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Emergency Action by the WTO Director-General: Global Administrative Law and the WTO's Initial Response to the 2008–09 Financial Crisis*

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Abstract

The WTO's initial reaction to the 2008–2009 financial crisis was taken mainly by its managerial arm, that is, by the Director-General (DG) and the Secretariat and not by its legislative or judicial bodies. This is a novelty for the WTO and illustrates the emergence, even at the otherwise hard-law WTO, of informal administrative actions that go beyond the traditional member-dominated WTO. The actions were in two areas: The DG convened trade finance expert meetings with other organizations and private banks, and the Secretariat prepared reports on trade-related measures enacted across the globe in response to the crisis. The article examines these actions in light of certain concepts and principles of the GAL project. Overall, the Director-General was sensitive in his actions to GAL principles.

* This article, like the others in this symposium on “Global Administrative Law in the Operations of International Organizations” (ed. L. Boisson de Chazournes, L. Casini, and B. Kingsbury), is an extensively revised version of a paper written for the conference on “Practical Legal Problems of International Organizations. A Global Administrative Law Perspective on Public/Private Partnerships, Accountability, and Human Rights” (Geneva, 20–21 March 2009), convened by the Department of Public International Law and International Organization at the University of Geneva Law School and the New York University (NYU) Institute for International Law and Justice (IILJ). A detailed report and other materials are available on the website of the NYU-IILJ “Global Administrative Law Project” at <www.iilj.org/GAL/GALGeneva.asp>.

Keywords

WTO Director-General, WTO Secretariat, financial crisis, emergency, trade finance, Report to the Trade Finance Review Body, global administrative law

1. Introduction

The purpose of this paper is to examine the WTO's initial actions in response to the 2008–2009 financial crisis in light of the concepts and principles of the Global Administrative Law (GAL) project.

The WTO's initial actions to the 2008–2009 financial crisis were taken mainly by and at the initiative of its managerial arm, that is, by the Director-General (Mr. Pascal Lamy of France) and the WTO Secretariat. The action was not spear-headed by its legislative or judicial bodies (the Committees or Councils, or the Dispute Settlement Mechanism, respectively). As will be explained below, these important managerial initiatives can be characterized as administrative action. Moreover, the actions initially undertaken were *ad hoc* and informal and might be regarded as going beyond the express powers of the Director-General and Secretariat as set out in the rules of the organization. This development illustrates the emergence – in response to emergency situations – of informal administrative actions that go beyond the traditional member-dominated hard-law sphere of the WTO. In this paper we examine the degree to which Global Administrative Law principles seem to have influenced the ways in which these actions were taken or critiqued.

Several months after the outbreak of the financial crisis, WTO legislative bodies also began to undertake certain actions, yet in a slower and less urgent manner. Following a call by the Chairman of the General Council on 26 February 2009, WTO Councils and Committees began to review existing notification and transparency provisions on trade measures among WTO members and to consider improvements.¹ This paper focuses, however, on the WTO's initial reaction. In the following section (section 2), we describe this reaction. Then (section 3), we examine and analyze this reaction in light of GAL concepts and principles. Finally (section 4), we offer conclusions.

¹ JOB(09)/30, 26 March 2009, "Report to the Trade Policy Review Body from the Director-General on the Financial and Economic Crisis and Trade-Related Developments", available at <www.wto.org/english/news_e/news09_e/trdev_dg_report_14apr09_e.doc> ("Second Monitoring Report"), 3.

2. The WTO's Reaction to the Financial Crisis

The financial crisis quickly had serious effects for world trade. Two of its consequences attracted particular attention from the WTO: on the one hand, trade finance; on the other hand, bailouts, financial stimulus packages and other possibly protectionist measures.

Trade Finance

Because of the financial crisis, the cost of trade financing sky-rocketed, if it remained available at all. 90 per cent of world trade depends on short term credit. Such credit is crucial especially for developing country trade. Brazil, for example, was particularly hit and prominently raised the issue at the WTO. The shortfall in trade financing was reported to be US\$25 billion in November 2008.²

Although the WTO treaties set out limits on, for example, export credits in the Subsidies Agreement, the WTO's reaction to this drying up of trade finance was not a normative one (e.g. by means of enacting a formal waiver or changing or adding new rules). Instead, the reaction was of a more managerial and informal type.

