venue in which members are called upon to explain and justify proposed new SPS regulatory measures; these discussions can lead to steps to reduce or eliminate trade conflicts which such measures could produce. The committee also issues guidelines, decisions, and recommendations for implementing provisions in the SPS agreement, for example on issues such as transparency and equivalence; most of these instruments “represent a soft law elaboration” of SPS obligations, but may nonetheless have a significant practical effect.<sup>30</sup> Finally, both the GATS and SPS bodies liaise and interact with other international regulatory standards organizations and, in the case of the SPS Committee, oversee members’ practices regarding relevant standards issued by these bodies.

Perhaps the most significant of these administrative functions is to review, supervise and promote members’ implementation of both the substantive and GAL procedural disciplines in the various WTO agreements. These activities can promote mutual compliance with shared understandings of applicable trade regulatory norms and prevent de facto defection from the WTO regime, thereby promoting the mutual advantage in trade liberalization. Review is often triggered as a result of provisions in many WTO agreements requiring members to notify specified WTO administrative bodies of relevant changes in domestic measures that may affect other members,<sup>31</sup> although these bodies, especially the TPRB, also gather information on members’ trade policies and measures with the assistance of the Secretariat. The Secretariat also prepares a draft of a report on each member under evaluation (after consultation with that member); the draft is available to all other members. Members often regard the evaluations and guidance provided through these processes as quite helpful in dealing with the complexities of trade regulatory administration. Thus, many members affirmatively requested that the TPRB

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<sup>28</sup> Andrew Lang and Joanne Scott, *The Hidden World of WTO Governance*, 20 *European Journal of International Law* 575 (2009)

<sup>29</sup> *Id.* at 587.

<sup>30</sup> *Id.* at 600.

<sup>31</sup> 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. See <[http://www.wto.org/english/tratop\\_e/adp\\_e/adp\\_e.htm](http://www.wto.org/english/tratop_e/adp_e/adp_e.htm)> (June 2009).

review measures which they adopted in response to the 2008 financial crisis, rather than simply notifying the measures to the respective committees and councils.<sup>32</sup>

Recently Director-General Pascal Lamy and the Secretariat have successfully launched significant administrative initiatives to respond to the recent financial crisis.<sup>33</sup> They convened meetings of members and promote steps by domestic and international financial authorities to remedy the drying up of credit for financing international trade. They also gathered information to monitor members' domestic responses to the crisis, including bail-outs and other potentially protectionist measures, in order to head off potential recurrences of the beggar-thy-neighbor policies that state adopted during the Great Depression.

Review and supervision of members' implementation by the various WTO administrative bodies will necessarily involve discussions, interpretations clarifications and development of mutual understandings regarding the meaning and application of provisions in the WTO agreements. As discussed below, much of this work concerns provisions requiring that members to follow GAL procedures of transparency, participation, reason giving and review in their domestic administration. 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 of governing legal norms. Taken together, these various activities, including those discussed in detail by Lang and Scott, involve a range of normative practices that have appreciable practical significance and influence.

All WTO members are entitled to attend and participate in the meetings of the various 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.<sup>34</sup> To the extent that the processes of information-sharing, discussion, and negotiation produce more or less crystallized decisions, these are reached through consensus.<sup>35</sup> From an external perspective, and even from the viewpoint of many members who lack the resources to send representatives to all of the many committee meetings, the WTO administrative bodies operate in a closed and opaque fashion, notwithstanding the broader impact and normative significance of many of their activities.

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<sup>32</sup> 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).

<sup>33</sup> See J. Pauwelyn & A. Berman, *Emergency Action by the Director General: Global Administrative Law and the WTO's Initial Response to the 2008-2009 Financial Crisis* (paper presented at NYU IILJ Conference on Practical Legal Problems of International Organizations, 2009 – see [www.iilj.gov](http://www.iilj.gov))

<sup>34</sup> 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](http://www.noits.org/noits06/Final_Pap/Hakan_Nordstrom.pdf) >, June 2009).

<sup>35</sup> 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.

The more significant administrative norm-making functions carried out by these WTO bodies 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 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.<sup>36</sup> 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.<sup>37</sup> There are no requirements for the WTO administrative bodies to state public reasons for their actions nor is there a general practice of doing so. Nor is there any established system for publicity and review of specific interpretations and guidances. The decision making paradigm is one of discussion and negotiation solely among member representatives.

Notwithstanding the opaque character of decision making by the WTO administrative bodies, demands by NGOs and other outsiders for greater openness on their part have been surprisingly sparse.<sup>38</sup> This may reflect the circumstance that these bodies currently exercise considerably less authority than the WTO's two other branches, as well as proliferation of these bodies and the low-visibility way in which they operate. They must contend with members' short-term political needs and 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.<sup>39</sup> 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.

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 dispute settlement branch could play a key role in supporting these developments. 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.<sup>40</sup> The Appellate Body could usefully go further by

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<sup>36</sup> Since 2002, all WTO documents are unrestricted and posted on the WTO website unless a member or 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.

<sup>37</sup> See Steve Charnovitz, Peter Willetts, and Jan Aart Scholte, Robert O'Brien and Marc Williams (footnote 11).

<sup>38</sup> 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.

<sup>39</sup> 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](http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report08_e.pdf) (April 2009).

