



BRINGING LAW AND ORDER TO INTERNATIONAL TRADE: ADMINISTRATIVE LAW PRINCIPLES AND WTO

ABSTRACT

Present article have made an analysis referring the WTO and application of administrative law in the function of the WTO. WTO as the transnational regulator of trade have evolved as the most significant part in the trade around the globe as the era only evidence the globalizations of trade. Globalization of trade has imputed may challenges for various countries and to regulate the same, with consent of global business partners, world has evidence the emergence of WTO as the control device for trade and hence WTO came into effect. WTO itself has its own mechanism for administering various issues that have emerged internally and externally and hence it attracts principles of administrative law in action. Global administrative law has seen a recent developmental shift as world have felt its essence in the administration of various institutions that may be either state or non-state actors. Global administrative law also focuses on the fundamental principles that are need of any administrative system. Present article raises two points contending on the judicial review mechanism of the WTO and transparent that is followed in WTO and GATS/GAAT. Article proposes the replacement of Dispute Settlement Body's functioning members as making it as the separate body having members distinct from the General council of WTO. Also a touch has been felt in the article relating it with the principles of transparency that are ought to be flowed at some points and defaulted at another point in the working of WTO.

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1- INTRODUCTION

Administrative Law have presented as underdog compared with the constitutional law as less work have been explore in field of administrative law making lacking emergence of comparative administrative legal ideologies as was present in case of comparative constitutionalism.¹ As administrative law is younger than constitutional law and therefore a global framing seems to be absent in relation to application of administrative law principles that are base of making relation between governments and international institutions.² In the age materialization of legal principles globally, time has came to present the

administrative inclusive on international level. Present administrative law is not a standing as mere regulatory principles for an individual nation but shaped itself in global packing that has been followed in various international mechanism setup across the world. Present article try to make an analysis on the administrative law and its implication on World trade Organization (hereinafter called as WTO). WTO is the principle trade regulatory body extending its functions from legislating, administering as well as adjudicating and for the reason there have to be principles followed that must inherit



some fundamental feature of ought to followed by any authority while following its daily business or conduct. Boundaries between states and international arena have shrunk by emergence of well insightful international principles and trade evidenced steep development as the globalization affected economies around the globe. WTO use to regulate all the trade related matters internationally so as preserve a condition of free trade and reducing tariff barriers across the world but on the other side a greater risk pertains to the weaker economies of several countries who are dominated by the stronger ones as result of participation of various economies on the same floor. WTO hence needs mechanism to rebuff and eliminate the discriminations and quandaries with assistance of general principles governing the administrative law. Administrative law is nothing more than a method of governance that authorities apply There are as many as principles Rule-making powers, discretion, transparency adjudicatory powers, judicial review, fair play etc. but the current article only makes an overview upon the WTO setup in realm of administrative law.

2-WTO AND ITS ADMINISTRATIVE MACHINERY

WTO being an International institution have impact on international governance and hence many authors have attracted the inception of Global administrative law in force to meet challenges faced by WTO.³The recent studies in inter-institutional global governance have initiated a scope for flourishing global administrative law in action.⁴ Global Administrative law in realm of WTO will focus on the measure smooth the governance and disciplining global trade as WTO is the concerned authority for same.⁵ The measure for making a global administrative law approach approved in case of WTO because of need of legitimacy in exercise of authority that the institutional actor seeks to perform.⁶ For scrutinizing application of administrative law in any system, one should be aware organizational setup of that institution that may be either state or non-state actors. WTO structures itself in various parts for its functioning as WTO works under two heads of the functioning, that is Ministerial Conference as head and General Council for its day to day functioning. It also include Trade Policy Review Body and Dispute Settlement Body in addition to several committees and councils to make decisions regarding General agreement on Tariff and Trade (GAAT), General agreement on Trade in Services (GATS), Trade related Aspects of Intellectual Property Rights etc. All these internal setups have been divided in to three spearheads of functions that are legislative, executive or