On 12 November 2008, the Director-General of the WTO convened a meeting at the WTO to discuss the issue with some 30 participants, including other multilateral institutions (e.g. IMF, World Bank's International Finance Corporation (IFC), regional development banks as well as leading private banks (ING, HSBC, Citigroup, Commerzbank, etc.) and credit insurance agencies (the so-called Bern Union)).³ A follow-up meeting took place on 18 March 2009.⁴ The issue was also raised at an informal meeting

²) WT/TF/COH/S/14, 7 May 2009, "Coherence in Global Economic Policy-Making, Report (2008) by the Director-General", 5 ("Coherence Report").

³) "Lamy creates WTO Task Force on Financial Crisis", 14 October 2008, available at <www.wto.org/english/news_e/news08_e/tnc_chair_report_oct08_e.htm> ("Task Force brief"); "Lamy warns trade finance situation deteriorating", 18 November 2008, available at <www.wto.org/english/news_e/news08_e/gc_dg_stat_12nov08_e.htm> ("Trade Finance brief"); WT/WGTDF/W/40, 18 November 2008, Working Group on Trade, Development and Finance, "Expert Group Meeting on Trade Finance – 12 November 2008, Note by the Secretariat" ("First Secretariat Report on Trade Finance Meeting"); Coherence Report, *see supra* note 2, at 1.

⁴) International Center for Trade and Sustainable Development, "Lamy hosts trade finance meeting, will attend G20 summit", available at <ictsd.net/i/news/bridgesweekly/43434/>;

of the Trade Negotiations Committee and is followed up in the Working Group on Trade, Debt and Finance.⁵ The Director-General also referred to the possibility of convening a General Council meeting on the issue under the WTO's so-called coherence mandate⁶ (i.e. coherence amongst, especially, the WTO, IMF and World Bank).⁷ One tangible outcome was that regional development banks and multilateral financial institutions (the Asian Development Bank, the European Bank for Reconstruction and Development, the Inter-American Development Bank and the International Financial Corporation of the World Bank Group) enhanced risk mitigation programs under their trade finance facilities, doubling their capacity from \$4 billion to \$8 billion. Another outcome was that export credit agencies took specific measures with respect to the financing of credit and insurance of trade. For example, China and the United States' export-import banks made available an additional US\$20 billion for trade finance.⁸

Monitoring Bailouts and Stimulus Packages

A second consequence of the financial crisis was the enactment, across the globe, of so-called bailouts to save financial institutions and carmakers, stimulus packages to kick-start the slowing economy, and several types of resurging protectionism to deal with the crisis (such as increased import or export duties, import licensing or trade remedies procedures to support

WT/WGTDF/W/44, 23 March 2009, Working Group on Trade, Development and Finance, "Expert Group Meeting on Trade Finance – 18 March 2009, Note by the Secretariat" ("Second Secretariat Report on Trade Finance Meeting").

⁵ See First Secretariat Report on Trade Finance Meeting, *supra* note 3; and Second Secretariat Report on Trade Finance Meeting, *supra* note 4.

⁶ Trade Finance brief, *supra* note 3; Task Force brief, *supra* note 3.

⁷ Globalization has led to an increased need of cooperation between the WTO and other multilateral institutions, particularly the IMF and the World Bank. The mandate for such cooperation is set out in the agreements under which they have been established and in agreements signed among themselves for mutual cooperation, as well as Ministerial Declarations and Decisions. This is the so-called "coherence mandate". This includes the General Council Decision of November 1996 on Agreements between the WTO, IMF and World Bank; Article III of the Agreement establishing the WTO; the Decision on Achieving Greater Coherence in Global Economic Policymaking; the Declaration on the Contribution of the WTO to Achieving Greater Coherence in Global Economic Policymaking; the Declaration of the Relationship of the WTO with the IMF – all from the Uruguay Round Final Act.

