

# A Global Law Perspective of the WTO

**Panagiotis Delimatsis**

Associate Professor of Law and Co-Director, Tilburg Law and Economics Center (TILEC)  
Tilburg University, The Netherlands  
p.delimatsis@uvt.nl

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## Abstract

This note attempts to map the relevance of global law advocacy for the WTO. In this regard, it understands global law as an attempt to describe a growing decrease of the regulatory State and an ensuing increase of private rule-making. Global law intends to generate new thinking about global governance and its patterns of influence and power. Few instances of creeping global law are identified, whereas the note concludes with some thoughts on much-needed future research on a range of topics ranging from the role of NGOs to the struggle against intrinsic inequalities of the multilateral trading system.

## Keywords

global law; WTO; transnational law; producer welfare; consumer welfare; NGOs

## 1. Introducing the WTO

Created only in 1995, the potentially broad scope of the World Trade Organization (WTO) attracted the attention and critique of many, including international law scholars and political scientists, export-oriented companies and import-competing groups, domestic authorities and the public, including domestic consumer groups and global non-governmental organizations (NGOs). This was only a matter of time: the creation of the WTO and its evolution in the last fifteen years arguably constitutes a paradigm shift in the way trade matters are regulated, through a combination of *centripetal* forces, bringing more integration in terms of, for instance, regulating intellectual property protection, the use of technical regulations or sanitary and phytosanitary measures, and *centrifugal* forces, which result from the nature of contemporary globalized trade occurring at the very peripheries of the four corners of the world by individual economic operators or companies.

The WTO is the institutionalized umbrella of the multilateral trading system (MTS) succeeding the previous diplomacy-based General Agreement on Tariffs and Trade (GATT).<sup>1</sup> The WTO is a semi-autonomous regime that promulgated its own administrative, legislative and judicial procedures and therefore exemplifies a certain degree of self-sufficiency. At the same time, when viewing the everyday activities, institutional structures, ways of decision-making and settlement of disputes among Members, the WTO is quite similar to other international organizations (IOs).<sup>2</sup> In addition, general international law applies to the WTO unless there is a WTO rule going explicitly to the contrary. Thus, to all intents and purposes, the WTO is an international treaty (the international equivalent of a contract) concluded among States, which is to be interpreted in accordance with general international law.<sup>3</sup> At equipoise, WTO is yet another contextualized regime of international law.<sup>4</sup>

The WTO is an immediate derivative of the development of global trade, but also the development of an increasingly globalized society. It has resulted from ever-increasing global economic interdependence and has admittedly been instrumental in *accentuating* this phenomenon. Through its manifest paradigm shift towards higher levels of rule-orientation, particularly when performing its executive and judicial functions,<sup>5</sup> the WTO has arguably instigated institutional reform in IOs such as the Codex Alimentarius Commission whose activities may constitute inputs for the WTO activities or which may otherwise be somehow connected to the WTO.

This short note does not aim to delve in the abstract into the current theoretical debates about the exact contours of the concept of global law and its cognates, such as post-national law.<sup>6</sup> It understands global law as an attempt to describe a growing *decrease* of the role of the State in regulatory matters, coupled with a frenetic *increase* of the regulatory activity of private parties at the transnational level, stemming from the globalization

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<sup>1</sup> Also J Jackson, 'The Evolution of the World Trading System – The Legal and Institutional Context' in: D Bethlehem, D McRae, R Neufeld, I van Damme (eds), *The Oxford Handbook of International Trade Law* (Oxford University Press, 2009) 30–53.

<sup>2</sup> P Delimatsis, 'The Fragmentation of International Trade Law' (2011) 45(1) *Journal of World Trade* 87.

<sup>3</sup> Cf J Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?' (2001) 95 *American Journal of International Law* 535, 538.

<sup>4</sup> Cf Appellate Body Report, *US – Gasoline* 17.

<sup>5</sup> Cf J Weiler, 'The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement' Harvard Jean Monnet Working Paper 9/00, 2000.

<sup>6</sup> For this, see N Walker, 'Intimations of Global Law', in this special issue.

of economic activity. It also considers the concept of global law, much as appealing as it is, to be yet another effort to think anew as to the normative question of future global governance and the morphology of global patterns of power and influence.<sup>7</sup> Indeed, just like debates relating to constitutionalism or constitutionalization of international law; global administrative law; constitutional pluralism and so on, discussions about global law constitute an alternative intimation of the law of the future.