<sup>40</sup> 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

granting significant deference to WTO administrative 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.<sup>41</sup> 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 in turn enhance the independence and authority of the WTO administrative bodies, creating a virtuous cycle.

These steps would better enable NGOs and other civil society actors, domestic legislators and administrative agencies outside the trade field, and even some WTO members to track and engage important developments and decisions within the WTO administrative bodies. Moreover, because those bodies monitor and interact with trade and other regulatory practices and decisions by member administrative bodies and other global standard setting bodies, greater transparency would provide a useful window on functionally related developments in these other fora as well.

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 ensure that regulatory norms are systematically developed, updated and implemented by specialized officials exercising an important authority and substantial degree of independence.<sup>42</sup> 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. Trade regulatory policy is subject to strong domestic political pressures, and a degree of closed-door bargaining is necessary to cope with and balance the conflicting pressures generated. In addition, even GAL norms were more fully adopted, the ability of NGOs and other outsiders, other than well-organized business and financial interests (who are often de facto "insiders" currently because of their close relation with members' trade

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

<sup>41</sup> See *Chevron, Inc. v. NRDC*, 467 U.S. 837 (1984)

<sup>42</sup> See, e.g., M. Livermore, *Authority and Legitimacy in Global Governance: Deliberation, Institutional Differentiation, and the Codex Alimentarius*, 81 N.Y.U.L. Rev 866 (2006).

ministries), to follow and engage effectively with the myriad different activities of the numerous WTO administrative bodies would be limited.<sup>43</sup> Yet, such a shift, which could be undertaken in gradual stages, promises appreciable net benefits for the long-run health of the organization.

### III. GAL and Domestic Trade Regulatory Governance Under the WTO Agreements

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.<sup>44</sup> 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.<sup>45</sup> 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. Further, almost all of the new WTO agreements contain either a reference to Article X or, more usually, their own version of its requirements, often with detailed provisions for domestic administrative decision making. Extensive GAL requirements are, for

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<sup>43</sup> See Livermore, *supra* (discussing these problems in the code of Codex)

<sup>44</sup> 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."

<sup>45</sup> 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.

example, found in the GATS,<sup>46</sup> SPS,<sup>47</sup> TBT<sup>48</sup> and TRIPS<sup>49</sup> agreements. These developments comport with the development of a regulation-oriented global trade regime that looks to the expectations of market actors. Moreover, the many GAL requirements can in practice operate to the benefit of local citizens as well as foreign nations and economic actors.

Dispute settlement panels and the Appellate Body have regularly enforced these requirements.<sup>50</sup> Also striking is the Appellate Body's creation in *Shrimp/Turtle* of general norms of regulatory due process which it read into the *chapeau* of GATT Article XX, subjecting US domestic administrators to requirements of notice and opportunity for hearing for the benefit of foreign states and economic actors.<sup>51</sup> The decision is a vivid illustration of the potentially expansive juris-generative role of the DSB in the continuing emergence of global administrative law – even if there is some 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*.<sup>52</sup>

The WTO's administrative bodies also play a highly important role in interpreting and applying the GAL procedural norms in the WTO agreements and securing their observance by members.

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<sup>46</sup> 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.

<sup>47</sup> SPS 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.

<sup>48</sup> TBT 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.

<sup>49</sup> TRIPS Article 41, requires fair and equitable procedures for enforcement of intellectual property rights, including requirements that they shall be written, reasoned and only based on evidence at a hearing with a right to review of the decision reached. 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.

<sup>50</sup> See, e.g., WTO Appellate Body Report, Japan – Measures Affecting Agricultural Products (Japan – Agricultural Products II), WT/DS76/AB/R (adopted 19 March 1999); WTO Panel Report, Canada – Term of Patent Protection (Canada – Patent Term), WT/DS170/R (adopted 12 October 2000); WTO Panel Report, Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil (Argentina – Poultry Anti-Dumping Duties), WT/DS241/R (adopted 19 May 2003); 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.

<sup>51</sup> WTO Appellate Body Report, United States-Import Prohibition of Certain Shrimp and Shrimp Products (US – Shrimp), WT/DS58/AB/R (Oct. 12, 1998). For 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; Giacinto Della Cananea, *Beyond the State: the Europeanization and Globalization of Procedural Administrative Law*, 9 *European Public Law* (2003) 563. See also 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.

<sup>52</sup> 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.

They do so by issue guidelines and recommendations as well as through the process of reviewing 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 regulations, procedures for assessing conformity, and mechanisms for providing responding to information and requests regarding domestic regulatory programs.<sup>53</sup> Similarly, the SPS Committee has been developing a set of procedures to enhance transparency of special and differential treatment in favor of developing country members.<sup>54</sup> The recommendations and decisions of these and other committees are not legally binding. Thus, 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"<sup>55</sup> Yet it would blink reality to regard them as altogether lacking normative significance. It is difficult to imagine that a member would be found to be in violation of, for example, the notification requirements under the SPS or TBT Agreements if they had followed 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.<sup>56</sup>

On paper at least, the WTO is generating an extensive system of multilevel global administrative law for trade regulatory administration. How do these requirements translate into member state practice? While a sustained analysis is beyond the scope of this article, 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.<sup>57</sup> Notwithstanding the resulting 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

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<sup>53</sup> 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

<sup>54</sup> 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).

