Global trade-enabling law

Delimatsis, Panagiotis

Published in:
Indian Journal of International Economic Law

Publication date:
2021

Document Version
Publisher's PDF, also known as Version of record

Global Trade-Enabling Law

*Panagiotis Delimatsis**

Abstract *Trade regulation may never have been in more flux than it is nowadays. Apart from the emergence of 'megaregionals' (more recently, the Regional Comprehensive Economic Partnership – RCEP, or the Comprehensive and Progressive Trans-pacific Partnership–CPTPP) and the difficulties in pursuing the objectives of the Doha Development Agenda, the increased heterogeneity of interests within the World Trade Organization (WTO) puts into question its ability to achieve its central objective of free(r) trade. While internally rethinking the future of the WTO, it seems opportune to discuss, and factor in the realities of everyday global trade. To this end, this Article argues that the stateless reality of commercial transactions requires that state-driven, trade-related rule-making and stateless rule-making should be analysed in tandem if we are to make any sense of how global trade works and evolves. It further advocates a new theory of global trade-enablinglaw that focuses on a critical review of all rules that aim to mitigate legal risks of economic actors when they partake in transboundary commercial activities. This theory would emerge from a norm-user perspective that focuses on the functionality of the law. Global trade law-related research should focus on and evolve around three, broadly-defined axes: first, the identification and critical review of a set of principles akin to the global law advocacy; second, the analysis of the phenomenon of the empowerment of non-State constituencies, including firms, and a more intensive bridge-building with not only the semi-autonomous regimes of transnational private regulators but also with other international organizations (IOs) (be it governmental, non-governmental or hybrid), whose activities have an impact on commercial transactions; and, third, the intensification of the still scattered, unsuccessful efforts to create a more inclusive global trading system brimming with development opportunities for all. Action in these three areas shall determine the sustainability and resilience of global trade law.*

* Professor of Law and Director, Tilburg Law and Economics Center (TILEC), Tilburg University, the Netherlands. The author would like to thank Fabrizio Cafaggi, Rob Howse, Randall Lesaffer, Hans Lindahl, Petros Mavroidis, Anne Peters and Joel Trachtman for enlightening discussions and insightful comments. Excellent research assistance was provided by Apoorva Nangia and and Saurabh Gupta and is gratefully acknowledged. Remaining errors are the author's alone.

> *[t]he greatness of our city brings it about that all the good things from all over the world flow in to us, so that to us it seems just as natural to enjoy foreign goods as our own local products [...] We throw open our city to the world, and never by alien acts exclude foreigners from any opportunity of learning or observing, although the eyes of an enemy may occasionally profit by our liberality.*
>
> *(Pericles Funeral Oration in Thucydides, History of Peloponnesian War, ca. 404 B.C., 2.38-39).*

I. INTRODUCTION

This Article does not aim to delve into the abstract of the current theoretical debates about the exact contours of the concept of global law and its cognates, such as post-national law.[1] It tentatively, and perhaps reductively, understands global law as an attempt to comprehend a growing decline of the State's role in regulatory matters, coupled with a frantic increase of the regulatory activity of private parties at the transnational level, both of which challenge existing legal configurations and introduce a global dimension to law. It also considers the concept of global law, as appealing as it is, to be yet another effort to think anew about the normative question of future global governance and the morphology of global patterns of power and influence.[2] Indeed, just like debates related to constitutionalism or constitutionalization of international law, global administrative law or constitutional pluralism, discussions about global law constitute an alternative intimation of the law of the future. The World Trade Organisation (WTO) can be viewed through the lens of most of these debates. With its quasi-universality in terms of addressees and substantive legal reach, global trade-enabling law can be regarded as an expression of an issue-specific global legal order. This legal

---

1 On this, see Neil Walker, *Intimations of Global Law* (2015).

2 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.

order, however, is compartmentalized, affecting its performance vis-à-vis its constituents. In what follows, I will argue that a recalibration of global trade law that adheres to a norm-user perspective may lead to a more resilient theory of the role that law can play in regulating trade in the future.[3]

At the outset, one should note that a key trend that results in so much discussion about law's normativity at the global level is economic globalization, and relatedly, increased interdependence and interconnectedness. These phenomena are closely associated with, and result in the creation of multiple legal or quasi-legal frameworks, putting forward competing conceptions of sovereignty over overlapping sites of jurisdiction. Therefore, it is the evolution and expansion of law that allows for, feeds, and informs the debates over institutions, rules, and principles.

This Article attempts to map the relevance of global law advocacy for the WTO. Arguably, the concept of global law, as viewed in the commercial realm, could be a unique opportunity to view rules enabling trade holistically, seeking new mechanisms for interoperability, and coherence. In this regard additional work is needed, with a view to identifying conflict rules and creating some sort of order in a currently disorderly legal landscape with overlapping authorities. Crucially, this Article argues that such work will be meaningful if it adopts a norm-user perspective- that is, it puts the needs of the subjects of such rules at the centre of a reconfigured global trade law.

Section II reviews the WTO through this critical lens and discusses recent developments within this context. Section III entails an informed account, and identifies the richness and complexity of those forces that enable trade, while calling for a new scholarship that adequately combines private commercial law and WTO law and views the law regulating international commerce from a norm-user perspective. In Section IV, few instances of creeping global-enabling trade law are identified. The Article concludes with some thoughts on much-needed future research on a range of topics ranging from the role of non-state actors in the multilateral trading system to the struggle against intrinsic inequalities of the multilateral trading system. This is to track down the fundamental traits of a much-needed emerging global trade-enabling law, which will put an emphasis on institutional resilience,

---

[3] 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 *Ruling the World? Constitutionalism, International Law and Global Governance* (Jeffrey Dunoff and Joel Trachtman, eds., 2009) 178.

interoperable regulatory frameworks, varying levels of legal certainty, economic growth and sustainability.

II. THE WTO

A. The WTO and general International Law

No discussion on international trade law can occur without referring to the WTO.[4] As glorious as the end of the 20th century was for the Multilateral Trading System (MTS) that emerged from the Uruguay Round of Multilateral Trade Negotiations, the beginning of the 21st century only had unpleasant surprises in store, raising questions about WTO's legitimacy, credibility, and resilience. Despite the insurmountable difficulties in concluding the Doha Development Agenda, the most recent round of multilateral trade negotiations, the WTO mechanics and substantive rules have been at the centre of scholarly analysis and public attention, and have become a frequent target of the anti-globalization movement. Although the demise of the Appellate Body, the WTO's last instance standing court, in December 2019, and the resignation of the WTO Director-General in August 2020 were the last of a series of unfortunate events that led to an institutional crisis, the WTO is at its best in terms of geographical coverage of its rule, for, after the accession of China and Russia, it accounts for over 95% of global trade.

As the prime expression of international *economic* law, WTO is yet another contextualized regime of international law.[5] It is a semi-autonomous regime that promulgated its own administrative, legislative, and judicial procedures and therefore exemplifies a certain degree of self-sufficiency, legally speaking. At the same time, with regard to its everyday activities, institutional structure, ways of decision-making, and settlement of disputes among Members, the WTO does not differ in any substantial way from other international organizations (IOs).[6] On the contrary, for all practical purposes, the WTO is an international treaty concluded among States, which is to be

---

4 WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization, 15 April, 1994, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* 4 (1999), 1867 UNTS 154, 33 ILM 1144 (1994) [hereinafter Marrakesh Agreement or WTO Agreement]. Note also the most recent WTO Ministerial Declaration at Nairobi recognizing 'the centrality and primacy of the multilateral trading system': WTO Ministerial Declaration, adopted in Nairobi on 19 December 2015, WT/MIN (15)/DEC, ¶19.

5 Cf Appellate Body Report, United States – Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, adopted on 20 May 1996, DSR 1996 (I) 3 at 17.

6 Panagiotis Delimatsis, "The Fragmentation of International Trade Law" (2011) 45(1) Journal of World Trade 87.

interpreted in accordance with general international law.[7] Public international law applies to the WTO unless there is a WTO rule limiting such application.[8]

For most of the WTO history and until the recent Appellate Body crisis unfolded in 2019, experts of MTS praised the two-instance dispute settlement mechanism.[9] For many, the WTO represented an *evolution* of the traditional IO model as we know it from the post-World War II era, due to its enhanced adjudicative function. Scholars have even spoken of an 'international economic law revolution' and used it as an example for sweeping institutional reforms of similar magnitude at the international level.[10] This was, *inter alia*, because the WTO had the most advanced, relatively depoliticized[11] system of settling disputes in international law, including mandatory recourse to a third party adjudication system and a sophisticated, quite effective – and thus unparalleled, for international law standards – mechanism of (prospective) remedies in case of non-compliance with the rulings of the WTO adjudicating bodies.[12] Clearly, the overwhelming majority of the specialized WTO scholars were enchanted by the advanced tools[13] that the adjudicatory mechanism of the WTO was equipped with since its creation in the mid-90s.[14]

However, the emphasis on the dispute settlement system of the WTO neglects or seeks to undermine significant regulatory advances at the multilateral level that the advent of the WTO has brought about. Being once the province of commercial diplomacy and politics, the WTO has displayed

---

7 Cf Joost Pauwelyn, "The Role of Public International Law in the WTO: How Far Can We Go?" (2001) 95 AM. J. INT'L L. 535 538; and Petros Mavroidis, "No Outsourcing of Law? WTO Law as Practices by WTO Courts" (2008) 102 AM. J. INT'L L. 421.

8 Cf Appellate Body Report, Peru – Agricultural Products, paras 5.112-13.

9 See Robert Howse, "The World Trade Organization 20 Years On: Global Governance by Judiciary" (2016) 27(1) European Journal of International Law 9; also Padideh Ala'i, "The Vital Role of the WTO Appellate Body in the Promotion of Rule of Law and International Cooperation: A Case Study" (2019) 44 Yale Journal of International Law Online 86. For an early account that described the delicate position of the Appellate Body, see Richard Steinberg, "Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints" (2004) 98(2) American Journal of International Law 247.