⁸ Coherence Report, *supra* note 2, at 6.

industries that have faced difficulties early on in this crisis). With the world economy in an almost global recession, these trade-related measures, bailouts and stimulus packages came in a broader atmosphere of renewed pressure for economic protectionism, which for a time seemed potentially reminiscent of the beggar-thy-neighbor policies of the 1930s Great Depression.

As with the problem of trade financing, the initial reaction at the WTO was not a formal or normative one. At least in the early stages described here, no formal dispute settlement proceedings were filed, nor were waivers or new rules proposed. Instead, the Director-General set up an internal Task Force on the Financial Crisis within the WTO Secretariat (headed by a WTO official, Richard Eglin). One of the main outcomes of this Task Force was the preparation of reports on trade-related developments associated with the financial crisis. These reports list country-specific trade-related measures, bailouts and stimulus packages enacted across the globe. A first monitoring report was issued on 23 January 2009,⁹ and a second one on 26 March 2009.¹⁰ This “radar picture” or “pulse-taking” of the response by WTO members to the crisis was subsequently presented by the Director-General and discussed collectively at informal meetings of the Trade Policy Review Body (TPRB),¹¹ where all WTO members have a seat and can raise their comments and remarks. It was agreed in the TPRB that this “radar picture”¹² should be regularly updated by the WTO Secretariat,¹³ which can

⁹) JOB(09)/2, 23 January 2009, “Report to the Trade Policy Review Body from the Director-General on the Financial and Economic Crisis and Trade-Related Developments”, available at <www.tradeobservatory.org/library.cfm?refid=105042> (“First Monitoring Report”).

¹⁰) Second Monitoring Report, *supra* note 1.

¹¹) The presentation of the First Monitoring Report took place on the 9th of February, 2009. The Director-General presented the Second Monitoring Report on the 14th of April 2009.

¹²) “Radar picture” is the term used by Director-General Lamy. Although the idea is not to unearth and decide on breaches of the WTO treaty, we cannot resist the remark that the main purpose of “radar pictures” in traffic control is to collect evidence so as to fine speeding conductors ... But see footnote 1 in the First and Second Monitoring Reports, *supra* notes 9 and 1, respectively: “This is intended to be a purely factual report and is issued under the sole responsibility of the Director-General. It has no legal effect on the rights and obligations of Members, nor does it have any legal implication with respect to the conformity of any measure noted in the report with any WTO Agreement or any provision thereof. This report is also without prejudice to Members’ negotiating positions in the Doha Round”.

¹³) “Report to the General Council by Director General Lamy in his role as Chairman of the Trade Negotiations Committee”, 26 and 27 May 2009, available at <www.wto.org/english/

be viewed as an acceptance by the Member States of the Director-General's initial action in this respect.

This informal monitoring mechanism stands in sharp contrast to the hard law and dispute settlement approach for which the WTO is well known. What the long-run impact, if any, of this informal review process will be, remains an open question. Even though the WTO Secretariat admits to collecting part of its information from public media sources, most people familiar with the dynamics of the process agree that the process may serve an important data collection and information sharing purpose. The hope has also been expressed that publication and collective discussion of members' responses to the crisis may exert some peer pressure and thereby avoid some instances of protectionism, albeit only at the margins.¹⁴

Finally, it may be noted that the financial crisis also spurred privately-run, independent monitoring initiatives. For example, a group of research institutes and trade experts from around the world teamed up to create Global Trade Alert (GTA). GTA's mission is to provide real time information on state measures taken during the downturn that are likely to affect trade.¹⁵ There is no official link between the WTO's monitoring process and the Global Trade Alert, although informally the latter is using the information gathered by the formal. In addition, whereas the WTO has to be extremely careful not to cross the line between reporting and monitoring, on the one hand, and passing legal judgment on WTO consistency, on the other hand, GTA as a private initiative is much freer to pass judgment on any of the measures listed. In that sense, the two initiatives complement each other.

3. Assessment and Questions

From a GAL perspective, the WTO's initial reaction to the financial crisis presents interesting features and questions. In this section we first examine the WTO's reaction to the financial crisis within the framework of certain GAL-relevant concepts, in particular, the type of global administration

[news_e/news09_e/tnc_chair_report_26may09_e.htm](#).