The WTO can be viewed through the lens of most of these endeavors.<sup>8</sup> Having said this, one should note at the outset that one of the trends that results in so much discussion about law's normativity at the global level is the fact that an ever-globalized and interdependent economy also contributes to the creation of more law in general. Everything is legalized from economic transactions to politics at the international level. Thus, it is the evolution of law that allows for so much debate over the institutions, rules and principles. However, the sources of law multiply and thus reconceptualizing what we consider to be law will alter the way we understand legal science.<sup>9</sup>

This note constitutes a very tentative and humble attempt to map the relevance of global law advocacy for the WTO. Few instances of creeping global law are identified, whereas the note concludes with some thoughts on much-needed future research on a range of topics ranging from the role of NGOs to the struggle against intrinsic inequalities of the multilateral trading system.

## 2. WTO Law as an Instance of Incremental Global Law?

Increased globalization of economic activity leads to a shift of regulatory power from public to private and from national to global.<sup>10</sup> Indeed, the WTO as a forum (albeit State-centered) for the regulation of international

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<sup>7</sup> Cf D Kennedy, 'The Mystery of Global Governance' in J Dunoff and J Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press 2009) 38.

<sup>8</sup> Cf T Cottier, P Delimatsis and K Gehne, 'Fragmentation and Coherence in International Trade Regulation: Analysis and Conceptual Foundations' in T Cottier and P Delimatsis (eds), *The Prospects of International Trade Regulation – From Fragmentation to Coherence* (Cambridge University Press 2011) 1; see also J Dunoff, 'The Politics of International Constitutions: The Curious Case of the World Trade Organization' in Dunoff and Trachtman (eds), (n 7) 178.

<sup>9</sup> Cf Kennedy, (n 7) 55.

<sup>10</sup> F Cafaggi, 'New Foundations of Transnational Private Regulation' (2011) 38(1) *Journal of Law and Society* 20.

economic activity is interesting for a global law theorist because boundaries are blurred between various layers of law and governance: public and private, national, supranational/regional and international are inextricably intertwined. As an institution, the WTO is overtly overwhelmed by such abundance of self-interested pullers, suggesting different (sometimes even conflicting) directions and exerting varying influence.

From a global law perspective, the transformation of international trade regulation reflects one of the most intriguing challenges that the WTO faces nowadays: how to square an institutional legal tradition and culture based on the sovereign equality of the States, a State-centered mentality and the infamous secrecy and confidentiality of trade negotiations (keyword: Member-driven organization) with the incremental, yet perceivable – and, in fact, pervasive nowadays – Stateless reality of commercial transactions as well as the rising of NGOs arguing for increased participatory rights? This competition for participation and voice can easily transform into a competition for authority in an ever-increasing number of instances, raising a whole new bundle of questions relating to hierarchy or, as some would argue, the adequate (that is, manageable) level of heterarchy.

If one considers global law as a field where lack of a commonly agreed ordering among legal orders reins, then the WTO could very well fit the confines of such a construct; then, whereas the WTO remains a Member-driven IO, much of its output can no longer be deemed as the outcome of work and activity exclusively originating in States and their organs. Rather, much of this output reflects views and input by domestic special interest groups; transnational corporations; non-governmental organizations representing what is commonly termed ‘the global civil society’ and other private constituencies. This transformation of the global trade regulator *par excellence* is irreversible and thus much of ‘blue-sky’ thinking takes place in the relevant scholarship as to the future governance and indeed structure of the multilateral trading system, overestimating<sup>11</sup> or underestimating<sup>12</sup> the role that the WTO can play, as well as identifying the potential sideplayers and stakeholders beyond the States.

In the meantime, the evolution of transnational private regulation continues apace. The term ‘transnational private regulation’ describes the

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<sup>11</sup> See, for instance, A Guzman, ‘Global Governance and the WTO’ (2004) 45 *Harvard International Law Journal* 303.