10 See Ernst-Ulrich Petersmann, "How to Reform the United Nations? Lessons from the 'International Economic Law Revolution" (1998) 53(2) Aussenwirtschaft 206.

11 Cf Bernard Hoekman and Petros Mavroidis, "To AB or Not to AB? Dispute Settlement in WTO Reform" (2020) 23(3) Journal of International Economic Law 1.

12 Having said this, the retaliation mechanism of the WTO is everything but perfect. See also Robert Lawrence, *Crimes and Punishments? Retaliation under the WTO* (Peterson Institute for International Economics, 2003).

13 Cf Martti Koskenniemi, "Enchanted by the Tools? An Enlightenment Perspective" (2020) 35(3) American University International Law Review397.

14 However, for a critique, see Petros Mavroidis, "The Gang That Couldn't Shoot Straight: The Not So Magnificent Seven of the WTO Appellate Body" (2016) 27(4) European Journal of International Law 1107.

significant rule-making activity, covering a wide array of issues ranging from technical regulations to phytosanitary measures to enforcement of intellectual property rights and good governance provisions to the benefit of foreign service suppliers such as those relating to import licensing, trade facilitation or adoption of trade-restrictive technical regulations, and food safety measures domestically.[15]

Equally important is the observation that a rules-based system such as the WTO, just like the GATT previously, still requires the active involvement of its members to advance its rule-making function. Thus, the WTO did not start from a clean slate, as politics and power, even if contained and often constrained by increased legalization, is still a staple of the MTS.[16] The GATT legacy is cherished in that the WTO is a 'Member-driven' IO, that is, an organization in which its Members are required to set the agenda and carry out the functions of the WTO, assisted by a rather small secretariat of some 625 officials.[17]

The juridification of the WTO was regarded early on as heralding a new era of an international rule of law in international relations.[18] The rule of law, however, should be seen through the lens of internal conflicts, power politics and the currently imperfect construct of international law and fragility of IOs in particular, which in the case of the WTO is characterized by significant path dependence,[19] structural bias,[20] and shifting economic power. A shift – at least, in part – of regulatory power in commercial matters, and thus of sovereignty in favour of the MTS, has taken place. This may not sit well with politicians that aim at reshaping economic issues at the domestic level (as they are mandated to do) and global level (as they often desire to do).

Within the MTS, sovereignty is a context-specific concept, i.e., it should be seen through the lens of trade: customs administration rather than

---

15 See, for an early account, Joost Pauwelyn, "The Transformation of World Trade" (2005) 104 Michigan Law Review 1.

16 See also Mark Wu, "Rethinking the Temporary Breach Puzzle: A Window on the Future of International Trade Conflicts" (2015) 40 Yale Journal of International Law 95.

17 As of 2019 end, the WTO had 625 officials of which over 60 per cent come from Europe and 165 (that is, almost 30 per cent of the total) were of French nationality. For further statistics (for e.g., based on gender), see <http://www.wto.org/english/thewto_e/secre_e/intro_e.htm> accessed 20 December 2020.

18 See Bernhard Zangl, "The Rule of Law: Internationalization and Privatization – Is there an Emerging International Rule of Law?" (2005) 13(1) European Review 73; See also Judith Goldstein et al., "Introduction: Legalization and World Politics" (2000) 54(3) International Organization 385.

19 Cf Paul Pierson, "Increasing Returns, Path Dependence, and the Study of Politics" (2000) 94 (2) American Political Science Review 251.

20 Cf Martii Koskenniemi, "The Politics of International Law – 20 Years Later" (2009) 20(1) European Journal of International Law 7.

territoriality is decisive in the context of the MTS.[21] WTO members are not necessarily States within the meaning of international law. Rather, customs territories can become Members of the WTO. For instance, Hong Kong or Chinese Taipei are WTO Members, just like the European Union is.[22] This creates dynamics within the WTO negotiations that are quite different from other IOs.

Arguably, however, this unique feature of the MTS also depoliticizes the importance of the WTO to a certain degree. What the WTO crisis has shown in recent years is that some of its strongest proponents, including the USA, did not challenge its utility. One reason for that may indeed be the almost irreversible nature of global economic entanglement that has occurred in the last three decades, driven by the internationalization of finance and technological advances. If one takes into account the globalized nature of business and capital nowadays, as well as the paradigm shift in international ownership of business (i.e., in global value chains, transnational production sharing, or foreign investment),[23] then alliance formation is increasingly idiosyncratic within the WTO.

In addition, this peculiarity of the WTO Membership reflects in its principles, as it renders certain concepts and principles from general international law (sovereign equality, good faith, equity, and so on) either not directly transposable to the WTO legal order, or possibly applicable on the condition that they can be reconciled with trade-specific principles with which, again, general international law does not always sit comfortably (such as reciprocity, progressive liberalization, or increasing participation of developing countries in the MTS).

B. Collective action, authority, and compliance at the WTO

Homogeneity is not a trait of the WTO epistemic community ,and nor is lack of conflict and contestation as WTO Membership grows. The anti-trade politics of recent times and American isolationism have brought such traits to the fore. However, short-term trends calling for a more power-based

---

[21] Territoriality as a constitutive element of statehood has not always been important in human history. See Randall Lesaffer, *European Legal History: A Cultural and Political Perspective* (2009) 382.

[22] Note, for instance, that certain IOs would not accept a request from the EU for accession, as their constitutional charter would not allow accession of entities which are not States. More strikingly, the EU is not party to the United Nations Convention on the Law of the Sea (UNCLOS).

[23] Cf Emily Blanchard, "Re-evaluating the Role of Trade Agreements: Does Investment Globalization Make the WTO Obsolete?" (2010) 82(1) Journal of International Economics 63.

approach in dispute resolution cannot cancel out significant progress made on the ground, and liberalization achieved, for more than half-century. A peculiar sense of community has preserved the WTO in motion, through fire and water, among failed Ministerial Conferences (MCs), intense general council meetings ,and controversial rulings by the dispute settlement organs. This sense of community (or, else, of 'us' and 'them') with a shared credo that entails the long-term protection, through mutually advantageous arrangements (alias, lowering trade barriers), of the public good that freer trade represents, has been present already in the GATT years.[24]

As the WTO gradually becomes a more mature institutional construct and a legal order vested with significant normative power to regulate global trade matters,[25] the WTO community, while more diverse than ever, retains its unifying feature: the ideology of free trade that it serves and pursues through collective action. Free trade is the non-rival club good that only WTO Members can enjoy (and nourish).[26] Collective action is meant to harness governmental ingenuity with respect to the creation of trade barriers, being tariffs or non-tariff impediments to trade flows. Thus, whereas trade is an arm of diplomacy[27] with the WTO's legislative branch representing an institutionalized form of commercial diplomacy,[28] this sense of community also transforms WTO Members (or, at least, a critical mass thereof) into gatekeepers of an important, yet abstract, creed.

The most important of privileges reserved to the members of the 'trade club' and a cornerstone of the WTO edifice is the guarantee of non-discrimination:[29] the so-called most-favoured nation (MFN) principle ensures that the best available trade measure applied by a WTO Member will be extended to all parties to the club, even if this measure entails rights granted to non-members of the club. This means that the most favourable treatment

---

[24] See also Robert Howse, "From Politics to Technocracy – and Back Again: The Fate of the Multilateral Trade Regime" (2002) 96(94) American Journal of International Law 98.

[25] We follow the broad definition of legal order proposed by Hadfield and Weingast. See Gillian Hadfield and Barry Weingast, "What is Law: A Coordination Model of the Characteristics of Legal Order" (2012) 4(2) Journal of Legal Analysis 471-514. Rather than coercion or uniformity, a legal order requires the presence of an institution that deliberately provides for a normative classification scheme of right and wrong and monitors behaviour and compliance of the participating agents. See also Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 81-90.

[26] James Buchanan, "An Economic Theory of Clubs" (1965) 32(125) Economics 1.

[27] Judith Goldstein, "The Political Economy of Trade: Institutions of Protection" (1986) 80(1) American Political Science Review 162.

[28] Cf Eric Stein, "International Integration and Democracy: No Love at First Sight" (2001) 95(3) American Journal of International Law 502.

[29] Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, adopted 20 April 2004, DSR 2004 (III) 925 [101].

that a given member of the club applies in each instance will be immediately and unconditionally extended to all members of the club.[30] Non-members are excluded from participation and consumption of such benefits.

Moving beyond non-discrimination, maintaining stability in trade relations through continuous adherence to the WTO principles becomes an objective of utmost importance. A 'balance of terror' is present in the MTS, as famously advocated by the former GATT Director-General, Arthur Dunkel, whereby a short-term interest to unilaterally have recourse to protectionism is outweighed by the long-term interest of Members to abide by the WTO rulebook because of the fear that the whole MTS may unravel due to retaliatory action or 'tit-for-tat' protectionism.[31] Economic theory supports such an interpretation of the rationale behind compliance with WTO law.[32] In addition, several scholars have attempted to explain Members' continuous commitment to the WTO by equating such commitment to the concept of a bicycle, suggesting that the more countries continue with liberalization efforts, the more the value of their (previous and present) commitments increases.[33]

Seen from this angle, compliance with the WTO is also in line with a given State's intention to protect its self-interests.[34] To be sure, such interests do not necessarily align themselves, but they are typically of similar nature and thus, cooperation becomes possible provided that the relevant actors adjust their behaviour to the actual or anticipated preferences of others in the medium run.[35] Other State actors may be adjusting their behaviour due

---

30 See Art. 1 GATT 1994: General Agreement on Tariffs and Trade 1994, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex. 1-A, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* 17 (1999), 1867 UNTS 187, 33 ILM 1153 (1994) [hereinafter GATT 1994]. Also see Henrik Horn and Petros Mavroidis, "Economic and Legal Aspects of the Most-Favoured-Nation Clause" (2001) 17 European Journal of Political Economy 233-279.