administrative and judicial in nature. Ministerial conference bears function to legislate matters in WTO, General Council stand for executive functions and Dispute Settlement Body sits as the adjudicatory mechanism. There are many challenges to the WTO that warrant the need for a administrative law application in operation of WTO administration. This article in later part will deal with the two major problems that are traced in the WTO mechanism that need a bird eye's watch that are two distinctive principles of administrative law i.e. transparency and accountability in WTO. Transparency, accountability and legitimacy are not one principles of administrative law of particular state, but have accomplished its suitable and effective status in global administrative law.⁷ In special reference to WTO as a transnational regulatory actor concerns over legitimacy and accountability have raised much quandaries and hence attracting re-conceptualization of changing their comportment of functioning.⁸ Reflections have proceeded toward the appearance of disaggregated form of governance over the bounded form of governance.⁹

3-ADJUDICATION MECHANISM AND ADMINISTRATIVE LAW IN WTO

Judicial review emerged as one of the sacrosanct principle in any legal principle and separation of power has strengthened the principle by leaps and bounds. Although various principles of adjudication in administrative law differs as the change in laws of domestic and transnational perspective but more or less the basic spirit of the judicial review remains identical around sphere.¹⁰ Dispute Settlement Body serves as the rectifying authority that asserts the rules regarding the global trade administration in the realm of domestic administrations being disturbed by violation of those laws made in adherence to WTO mandates. Dispute Settlement Body serves as the quasi-judicial nature as it not only regards with the dispute settlement authority but even as the regulation making body. The most stringent condition that needs to be reviewed is regarding the administrative nature of the Dispute Settlement Board that is the deems to be independent judicial authority under WTO but the mystification regarding involvement of general council of WTO is the major concerning element in the judicial hand of WTO. Taking the normal judicial working in domestic laws, we could see a separated judicial mechanism that is in consonance with the idea of separation of powers in government but seems to be absent in case of WTO. Judicial trend around the globe will evidence that an independent judiciary in place for any institution

either a state-actor or a non-state actor is present but same seems to be absent in the scenario when focused on the adjudicatory mechanism of the WTO that itself involves the members of general council that sits as the adjudicators in the WTO dispute Settlement Body. The major questions that current article poses is the warrant of a separate judicial branch of WTO as WTO not being a domestic regulator but being a transnational regulator and controller of trade across the globe is the main issue in present case. WTO must ensure that a separate judicial branch is endowed with the particular institution that will fructify the intention connecting the formation of the WTO. The major contention that emerges from the present article signifies the importance of the judicial review that is the major part of any administrative functionary and hence it approves the contention warranting the separate judicial authority for the WTO. Dispute Settlement Body of WTO must have a specific article of association that provides specific rules and obligations for the judicial officers of WTO. This special and separate body that is ought to be proposed by the current article must endeavors to solve all the subject matter regarding the dispute that lies in the present Dispute Settlement Body jurisdiction area but it is pertinent to recognize the essence of the proposed mechanism that sets just a specific machinery for the dispute settlement body keeping present actionable power as same according to current structure.

Therefore the basic change in WTO Dispute Settlement Body will have an impact on the present dispute adjudication process as conferring it in consonance of the administrative law that in present article emerged as the global administrative law. Need for a transparent and independent judiciary is the essence of any legal system and when the system is on the international level possesses more significance of warranting the independent judiciary.