<sup>55</sup> *Ibid.*, at para. 3.

<sup>56</sup> See Sabino Cassese 'Global Standards for National Administrative Procedure, 68 *Law and Contemporary Problems* (2005) 109.

<sup>57</sup> 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. See Sylvia Ostry, "China and the WTO: The Transparency Issue", 3 *UCLA Journal of International Law and Foreign Affairs* (1998) 1, 2, 12-13.

consistent procedures that would enable legal persons to challenge laws, regulations, and decisions, and to enforce their legal rights before administrative agencies.<sup>58</sup>

There is evidence that WTO 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 permits<sup>59</sup> and right to meaningful judicial review of trade-related administrative decision makes.<sup>60</sup> 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,<sup>61</sup> and that China's accession has promoted a more law-based approach to environmental regulation and enforcement,<sup>62</sup> potentially benefitting Chinese citizens generally.<sup>63</sup> Notwithstanding the small number available studies, there is sufficient to suggest the transformative and overall positive potential of the global administrative law of the WTO in domestic administration and governance, including a potential "democracy-enhancing" function.<sup>64</sup>

The benign view that GAL requirements of transparency, participation, reason giving and review promote accountability and the rule of law has not escaped contest. It has been argued, for example, that administrative law itself is a "Western" construct, developed in a particular setting and inherently structurally biased towards certain interests.<sup>65</sup> When operationalized in the trade regulatory context, any such structural biases could serve to entrench the 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.<sup>66</sup> 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

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<sup>58</sup> 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. See also Chien-Heui Wu, "How Does TRIPS Transform Chinese Administrative Law?", 8 *Global Jurist* (2008), at p. 5.

<sup>59</sup> *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.

<sup>60</sup> Qin, *loc. cit.* n. 33, at p. 736; see also Wu, *loc. cit.* n., 32 at p. 19.

<sup>61</sup> Wu, *loc. cit.* n. 32, at pp. 21-23; Qin, *loc. cit.* n. 33,

<sup>62</sup> See R. Ferris & H. Zhang, *Reaching Out to the Rule of Law: China's Continuing Efforts to Develop and Effective Environmental Law Regime*, 11 *William & Mary Bill of Rights J.* 569 (2003)

<sup>63</sup> 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.* Biukovic 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).

<sup>64</sup> See R. Keohane, St. Macedo & A. Moravcsik, *Democracy-Enhancing Multilateralism*

63 *International Organization*, 1 (2009)

<sup>65</sup> See C. Harlow, "Global Administrative Law: The Quest for Principles and Values", 17 *European Journal of International Law* (2006) 187, at p. 207.

<sup>66</sup> 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.

promote the economic development of local ethnic groups.<sup>67</sup> In a somewhat different perspective, Chimni has 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.<sup>68</sup> Acknowledging legitimate scope for contestation and the need for further empirical research, we nonetheless view the WTO's striking progress in promoting the adoption by domestic administrations of GAL norms and practices as an overall positive development in ensuring the fair and even handed treatment of political outsiders and promoting the rule of law more generally.

#### **IV. WTO Recognition of Other Global Regulatory Bodies' Standards: The Horizontal Dimension of GAL**

A further dimension of GAL is presented by the WTO's relations with other global regimes, specifically in the context of whether WTO authorities should take into account the decision making procedures of other global standard-setting bodies in deciding whether or not to recognize and accord legal significance to such bodies' regulatory standards.

Through its administrative bodies, the WTO is engaged in a dense and complex network of interactions with other global institutions. More than 100 organizations have observer status within the WTO, and it itself is an observer in as many institutions.<sup>69</sup> As Lang and Scott report, a substantial number of the WTO administrative bodies monitor the use of international standards in members' domestic administration and cooperate with intergovernmental and other international organizations and associations in producing regulatory standards, guidelines, and recommendations.<sup>70</sup> These relations assume specific legal significance under the SPS and TBT Agreements, which provide presumptive WTO validity to member domestic regulations based domestic on relevant international standards. The SPS Agreement accords such recognition to standards adopted by the Codex Alimentarius Commission (CAO, the International Office of Epizootics (OIE, and the Secretariat of the International Plant Protection Convention within their respective areas of competence, and, . With regard to matters not covered by these organizations, presumptive validity is extended to standards, guidelines and recommendations promulgated by

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<sup>67</sup> 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.

<sup>68</sup> 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.

<sup>69</sup> See <[http://www.wto.org/english/thewto\\_e/coher\\_e/coher\\_e.htm](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) participate as observers in each others' meetings and collaborate at the staff level on such activities as research, publications, conferences and workshops

<sup>70</sup> Lang and Scott at 588-590, 595-597.

other relevant international organizations open for membership to all WTO members, as identified by the SPS Committee.<sup>71</sup> The TBT Agreement (Art. 2.4) not only accords presumptive validity to member technical regulations that are in accordance with relevant international standards but imposes in imposing an affirmative obligation on members to use “relevant international standards” as a basis for their technical regulations except when they would be “ineffective or inappropriate.”<sup>72</sup> Although it does not identify any specific institutions whose standards must be recognized, the TBT Agreement provides generic criteria for recognition and contains a broad concept of “standard.”<sup>73</sup> It 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) or NGO-based organizations that adopt standards on subjects such as sustainable forestry and fishing methods. Finally, the GATS provide that in determining members’ conformity with interim obligations regarding licensing, qualifications and technical requirements, “account shall be taken of international standards of relevant international organizations.”<sup>74</sup> Further, it provides that members shall “work in cooperation with relevant intergovernmental and non-governmental organizations” for the adoption of common international standards.<sup>75</sup>