31 See Robert Axelrod, "The Emergence of Cooperation Among Egoists" (1981) 75(2) American Political Science Review 306; and Gene Grossman and Elhanan Helpman, "Trade Wars and Trade Talks" (1995) 103(4) Journal of Political Economy 676.

32 See Kyle Bagwell and Robert Staiger, *The Economics of the World Trading System* (2003).

33 See the seminal treatise by Jagdish Bhagwati, *Protectionism* (1988); Also see James Bacchus, "The Bicycle Club: Affirming the American Interest in the Future of the WTO" (2003) 37(3) Journal of World Trade 439. Interestingly, economists have shown that even in the case of retaliation, a country can still have an interest in unilaterally raising its levels of trade protection. See, for instance, Harry Johnson, "Optimum Tariffs and Retaliation" (1953-1954) 21(2) Review of Economic Studies 142. If so, then ideological reasons described above may be equally decisive in the decision of a country to abide by the WTO rulebook or not.

34 Thus, in line with the theory of rational choice. See Jack Goldsmith and Eric Posner, *The Limits of International Law* (2005).

35 See Robert Axelrod and Robert Keohane, "Achieving Cooperation under Anarchy: Strategies and Institutions" (1985) 38(1) World Politics 226-254.

to a particular set of values that are inherent in their actions, but have also shaped the MTS for decades, creating a set of social norms and habits that generations of diplomats have abided by. Thus, reputation costs shall arguably be taken into account when designing domestic trade policies and occasionally imposing trade barriers.[36] In addition, there is a signalling effect that may lead Members to act in a WTO-consistent way: the desire to act in an unconstrained manner is kept at bay due to the long-term interest in successfully regulating the behaviour of others through WTO rules.[37]

Regardless of the incentives that WTO Members have regarding adherence to WTO law, violations of WTO law and temporary breaches that may postpone non-compliance occur. However, blatant and repeated violations of key WTO rules are in principle not to be observed even in an era of financial hardship,[38] and of a multipolar and polycentric international commerce whereby a growing number of emerging, increasingly emancipated economies (keyword: BRICS) claim a more prominent role in the international arena, and where domestic anti-trade politics lead to bilateral tensions of significant magnitude, as it occurred in the case of the Sino-US trade war during the Trump administration.

This does not mean that global commercial affairs operate in a rosy environment. On the contrary, the MTS still struggles to find its direction and address protectionist actions that manifest themselves through important and persistent violations of the national treatment obligation- in the aftermath of the global financial crisis- that have amounted to an unwinding of global trade cooperation in the last decade.[39] The Sino-US trade war was only the tip of the iceberg in that regard, calling for a renewed commitment to the multilateral trade cause, but also for a reflection about the purpose and role of trade law and policy that aligns with the welfare-state objectives at the domestic level.[40]

---

[36] This is reminiscent of a constructivist explanation of international law. See, for instance, Jutta Brunnée and Stephen Toope, "Constructivism and International Law" in *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Jeffrey Dunoff and Mark Pollack eds., 2013) 119.

[37] Also see Nico Krisch, "International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order" (2005) 16(3) European Journal of International Law 369, 379.

[38] See *The Great Recession and Import Protection: The Role Temporary Trade Barriers* (Chad Bown ed., 2011).

[39] See also Simon Evenett, "The Smoot-Hawley Fixation: Putting the Sino-US Trade War in Contemporary and Historical Perspective" (2019) 22 Journal of International Economic Law 535.

[40] See Harlan Grant Cohen, "What is International Trade Law For?" (2019) 113(2) American Journal of International Law 326.

In this state of affairs and geopolitical uncertainty, more than ever before, every Member has an interest in predictable behaviour and rule compliance. This is yet another reason why transparency has gained increasing traction in recent years: as a counterweight to manage trade uncertainty and institutional inertia.[41] Transparency is inextricably linked with legitimacy and, ultimately, compliance.[42] A law-making process perceived to be illegitimate is likely to be disregarded or undermined.[43] In a world of varying levels of power whereby acquiring information is not always equally straightforward for all relevant parties,[44] transparency ranks among the most basic *desiderata* in the grammar of governance of IOs.

The WTO is an immediate derivative of the development of global trade, but also of an increasingly globalized society. It has resulted from an ever-increasing global economic interdependency but has also been instrumental in *accentuating* this phenomenon.[45] The role of law has been influential in both directions. Empirical evidence when viewed from a comparative institutional perspective suggests that the WTO is a highly legalized international institution.[46] This is one of the features that relatively few IOs currently display.

Legalization is a dynamic process and entails, among others, relatively precise rules and obligations, and consequently, more precision and transparency as to the law (both in its current and future state) that needs to be adhered to.[47] Through its manifest paradigm shift towards higher levels of rule-orientation particularly when performing its executive and judicial functions,[48] the WTO has also instigated institutional reform – including

---

41 See generally, Marianna Karttunen, *Transparency in the WTO SPS and TBT Agreements: The Real Jewel in the Crown* (2020).

42 See Thomas Franck, "The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium" (2006) 100(1) American Journal of International Law 90; See also Panagiotis Delimatsis, "Transparency in the WTO Decision-Making" (2014) 27 Leiden Journal of International Law 701, 706.

43 Cf Alan Boyle and Christine Chinkin, *The Making of International Law* (2007) 25.

44 See also Stephen Morris and Hyun Song Shin, "The Social Value of Public Information" (2002) 92(5) American Economic Review 1521-1534.

45 See also Francis Snyder, "The Gatekeepers: The European Courts and WTO Law" (2003) 40 Common Market Law Review 313.

46 Kenneth Abbott et al, "The Concept of Legalization" (2000) 54(3) International Organization401, 405.

47 Still, legalization also is a political process, as the content of law is determined through political processes. At the same time, these processes are highly influenced and actually shaped by the existing rules, institutions and procedures. See Kenneth Abbott and Duncan Snidal, "Law, Legalization and Politics: An Agenda for the Next Generation of IL/IR Scholars" in *Interdisciplinary Perspectives on International Law and International Relations- The State of the Art* (Jeffrey Dunoff and Mark Pollack eds., 2013) 33, 35-36.

48 Cf Joseph Weiler, "The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement" (2000) Harvard Jean Monnet Working Paper 9/00.

more legalization – in IOs such as the Codex Alimentarius Commission or the International Organization for Standardization (ISO), whose activities may constitute inputs for the WTO activities or which may otherwise affect global trade.[49]

Such cross-fertilization does not only work horizontally, that is, among IOs, but also vertically, that is, within the interstices between the WTO and the respective domestic regulatory frameworks and institutional settings of its members. Good governance provisions such as those relating to transparency or effective review of administrative decisions within the WTO treaty abound, obliging WTO Members to adjust their laws to comply with their WTO obligations. At the same time, domestically successful regulatory recipes,such as managed liberalization of network industries, have found their way to the WTO negotiating table and subsequently led to multilateral liberalization in areas such as telecommunications or financial services under the auspices of the WTO General Agreement on Trade in Services (GATS).[50]

In this respect, the WTO functions as a legitimate *diffusion point* of regulatory practices in commercial matters, thereby creating an increasingly crystalized global legal culture in the public regulation of trade. Still, the very functioning of the WTO largely depends on the cooperation and ensuing implementation of rules by national and subnational bodies or mechanisms. Thus, the amalgamation of global and local is constitutive of global commerce[51] and determinative of the compliance-pull of the WTO norms.[52]

This should not be taken to mean that compliance is evenly divided among the WTO membership, nor that the WTO is equally effective in terms of domestic regulatory reform. It would be naïve not to factor in, in any assessment of compliance with WTO law, the current diversity in WTO membership. To start with, not all WTO Members share the same starting point: certain developed countries have exported their rules to the GATT/WTO legal framework, thereby ensuring that it is in line with their regulatory preference and structures from the outset. For those countries, compliance with the MTS rules is relatively easy.

---

[49] See also Panagiotis Delimatsis, "Into the Abyss of Standard-Setting: An Analysis of Procedural and Substantive Guarantees within ISO" (2014) TILEC Discussion Paper 2014-042, accessed November 2014.

[50] GATS: General Agreement on Trade in Services, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex. 1-B, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* 284 (1999), 1869 UNTS 183, 33 ILM. 1167 (1994) [hereinafter GATS].

[51] See also Boaventura de Sousa Santos, *Toward a New Common Sense- Law, Globalization and Emancipation (*2004).

[52] Cf Harold Koh, "Why Do Nations Obey International Law?" (1997) 106(8) Yale Law Journal 2599.

Compliance is less evident for those countries in which compliance with such rules would necessitate major reforms and changes in institutional traditions, regulatory preferences, or even long-standing values. The WTO's predecessor, the GATT, was a developed-country construct, developing countries being for a long time largely 'passive bystanders' in the creation and increased legalization of the MTS.[53] In addition, special and differential treatment for developing countries has been part of the GATT historical pedigree, enshrined in its fabric. With the evolution from the GATT to the WTO, a more demanding approach was adopted. Such an approach is less reflected in the WTO texts but is more clearly articulated in bilateral investment treaties, preferential trade agreements, international agreements coupling funding with structural economic reforms (conditionality), and the very nature of contemporary trade and the ensuing movement of capital (including human capital).

Thus, regulatory change and variations in policies domestically are not only the result of the WTO's normative compliance-pull but of a more concerted effort by all countries globally to create a more business-friendly domestic regulatory environment with a view to reaping investment-related benefits.[54] Even so, it is less obvious and thus constitutes a contemporary challenge for the MTS, whether – if at all – the necessary upward communication channels are in place to allow for local concerns to be taken into account and potentially influence international decision-making and future WTO rules. Admittedly, such efforts have been made in certain areas,[55] but they seem to be scattered and unorganized. More crucially, in the post-pandemic economic landscape, the WTO would have the difficult task of convincing its members that are focused on strengthening their self-reliance and self-sufficiency to engage in cooperative efforts. For that to happen, the WTO services and trade policy scholars would have to intensify their research to demonstrate how certain initiatives and new agenda items create benefits that cater for even distribution.[56]

---

[53] See Gilbert Winham, "The Evolution of the Global Trade Regime", in John Ravenhill (ed.), *Global Political Economy* (2nd edn., 2008) 137, 168.