¹⁴) Mr. Lamy himself mentioned in this regard that the purpose of this monitoring exercise is to increase transparency and peer pressure among members so as to preempt a shift towards protectionism. See Pascal Lamy, "We must ensure Aid for Trade promises are kept", 29 May 2009, available at <www.wto.org/english/news_e/sppl_e/sppl126_e.htm>.

¹⁵) See <www.globaltradealert.org>.

that undertook the action,¹⁶ and the fact that it was an emergency action. We then examine the appropriateness of these actions in accordance with relevant GAL principles and requirements, in particular, whether the actions were undertaken within the Secretariat's mandate,¹⁷ as well as questions of transparency, procedural participation, and reasoned decision-making.¹⁸

The Type of Global Administration

The GAL project distinguishes between five idealized types of global administration, including administration by formal international organizations, transnational networks between national regulators, and hybrid intergovernmental-private arrangements.¹⁹

In classifying the WTO's actions, the monitoring reports would seem to fall under the category of "administration by a formal international organization". Although surely this action was taken with the support of major WTO members, the interesting feature from a GAL perspective is that the initiator of both responses was the WTO Secretariat or the Director-General, that is, the managerial arm of the organization, and not its political/legislative arm (such as the Committees or General Council) or judicial arm (the dispute settlement mechanism). Although there was *ex post* implicit approval of this action (e.g. when members discussed the reports), at its origin WTO members did not formally make a decision to launch it so that countries could not exercise their veto to prevent it. This is something that is rather exceptional and controversial in this organization which prides itself to be "member-driven". Moreover, in the monitoring process of trade-related measures, bailouts and stimulus packages, it is also the WTO Secretariat that does the research and compiles the list. This has further highlighted the delicate balance between, on the one hand, Secretariat initiative, neutrality and freedom to act and, on the other hand, member state control (in what is conventionally seen as a strict principle-agent relationship).

¹⁶ B. Kingsbury *et al.*, "The Emergence of Global Administrative Law", 68:3–4 *Law and Contemporary Problems* (2005), 15–61, at 20, available at <iilj.org/GAL/documents/TheEmergenceofGlobalAdministrativeLaw.pdf>.

¹⁷ Kingsbury *et al.*, *id.*, at 43–44.

¹⁸ Kingsbury *et al.*, *supra* note 16, at 37–40.

¹⁹ The other two mentioned are: distributed administration conducted by national regulators, and administration by private regulators. See Kingsbury *et al. supra* note 16, at 20–23.

As regards its actions on trade financing, the WTO has acted in an interesting and quite novel way: the meetings on trade financing not only included other international organizations, but also private banks and export credit agencies. This cooperation does not fall clearly in any of the idealized suggested types, but could possibly be classified as an informal type of public-private network.

Informal Emergency Action

The WTO reaction constitutes informal emergency action where formal, treaty-based mechanisms may be too ponderous to take action in time. The formal mechanism of, for example, WTO dispute settlement serves one function of the WTO (e.g. defining, punishing and deterring defection from the WTO treaty especially where the treaty presents a prisoners' dilemma where WTO members have incentives to breach the rules). The informal mechanism of Trade Policy Reviews and the monitoring reports serve another and quite distinct function of international organizations, namely information sharing, data collection and peer pressure in something more akin to a coordination or assurance game.

Mandate Issues

One of the main roles of global administrative law is to achieve internal administrative accountability, especially through ensuring the legality of administrative action.²⁰ Therefore, the emergency actions, spearheaded by the Secretariat, raise the question of whether the action fell within the mandate of the WTO and was pursued according to the rules. It is noteworthy that the Director-General went to great pains to find formal legal hooks on which he could hang his initiatives.

For the trade finance meetings, the Director-General relied on the WTO's coherence mandate.²¹ Moreover, the meetings on trade finance were followed-up and reported to the Working Group on Trade, Debt and Finance.²²

²⁰ Kingsbury *et al.*, *supra* note 16, at 43–44.

