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# A World of Choices

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# A WORLD OF CHOICES

*David A Wirth\**

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*In this keynote address, David Wirth identifies fundamental and dynamic attributes of globalisation, examines the need to confront institutional failures and systemic challenges of multilateral governance, and offers some preliminary observations on directions in which global governance might evolve to achieve salutary outcomes that are good for all.*

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## **I INTRODUCTION**

The title of this special issue, "Enhancing Stability in the International Economic Order", captures one of the principal existential anxieties of our age. There have been a variety of reactions – expectation, surprise, satisfaction, and for at least some, concern – as the forces of globalisation emerge or have been unleashed. Whether this is something that happened inevitably as a result of technological progress, or something that human beings affirmatively undertook, is a story that has not yet been told. The answer most likely contains a little of both. In any event, given the progress of globalisation to date, its historical path is probably irrelevant. Regardless of one's own view of that trajectory, there is a palpable cognitive dissonance surrounding the phenomenon of globalisation,<sup>1</sup> as inevitably reflected in the papers collected in this special issue.

There is great concern about making the most of new opportunities that have presented themselves without simultaneously crippling developments that benefit human welfare by tying them down like Gulliver with apparently senseless constraints. There appears to be almost literally a world of choices. George Will, the American columnist, captured this sentiment during the debate over NAFTA, the trilateral North American Free Trade Agreement.<sup>2</sup> Will accused NAFTA critics of impeding the "exhilaratingly unknowable" future that NAFTA would undoubtedly launch.<sup>3</sup>

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1 Such dissonance is a core attribute of the globalisation debate itself. See David Held and others "Introduction" in David Held and others (eds) *Global Transformations: Politics, Economics and Culture* (Stanford University Press, Stanford, 1999) 1.

2 North American Free Trade Agreement (1993) 32 ILM 289 and 605.

3 George Will "Judicial Activism Aims At an Impossible Task" *Newsday* (United States, 8 July 1993) at 102.

Purposefully or not, Will compressed in those two words both the optimism and the concern: if the future is "unknowable", as he said, how can one be sure that it will also be "exhilarating"?

That was 1993, and the theme of this special issue suggests, at least in some respects, that the two decades since have been anything but "exhilarating". Global economic collapse, spearheaded by the subprime mortgage crisis originating in the United States, has been repeatedly blamed on overreaching made possible by insufficient oversight of financial instruments.<sup>4</sup> Perhaps it is only human nature to look for responses that bring, in the words of this special issue's title, "stability". There is also, however, a lurking anxiety that a disproportionate emphasis on stability will inevitably bring stagnation.

This address attempts to analyse the apparent contradiction between the ostensibly limitless range of possibilities presented by the phenomenon of globalisation with our seeming inability to effectively influence its direction, let alone to prevent the direst consequences. First, this address identifies the dichotomy between competing forces of deregulation and market correction as a fundamental attribute of globalisation. A second attribute, the tension between domestic and international policies, is then addressed. Third, the address examines the need to confront failures of multilateral governance, evaluating institutional failures and systemic challenges. Last, the address offers some preliminary observations on salutary directions in which global governance might evolve in the near and medium terms.

## ***II DEREGULATION VERSUS MARKET CORRECTION***

Variations in political, social and economic cultures that predate the widespread use of the label have produced a variety of perspectives on globalisation, particularly in regard to deregulation as a driver of this trend. Europeans are accustomed to scepticism about the social utility of unregulated or "uncorrected" markets that fail to offset or internalise economic and social externalities through governmental intervention. The notion of "correcting" markets in the United States, by contrast, approaches heresy, reflecting a different political and economic culture from Europe's social democracies. After years of the dogma of free market economics, the American public seems to have become convinced that the "cure" of "correction" may be worse than any of the trajectories that, in Will's words, are "unknowable". Yet, even in America there is a growing sense that the direction of not only economic policy, but a variety of other social policy agendas such as the environment, are not only tied together in increasingly dense global linkages, but that the trajectory of global deregulation through such international vehicles as free trade agreements (FTAs) and bilateral investment treaties is increasingly out of control, with no clear goal other than to reduce governments' interference in what otherwise would be a free market. Unfortunately, at present there