[54] See also L. Martin, "Against Compliance", in Jeffrey Dunoff and Mark Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations- The State of the Art* (2013).

[55] See, for instance, Christoph Beat Graber and Mira Burri-Nenova (eds.), *Intellectual Property and Traditional Cultural Expressions in a Digital Environment* (2008).

[56] See, for instance, Parth Patel, Paresha Sinha and Suraksha Gupta, "Globalization and Trade in a Post-Pandemic World: India's Atma-Nirbhar Bharat Abhiyaan" (*The Diplomat*, 10 July 2020).

C. 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.[57] The WTO, as a State-centred negotiating forum that touches upon the regulation of international economic activity, is an interesting case study from a global law viewpoint. This is because boundaries are blurred between various layers of trade law, policy,and governance: public and private, national, supranational/regional,and international are inextricably intertwined. The same phenomenon is seen in substantive themes: 'trade and…' issues have repeatedly been discussed in the literature, often in an interdisciplinary manner blending international law with international relations or economics, but a coherent theory is yet to emerge.[58]

As an institution, the WTO is overtly overwhelmed by an abundance of self-interested pullers pointing to different and often conflicting directions.[59] Such pullers exert varying levels of influence, depending on the issue area at stake. In addition, and in part due to the acknowledgment that trade is rarely conducted by States alone, the WTO pioneered in that it has experimented with various forms of participation of non-State actors, from granting observer status to tolerating the collaboration of State representatives with non-governmental organizations (NGOs) in the negotiating rooms in Geneva and elsewhere during MCs. By the same token, lobbying is not only happening in the various capitals[60] but also during the WTO meetings.

From a global law perspective, the transformation of international trade regulation reflects one of the most intriguing challenges that the WTO faces nowadays: that of how to square an institutional legal tradition and culture based on the sovereign equality of the States, a State-centric mentality and the infamous secrecy and confidentiality of trade negotiations (keyword: Member-driven organization) with the incremental, yet perceivable – and, in fact, nowadays, pervasive – the stateless reality of commercial transactions as well as the rise of NGOs arguing for increased participatory rights.[61] This

---

[57] See Fabrizio Cafaggi, "New Foundations of Transnational Private Regulation" (2011) 38(1) Journal of Law and Society 20.

[58] See David Leebron, "Linkages" (2002)96(1) American Journal of International Law 5.

[59] These directions can even be conflicting: Some would argue that the WTO had gone too far whereas other critics would suggest that the WTO did not go far enough. See Robert Lawrence, "Rulemaking amidst Growing Diversity: A Club-of-Clubs Approach to WTO Reform and New Issue Selection" (2006) 9(4) Journal of International Economic Law 823.

[60] See Dirk de Bièvre, "International Institutions and Domestic Coalitions: The Differential Effects of Negotiations and Judicialization in European Trade Policy" (2003) EUI Working Paper SPS No. 2003/17, 2003.

[61] Cf Tamar Megiddo, "Methodological Individualism" (2019) 60(2) Harvard Internatinonal Law Journal.

competition for participation and voice easily transforms 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' in the near future.[62]

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; while 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, transnational professional bodies, NGOs representing what is commonly termed 'the global civil society', and other private constituencies. Global trade law is reminiscent of a vertically organized matrix, with various levels interacting with and influencing each other in both a bottom-up and top-down manner.[63]

More crucially, this phenomenon is to be observed in the judicial arm of the WTO as well. Panels and the Appellate Body will typically peruse non-WTO judicial material, including judgments of the International Court of Justice, but also less authoritative sources such as arbitral awards, when preparing their judgments ('reports'). Disputes like the notorious softwood lumber saga between Canada and the USA, soft drinks between Mexico and the USA and disputes like the one brought (unsuccessfully) against Australia after the adoption of the Plain Tobacco Packaging Act exemplify the complex matrix of judicial tribunals (but also of non-judicial dispute resolution mechanisms), and the need for – at least informal – channels of communication between judicial actors globally, including private arbitration tribunals.[64] Whereas at the implementation phase of certain rulings, States, assisted by non-State actors domestically, may genuinely attempt to avoid off-handedly breaching their international obligations,[65] the danger of fragmentation is real and points to the need for higher levels of interaction and exchange of information among judicial actors.

---

[62] On heterarchy, see Rosalba Belmonte and Philip Cerny, "Heterarchy: Toward Paradigm Shift in World Politics" (2021) 14(1) Journal of Political Power.

[63] Cf Neil Walker, "Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders" (2008) 6 International Journal of Constitutional Law 373.

[64] See also EyalBenvenisti and George Downs, "National Courts and Transnational Private Regulation", in Fabrizio Cafaggi (ed), *Enforcement of Transnational Regulation: Ensuring Compliance in a Global World* (2012)131, 140.

[65] See Tamar Megiddo, "Beyond Fragmentation: On International Law's Integrationist Forces" (2019) 44(1) Yale Journal of International Law 115.

This transformation of the global trade regulator *par excellence* is irreversible ,and thus much 'blue-sky' thinking takes place in the relevant scholarship as to the future governance and indeed the structure of the global trade system, overestimating,[66] or underestimating,[67] the role that the WTO can play, as well as identifying the potential side-players and stakeholders beyond the States *qua* WTO Members. Such debates are often instigated by the WTO leadership itself,[68] which seems to also feed the never-ending discussion on WTO institutional reform.[69] However, similar introspection and fruitful soul-searching are rather rare in other IOs. As imperfect as it might be, the WTO constantly capitalizes on accumulated experience after twenty years of relative openness. Such an effort cannot be beneficial for trade relations unless non-state actors that shape much of today's global trade are involved.[70] At the national and regional levels, changes towards improving public participation with a view to informing trade negotiations can be observed.[71]

This is because much of trade-related regulation is increasingly produced by private parties, often at the transnational level.[72] The term 'transnational private regulation' describes the emerging body of rules created by private actors that is impervious to national borders.[73] 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.[74] The constant increase of the role of private parties in regulatory activities,

---

66 See, for instance, Andrew Guzman, "Global Governance and the WTO" (2004) 45 Harvard International Law Journal 303.

67 See, for instance, R. Howse, *supra* note 576.

68 See also Peter Sutherland et al., The Future of the WTO- Addressing Institutional Challenges in the New Millennium (2004) [hereinafter the Sutherland Report]; and The Report of the Panel on Defining the Future of Trade, The Future of Trade: The Challenges of Convergence (24 April 2013). Both reports were commissioned by the WTO DGs at the time, Supachai Panitchpakdi and Pascal Lamy, respectively.

69 Joseph Weiler, "Law, Culture, and Values in the WTO – Gazing into the Crystal Ball" in Daniel Bethlehem et al., (eds.), *The Oxford Handbook of International Trade Law* 750.

70 See also Yves Bonzon, *Public Participation and Legitimacy in the WTO* (2014).

71 See Maria Laura Marceddu, "Implementing Transparency and Public Participation in FTA Negotiations: Are the Times a-Changin'?" (2018) 21(3) Journal of International Economic Law 681.

72 See Gralf-Peter Callies and Peer Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law* (2010).

73 F. Cafaggi, "New Foundations of Transnational Private Regulation" (2011) 38(1) Journal of Law and Society 20.

74 Kenneth Abbott and Duncan Snidal, "The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State", in Walter Mattli and Ngaire Woods (eds.), *The Politics of Global Regulation* (2009). For an economic perspective on alternative modes of governance, see Avinash Dixit, *Lawlessness and Economics- Alternative Modes of Governance* (2004).

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 reflection as to the normativity of the future law governing global trade and the group of constituencies which will promulgate it – and control it.

At present, with respect to the idea of a global law theory to upgrade individuals to the driving force of change,[75] 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 centre of the WTO actions only in part, that is, in their capacity as *traders* or *producers*.[76] In its early caselaw, the *USA – Section 301* Panel recognized that the MTS 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 legislation 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'.[77]

In addition, the protection of producer welfare 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 requirement exists to take it into account when formulating domestic trade policies or, indeed, global trade rules.[78] The welfare of third parties is even less of a concern, although certain deals may have very serious consequences on third parties,

---

[75] Opening the circle of international law subjects to include consumers as (co)producers (rather than the mere consumers) of international law is also part of a constitutional view of international law, but the latter theory appears to be more modest than the emerging global law theory. In addition, the former is more focused on vertical, hierarchical relationships than global law. See Jan Klabbers et al., *The Constitutionalization of International Law* (2009) 153-ff.

[76] See, inter alia, Panel Report, Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather, WT/DS155/R and Corr.1, adopted 16 February 2001, DSR 2001:V p 1779 ¶11.76-11.77 ; and Panel Report, European Communities – Selected Customs Matters, WT/DS315/R, adopted 11 December 2006, as modified by Appellate Body Report WT/DS315/AB/R, DSR 2006:IX, p 3915 ¶7.107-8.

[77] Panel Report, United States – Sections 301-310 of the Trade Act of 1974, WT/DS152/R, adopted 27 January 2000, DSR 2000(II), 815 ¶7.73-7.91.

[78] See also Petros Mavroidis, 'Come Together? Producer Welfare, Consumer Welfare, and WTO Rules', in Ernst-Ulrich Petersmann (ed), *Reforming the World Trading System: Legitimacy, Efficiency and Democratic Governance* (2005) 277.

which are indirectly affected by a given deal.[79] This is in sharp contrast with other areas of economic law, including, for instance, competition law.