<sup>12</sup> See, for instance, R Howse, ‘From politics to technocracy – and back again: The fate of the multilateral trade regime’, (2002) 96 *American Journal of International Law* 94.

emerging body of rules created by private actors in a manner that leapfrogs national borders. Driven by the forces of globalization of business, these actors offer handy solutions to globally active economic operators through rule-making activities that take place ‘in the shadow of the law’ and the traditional forms of State regulatory making.<sup>13</sup> The constant increase of the role of private parties in regulatory activities and the desire of such parties to assume a regulator-like role, very similar to the one that was traditionally taken up by the State, constitutes a phenomenon that is driving legal change and continuous reflexion as to the normativity of the future law of world trade and the group of constituencies which will promulgate it. At present, with respect to the idea of global law theory upgrading individuals to the driving force of change,<sup>14</sup> nothing revolutionary is to be reported on the front of the WTO when one looks at the current state of affairs: indeed, human beings are at the center of the WTO actions only in part, that is, in their capacity as traders or producers.<sup>15</sup>

In its early case-law, the *US – Section 301* Panel recognized that the multi-lateral trading system is composed not only of States but mostly of individual economic operators and thus one of the primary objectives of the system is to generate and maintain certain market conditions which would allow this individual activity to flourish. It went on to confirm the importance that the WTO and its predecessor, the GATT, had attributed to the indirect impact of legislations on individuals. Thus, the Panel found that, contrary to traditional public international law, in a treaty like the WTO ‘the benefits of which depend in part on the activity of individual operators the legislation itself may be construed as a breach, since the mere existence of legislation could have an appreciable “chilling effect” on the economic activities of individuals’.<sup>16</sup>

In addition, producer welfare and its protection is an essential *raison d’être* for the contingent protection agreements of the WTO, that is, the agreements relating to safeguards, anti-dumping and subsidization. Consumer welfare, on the other hand, is a concern only indirectly and no

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<sup>13</sup> For an economic perspective on alternative modes of governance, see the treatise by A Dixit, *Lawlessness and Economics – Alternative Modes of Governance* (Princeton University Press 2004).

<sup>14</sup> For the sake of argument, let’s assume that such a theory exists. In this respect, we follow here the scholarship developed by R Domingo.

<sup>15</sup> See, inter alia, Panel Reports, *Argentina – Hides and Leather*, paras 11.76-11.77, *EC – Selected Customs Matters*, paras 7.107-8.

<sup>16</sup> Panel Report, *US – Section 301*, paras 7.73-7.91.

requirement exists as to it being taken into account when formulating domestic trade policies or, indeed, global trade rules.<sup>17</sup>

Therefore, instances of global law, at least as understood by Rafael Domingo,<sup>18</sup> whereby the individuals take center stage in a post-modern legal landscape, cannot yet be found in the WTO. Having said this, the WTO does constitute an important complementary layer of governance exerting unprecedented influence in the regulation of economic activity domestically. If the erosion of national sovereignty is happening in any global institution, then this is the WTO. Discussions about the infamous ‘S word’ and the legitimacy of the WTO,<sup>19</sup> notably its judicial branch,<sup>20</sup> have quickly become mainstream in the wake of controversial rulings by the WTO adjudicating bodies and notably the Appellate Body, the WTO’s last instance standing court, over politically charged and highly mediatized disputes, particularly in the developed world. Such rulings, for instance, condemned the EU ban on genetically modified products (GMOs); the EU preferences for the importation of bananas from the EU former colonies (the so-called ACP countries); or the US import prohibition of shrimps based on environmental grounds.<sup>21</sup>

The debate over sovereignty has quickly been contextualized to include borderless issues such as global subsidiarity;<sup>22</sup> efficient power allocation and institutional choice in a multi-layered environment;<sup>23</sup> inequality and global responsibility or ethics;<sup>24</sup> cooperation for the production and protection of global public goods;<sup>25</sup> cooperation to address global

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<sup>17</sup> Cf P Mavroidis, ‘Come Together? Producer Welfare, Consumer Welfare, and WTO Rules’ in E-U Petersmann, *Reforming the World Trading System – Legitimacy, Efficiency, and Democratic Governance* (Oxford University Press 2005) 277.

<sup>18</sup> See R Domingo, *The New Global Law* (Cambridge University Press 2010) 121ff.