These “borrowing” arrangements, which really amount to an effective delegation of lawmaking authority,<sup>76</sup> allow WTO DSB bodies to rely on the expertise and decisional capacity of other global bodies specialized in often highly technical areas of regulation at a time when international standards play a growing and important role in the regulation-oriented WTO system. According presumptive WTO validity to domestic measures based on international standards can encourage development and adoption of international standards and promote potentially beneficial regulatory harmonization. In many fields, however, different public, private or hybrid public-private standard-setting organizations compete in issuing regulatory standards.<sup>77</sup> Standards for software food safety, carbon footprint labeling, and sustainable

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<sup>71</sup> Art. 3.2; Annex A (Article 3.d). To date, the SPS Committee has not extended recognition to standards of other international standardizing bodies, nor has a proposal to do so been submitted to it. See T. Bütte, “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).

<sup>72</sup> At Arts 2.4, 2.5.

<sup>73</sup> 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.

<sup>74</sup> GATS Art. VI.5(b). Relevant international organizations are defined as those open to all WTO members. Id fn 3.

<sup>75</sup> GATS Art VII.5

<sup>76</sup> See T. Bütte, “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.

<sup>77</sup> 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). For discussion of private standard setting on environmental and social issues by market-based NGOs, see Steven Bernstein and Erin Hannah, Non-State

forestry practices are but a few of many examples. Where the relevant WTO agreements do not specify the institutions whose standards are to be recognized, WTO authorities will have to choose among competitors. The SPS Agreement give the SPS committee for deciding on which international standards to recognize in fields outside the competence of the three international organizations identified in the agreement, but the TBT and GATS agreements is silent on the question. Consistent with the discussion in the previous section of this article, the TBT Committee and GATS Council should signal their willingness to exercise their competence to decide on which global bodies' standards to recognize, subject to DSB review by bodies when a dispute presents the issue.

These circumstances potentially mark an additional pathway, horizontal in nature, for the development of GAL. In deciding which global bodies' standards to recognize, WTO administrative and dispute settlement bodies should conclude that standards adopted by other global bodies would be recognized by the WTO only if generated through transparent and open 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 affected interests, supported by reasoned justification, and thereby justify the WTO in giving such standards legal effect and endorsing them for domestic adoption by its members. This use of GAL procedures would reduce the risk of suppressing local regulatory autonomy through invocation of international standards that may lack public legitimacy.<sup>78</sup> Scrutiny by WTO authorities of other bodies' procedures would also promote GAL by introducing a mechanism of review.

A number of respected commentators agree that the WTO should make compliance by such bodies with basic GAL-type norms of regulatory due process a condition for recognition of their standards,<sup>79</sup> and that the DSB should exercise a form of judicial review over these procedures.<sup>80</sup> While no WTO case has dealt directly with this issue, the AB 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.<sup>81</sup> The AB disclaimed any role in reviewing the validity of the Codex decision making process. However, the decision may have been conditioned by the fact that involved the Codex, one of the sister organizations specified in the

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Global Standard Setting and the WTO: Legitimacy and the Need for Regulatory Space, 11(3) J. Int'l Econ. L. 575 (2008).

<sup>78</sup> For discussion of such risks, 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..

<sup>79</sup> J. Scott, "International Trade and Environmental Governance: Relating Rules (and Standards) in the EU and WTO", 15 *EJIL* (2004) 307, at 311-312.

<sup>80</sup> 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.

<sup>81</sup> 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).

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. And it may be even more willing to do so if the TBT Committee takes the lead on the issue.

Apart from the potential for formal review by WTO organs of other global standard setting bodies' standards and decisional procedures, WTO administrative bodies, as Lang and Scott note, interact and cooperate in various ways with other global regulatory authorities in the development of regulatory standards.<sup>82</sup> They are accordingly often in a position to influence these other bodies' decision making practices.<sup>83</sup> The TBT Committee has taken a proactive approach, adopting a Decision on "Principles for the Development of International Standards, Guide and Recommendations" which provide principles and procedures to further transparency, openness, and impartiality in decision making on international standards, guidelines and recommendations including broad provisions for notice and opportunity to comment on proposed standards.<sup>84</sup> The Decision effectively extends to international regulatory bodies the requirements for domestic administrations contained in the Code of Good Practice for the Preparation, Adoption and Application of Standards annexed to the TBT Agreement.<sup>85</sup> No doubt due in part to the expectation that the Principles could be invoked in deciding whether or not to extend recognition under the TBT borrowing arrangement, the Principles have had a significant influence, as illustrated by the case of ISO, which treats their provisions as obligatory.

The administrative law norms established by the TBT Committee decision can thus exert a substantial if informal influence on other global standard setting bodies' decisional practices. They should also serve as a basis for formal 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.<sup>86</sup> 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.