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<sup>4</sup> See generally Brian Quinn "The Failure of Private Ordering and the Financial Crisis of 2008" (2005) 5 NYUJL & Bus 549.

seem to be few, if any, tools at the international level effectively to shape, mould, direct, "correct" or remedy this inherent dichotomy.

Clearly there are many trajectories and paths that globalisation can take, and a variety of endpoints that can be imagined, some fraught with considerable potential for unpleasant surprises. The subprime mortgage crisis, beginning in the United States but precipitating global consequences, surely could have been averted through financial regulation that prevented the bundling and resale of individual loans as mortgage-backed securities, and its roots have been traced to policy decisions as long ago as the Clinton Administration. But it is important to not lose sight of the broader public policy goal, which was to broaden access to home ownership for citizens of all means and not just the wealthier classes. The casualties, extending well outside the borders of the United States, seem to have come about as a result of the law of unintended consequences, an artifact of poor regulatory – or in this case – deregulatory design. Given the current interconnectedness of the global economic system, it is difficult to imagine a problem of this magnitude being confined to the borders of one state, and as we now know, a global economic crisis subsequently ensued.

One can see this phenomenon at work in many other areas as well. The theme of one of the conference sessions from which this special issue was developed, "Increased Protectionism or Legitimate Response", is familiar from the debate over the relationship between trade and social policies, such as environmental protection and sustainability. There, the question is whether an ostensibly legitimate public policy purpose is sufficient to overcome the deregulatory momentum from free trade agreements. Again, the model is one of deregulation-plus-correction. Unfortunately, this has resulted in a public policy paradigm that involves drawing distinctions, at times very fine indeed, between the "legitimate" and the "protectionist".<sup>5</sup> This has become an important debate, if only because that is the policy space created by the existing institutional and legal structure framed by the competing goals of deregulation and market correction. Ultimately, however, global society should be careful not to deceive itself by giving in to a Goldilocks-like search for an optimal balancing of competing interests. Even if this jurisprudence were to evolve for decades more, it still would fail to address the much larger question of where globalisation is or should be taking our world.

This approach of deregulation followed by market correction, as driven by institutions such as the World Trade Organization (WTO) and a plethora of bilateral and regional FTAs, has not gotten the world far, and indeed has produced notable failures. Deregulated financial markets have led to the crisis that sparked the analysis addressed in this special issue. Although deregulated trade is a familiar paradigm, the trade regime has been abysmally unsuccessful at even beginning a debate on

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5 See for example Thomas Cottier "The Legitimacy of WTO Law" (Working Paper No 2008/19, Swiss National Centre of Competence in Research, November 2008); Ernst-Ulrich Petersmann "Challenges to the Legitimacy and Efficiency of the World Trading System: Democratic Governance and Competition Culture in the WTO (Introduction and Summary)" (2004) 7 JIEL 585.

the notion of sustainable trade.<sup>6</sup> Although it may be difficult to say what sustainable trade is or how to get there, it will almost certainly not be the result of a purely deregulatory approach as is found in the WTO and regional trade agreements.<sup>7</sup>

Somehow there seems to be a world of choices, but a lack of effective tools to steer in a particular direction, let alone direct a particular outcome. Surely new approaches are necessary to address challenges in all the areas covered by this conference: trade, finance, investment, environment and no doubt others as well. Without being so bold as to suggest a comprehensive approach to this challenge, several preliminary observations are possible even now. The remainder of this address examines the tension between unilateral action and multilateralism; assesses institutional failures and systemic challenges at the international level, among which are the potential salutary role of private actors, including non-profits and business; and, evaluates the need for structural and institutional evolution.