²¹ Coherence Report, *supra* note 2, at 1, 4–6. On the Coherence mandate, *see also supra* note 7.

²² Task Force brief, *supra* note 3; "Experts discuss problems of trade finance", 18 November 2008, available at <www.wto.org/english/news_e/news08_e/trade_finance_12nov08_e.htm>;

As regards the monitoring reports, the Director-General relied on paragraph G of the Trade Policy Review Mechanism as the source of his authority,²³ stating that the second report “is a preparatory contribution to the report by the Director-General that is called for in Paragraph G of the TPRM mandate and that aims to assist the TPRB to undertake an annual overview of developments in the international trading environment which are having an impact on the multilateral trading system.”²⁴

Interestingly, in the first monitoring report, the Director-General did not refer expressly to the source of his authority, and the inclusion in the second report of the express statement of the basis for the action suggests that the Director-General went to greater lengths to justify the legitimacy of his actions, perhaps due to the apprehension or criticism encountered after the first report. In addition, one should not forget that the initial reaction took place in what was undoubtedly an emergency situation. As a result, even if some formal rules may not have been respected initially, the action could still be justified as a legitimate and timely one in the face of an urgent crisis.

The legitimacy of these actions was in fact contested after the issuance of the first monitoring report. Bolivia and other developing countries contested the WTO’s monitoring of the trade-related measures, bailouts and stimulus packages on the ground that there was no formal mandate to do so, and that not all 153 WTO members had been involved in the process of setting up the mechanism (Bolivia called for the “G-153” to meet, rather than the G-20 or any other sub-group of WTO members). Bolivia required further precision on, more specifically: (i) the purpose of the activity, (ii) how long it would last, (iii) the periodicity of reports and meetings, and (iv) special rules for developing countries.²⁵

First Secretariat Report on Trade Finance Meeting, *supra* note 3; Second Secretariat Report on Trade Finance Meeting, *supra* note 4.

²³) Paragraph G states: “An annual overview of developments in the international trading environment which are having an impact on the multilateral trading system shall also be undertaken by the [Trade Policy Review Body]. The overview is to be assisted by an annual report by the Director-General setting out major activities of the WTO and highlighting significant policy issues affecting the trading system”.

²⁴) Second Monitoring Report, *supra* note 1, at fn. 1.

²⁵) <www.twinside.org.sg/title2/wto.info/2009/twninfo20090211.htm>; <ictsd.net/i/news/tni/42017/>; <www.nytimes.com/2009/02/10/business/worldbusiness/10protect.html?_r=1&scp=1&sq=wto%20of%20financial%20crisis&st=cse>.

Without opining on whether the Secretariat acted within its mandate or exceeded it, technically speaking, where the WTO would exceed its mandate, opposing WTO members could block any decision or progress (arguably even the adoption of the agenda of a particular meeting), since the fall-back rule of WTO decision-making is and remains consensus. Conversely, even if the Secretariat were to have exceeded its mandate in this matter, the fact that WTO Members went ahead with the process implies at least tacit consent of the WTO membership for the Secretariat to continue its action. A so far unexplored alternative avenue or mandate to pursue (or contest) WTO activity in response to the financial crisis could be so-called “situation complaints” under GATT Article XXIII:1(c). This mechanism can be triggered by any WTO member single-handedly in respect of “any other situation” that is not claimed to be a breach of the WTO treaty, nor a so-called non-violation complaint. The negotiating history of this provision (written in 1947, not long after the Great Depression) refers to global economic crises which transcend individual countries as the typical “situation” that the drafters had in mind. Under WTO dispute settlement rules, this “situation” would then be automatically examined by a WTO panel. Yet, panel reports could only be adopted by positive consensus of all WTO members (and no appeal seems possible, see DSU Article 26.2). However, even if an eventual “situation” panel report were not adopted, the fact that it was written and issued may well be sufficient to serve the purpose of information gathering, neutral analysis and peer pressure.