Providing incentives for and otherwise promoting adoption by other global regulatory bodies of GAL principles and procedures can partially and indirectly but nonetheless significantly address concerns over factional capture, tunnel vision, and lack of accountability.<sup>87</sup> Accordingly, , the

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<sup>82</sup> Land & Scott, *supra*.

<sup>83</sup> 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.

<sup>84</sup> 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.

<sup>85</sup> S. Charnowitz, "International Standards and the WTO", quoted, p. 9.

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).

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<sup>87</sup> 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

DSB authorities and WTO administrative bodies should embrace this opportunity. A likely 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. The Appellate Body stated in Sardines 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, no doubt signaling that the WTO expects reciprocal deference regarding its internal procedures. If, however, the WTO made greater use of GAL procedures for its own administrative decision making, as recommended above, it could be more willing and able to ask for similar steps by other global regulatory bodies.

## **V. Conclusions and Reflections on GAL**

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.

### **A. GAL and Global Trade Regulatory Governance**

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.<sup>88</sup> Such an institutional

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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.

<sup>88</sup> 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. 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).

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 domestic administration, 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. Although other bodies' compliance with GAL norms has not yet surfaced in formal review of their decisions by the WTO dispute settlement bodies or committees, the standard setting norms adopted by the WTO committee have already exert a substantial informal influence. If the WTO, though 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, as suggested by Benedict Kingsbury, and create a platform for the further diffusion of GAL norms throughout the global administrative space.<sup>89</sup>

## B. The Development of GAL: Positive Analysis

What are the factors that explain, as matter of positive analysis, the highly variable and uneven reception of GAL within the global administrative space, and indeed, as this article shows, even within a single global regulatory regime complex? This unevenness is strikingly exemplified within the WTO regime itself. How to explain the dramatic contrast between the elaborate

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<sup>89</sup> The "inter-public" concept and its relation to GAL is developed in B. Kingsbury, "International Law as Inter-Public Law," in *NOMOS XLIX: Moral Universalism and Pluralism* (Henry R. Richardson and Melissa S. Williams, ed., New York University Press, 2009)

development of GAL in member state administration, and its virtual absence in the WTO's internal governance or its horizontal relations with other global bodies? And, what are the lessons from the WTO experience for the adoption of GAL more generally. The following is a preliminary effort to address these questions.

*The self-interest of members, especially more powerful states.*

In some global regulatory bodies, GAL procedures have been adopted to promote the internal accountability of their administrations to the dominant members, as illustrated by the history of the World Bank Inspection Panel. In the WTO, however, the traditional form of administrative bureaucracy, in the form of the Director General/Secretariat, is relatively small and lacks significant autonomy; administrative decision making is predominantly exercised by the councils, committee, and TRB, where the powerful members can exercise a strong influence under informal "club" modes of decision. The recent initiatives of the Director General and the Secretariat in responding to the financial crisis may, however, presage the beginnings of some shift in the configuration of power, and with it the GAL calculus.

By contrast, application of GAL procedures to domestic administration tends to promote the interests of the US and the European members that have traditionally dominated the WTO. Their domestic administrations already follow GAL procedures, as matter of domestic law. These members face the risk that other members whose domestic administrations do not observe GAL norms will have a freer hand to favor domestic firms and otherwise engage in discriminatory and protectionist practices. Requiring these members to follow GAL in domestic administration "levels the playing field" of international competition.

The interests of dominant WTO members regarding the application of GAL to decision making by other global standard setting bodies are less clear. The more powerful members may simply prefer to have a freer hand in the internal governance of these bodies, or fear that imposing GAL norms on such bodies will make it more likely that the same norms will be adopted within the WTO, to their disadvantage.

Notwithstanding the desire of the more powerful states in being free to exercise their leverage as shifting circumstances and demands dictate, application of GAL procedures to the WTO administrative bodies can promote their longer run interests by improving the quality of administrative decision making and the organization's functional performance, as argued above. The "constitutional" argument for such a step, in which the scope for ad hoc maneuver is restricted for longer term gains, is similar to that for the DSB, which also restricted the freedom of maneuver of more powerful states

The effectiveness of the WTO in promoting the interests of the more powerful members also depends in part on its perceived legitimacy with various constituencies whose support for or at least acceptance of the organization may be needed for it to flourish, especially at a time when the organization is embattled and face competition from regional and bilateral trade regimes.<sup>90</sup> Adopting GAL procedures can help boost the WTO's standing with a number of important

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<sup>90</sup> [citations to Julia Black, Eran Shamir-Borer]

“legitimacy audiences,” most notably international and domestic NGOs, and possibly less powerful WTO members. Adoption of GAL for WTO administrative decision making may promote “pragmatic legitimacy” by enabling such constituencies to advance their interests by furnishing means for them to know about and influence decisions. In addition, GAL procedures can promote “conceptual legitimacy” by appealing to constructivist notions of proper decision making which such constituencies, notably NGOs, hold.<sup>91</sup> The AB’s embrace of amicus briefs reflects the adoption of GAL to boost organizational legitimacy (but also responds to interests of powerful states like US). Applying GAL norms to internal WTO administrative decision making or to other global standard setting bodies as a condition for recognition of their standards would also promote the organization’s legitimacy with these external constituencies. However, such developments are likely to be opposed by members, especially the developing country members including the newly powerful, who view the adoption of GAL procedures as contrary to their interests. As with any other organization, the WTO must balance the often competing demands of its various constituencies and audiences.