<sup>19</sup> Cf A Buchanan and R Keohane, ‘The Legitimacy of Global Governance Institutions’ (2006) 20 *Ethics and International Affairs* 405.

<sup>20</sup> Cf R Howse, ‘The Most Dangerous Branch? The WTO Appellate Body Jurisprudence on the Nature and Limits of the Judicial Power, in T Cottier and P Mavroidis (eds), *The Role of the Judge in International Trade Regulation* (University of Michigan Press 2001).

<sup>21</sup> Ironically, it was the most powerful countries that insisted in the inclusion of an effective dispute settlement system during the Uruguay Round negotiations: J Trachtman, ‘The Constitutions of the WTO’ (2006) 17 *European Journal of International Law* 623, 634.

<sup>22</sup> See R Howse and K Nicolaidis, ‘Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?’ (2003) 16(1) *Governance* 73.

<sup>23</sup> See, in particular, J Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law* (Cambridge University Press 2006).

<sup>24</sup> Cf Kennedy (n 7) 66.

<sup>25</sup> See, for example, G Shaffer, ‘Recognizing Public Goods in WTO Dispute Settlement: Who Participates? Who Decides? The Case of TRIPS and Pharmaceutical Patent Protection’ (2004) 7(2) *Journal of International Economic Law* 459.

concerns<sup>26</sup> and so on. This reflects a broader fading of the once alluring concept of sovereignty. As noted by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in *Tadic*, '[d]ating back to a period when sovereignty stood as a sacrosanct and unassailable attribute of statehood, this concept recently has suffered progressive erosion at the hands of the more liberal forces at work in the democratic societies'.<sup>27</sup> Beyond doubt, sovereignty is a concept in crisis and there does not seem to be much to do to avoid the transition beyond the traditional notion of the Westphalian Nation-State.

In addition, one should not lose sight of the fact that the regulation of global commerce is binary and thus it would be a naïve understatement to suggest that no trace of global law, understood as an individual-centered law, is identifiable in the regulation of global commerce. Indeed, much of global commerce nowadays is largely conditional on the regulatory activities of private bodies, the so-called *lex mercatoria*. This regulatory usurpation that is taking place in the area of commerce is not something extraordinary. States were acquainted with it very early in the human history and the situation has not changed much ever since, despite few intervals of 'State bullying' from time to time. In addition, it may even be misleading to consider as antagonists the State and the private quasi-regulators in this respect: cross-fertilization and complementarity may be the keywords rather than fervent rivalry.<sup>28</sup>

The role of the WTO is fairly modest in this regard: its regulatory activity evolves around facilitating trade, for instance, through the requirement that WTO Members abide by procedural obligations relating to transparency, due process, proper notification and publication of amendments to law and so on, with a view to ensuring predictability and security in the marketplace. In an era where disorderliness of rules and institutions is the very trait of economic globalization and the importance of the source of rulemaking seems to have vanished, the WTO needs to stick to the basics: ensuring non-discrimination and equality of competitive opportunities in the marketplace. This may be more difficult than one would think at first blush: to start with, economists would predict that, in case of an ongoing,

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<sup>26</sup> T Cottier and Sofya Matteotti-Berkutova, 'International Environmental Law and the Evolving Concept of "Common Concern of Mankind"' in T Cottier, O Nartova and S Bigdeli (eds), *International Trade Regulation and the Mitigation of Climate Change* (Cambridge University Press 2009) 21.

<sup>27</sup> *Prosecutor v Tadic* (Jurisdiction) (1996) 3 Intl Human Rights Rep 578, para 55.

<sup>28</sup> Cf R Michaels, 'The True Lex Mercatoria: Law Beyond the State' (2007) 14(2) *Indiana Journal of Global Legal Studies* 447.

important flow of private rules that companies prefer to use over public rules, States may have no incentive to switch towards more efficient rules due to the uncertainty as regards ‘buyers’ of their product, i.e. regulatees that use such regulations.<sup>29</sup>

Legally speaking, various legal concepts within the WTO legal system are anachronistic at best: take the case of the definition of what constitutes a ‘measure’ for the purposes of dispute settlement in the WTO.<sup>30</sup> Some form of involvement by the State is a *conditio sine qua non* for the application of any obligation under the agreements on trade in goods.<sup>31</sup> Such interpretations, a legacy of the GATT State-centered tradition, are becoming less and less defensible.