4-WTO AND GATT: TRANSPARENCY CHECK

Transparency not only evolved from very deep in administrative law but also makes the structural part of administrative law so as to make it accountable before public. Global administrative law plays not only in dealing with principles of administrative law but also focus on the various mechanism relating to transparency in general.¹¹ Global Administrative law deals with the principle of transparency in the transnational arena of legal field.¹² Thereby we can say that various principles and mechanisms of global administrative law functions to promote transparency on global level.¹³ An example for the same could be found out in the directives issued by

world bank to developing countries that include rules and code of principles that intent to achieve greater goals to maintain transparency and combat corruption for market actors.¹⁴ Transparency is sometimes shown as negating approach as the organizations on international level sometimes fails to recognize the principle that may be even stated as hallmark of administrative functioning of any organization.¹⁵ Reduced On international arena transparency is so important that many a times organizations like World Trade Organizations have been criticized for their insufficiency to maintain a transparency in administrative functions.¹⁶ The need for accountability in the international arena have focused and fascinated the need to evolve transparency measures in functioning of regulatory actors like WTO.¹⁷ In pursuant to article III and IV of GATS, service supplier have enquiry or contact points as the aftermath of Uruguay round so that information can be easily disseminated between them. This government to government transfer of information have left the non-state players in distortion and worthlessness of those provisions of GATS as the traders are the only interested class who were to be facilitated by the provisions of GATS. Forthcoming rules on GATS make the provisions for providing a single phased licensing for supplier application and its process and administration in a purposeful manner. Also the draft rules have to seek into maintaining the reasonableness in fees fixation. In case authorities refuse to grant license to applicant the authorities are required to give the decision in writing and without delay in addition to mentioning the reason for the disqualification on demand of applicant. All this draft rules that are also called as disciplines on domestic regulations are intended to create the transparency regime in the context of WTO.¹⁸ Some provisions of the WTO will be traced here to clarify that WTO main instrumentalities have followed the basic transparency principles that recognize duty to inform. Publication of international Obligations are enumerated in Article II of GAAT, Article XX of GATS and several trade agreements, publication of laws and regulations in article X of GAAT, Article III of GATS and Article 63 of TRIPS, enquiry points for trading partners in Article III of GATS, SPS, TBT in addition to several provisions regarding issuance of notification by WTO on various grounds that depends on information provided by actors on its own behavior and information provided by actors in other actor behavior.

Steve Charnovitz of Washington University Law school have rightly advocated his opinion wherein he argued about the malfunctioning of WTO with reference

to transparency in its own functioning but making some stringent rules laid down in transparency in national arena.¹⁹ Even in conventions by WTO that needed more transparency were devoid of same as was in case of Custom Convention²⁰ and further negation of non-governmental organization involvement that would have been made more transparent provisions if were added in convention.²¹ Also the fundamental document in relation to trade in goods on global level is GATT (General Agreement on Trade and Tariff) shows an essence of transparency wherein Article X, 2 of GATT²² refers to the disclosure of government acts that affects other members, private persons and enterprise that shows a wider shelling of transparency in the document responsible for global trade. Whatsoever may be the conditions in international arena but nonetheless future of administrative laws needs to be more transparency involved for dynamic state culture around the globe so as to imply smoother functioning of same.²³

5-CONCLUSION

Present article have made an analysis referring the WTO and application of administrative law in the function of the WTO. WTO as the transnational regulator of trade have evolved as the most significant part in the trade around the globe as the era only evidence the globalizations of trade. Globalization of trade has imputed may challenges for various countries and to regulate the same, with consent of global business partners, world has evidence the emergence of WTO as the control device for trade and hence WTO came into effect. WTO itself has its own mechanism for administering various issues that have emerged internally and externally and hence it attracts principles of administrative law in action. Global administrative law has seen a recent developmental shift as world have felt its essence in the administration of various institutions that may be either state or non-state actors. Global administrative law also focuses on the fundamental principles that are need of any administrative system. Present article raises two points contending on the judicial review mechanism of the WTO and transparent that is followed in WTO and GATS/GAAT. Article proposes the replacement of Dispute Settlement Body's functioning members as making it as the separate body having members distinct from the General council of WTO. Also a touch has been felt in the article relating it with the principles of transparency that are ought to be flowed at some points and defaulted at another point in the working of WTO. Present article concludes with the point of conformity that present structure of WTO needs much alterations as well as embracement's that will project toward a more comprehensive development regime in

the global trade relations among the countries. WTO in needs certain revolutionize adjustment that will further ensure the international business on next level.