### *Constructivist influences*

Through constructivist influences and mechanisms, GAL procedures may come to be regarded by member representatives, administrators, and others within international organizations, including potentially the WTO, as the appropriate and fitting means for making decisions. Domestic models of administrative law, especially in leading states, may increasingly shape conceptions of proper decision making by global administrative authorities. And, once adopted by some leading global bodies, GAL norms may “radiate” to other global bodies. Indeed, as discussed below, they may come to be regarded as legally obligatory. But, as Joseph Weiler notes, contrary “club” norms of decision making through diplomatic discussion and negotiation are culturally and institutionally deeply embedded in the WTO and many other international bodies.<sup>92</sup>

### *Institutional structure and the problematique of “administration”*

It is functionally not difficult to superimpose GAL requirements on member administrations, comprised primarily of bureaucratic bodies that issue legally binding regulations and decisions and are already subject to some sort of administrative law disciplines. It is more challenging to successfully apply them to “horizontal” decision making processes like those within regulatory committees composed of member representatives (and in many cases non-member experts) or regulatory networks of diverse actors that are not hierarchically organized and whose normative output is often much less formalized. Some global administrative bodies, such as the World Bank, assume the traditional bureaucratic form. In the case of the WTO, this form is represented by the Director General and Secretary General.<sup>93</sup> Yet, non-hierarchical committee and network decision making is very common in the WTO and elsewhere at the global level (as well as at the supranational level in the EU). Notwithstanding, these features need not be an insuperable barrier to the adoption of GAL procedures, as discussed below.

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<sup>91</sup> See *id.*

<sup>92</sup> Weiler, *supra*.

<sup>93</sup> Pauwelyn & Berman, *supra*, give a positive evaluation of their conformance with GAL norms in their actions with respect to the financial crisis.

Nonetheless, the definition of the “administrative” remains a significant problem for GAL. The working definition is quite broad, including all forms of law making other than treaties or other international agreements on the one hand and episodic dispute settlement on the other.<sup>94</sup> This definition would include a wide variety of bodies, including treaty COPs that adopt subsidiary norms; committees and councils composed of member representatives, as in the WTO; large administrative bureaucracies like those of the World Bank or the WHO; expert committees that may or may not include some member representatives; coordinating bodies; many varying forms of network arrangements; and even tribunals, such as the AB or the World Bank Inspection Panel, that play a systemic, regulative normative role. Notions of administrative law borrowed from bureaucratic models of domestic regulatory administration (which are themselves being challenged at the domestic level by “new governance” modes of regulation) may not “fit” all of these different types of bodies, either functionally or in constructivist terms, and certainly cannot be applied in the same way to all of them. Yet, to conclude that the extent that some of these bodies are classified as other than “administrative” what procedures are “fit” for them? And, what decision making procedures should apply to global bodies that are “legislative,” such as the WTO Ministerial Council or the UN Security Council? This question creates the specter of a conceptual and normative void in global governance. As briefly discussed in the Appendix both GAL and global constitutionalism aspire to fill this potential void.

### *Reviewing bodies*

Experience suggests that mature development of GAL likely depends on strong reviewing mechanisms. The DSU constitutes such a mechanism with respect to WTO members’ domestic administrations. The AB could extend review to decision making by WTO administrative bodies or those of other global bodies, but for likely Eyal prudential reasons has so far refrained from doing so. The WTO experience tends to confirm Eyal Benvenisti’s argument that tribunals, like WTO panels and the AB, that are located within rather than independent of a global regime are generally reluctant for prudential reasons to review closely the decisions of other bodies within the regime, or to rock the boat and disturb reciprocity by reviewing decisions of other regimes.<sup>95</sup> And, domestic court review of decisions by the WTO bodies is generally unavailable. The role of international courts and tribunals is growing, as is that of domestic courts in reviewing, directly or indirectly, the decisions of global administrative bodies, but their roles are still at present relatively limited.

### C. The Normative Character of GAL

Many NGOs and some academics advocate greater transparency and opportunities for participation in order to promote the accountability of global regulatory bodies. Too often these calls for greater accountability are little more than analytically hollow rhetoric. A more precise (and limited) characterization of accountability is required.<sup>96</sup> Accountability is a relation

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<sup>94</sup> Kingsbury, Krisch & Stewart, *supra*.

<sup>95</sup> [citation]

<sup>96</sup> See Stewart, Accountability, Participation, and the Problem of Disregard in Global Regulatory Governance (forthcoming).

between one actor, who is obliged to render account for its actions, to one or more other actors, account holders, who are entitled to receive accounts and impose sanctions on the accountor for deficient performance. Accountability relations are of two basic types. In the first, the account holders grant authority and/or resources to the accountor, who must account for his use thereof. The mechanisms for conferring authority and exercising accountability include electoral (voters and office holders), fiscal (grantors and grantees) hierarchical (the legal relation of principals and agents) and supervisory (those who confer and those who receive and exercise authority but are not in a legal relation of principal and agent). The second basic form of accountability is legal, under which right holders can (through a judicial proceeding) hold to account. A third candidate, not yet fully fleshed out or examined, is peer accountability, under which actors face incentives to act so as to maintain their reputations with others in the same mutual enterprise.<sup>97</sup>