Transparency

Transparency of global governance actors, including transparency of international organizations and member states to each other, towards the public, as well as internally within the organization is one of the principles highlighted by the Global Administrative Law project.²⁶ This raises the question whether the WTO not only promoted transparency between member states but also adhered itself to transparency towards the public and within the organization in the actions it undertook in reaction to the crisis.

The monitoring reports clearly aim at increasing transparency between member states in the enactment and implementation by WTO members of their different responses to the financial crisis. Such transparency,

²⁶ Kingsbury *et al. supra* note 16, at 37–39.

neutral reporting and collective appreciation and evaluation is in line with substantive principles of GAL, imposed, in this case, not on the international organization itself, but on the member states by and through the international organization. The Director-General stated in this regard that the purpose of the monitoring is to increase transparency and peer-pressure among members so as to preempt a shift towards protectionism.²⁷

As regards transparency towards the general public, on the negative side, the informal meetings where the Secretariat's "radar picture" is discussed are closed to the public. On the positive side, the WTO has openly reported to the public on the establishment and progress of this process. Moreover, while the first report remained a formally confidential document and is not available on the WTO site (even though it can be readily found on the internet²⁸), the second report was made open to the public and is easily available on the WTO website.²⁹ Director-General Lamy explicitly stated that this was done "in the interest of transparency".³⁰ As regards the trade finance meetings, the reports of the meetings are also open to the public and easily accessible on the WTO website.³¹

Transparency of the Secretariat towards WTO members is another, important matter. The Secretariat's monitoring reports were presented to the Trade Policy Review Body where all WTO members have a seat and can raise their comments and remarks. The Secretariat has also been transparent in its working methods: it has published the sources from which it has derived its conclusions, and it is also clearly seeking greater participation on behalf of member states in the preparation of the reports (see on this matter the discussions under the paragraphs on "reasoned decisions" and "procedural participation" respectively below).

As regards the trade finance meetings, it is unclear whether member states have access to information as to how participating parties are selected. But as noted above, they do have access to reports of the meetings.

²⁷) Lamy, *supra* note 14.

²⁸) First Monitoring Report, *supra* note 9.

²⁹) Second Monitoring Report, *supra* note 1.

³⁰) Director-General's Introductory Remarks to the Second Report, 14 April 2009, available at <www.wto.org/english/news_e/news09_e/trdev_14apr09_e.htm> ("DG's Introductory Remarks to the Second Report").

³¹) First Secretariat Report on Trade Finance Meeting, *supra* note 3; Second Secretariat Report on Trade Finance Meeting, *supra* note 4.

Procedural Participation

Another requirement of Global Administrative Law is the principle of “procedural participation”. According to this principle, a member state or any other body affected by the decision of an international organization should have the right to comment and have relevant information considered before a decision is taken in its respect.³²

While the monitoring reports expressly note that they have no intent to determine whether a listed measure is WTO consistent,³³ the report may clearly affect member states – whether at a political level, or indirectly in a future legal dispute. From a GAL perspective, therefore, the question that arises is whether affected member states have been able to comment and to present relevant information before being listed in the report.

At first, the Secretariat prepared the report without active member state participation. In preparing the first report, the Secretariat compiled the information from public media sources only, and no reporting or notifications were filed or required by members themselves.³⁴ However, this has changed and the Secretariat is now encouraging participation. In fact, following concerns of members as to the accuracy of the first report, Mr. Lamy invited all members and observer governments to provide information about trade-related or financial measures. Subsequently the Director-General called for increased participation of member states in future reports, saying that the Secretariat expects the active participation and help of all delegations in order to ensure that the reports are correct and up-to-date.³⁵ Moreover, in preparing the second report, the Secretariat took account of concerns raised and comments made by the Trade Policy Review Body, as well as by the General Council, on how to improve the quality of the reports.³⁶

³²) Kingsbury *et al.*, *supra* note 16, at 37–38.

³³) “The inclusion of any measure in this report or its annexes implies no judgment by the WTO Secretariat on whether or not such measure, or its intent, is protectionist in nature. Moreover, nothing in this report implies any judgment, either direct or indirect, as to the consistency of any measure referred to in the report with the provisions of any WTO Agreement or such measure’s relationship to the global financial or economic crises.” *See* Annex 1 of Second Monitoring Report, *supra* note 1, at fn. 1.