### ***III UNILATERAL ACTION VERSUS MULTILATERALISM***

As already observed, the current model of globalisation relies on deregulation as a principal driver.<sup>8</sup> FTAs are a good example, as they consist of a series of obligations that could be termed "negative". "Negative" in this sense is not a normative statement, and certainly not a pejorative evaluation, but a structural attribute. The obligations in trade agreements are negative because they limit or constrain the range of governmental behaviour. The theory is to elevate parochial, and presumptively protectionist, national interests on the international level. There, multilateral collective action provides the legal and policy discipline lacking at the domestic level for states to either choose, or be impelled to confront, domestic actions that conflict with the larger global good.

The larger perspective is that, in the economic realm, unilateral measures imposed by individual states have considerable potential to disrupt global markets. Certainly, all governments engage in decision-making processes and take concrete actions that are less than ideal. While governments surely need to be restrained from time to time, they nonetheless have a near-monopoly on crafting public policy. In a democracy, this makes government the principal, if not the sole, viable option for representing the collective interests of the people. So surely one should be wary of wholeheartedly embracing the presumption that governmental action is exclusively or even primarily an impediment to economic growth – as, indeed, acknowledged by WTO agreements and many chapters in FTAs –

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6 See for example Steve Charnovitz "International Standards and the WTO" (Legal Studies Research Paper No 133, GWU Law School, Washington DC, 2005); Sara Dillon "Trade and the Environment: A Challenge to the GATT/WTO Principle of 'Ever-Freer Trade'" (1996) 11 St John's J Legal Comment 351.

7 See generally Markus W Gehring "WTO Law and Sustainable Development" in David Armstrong (ed) *Routledge Handbook on International Law* (Routledge, New York, 2009) 375.

8 For a sustained critique of contemporary globalisation precisely for this link with deregulation, see Dani Rodrik *Has Globalization Gone Too Far?* (Institute for International Economics, Washington (DC), 1997).

and that the path to economic paradise is to tie government's hands. Beginning from a multilateral world view dominated by deregulatory perspective, moreover, "corrections", if any, are left to states acting on their own, freed from international disciplines. Without more, governments are then potentially left adrift without multilateral guidance as to how to channel the policy-making discretion that results.

This approach has worked tolerably well so long as issues of trade, investment and other international economic issues have remained confined to strict functional boundaries, without spilling over into other social policy arenas. But over the last two decades there has been continuous friction at the interface of an international economic agenda focused on deregulation with other equally legitimate social policy concerns like labour and trade. From one point of view, those social policy agendas have been characterised by an amoeba-like creep into areas of trade, investment and other corners of the economic order. This trend in part results from an evolution in the notion of what constitutes a trade barrier, moving beyond the relatively straightforward categories of tariffs and import quotas into the terrain of national regulatory requirements. Similarly, an expansion in the notion of trade agreements as covering only trade in goods to encompass, for example, services and intellectual property, has also encouraged a sense of gear-grinding with social policy goals.

From another point of view, deregulatory constraints imposed by international economic law and policy can fetter desirable or necessary public policy responses to social ills. After more than 20 years of experience with these clashes, this appears to be an immutable law of the globalisation debate: there are almost always two equally principled ways of characterising a situation based on one's perspective.<sup>9</sup> For example, a measure that, from a trade policy point of view, appears to be an unnecessary obstacle to trade, may from an environmental perspective look like a legitimate exercise of a state's inherent police power.<sup>10</sup> In mirror-like fashion, a host country's action to protect labour rights may look to a foreign investor like a heavy-handed disruption of its legitimate business interests.<sup>11</sup>

This situation creates a dynamic that promotes social welfare in some ways, but is counterproductive in others. International disciplines in areas such as trade and investment elevate domestic policy above the provincial, the parochial and the protectionist, providing a counterweight

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9 For an analysis of the globalisation debate in terms of "skeptical" and "globalist" views, see David Held and Anthony McGrew "The Great Globalization Debate: An Introduction" in David Held and Anthony McGrew (eds) *The Global Transformations Reader* (2nd ed, Polity Press, Cambridge, 2003) 1. See generally Stephan Marette and John Beghin "Are Standards Always Protectionist?" (2010) 8 *Rev Intl Econ* 179.