### 3. A Future Research Agenda for the WTO from a Global Law Perspective

A global law-related research agenda for the WTO would evolve around three axes: first, the identification of a set of principles akin to the global law advocacy; second, the empowerment of non-State constituencies and a more intensive bridge-building with the transnational private regulators; and, third, improving the still unconvincing actions to create a more inclusive world trading system that is brimful with development opportunities for all.

With respect to principles, traces of a cosmopolitan or global law view are already discernible in dispute settlement. In *US – Underwear*, the Appellate Body, in an attempt to give flesh to the fundamental principle of transparency, found that promoting full disclosure of governmental acts affecting Members and private persons and enterprises, *whether of domestic or foreign nationality*, is an overarching objective of the multilateral trading system. For the Appellate Body, there is on the ground a community of traders that is worth protecting irrespective of nationality. Due process

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<sup>29</sup> See E Carbonara and F Parisi, ‘Choice of Law and Legal Evolution: Rethinking the Market for Legal Rules’ (2009) 139 *Public Choice* 461.

<sup>30</sup> Cf T Voon and A Yanovich, ‘What is the Measure at Issue?’ in A Mitchell (ed), *Challenges and Prospects for the WTO* (Cameron May 2005).

<sup>31</sup> Having said this, the definition of measure under the General Agreement on Trade in Services (GATS) is more promising, as it covers private regulation and adopts an all-encompassing definition of a measure affecting trade in services. See also the rather unique case of export subsidies made and funded by private parties in Appellate Body Report, *Canada – Dairy (Art 21.5 – New Zealand and US II)* para 95.



shall be universally applicable implying that persons (that is, not only States) affected, or likely to be affected, 'by governmental measures imposing restraints, requirements and other burdens, should have a reasonable opportunity to acquire authentic information about such measures and accordingly to protect and adjust their activities or alternatively to seek modification of such measures.'<sup>32</sup>

Few years later, the controversial issue of *amicus curiae* briefs and the ensuing right to communication and information arose. In *US – Shrimp*, the Appellate Body, against all odds, accepted the filing of *amicus curiae* briefs by NGOs, only to find that they were not helpful in resolving the dispute. In *EC – Sardines*, the Appellate Body would go a step further to also accept and consider an *amicus curiae* brief submitted by a private individual. However, the Appellate Body also stated earlier that *no legal right* exists for individuals or NGOs to make submissions or to be heard by the WTO adjudicating organs; this remains a matter of their discretion.<sup>33</sup>

When it comes to the empowerment of non-state actors and increased participation, a caveat has to be mentioned at the outset: it appears that access to the WTO decision-making is unbalanced to the benefit of global companies and less of transnational private regulators such as professional bodies or standard-setting organizations. This is because of obvious public choice reasons that go beyond the scope of this note.<sup>34</sup> On the other hand, any calls for more democracy within the WTO shall also be treated with caution. Recall that the WTO is a reflection of its Members' national systems with all the imperfections that such democracies have in terms of participation, deliberation, inclusiveness and the like. The fact remains that more transparency brings with it more interest in the activities of the WTO and thus more interest in influencing those activities.

The attribution of observer status to NGOs has been a first step. Clearly, the red line is attributing to the NGOs something more than an observer status.<sup>35</sup> NGOs have been very active and quickly managed to become considerably savvy in the relevant technical issues under discussion at the WTO. This applies with particular force in the so-called 'trade and (...)' issues. Thus, by involving the NGOs more in its work along functional lines, the WTO and its Members receive a valuable support, which can enhance

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<sup>32</sup> Appellate Body Report, *US – Underwear* 21.

<sup>33</sup> Appellate Body Report, *US – Lead and Bismuth II*, para 41.

<sup>34</sup> The reference work in this respect is G Grossman and E Helpman, 'Protection for Sale' (1994) 84(4) *American Economic Review* 833.