In the case of global bodies established by states, including intergovernmental organizations and networks of domestic regulatory officials, powerful states are the primary grantors of power and authority, and the organizational decision makers are generally highly accountable to them through mechanisms of electoral, fiscal, and supervisory accountability. In the internal governance of the WTO, this means that the Director General, the Secretariat, and the councils, committees, and TRB are informally accountable, and accordingly attentive to, the interests of the most important members. This structure, however, provides no or little systemic protection for weaker members or third parties whose interests may be slighted. Peer mechanisms also operate within the WTO councils and committees and the TRB, but they probably tend to reinforce the disproportionate influence enjoyed by the more powerful members.

Legal accountability can potentially remedy the problem of disregard of less powerful members and third party interests, but only if there are relatively strong and independent reviewing bodies with significant remedial powers. Under the WTO DSU, a member's domestic administrative bodies are subject to powerful mechanisms of legal accountability to other members. This mechanism is increasingly being used by developing country members whose interests might be disregarded by the most powerful developed country jurisdictions. But legal accountability does not currently exist with respect to the WTO's internal administrative bodies or the decisions of other global bodies, even if it might develop in the future. In the case of the WTO's administrative bodies, this could, as previously discussed, consist of *Chevron*-type review of administrative interpretations of WTO Agreements in the context of resolving disputes between members. In the case of other regulatory global bodies legal accountability could be exercised by WTO administrative bodies or WTO panels or the AB in deciding whether to give legal weight to their standards. Moreover, because these bodies have been effectively delegated a degree of regulatory authority by the TBT and SPS agreements, the potential for withdrawal of that authority could provide a basis for informal supervisory accountability to the dominant WTO members.

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<sup>97</sup> I am indebted to Bob Keohane for persuading me serious to entertain this potential mode of accountability. R. Grant and R. Keohane, Accountability and Abuses of Power in World Politics 99 Am. Pol. Sci. Rev. 1 (2005).

Accountability, however, is by no means a sine quo non of an institution's legitimacy, in either a positive or normative sense.<sup>98</sup> Even where accountability mechanisms operate, the critical question is to whom accountability is owed and by what means. To the extent that accountability runs to powerful states or organized economic interests, it may not secure legitimacy, much less justice. On the other hand, decisional procedures that do not include any of the accountability mechanisms identified above may be welcome and important. Even where review is absent or weak and there is accordingly no legal accountability, the remaining GAL procedures of transparency, participation and reason giving can help promote greater consideration of otherwise disregarded interests and more open, broadly responsive and balanced decision making. The development of such procedures, in circumstances where they are appropriate and effective, is an important normative achievement, even where mechanisms for account giving to affected constituencies and sanctioning or remedial mechanisms are absent. Also, a proceduralist approach, which may be disparaged as administrative law "lite," has the advantage of avoiding some of the deformities and drawbacks of legalization that could be spawned by , strongly judicialized reviewing mechanisms. If the WTO administrative bodies were to adopt, in the case of more significant matters, practices for publicly available agendas and background documentation including proposals, notice and opportunity for comment, and publication of decisions and recommendations with reasons for them, these procedures could improve and broaden the decision making process without imposing undue rigidity and delay or spawning strategic behavior in anticipation of judicial scrutiny. GAL procedures for decision making without review could be applied with sufficiently flexibility to accommodate non-bureaucratic forms of administration, including global committees or networks. The extent and application of such procedures, and the admixture in some cases of some form of review, will necessarily reflect compromise between the ideal of reasoned decision on an open record and decision based on negotiation and on specialized experience and judgment; analogous accommodations are familiar in domestic administrative law.

As the use of GAL procedures gradually grows and spreads throughout the global administrative space, the likelihood increases, *ceteris paribus*, that their use will come to be regarded as fitting and even obligatory for exercises of public regulatory authority. As the Kadi case and other decisions by both international and domestic tribunals illustrate, the conclusion that GAL procedures are legally required is strongest in the case of decisions by global bodies that impose sanctions on individuals.<sup>99</sup> But that conclusion is also beginning to emerge with respect to specific decisions by global bodies that affect groups, such as decisions to fund or authorize development projects that have harmful environmental and social effects.<sup>100</sup> And it is also becoming more prevalent in the issuance of general regulatory norms, especially those affecting the environment, health and safety.<sup>101</sup>

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<sup>98</sup> See Julia Black, *Legitimacy and the Competition for Regulatory Share*, LSE Law, Society and Economy Working Paper Series, WPS 14-2009, July 2009; A. Buchanan and R. Keohane, *The Legitimacy of Global Governance Institutions*, 20 *Ethics and International Affairs* 405 (2006).