As it becomes clear, instances of global law, at least as understood by Rafael Domingo,[80] whereby individuals take centre stage in a post-modern legal landscape, are yet to emerge at 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,[81] notably its judicial branch,[82] have quickly become mainstream in the wake of controversial rulings by the WTO's adjudicating bodies, and notably the Appellate Body, 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), which, interestingly, was not supported by all EU Member States, the EU preferences for the importation of bananas from the EU former colonies (the so-called ACP countries); or the USA import prohibition of shrimp based on environmental grounds.[83]

As noted earlier, because of the functional approach that the GATT/WTO has opted for to the detriment of the organising principle of territoriality in general international law, sovereignty within the WTO has been relativized to fit the reality of global commerce and efficient (that is, friendly for trade and increasingly other non-economic values as well) rule-making. The debate over sovereignty has quickly been contextualized to include borderless issues such as global subsidiarity,[84] efficient power allocation and institutional choice in a multi-layered environment,[85] inequality and global

---

79 See Daniela Caruso, "Non-Parties: The Negative Externalities of Regional Trade Agreements in a Private Law Perspective" (2018) 59 Harvard International Law Journal 389.

80 See Rafael Domingo, The New Global Law (2010), 121ff.

81 Cf Alan Buchanan and Robert Keohane, "The Legitimacy of Global Governance Institutions" (2006) 20 Ethics and International Affairs 405.

82 Cf Robert Howse, "The Most Dangerous Branch? The WTO Appellate Body Jurisprudence on the Nature and Limits of the Judicial Power" in Thomas Cottier and Petros Mavroidis (eds.), *The Role of the Judge in International Trade Regulation : Experience and Lessons for the WTO* (2001).

83 Ironically, it was the most powerful countries that insisted on the inclusion of an effective dispute settlement system during the Uruguay Round negotiations. See Joel Trachtman, "The Constitutions of the WTO" (2006) 17 European Journal of International Law 623, 634.

84 See Robert Howse and Kalypso Nicolaidis, "Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?" (2003) 16(1) Governance 73.

85 See, in particular, John Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law* (2006).

responsibility or ethics,[86] cooperation for the production and protection of global public goods,[87] cooperation to address global concerns,[88] and so on.

This reflects a broader fading of the once alluring concept of sovereignty. As underscored 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*'.[89] Beyond doubt, sovereignty is a concept in crisis,and there does not seem to be much to do to avoid the transition towards new concepts that would reflect economic reality more accurately. It does not seem that we are moving towards a cosmopolitan vista of global affairs or a united global *demos*. Rather, new sovereignty-related concepts emerge. In the EU, for instance, and in light of sovereignty- and national security-related issues raised by the Sino-US trade war,which found the EU vulnerable bearing the negative externalities of this commercial shock, the concept of open strategic autonomy has taken central stage, focusing on assertively defending its interests and enforcing its rights.[90]

The regulation of global commerce is not binary, and thus it would be a naïve understatement to suggest that no trace of global law, understood as an individual-centred law, is identifiable in the regulation of global commerce nowadays. Indeed, much of global commerce nowadays is largely subject to the regulatory activities of private bodies. This regulatory usurpation that is taking place in the area of commerce is not something extraordinary. States were satisfied with such a development very early in human history, and the situation has not changed much ever since, despite few intervals of State intervention and control from time to time. In addition, it may even be misleading to consider the State and the private quasi-regulators as antagonists in this respect: cross-fertilization, complementarity, and mutual supplementation (rather than fervent rivalry) are to be identified.[91]

---

86 Cf Kennedy *supra* note 554, 66.

87 See, for example, Gregory 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.

88 See Thomas Cottier and Sofya Matteotti-Berkutova, 'International Environmental Law and the Evolving Concept of "Common Concern of Mankind", in Thomas Cottier et al., (eds.), *International Trade Regulation and the Mitigation of Climate Change: World Trade Forum* (2009) 21.

89 *Prosecutor* v. *Dusko Tadic* (1996) International Criminal Tribunal for the Former Yugoslavia, Case No IT-94-1-AR72, decided 2 October 1995, 35 ILM 32, 39 para 55.

90 See European Commission Communication, *Trade Policy Review – An Open, Sustainable and Assertive Trade Policy* (COM(2021) 497 final, 18 February 2021).

91 Cf Rolf Michaels, "The True Lex Mercatoria : Law Beyond the State" (2007) 14(2) Indian Journal of Global Legal Studies 447.

As one would expect, requiring that States cater for and reflect seriously on traders' rights would be inconceivable in the current state of international law.[92] However, in view of the circumstances under which the MTS was created and evolved, a modest but still worthwhile attempt was made to ensure that traders would suffer as little as possible from State arbitrariness or burdensome regulatory making. The regulatory activity of the WTO evolves around facilitating trade, for instance, through the requirement that WTO Members abide by procedural obligations relating to transparency, due process, access to impartial review, proper notification and publication of, and amendments to existing laws affecting trade and so on with a view to ensuring predictability and security in the marketplace.[93] In an era where disorderliness of rules and institutions is the very trait of economic globalization and the importance of the source of rule making seems to have vanished, safeguarding the missions of the WTO, that is, ensuring non-discrimination and equality of competitive opportunities in the marketplace, is key in the smooth functioning of global trade, but also instrumental in ensuring high levels of trust among the WTO membership.[94]

Sticking to the basics is not as self-evident for the WTO as one would think at first blush: to start with, economists would predict that, in case of an ongoing, important flow of private rules that companies prefer to use over public rules, States may have no incentive to maintain or switch towards more efficient rules due to the uncertainty as regards 'buyers' of their product, i.e., regulatees that use such regulations.[95] In addition, the WTO community should start contemplating adjustments to the WTO legal framework. For instance, 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,[96] whereby 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.[97]

---

92 For a normative take, see Ernst-Ulrich Petersmann, "International Economic Law, 'Public Reason', and Multilevel Governance of Interdependent Public Goods" (2011) 14(1) Journal of International Economic Law 23.

93 See, most notably, the WTO Trade Facilitation Agreement that entered into force on 22 February 2017.

94 Cf Bo Rothstein and Eric Uslaner, "All for All : Equality, Corruption, and Social Trust" (2005) 58 (1) World Politics 41.

95 See Emanuela Carbonara and Francesco Parisi, "Choice of Law and Legal Evolution: Rethinking the Market for Legal Rules" (2009) 139 Public Choice 461.

96 See also Tania Voon and Alan Yanovich, "What is the Measure at Issue?", in Andrew Mitchell (ed.), *Challenges and Prospects for the WTO* (2005).

97 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

By the same token, the scope of the Agreement on Technical Barriers to Trade (TBT) is quite limited in requiring that Members only take reasonable measures to ensure that technical standards adopted by non-governmental standard-setting bodies comply with the requirements set out in the TBT.[98] For the sake of comparison, the Court of Justice of the European Union (CJEU), by taking recourse to effective interpretation (*effet utile*) of the text of the Treaty on the functioning of the European Union (TFEU), has expanded the scope of the legal provisions on free movement of goods relating to quantitative restrictions to also include private conduct by standard-setting bodies (in this case, a private law certification body), impeding market access.[99]

Such interpretations, a legacy of the GATT State-centred tradition, are becoming less and less defensible and may lead traders to seek remedies outside the WTO. In the medium run, this does nothing more than increase the irrelevance of the WTO for contemporary commerce. If traders feel that more efficient alternatives to the WTO rules and dispute settlement proceedings exist or are emerging, this can bring the WTO in major distress, for it is largely dependent on its members (and, indirectly, yet crucially, the companies thereof) using the mechanisms that it establishes.

A State-centred system and the private international commercial law system offer different opportunities and indeed fora that traders may choose to use depending, in every instance, which of the two are more efficient and interesting for them, with no a priori preference for one *vis-à-vis* the other.[100] The two systems may mutually support each other, but they may also compete to resolve a particular dispute. Take the infamous dispute between Canada and the USA on softwood lumber: after several years of recourse

---

of export subsidies made and funded by private parties in Appellate Body Report, Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Second Recourse to Article 21.5 of the DSU by New Zealand and the United States, WT/DS103/AB/RW2, WT/DS113/AB/RW2, adopted 17 January 2003, DSR 2003(I) 213, ¶95.

98 On arguments for and mechanisms towards a more hands-on approach by the WTO on private standards, see also Petros Mavroidis and Robert Wolfe, "Private Standards and the WTO: Reclusive no More" (2017) 16(1) World Trade Review 1; Eva van der Zee, "Disciplining Private Standards Under the SPS and TBT Agreement: A Plea for Market-State Procedural Guidelines" (2018) 52(3) Journal of World Trade 393; and Ming Du, "WTO Regulation of Transnational Private Authority in Global Governance" (2018) 67 International and Comparative Law Quarterly 867. On arguments against such takeover when it comes to technical standards, see Olia Kanevskaia, *The Law and Practice of Global ICT Standardization* (2021, forthcoming).

99 *Fra.bo SpA v Deutsche Vereinigung des Gas- und Wasserfaches eV*, Case C-171/11, ECLI:EU:C:2012:453; see also Harm Schepel, "Between Standards and Regulation: On the Concept of 'De facto Mandatory Standards' AfterTuna II and Fra.bo", in P. Delimatsis (ed.), *The Law, Economics and Politics of International Standardization* (2015).

100 See Michaels, *supra* note 643, 464.

to State-centred dispute settlement bodies, Canada and the USA reached an agreement that established a dispute settlement mechanism governed by the London Court of International arbitration, a *private* institution.[101] This can be circumstantial but may also be indicative of the limits and rigidity of a State-centric MTS, which cannot accommodate the concerns and needs of traders, the key players in global commerce.