<sup>35</sup> CFS Charnovitz, 'The WTO and Cosmopolitics' in E-U Petersmann (ed), (n 17) 438, 444.

the WTO legitimacy, authority and effectiveness.<sup>36</sup> Sticking with States is increasingly becoming old-fashioned and imprudent.<sup>37</sup> In addition, empirical evidence suggests that NGOs may be less critical once they become 'part of the system', thereby contributing to enhancing public support for trade liberalization.<sup>38</sup>

In this respect, a more important concern may relate to the representative function of the NGOs currently active at the WTO yard. There is an increased feeling that there are unorganized, ordinary people who mistrust the WTO, as exemplified by the demonstrations during MCs or other high-level meetings at the WTO. These people do not feel to be represented by any State official nor NGO. There seems to be an overall perception that State representatives join WTO negotiations or meetings with a significant bias to the detriment of the people on the ground. If this is indeed the case, openness, that is, open-door bargaining, decision-making, and dispute settlement, may be the only possible and sustainable *modus operandi* for the WTO if the organization wants to gain public support.

Public hearings of disputes are now reality and additional initiatives towards this direction such as the WTO Public Forum or the WTO Open Doors Initiative can only be praised. The same goes for live webcasting or press releases where non-technical language is used. Indeed, what is sought after is not transparency in the form of increased communication of technical documents, which few outside the WTO are able to assess and act upon.<sup>39</sup> This type of transparency may actually be perilous and have the opposite effect if it produces piles of documents that few understand and thus read.

As to transnational private regulators, the WTO can only benefit from more intensive cooperation with such constituencies. To be sure, there is a misalignment of incentives in this case, as private bodies have few incentives to cooperate due to their desire to maintain existing rents. As the interest of multilateral trade negotiations is moving towards the identification and elimination of non-tariff barriers almost exclusively, the cooperation of private regulators is critical. Thus, a more inclusive governance of

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<sup>36</sup> See D Esty, 'Linkages and Governance: NGOs at the World Trade Organization' (1998) 19(3) *University of Pennsylvania Journal of International Economic Law* 709, 716.

<sup>37</sup> Cf A Kuper, *Democracy Beyond Borders – Justice and Representation in Global Institutions* (Oxford University Press 2004) 164–165.

<sup>38</sup> D Esty, 'The World Trade Organization's Legitimacy Crisis' (2002) 1 *World Trade Review* 7.

<sup>39</sup> Cf Kuper (n 37) 180.

the WTO, open to private parties, seems to be a self-fulfilling prophecy in the field of global commerce.

Finally, with respect to the creation of a more inclusive system allowing for the development of all WTO Members, two things are worth mentioning: first, whereas we have witnessed an increasing integration of the developing world in the global trading system in recent decades, such integration has been highly unequal, with some countries benefitting more than others. The adoption of redistribution mechanisms and the participation of domestic constituents in the deliberation process of the WTO can be highly informative and, for this simple reason, beneficial. Such initiatives do not necessarily entail direct money transfers from the WTO to specific groups or countries. Global distribution of benefits is perhaps addressed for the first time through the Cotton initiative, involving four cotton-producing countries, Benin, Burkina-Faso, Chad and Mali, but the final deal is yet to be concluded. More determined action is needed, along with innovative legal drafting.

Arguably, support for development cannot be confined to the introduction of transitional periods during which developing countries and LDCs are exempted from application of certain rules. This has led to the alienation of several Members vis-à-vis the key WTO objective of achieving liberalization and restructuring the domestic market to allow for this. Indeed, transformation of the global regime regulating trade will most likely lead to more responsible governance domestically as well. Global challenges such as climate change, environmental degradation, protection of human dignity and public health cannot wait for long to be addressed. As interdependent regimes will increasingly realize the cul-de-sac that a solitary stance leads to, they will be looking for reconciling strategies which have to be carefully designed, along with the relevant actors, to enhance consumer welfare. For the WTO and other economic organizations, setting the improvement of consumer welfare as a priority for a modern trade agenda becomes pressing. The same goes for the largely neglected issue of the role of the WTO in *enabling* trade.

A new generation of researchers will have to pick up those issues and give satisfactory answers and effective solutions. Global law constitutes a new window to look at the evolution of the real world and its vicissitudes. Great expectations surround legal science. Legal engineering will either make or break economic globalization, but will also change law as we know it. Interesting times are ahead, indeed.