<sup>99</sup> [citations]

<sup>100</sup> [citations]

<sup>101</sup> [citations]

As Benedict Kingsbury has argued, Hartian positivism furnishes the best jurisprudential answer to David Dyzenhaus's demand for an account of where the "law" in GAL may be found.<sup>102</sup> Kingsbury argues that the key to determining when GAL procedures are "law" rather than simply pragmatically useful or prudent practice lies in the social practices and expectations of the different actors in global regulatory governance and, more specifically, a rule of recognition that holds GAL procedures to be *prima facie* obligatory when a global body exercises public authority.<sup>103</sup> In addition to their application for internal decision making by such bodies, he argues for an "inter-public" conception of global administrative law under which GAL procedures are also *prima facie* obligatory for decision making by a global public authority with respect to other public authorities.<sup>104</sup> Under this conception, institutions that exercise public authority, whether they consist of domestic governments and administrations or global bodies, must follow open decision making procedures and provide reasoned justifications for their decisions, not only with respect to their citizens or members, but also with respect to other public authorities and, indirectly, those bodies' citizens or members. As GAL procedures are increasingly recognized as not only appropriate but in some cases obligatory for the exercise of public regulatory authority, including in the inter-public context, it will be increasingly difficult for the WTO to insist that member administrations adhere to the full panoply of GAL procedures while refusing to adopt even modest version of GAL for its own exercises of public authority, including decisions on the application of GAL and other WTO disciplines on members. Similarly, the inter-public logic implies that WTO should adopts GAL procedures for its own administrative decisions regarding standards adopted by other global public authorities, and likewise insist that they also adopt GAL procedures for deciding on such standards.

As a rough overall normative assessment, adoption of GAL norms and practices by global regulatory bodies, including those examined herein, can serve in many contexts to ensure that public authority is exercised through open processes with opportunity for input by affected interests and decisions on the basis of public reasons, thereby promoting accountability and/or responsiveness to a broader range of affected interests including those that tend to be otherwise disregarded and a more cosmopolitan normative perspective. By prescribing these decisional procedures and norms in lieu of bargain and ad hoc expediency, GAL seeks to provide 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. There are potential counterexamples, where GAL may work to the disproportionate benefit of dominant states, powerful financial interests and other well-organized actors, thereby making the problems of disregard worse. However, the opportunities that GAL provides for NGOs and social interests generally, which are often otherwise largely shut out of closed processes of bargain among the powerful, and the largely successful use of those procedures in many different contexts at both the international and domestic levels, warrants a more optimistic conclusion.

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<sup>102</sup> [Dyzenhaus] Accountability and the Concept of Global Administrative Law, 1999 *Acta Juridica* 3.

<sup>103</sup> Kingsbury, The Concept of "Law" in Global Administrative Law, 20 *European Journal of International Law* 23 (2009)

<sup>104</sup> Kingsbury, note 39 *supra*.

Notwithstanding this somewhat impressionistic generalization, GAL cannot be judged 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, in some fields of global regulation, especially those involving security issues, the prima facie case for GAL may be outweighed by other considerations. In addition, , major global regulatory bodies such as the WTO must now operate in a highly charged political environment; the challenges may require fundamental strategic and structural changes that go far beyond GAL procedures.<sup>105</sup>

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As this article 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.

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<sup>105</sup> 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 21<sup>st</sup> 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).

## APPENDIX; NOTE ON GLOBAL ADMINISTRATIVE LAW AND GLOBAL CONSTITUTIONALISM

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.<sup>106</sup> The 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.<sup>107</sup> This note focuses 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 values<sup>108</sup>. 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.”<sup>109</sup>

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<sup>106</sup> 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 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.”

<sup>107</sup> See generally J. Dunoff & J. Trachtman, *Ruling the World: Constitutionalism, International Law and Global Governance*, (2009); Jan Klabber, Anne Petter & Geir Ulfstein, *The Constitutionalization of International Law* (2009).

<sup>108</sup> 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).

<sup>109</sup> Ibid at 9

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.<sup>110</sup> 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 is formulated with varying degrees of ambition.<sup>111</sup> 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.<sup>112</sup> 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.<sup>113</sup> 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

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<sup>110</sup> 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.

<sup>111</sup> 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.

<sup>112</sup> 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.

<sup>113</sup> 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).

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.<sup>114</sup> 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 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.<sup>115</sup> 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

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<sup>114</sup> 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)

<sup>115</sup> The history of the Basel II capital adequacy standards tends to support this conclusion.

basic change, and may divert attention from the need for more fundamental reform.<sup>116</sup> Further, too much reliance on legal mechanisms to achieve governance goals may end up sapping political accountability rather than compensating for its deficits.<sup>117</sup>

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.<sup>118</sup>

The normative ambitions of global administrative law are more limited than those of constitutionalism, yet they are by no means insignificant.<sup>119</sup> 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.<sup>120</sup> 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.<sup>121</sup>

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

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<sup>116</sup> 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.

<sup>117</sup> C. Harlow, ‘Global Administrative Law: The Quest for Principles and Values’ (2006) 17 *European Journal of International Law* 187.

<sup>118</sup> See Krisch, *Pluralism op cit.* at 275.

<sup>119</sup> B. Kingsbury, ‘The Concept of ‘Law’ in Global Administrative Law’, *cit.*

<sup>120</sup> See G. della Cananea, *op. cit.*; S. Casasse [LC to supply]

<sup>121</sup> Cf. P. Nanz, *Democratic Legitimacy in Transnational Trade Governance: A view from Political Theory*, in Joerges and Petersmann, p.59 ff..

and the procedural criteria for inter-regime norm recognition, GAL can counter the sectoral fragmentation which post-national constitutionalism might exacerbate.