III. Globalization of commerce, the emergence of a 'global trade law' scholarship, and the 'trade enablers'

In its 25 years of existence, the WTO has managed to be at the forefront of public discussions on the present and future of IOs. Created in 1995, in a period of major transformations and optimism at the international level, the potentially broad scope of the WTO and its new dispute settlement system *qua* an emancipated outlier in international dispute resolution, attracted the attention and critique of international law scholars and political scientists, export-oriented companies and import-competing groups, domestic authorities and the public, including domestic consumer groups and regional or global NGOs.

This was only a matter of time: the creation of the WTO and its evolution towards a truly global institution establishing a rules-oriented MTS in the last twenty years constitutes a paradigm shift in the way trade matters are regulated. In contemporary global trade, a combination is evident of *centripetal* forces and *centrifugal* forces. Centripetal forces are bringing more integration in terms of, for instance, regulating trade in services and intellectual property protection, the use of technical regulations or sanitary and phytosanitary measures, or a unitary mechanism for resolving trade disputes among States. *Centrifugal* forces result from the very decentralized nature of global trade being undertaken at the very peripheries of the four corners of the world by individual economic operators or corporations, sometimes promulgating (and, yes, abiding by) their own rules and codes of good conduct. The latter also engage in cross-border activity (even if only at the sub-global level), constantly influence global trade relations, and equally determine the degree of interdependency among economic actors.[102]

---

[101] John Crook, "Contemporary Practice of the United States Relating to International Law: United States and Canada Arbitrate a Softwood Lumber Dispute in the London Court of International Arbitration" (2008) 102 American Journal of International Law 192.

[102] Indeed, interdependency is a key element of any analysis of law from a global perspective. See William Twinning, *General Jurisprudence: Understanding Law from a Global Perspective* (2009).

In addition, a broader *ethos* of international regulatory cooperation is being developed in various areas of the globe in a bottom-up, decentralized manner, not always instigated by State forces.[103] In the end, trade existed long before the creation of the GATT and many times occurs without any reference to the WTO. Regulatory cooperation and the pursuit of regulatory coherence have taken centre stage in recent preferential trade arrangements striving for 'deep' integration such as the USMCA or the CPTPP. Still, at equipoise, the emergence of regulatory coherence as a global norm is yet to occur and is facing resistance by States, inter alia, due to the implications on democracy that regulatory reforms may have.[104] Work on best regulatory practices within the TBT Committee also faced similar resistance and is currently in limbo.

To be sure, preferentialism and bottom-up commercial forces shape global trade regulation in the 21st century, for the most part. However, in view of the current sophisticated state of its institutions and body of rules, the WTO cannot be deemed irrelevant to global commerce. Rather, *state-driven* trade-related rule-making and *stateless* rule-making should be analysed in tandem. If we are to make any sense of how global commerce works, I submit that trade transactions and legal phenomena associated with them, if anything, deserve a holistic, inclusive, and integrated depiction and analysis. This presupposes acknowledging that a mere inquiry into the WTO institutions and substantive rules is parochial in that it only covers the contemporary *lex mercatoria*in part and in an unbalanced manner; private international commercial law functions and evolves in parallel with the multilateral, state-centred trading system. More crucially, as trade statistics show in the relevant period 2018-19,[105] it is this system of rules outside the WTO that supports commercial transactions despite an in-crisis WTO that is unable to solve crises as they appear.

Institutions such as UNCITRAL, UNIDROIT, the ICC or transnational networks such as the International Bar Association (IBA) work autonomously and fit into a broader inter subjective process with a view to facilitating trade transactions at the global level through stable rules and increasingly binding precedents that *a*-national arbitral tribunals gradually

---

[103] See Organization for Economic Cooperation and Development (OECD), *International Regulatory Co-operation: Addressing Global Challenges* (2013).

[104] See also Han-Wei Liu and Ching-Fu Lin, "The Emergence of Global Regulatory Coherence: A Thorny Embrace for China?" (2018) 40(1) University of Pennsylvania Journal of International Law 133.

[105] Despite the uncertainty that the Sino-US trade war and the AB crisis have brought about, trade volumes remained relatively stable or decreased slightly. See WTO, *World Trade Statistical Review 2020* (2020) at 18.

nourish and consolidate.[106] The same goes for transnational entities: social networks whose members develop relationships through repeated interactions and later on agree on norms to coordinate such interaction as well as monitor compliance and enforce the agreed rules.[107] Such entities increasingly self-regulate trans boundary economic activity. For certain trades, such a phenomenon has been diachronic.[108]

Under these institutional settings, the possibilities for individual traders to participate and seek remedial action are of varying degrees, ranging from indirect participation in WTO decision-making through lobbying, and in investor-State arbitration according to the ICC rules of arbitration, to participation in specialized, alternative (non-State) dispute resolution mechanisms at the transnational level. While financial resources and leverage play an important role in the use of those possibilities, assuming that such possibilities are only taken up by the mighty corporations as swords in the hands of powerful economic interests would be too reductive an approach.

The emancipation of economic interests globally is evolving at an extraordinary pace. As a result, previously unbridgeable differences in terms of economic development between the developed and the developing world are equalized, thereby shifting the focus from neo-colonialism to the emergence of an international rule of law where the principle of legality becomes an embryonic orthodoxy for the international economic order.[109]

Within this context, global trade law should be seen – and is arguably becoming – an all-encompassing flexible concept that comprises all those rules which try to mitigate the legal risk for economic actors when they partake in transboundary commercial activities, regardless of whether such rules are promulgated by State or non-State actors in a top-down or bottom-up manner. A substantial penumbra of non-legal rules has evolved *pari passu* with the MTS in such important ways that it deserves to be recognized as an important body of norms affecting economic activity on equal footing.

---

[106] See L. Yves Fortier, "The New, New Lex Mercatoria, or Back to the Future" (2001) 17(2) Arbitration International 121.

[107] See also Scott Masten and Jens Prüfer, "On the Evolution of Collective Enforcement Institutions: Communities and Courts" (2014) 43(2) Journal of Legal Studies 359.

[108] See, generally, Barak Richman, *Stateless Commerce* (2017); See also Oscar Gelderblom and Regina Grafe, "The Rise and Fall of the Merchant Guilds: Re-thinking the Comparative Study of Commercial Institutions in Premodern Europe" (2010) 40(4) Journal of Interdisciplinary History 477.

[109] With respect to investment arbitration, for instance, see Thomas Schultz and Cedric Dupont, "Investment Arbitration: Promoting the Rule of Law or Over-Empowering Investors? A Quantitative Empirical Analysis" (2014) 25(4) European Journal of International Law 1147.

Global trade law can be better understood only if viewed in relation to the larger universe of normative systems governing commercial transactions.

This is in line with a view of 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 of economic activity. The emerging concept of global law can be regarded as yet another effort to reflect critically on the direction that global governance will take in the future and the allocation of power and influence among fluid legal orders. 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, regardless of its source. Everything is legalized,from economic transactions to politics at the international level. Thus, it is the mere evolution of law that allows for so much debate over the institutions, rules,and principles. However, the sources of law multiply, and thus,re-conceptualizing what we consider to be law will alter the way we understand legal science.[110] At the global level, what also becomes crucial is who are the collective controllers of that law under construction.

The seemingly inexorable slide of the State away from the 'pole position' where regulatory power is (at least) shared calls for creative emergence of new concepts and theories that attempt to explain contemporary developments and the forces that *enable* trade – the 'trade enablers'. Just like debates relating to constitutionalism or the constitutionalization of international law, constitutional pluralism, global administrative law, transnational law, and so on, discussions about global law constitute an alternative vision of how the law will look like in the future. Global trade law can be viewed and analysed through the lens of most of these intellectual debates.[111] However, contrary to all previous efforts, a global law perspective of trade law would entail a composite analysis of both public and private forces that make trade happen for the sake of individual traders. In this analysis, one would need to scrutinize in an interdisciplinary manner the rationale for such distribution of regulatory authority and seek evidence that corroborates the wisdom of particular choices made, often taking an evolutionary, empirical perspective.

---

[110] *Ibid*., 55.

[111] See also Thomas Cottier et al., "Fragmentation and Coherence in International Trade Regulation: Analysis and Conceptual Foundations", in Thomas Cottier and Panagiotis Delimatsis, *The Prospects of International Trade Regulation: From Fragmentation to Coherence* (2011)1; and Jeffrey Dunoff, "The Politics of International Constitutions: The Curious Case of the World Trade Organization", in Jeffrey Dunoff and Joel Trachtman (eds.), *Ruling the World? Constitutionalism, International Law and Global Governance* (2009) 180.

Arguably, a new concept is needed which will allow for such an accommodating and inclusive approach: by focusing on a composite analysis on global trade-enabling legal systems that interact and often overlap, the concept of global trade-*enabling* law offers a promising vista of the future global legal configuration in commercial matters. As the quest for global trade-enabling law adopts a norm-user perspective, it is contingent on a functionalist approach. Taking a norm-user perspective that focuses on the functionality of the law regulating international commerce and levelling the playing field *independently* of the nature of the norm-giver appears to be apposite and timely.[112] Ensuring legal certainty for the individual economic actors significantly reduces the costs of regulatory compliance and thus is the key benefit that WTO Members receive from WTO disciplines.[113] However, such a 'safety net' also encompasses a myriad of rules and norms adopted in fora *outside* the WTO aiming at managing legal risk mitigation. Thus, any analysis of trade law is incomplete and of limited utility, unless it incorporates such non-WTO norms, mechanisms, and institutions that often are developed beyond the State.

By the same token, any mention of the MTS becomes increasingly *démodé*, because it is misleading. Rather, based on the analysis above, a new scholarship discussing the mechanics and properties of the *global* trading system is warranted. Crucially, this concept challenges the centrality of the WTO and emphasizes the true nature of current international commercial rule-making as being polycentric and diffused. These new properties of the regulation of global commerce are further exemplified by the emergence of new, powerful, and potentially far-reaching constructs at the regional level such as the Trans-Pacific Partnership (CPTPP) in East Asia, or the EU-Mercosur, which both aim to not only liberalize further but also *rewrite* global trade rules in the medium-run and in a collaborative manner.[114] Rules on digital trade under the CPTPP are just one example among many.