REFERENCES

1. Janina Boughey, *Administrative law: the next frontier for comparative law*, *International & Comparative Law Quarterly*, 2013, 62(1), 56
2. *Ibid*, p.61
3. Krisch and Kingsbury, 'Introduction: Global Governance and Global Administrative Law in the International Legal Order', 17 *EJIL* (2006); Paul Schiff Berman (2012) Reviewed by Sujith Xavier, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders*, *European Journal of International Law*, 2013, 24(3), 981-987
4. Abigail C. Deshman, *Horizontal review between international organizations: a rejoinder to Rosa Raffaelli*, *European Journal of International Law*, 2013, 24(4), 1203
5. Jean L. Cohen, (2012), Reviewed by Grainne de Burca *Globalization and Sovereignty. Rethinking Legality, Legitimacy and Constitutionalism*, *European Journal of International Law* 2013, 24(4), 1246
6. Ingo Venzke (2012) Reviewed by Jan Klabbers, *How Interpretation Makes International Law. On Semantic Change and Normative Twists*, *European Journal of International Law*, 2013, 24(2), 721
7. Benedict Kingsbury, Nico Krisch & Richard B. Stewart, "The Emergence of Global Administrative Law" (2005) 68:3 *Law & Contemp. Probs.* 15
8. Alois Stutzer & Bruno S. Frey, "Making International Organizations More Democratic" (2005) 1 *Review of Law and Economics* 305.
9. Martin Shapiro, "Administrative Law Unbounded: Reflections on Government and Governance" (2001) 8 *Ind. J. Global Legal Stud.* 369
10. Carol Harlow, "Global Administrative Law: The Quest for Principles and Values" (2006) 17 *E.J.I.L.* 187 at 194.
11. Benedict Kingsbury, Nico Krisch, Richard Stewart, *The Emergence of Global Administrative Law*, *IILJ Working Paper 2004/1*, *Global Administrative Law Series*, p. 16 < www.iilj.org > accessed on 5 April, 2014.
12. Richard H. Steinberg, *The hidden world of WTO governance: a reply to Andrew Lang and Joanne Scott*, *European Journal of International Law* 2009, 20(4), 1063-1071
13. *Ibid*, p. 47
14. Woods & Amrita Narlikar, *Governance and the Limits of Accountability: The WTO, the IMF and the World Bank*, 53 *INTERNATIONAL SOCIAL SCIENCE JOURNAL* 569 (2001)

15. James Salzman, *Decentralized Administrative Law in the Organization for Economic Cooperation and Development*, Research Paper No. 77, Duke Law School Legal Studies Research Paper Series (September 2005), p. 197 <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2023&context=faculty_scholarship> accessed on 5 April, 2014
16. Philippe Legrain, *Open World: The Truth About Globalisation 200-01* (2002).
17. Janina Boughey, *Administrative law: the next frontier for comparative law*, *International & Comparative Law Quarterly*, 2013, 62(1), 76
18. Panagiotis Delimatsis, *Concluding the WTO services negotiations on domestic regulation: hopes and fears*, *World Trade Review* 2010, 9(4), 643-673
19. Steve Charnovitz, *Transparency and Participation in the World Trade Organization*, Public Law and Legal Theory paper no. 142, The George Washington University Law School, p. 2 <<http://ssrn.com/abstract=710522>> accessed on 6 April, 2014
20. *Ibid*, p.4
21. Arika Iriye, *Global Community 12-13* (2002)
22. *General Agreement on Tariffs and Trade*, Oct. 30, 1947, 61 Stat. A-11, <http://www.wto.org/english/docs_e/legal_e/legal_e.htm> accessed on 5 April, 2014
23. *THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE* (Lester M. Salamon ed., Oxford Univ. Press 2002)