³⁴) “Lamy: ‘We must remain extremely vigilant’”, 9 February 2009, available at <www.wto.org/english/news_e/news09_e/tp_r_09febo9_e.htm>.

³⁵) DG’s Introductory Remarks to the Second Report, *supra* note 30.

³⁶) *Ibid.*

In practice, however, not all members are interested in participating and providing information. Many prefer to remain silent, and only twenty four delegations (including the E.U. 27) replied to Mr. Lamy's call for the second report, of which 13 are members of the G20. This number is well below the number of economies involved.³⁷ The Secretariat, therefore, prepared the second report based on the information provided by delegations, as well as on a variety of other public and official sources.³⁸

As regards the trade finance meetings, it is unclear how the participating parties, particularly the private parties, were selected, and whether others that may have an interest in this matter were informed or given opportunity to express their views. Clearly GAL principles could potentially be invoked as indicative of useful normative guidance were controversy to arise about this.

Reasoned Decisions

Reasoned decision-making is an additional emerging principle of Global Administrative Law.³⁹ Accordingly, the question that arises, especially in the context of the monitoring reports, is whether the Secretariat provided appropriate justification as to why a member has been listed as undertaking trade-related or financial measures. Since the report is a factual report, this goes back to the question of whether the Secretariat explained on what sources it relied in producing the list. In the second monitoring report, the Secretariat expressly distinguishes between "verified" and "non-verified" information. "Verified" information is information retrieved from official documents or received from the respective delegations, whereas "non-verified" information is information that has been retrieved from public sources.⁴⁰ It then notes for each measure the name of the source of the information. It accordingly appears that the Secretariat provided appropriate reasoning as to how it reached its decision to list certain states and their measures.

4. Conclusion

In what is clearly a novelty for the WTO, it was the WTO's managerial arm – the Director-General and the Secretariat – that dominated the WTO's

³⁷) *Ibid.*

³⁸) Second Monitoring Report, *supra* note 1, at 3.

³⁹) Kingsbury *et al.*, *supra* note 16, at 39.

⁴⁰) Second Monitoring Report, *supra* note 1, *see* the Annexes.

initial reaction to the financial crisis, without an explicit *ex ante* mandate or approval by the members themselves. Although surely backed by member states, it was the Director-General that initiated the monitoring reports and the trade finance meetings. These actions were informal, and could be seen by some as going beyond the express powers set out in the rules of the organization. While reaction by other arms of the organization remains a possibility – as illustrated by the subsequent review by the WTO's Councils and Committees of notification and transparency requirements regarding trade measures amongst members – this development illustrates the emergence, even at the otherwise hard-law WTO, of informal administrative actions that go beyond the traditional member-dominated WTO.

We have examined these actions in light of the GAL project, and some of its relevant concepts and principles. In its monitoring exercise, the WTO has acted in its formal mode as an international organization, though primarily by its managerial arm. On the trade finance issue, it has acted in a rather contemporary approach in an informal network with other international organizations and private bodies. It remains to be examined what impact, if any, these different structures have on the application of GAL principles.

Overall, our impression is that the Director-General was sensitive in his actions to GAL principles, particularly after being confronted with initial criticism. He made an effort to demonstrate that the actions are legal and within his mandate. Furthermore, apart from an initial hiccup regarding the (formally still confidential) first monitoring report, monitoring reports and reports on the trade finance meetings are publicly available. The second monitoring report was also prepared with greater member state participation and the Director-General is encouraging affected member states to further participate and to provide information for future monitoring reports. Moreover, the reports justify their conclusions by referring to explicit references. In respect of trade finance, however, it remains unclear how the private banks participating in the trade finance meetings were selected and whether other relevant actors were informed or given the opportunity to present their views.

Finally, this new type of initiative by the Director-General sheds light on the relevance of GAL principles. The GAL principles provide tools to examine and enhance the legitimacy of administrative action, particularly at a time where international organizations such as the WTO may be expected to provide leadership in times of crisis.