Developments at the firm level also reshape global commerce and intensify the need for transboundary regulatory action at the WTO or elsewhere: international trade creates a bigger marketplace, offering opportunities for firms. The work by Krugman on increasing returns to scale (focusing on

---

[112] See also Neil McCormick, *Institutions of Law: An Essay in Legal Theory* (2007).

[113] Also see Panel Report, United States – Sections 301-310 of the Trade Act of 1974, WT/DS152/R, adopted 27 January 2000, DSR 2000(II) 815 ¶7.77.

[114] See also Richard Baldwin, "The World Trade Organization and the Future of Multilateralism",30(1) Journal of Economic Perspectives (2016) 95.

intra-industry trade)[115] and more recently by Melitz[116] on firm heterogeneity brought the nature, characteristics, and diversity of firms (rather than entire sectors) to the forefront of trade economics.

Quite revealingly, it appears that a clear relationship exists between the traits of firms and their engagement in trade. Furthermore, it was found that globalization induces consolidation within industries, allowing the best-performing and more productive firms to compete with each other and export, whereas the least productive ones withdraw (this may be taken to mean that they focus rather on serving the domestic market only). This reallocation effect, whereby market shares are reallocated from less to more productive firms (exporters) is strengthened by trade liberalization. Ultimately, trade liberalization raises the *average* productivity of a sector, which now includes fewer but more productive firms. Finally, trade liberalization (through the expansion of market size) seems to be linked with more innovation at the firm level, meaning that entry in export markets can induce firms to invest in innovating more.[117]

From this literature, one can infer that globalization and trade liberalization create winners and losers and may even lead to the domination of a handful of firms in exports.[118] Under these circumstances, ample room exists for governmental action to further expand and fairly distribute gains from trade, not only unilaterally but also at the multilateral level (within the WTO) and at the regional level (within preferential trade agreements – PTAs).[119] One of the key implications of the new literature in trade economics relating to firm heterogeneity is that trade policy should form part and parcel of the productivity, development, and industrial policy agenda of any government. Along with firm-friendly policies, governments have to also reflect on the policies that allow for the redistribution of gains from trade through appropriate domestic policies (typically, through taxation, but also other positive intervention-type instruments) to also manage potentially

---

[115] See Paul Krugman, "Increasing Returns, Monopolistic Competition, and International Trade" (1979) 9 Journal of International Economics 469.

[116] Marc Melitz, "The Impact of Trade on Intra-Industry Reallocations and Aggregate Industry Productivity" (2003) 71 Econometrica 1695.

[117] See Marc Melitz and Daniel Trefler, "Gains from Trade When Firms Matter" (2012) 26(2) Journal of Economic Perspectives 91.

[118] Bernard et al., found that in 2000 only 4 percent of the 5.5 million firms operating in the US were exporting. Among the exporting firms, the top 10 percent accounted for 96 percent of total US exports. Andrew Bernard et al., "Firms in International Trade" (2007) 21(3) Journal of Economic Perspectives.

[119] See Dan Ciurak et al., "Firms in International Trade: Trade Policy Implications of the New Trade Theory" (2015) 6(2) Global Policy 130.

counter-productive political polarization.[120] The empowering individuals to actively seek such benefits domestically (for instance, by accepting the possibility of relying directly on international agreements before ordinary or specialized judicial mechanisms) must form part of such redistributive policies at the domestic level.[121] While the trend in the existing trade agreements goes in the opposite direction,[122] it is argued that the State has various instruments in its armoury, including private law as well as direct payment systems, to ensure fair distribution of trade gains.

IV. Conclusion – An Agenda for the Emerging Global Trade-Enabling Law

Global law constitutes a new window to look at the evolution and vicissitudes of today's commercial world. A global law-related research agenda for global trade should evolve around three, broadly-defined axes: first, the identification of a set of principles akin to global law advocacy; second, the analysis of the phenomenon of the empowerment of non-State constituencies, including firms, and a more intensive bridge-building with not only transnational private regulators, but also with other IOs (be they governmental, non-governmental, or hybrid) whose activities have an impact on commercial transactions; and, third, the intensification of the still scattered, unsuccessful efforts to create a more inclusive global trading system brimming with development opportunities for all. Action in these three areas would determine the sustainability and resilience of global trade law.

With respect to principles, traces of a cosmopolitan or global law view are already discernible in WTO 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, private persons and enterprises, *whether of domestic or foreign nationality*, is an overarching objective of the MTS. For the Appellate Body, there is a community of traders that is worth protecting irrespective of nationality. Due process shall be universally applicable, implying that persons (that is, not only States) affected, or likely to be affected, 'by

---

[120] Cf David Autor, David Dorn, Gordon Hanson and Kaveh Majlesi, "Importing Political Polarization? The Electoral Consequences of Rising Trade Exposure" (2020) 110(10) American Economic Review 3139.

[121] See also Anne Peters et al., "The Constitutionalisation of International Trade Law" in Thomas Cottier and Panagiotis Delimatsis (eds.), *The Prospects of International Trade Regulation: From Fragmentation to Coherence* (2011) 69.

[122] See Aliki Semertzi, "The Preclusion of Direct Effect in the Recently Concluded EU Free Trade Agreements" (2014) 51 Common Market Law Review 1125.

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.'[123]

A few years later, the controversial issue of amicus curiae briefs and the ensuing right to communication and information arose, starting with *US – Shrimp*. In that dispute, 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 went a step further by accepting and considering an *amicus curiae* brief submitted by a private individual. However, the Appellate Body also stated inconsistent case law 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 within the discretion of the latter.[124]

From that period onwards, non-WTO actors (NGOs, interest groups, companies, academics, etc.) have routinely submitted unsolicited communications to the WTO adjudicating bodies. More recently, the semantics point in the direction of exclusion: parties to the dispute and third-parties will express their opinion on such briefs, and the WTO judiciary will subsequently dismiss the relevance of these briefs in two sentences.[125] On the other hand, panels will decide to spend more energy in discussing an *amicus* brief in case any party to the dispute decides to incorporate such a brief in its own submission or cross-refer to it.[126]

Due to the ever-increasing importance of global supply chains and the relevance of value-added inputs for production and trade expansion, pressure is put on trade negotiators to deal more effectively with regulatory obstacles. Therefore, regulatory principles as they are known from domestic legal orders and administrative law will need to be further elaborated upon at the WTO and in other trade-related instruments, including PTAs or

---

[123] See Appellate Body Report, United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear, WT/DS24/AB/R, adopted 25 February 1997, DSR 1997(I) 11, 21.

[124] Appellate Body Report, United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, WT/DS138/AB/R, adopted 7 June 2000, DSR 2000(V) 2595 ¶41.

[125] See, for instance, Appellate Body Reports, *Canada* – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program, WT/DS412/AB/R / WT/DS426/AB/R, adopted 24 May 2013, ¶1.30.

[126] See, for instance, Panel Report, United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, WT/DS381/R, adopted 13 June 2012, as modified by Appellate Body Report WT/DS381/AB/R, DSR 2012(IV) 2013, ¶7.9. See also Theresa Squatrito, "Amicus Curiae Briefs in the WTO DSM: Good or Bad News for Non-State Actor Involvement" (2018) 17(1) World Trade Review 65.

BITs. Principles such as necessity, proportionality, subsidiarity, due process, consistency and effective regulatory cooperation are dispersed in the WTO agreements.

However, a more coherent theory that buttresses the use and interpretation of these principles is missing, although the theoretical underpinnings of many of these principles have been the object of intense academic debate in various regional experiments such as the EU or ASEAN. In the currently heterogeneous environment in which firms operate, legal certainty that transcends borders is invaluable.[127] Governments acting as trade enablers through institutions at the regional and global level have an important role to play, after cooperating and consulting with non-state actors.[128] However, their task is not easy, as deep integration agreements render more difficult a convincing narrative about the net gains of trade agreements for ordinary people due to the complexity and multiplicity of regulatory issues that they cover.[129]

When it comes to the empowerment of non-state actors and their increased participation, a caveat is in order: it appears that access to the WTO decision-making is tilted more in favour of global companies than transnational private regulators such as professional bodies or standard-setting organizations. Lobbying by firms may relate to the need to protect the domestic market from foreign competition. In that case, a government or the WTO as a whole may succumb to such pressures.[130]

However, as mentioned earlier, firms, notably those that are the most productive and well-performing, may also lobby for openness and increased market access. Such lobbying activities are yet to be mapped in detail empirically,[131] but the emergence of global value chains would suggest that these activities can only intensify as competition in the global market becomes fiercer.[132] Such an exercise is everything but a walkover: Due to low downstream labour costs, dispersion of production increases as transport costs

---

[127] See also Joel Trachtman, *The Future of International Law* (2013) 292.

[128] See also Alexia Brunet Marks, "The Right to Regulate (Cooperatively)" (2016) 38(1) University of Pennsylvania Journal of International Law 1.

[129] See Giovanni Maggi and Ralph Ossa, "The Political Economy of Deep Integration" (December 2020) NBER Working Paper 28190.

[130] See the seminal work of Gene Grossman and Elhanan Helpman, "Protection for Sale" (1994) 84(4) American Economic Review 833.

[131] I Song Kim, "Political Cleavages within Industry: Firm-Level Lobbying for Trade Liberalization" (2017) 111 American Political Science Review 1.

[132] Cf H. Milner, "Resisting the Protectionist Temptation: Industry and the Making of Trade Policy in France and the United States During the 1970s" (1987) 41(4) International Organization 639.

decrease,[133] making the identification of the formation of alliances quite difficult. However, on an optimistic note, such trends exemplify the increasing importance of and engagement with international economic law that non-State actors have also increasingly become aware of.[134]

Nevertheless, despite the substantial progress made, transnational private regulators are yet to establish themselves as reliable interlocutors in trade negotiations and decision-making. NGOs may also suffer from similar doubts,and thus, some groundwork in terms of cooperation with WTO Members may be necessary before they gain a place at the trade negotiating table. Overall, a complex matrix of actors interested in trade rules is being created around the WTO, and the positions that such actors have, varies. 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. In addition, only after the accession of Russia at the WTO can a more thorough discussion about a fairer decision-making system take place, as by now, the WTO is a truly global institution with over 160 Members.

Practice has shown that transparency at the WTO is a double-edged sword. 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.[135] 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.[136] NGOs have been very active and managed to quickly build considerable savvy in various technical issues under discussion at the WTO. This applies with particular force in the so-called 'trade and…' issues.[137] By involving NGOs more in its work along functional lines, the WTO and its Members receive valuable support, which can enhance the WTO's legitimacy, authority, and effectiveness.[138] Engaging these NGOs further in trade discussions is necessary not only because state-only mechanisms are

---

[133] See also Anthony Venables, "Fragmentation and Multinational Production" (1999) 43(4-6) European Economic Review 935.

[134] See Tamar Megiddo, "The Domestic Standing of International Law: A Non-State Account" (2019) 57 Columbia Journal of Transnational Law 494.

[135] See Delimatsis, *supra* note 594, 718.

[136] Cf Steve Charnovitz, "The WTO and Cosmopolitics" in Ernst-Ulrich Petersmann (ed.), *Reforming the World Trading System: Legitimacy, Efficiency and Democratic Governance* (2005) 438, 444.

[137] See, in particular, Tim Bartley, "Institutional Emergence in an Era of Globalization: The Rise of Transnational Private Regulation of Labour and Environmental Conditions" (2007) 113(2) American Journal of Sociology 297.

[138] See Daniel Esty, "Linkages and Governance: NGOs at the World Trade Organization" (1998) 19(3) University of Pennsylvania Journal of International Economic Law 709, 716.

increasingly becoming old-fashioned and imprudent.[139] Rather, it is necessary also because the WTO may find some very useful allies in its quest for legitimacy: 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.[140]

To date, the interaction of NGOs with the WTO has been unbalanced, with the latter engaging in a public relations strategy that is outdated, as it focuses on emphasizing the value of the WTO.[141] However, if a more constructive dialogue about 'trade and' issues is to take place, then a more sincere, visionary, creative, inclusive, and constructive engagement with civil society would be warranted to broaden the type of cross cutting issues that can be the subject of debates. New fora will need to be created where contestation and critical dialogue can flourish, allowing new voices, from emerging and under represented economies, to join. The latter is particularly important as we are transitioning towards the era of deep integration, whereby global convergence is sought on sensitive regulatory issues.

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 increasing feeling that there are unorganized, ordinary people who mistrust the WTO, as exemplified by the demonstrations during WTO MCs or other high-level meetings of the WTO. These groups do not feel represented by any State official nor, crucially, any NGO or civil society group. 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. 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 cases are now a reality, and additional initiatives towards this direction, including live web casting or press releases where non-technical language is used, can only be praised.

Indeed, what is sought after is not transparency in the form of increased communication of technical documents, which few outside the WTO would be able to assess and act upon.[142] This type of transparency may actually be

---

[139] Cf Andre Kuper, *Democracy Beyond Borders: Justice and Representation in Global Institutions* (2004) 164-165.

[140] See Daniel Esty, "The World Trade Organization's Legitimacy Crisis" (2002) World Trade Review 1,7.

[141] For a critique on the format of the WTO Annual Public Forum, see Erin Hannah, James Scott and Rorden Wilkinson, "Reforming WTO-Civil Society Engagement" (2017) 16(3) World Trade Review 427.

[142] See also Kuper (n 139), 180.

perilous and have the opposite effect if it produces piles of documents that few understand and thus read.

Finally, one would expect the WTO to become more active and perhaps even play a leading role in coming up with solutions to overcome the COVID-19 pandemic and ensure speedy economic recovery, viewing this as a first-rate opportunity to prove the important role it can play in global issues of social relevance. This will be difficult, as access to vaccines is not equally divided. Vaccine nationalism clearly disfavours developing countries, and certain among them may not get access to vaccines until 2024. India and South Africa have proposed a TRIPS waiver to address the situation, allowing a broader level of access to the patented formulas that would in turn, lead to mass production of vaccines that can be distributed globally.[143] The newly appointed WTO Director-General will have the difficult task of mobilizing support around this proposal. To do this, she will have to underscore the potential benefits of global economic recovery for all countries that speedy access to the COVID vaccine could yield.

Concerning transnational private regulators, the WTO can only benefit from more intensive cooperation with such constituents. 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 inevitably towards the identification and elimination of non-tariff regulatory barriers, the cooperation of private regulators is critical.[144] Thus, a more inclusive governance of the WTO, open to private parties, seems to be a self-fulfilling prophecy in the field of global commerce. This does not necessarily entail a top-down, centralized view of trade governance; rather, it would be equally served by greater regional and initially small-scale cooperation at the international level in line with the principles of subsidiarity and respect for local or regional preferences and characteristics.[145]

Finally, while the most recent WTO Ministerial Declarations confirmed the indifference of certain Members regarding the conclusion of the Doha Development Round, Members still felt compelled to reiterate that development-related considerations should take centre-stage during future negotiations, along with the interests of the least developed countries (LDCs).

---

[143] See WTO, "Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of COVID-19" (2 October 2020) IP/C/W/669.

[144] See also Thomas Bollyky and Petros Mavroidis, "Trade, Social Preferences and Regulatory Cooperation The New WTO-Think" (2017) 20(1) Journal of International Economic Law 1.

[145] Cf Harlan Grant Cohen, "Multilateralism's Life Cycle" (2018) 112(1) American Journal of International Law 47.

With respect to the creation of a more inclusive system offering development opportunities for all, two things are worth mentioning: first, although we have witnessed an increasing (yet, highly unbalanced) integration of the developing world in the global trading system in recent decades, such integration has been highly unequal, with certain countries and regions benefiting 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, as it strengthens the norm-user perspective that I advocate. 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-4 initiative, involving four cotton-producing countries, Benin, Burkina-Faso, Chad, and Mali. At the Ministerial Conference in Nairobi, WTO Members agreed on taking significant steps towards alleviating diachronic injustices in the sector.[146] On market access, Members (developed countries and developing countries that are able to do so, including China) pledged to offer duty-free, quota-free access to imports of cotton from LDCs. Most crucially, Members satisfied a recurring request from the cotton-producing countries by prohibiting cotton export subsidies. This prohibition had immediate effect for developed-country Members and was applicable to developing countries no later than 1 January 2017.[147] Coupled with the pledge to phaseout agricultural export subsidies and credits by developed countries (immediately) and developing countries (by 2023 in most cases), and the agreement on disciplines relating to state-trading enterprises and food aid, the WTO has taken decisive steps towards addressing some of the most notorious trade-distorting schemes used at the global level.[148]

In more generalized terms, support for development cannot be confined to the introduction of transitional periods during which developing countries and LDCs are exempted from the application of certain rules. This has arguably led to the alienation of several Members vis-à-vis the key WTO objective of achieving liberalization and restructuring the domestic market

---

[146] See WTO, "Ministerial Decision of 19 December 2015 on Cotton" (21 December 2015) WT/MIN (15)/46 and WT/L/981.

[147] This prohibition is part of a broader obligation accepted by developed countries to abolish export subsidies in agriculture (except for a very limited number of agricultural products) immediately. For developing and LDCs, this obligation is set for a later date. See WTO, "Ministerial Decision on Export Competition" (21 December 2015) WT/MIN (15)/45 and WT/L/980.

[148] See also OECD, Joint Working Party on Agriculture and Trade, "The Evolution of the Treatment of Agriculture in Preferential and Regional Trade Agreements" (7 February 2019) TAD/TC/CA/WP(2018)5/Final.

to enable commercial activities. Indeed, the transformation of the global regime regulating trade will most likely lead to more responsible governance mechanisms domestically as well.[149] Global challenges such as climate change, environmental degradation, protection of human dignity, and public health need coordinated responses and 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 that have to be carefully designed, along with the relevant actors, to strengthen productivity and enhance aggregate consumer welfare. This is already happening through more proactive strategies that trade coalitions within the WTO, led by countries like Brazil and India, endorse.[150] In this effort, it becomes crucial that development- but also solidarity-related considerations- are embedded in the WTO agreements themselves or in new decisions by the relevant WTO organs.

For the WTO and other economic organizations, setting the improvement of consumer welfare – and empowerment of the forces that are key in this – as a priority for a modern trade agenda becomes pressing. A new generation of trade enablers should join forces with the WTO to create adequate conditions for increased productivity, creativity, innovation, growth, and welfare. Some would argue that the WTO could play the role of a key orchestrator.[151] Others would subscribe to a more egalitarian view whereby state and non-state trade enablers actively seek to cooperate on an equal footing as legitimacy-enhancing mechanisms for the WTO. Identifying ways and instruments to enable 21st-century trade will be the key task for regulators, policymakers, and scholars for years to come, knowing that trade can be the highway of learning and a handmaiden for steady, sustainable growth.[152]

---

[149] See also Gregory Shaffer, "Transnational Legal Ordering and State Change" in Gregory Shaffer (ed.), Transnational Legal Ordering and State Change 1 (2013).

[150] See Amrita Narlikar, "New Powers in the Club: The Challenges of Global Trade Governance" (2010) 86(3) International Affairs 717.

[151] See Kenneth Abbott and Duncan Snidal, "Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit" (2009) Vanderbilt Journal of Transnational Law 501.

[152] See also Gene Grossman and Elhanan Helpman, "Technology and Trade" in Gene Grossman and Kenneth Rogoff (eds.) *Handbook of International Economics* (1995) 1281.