10 See for example Andrea R Schmidt "A New Trade Policy for America: Do Labor and Environmental Provisions in Trade Agreements Serve Social Interests or Special Interests?" (2009) 19 *Ind Intl & Comp L Rev* 167.

11 See for example Roman Grynberg and Veniana Qalo "Labour Standards in US and EU Preferential Trade Agreements" (2006) 40 *JWT* 619.

for governments to resist the siren call of pandering to self-serving and short-sighted domestic interests. They also provide rule-of-law based dispute settlement mechanisms, typically among the more powerful in international law, to assure that states adhere to their promises, to facilitate the ongoing evolution of the law, and to create a policy climate that encourages compliance and discourages future transgressions. Then, too, states may have to push back against the momentum of global policies originating in the WTO or FTAs in a self-help mode to create policy space for their own societal choices. The result is an apparently unfortunate juxtaposition of what can turn out to be the momentum of a multilateral juggernaut against what is perceived as the blinkered, unilateral pursuit of a state's narrow, short-sighted goals. And those aims themselves may be driven not so much by genuine national priorities, but rather by the capture of government by special interests.

This structure nonetheless represents some limited progress in overcoming the impediments inherent in the unruly, sometimes chaotic state of nature that characterises an international order now consisting of over 190 states. There are, nonetheless, persistent structural and institutional weaknesses as well. While the state of the international economic order may, as suggested by the title of this special issue, be less than stable despite considerable efforts over the past decades, even less progress has been made on other social policy agendas such as environmental sustainability and labour rights.<sup>12</sup> The international regime as currently structured pits these affirmative goals requiring collective intervention in markets against a deregulatory imperative in an apparently ceaseless tug-of-war that seems destined to produce lose-lose rather than win-win results. National policy agendas are notoriously subject to capture by special interests with objectives contrary to the global economic good. There has been much less recognition of the analogous capacity for multilateral processes similarly to be hijacked aggressively to squelch what might very well be salutary national action.<sup>13</sup> The current system, not only in terms of content but also structurally, is nothing short of a systemic failure of global governance.

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12 See for example Chantal Thomas "Trade-Related Labor and Environment Rights Agreements?" in James Harrigan and E Kwan Choi (eds) *Handbook of International Trade: Economic and Legal Analyses of Trade Policy and Institutions Volume 2* (Blackwell Publishing, Oxford, 2005) 107.

13 International disciplines in specific areas, such as intellectual property and food safety, can be interpreted as vehicles for achieving economic goals of certain sectors, such as agricultural exporters and the entertainment industry. The question, of course, is whether these requirements further the needs of the public more generally, as opposed to merely specific private business sectors. For instance, the need for a WTO waiver of intellectual property obligations related to pharmaceuticals for the treatment of HIV/AIDS, malaria and tuberculosis epidemics in developing countries can be interpreted as a correction necessitated by overreaching on the part of drug companies in demanding worldwide intellectual property protections for their products. See *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health* WT/L/540, 30 Aug 2003 (Decision of the General Council). See generally Chad P Brown *Self-Enforcing Trade: Developing Countries and WTO Dispute Settlement* (Brookings Institution Press, Washington (DC), 2009).

#### ***IV INSTITUTIONAL FAILURE AND SYSTEMIC CHALLENGES***

Overcoming these impediments to collective international action – as in the form of internationally-agreed standards in multilateral treaties or other undertakings, or, alternatively, effective institutional mechanisms for taking meaningful international decisions on issues that affect many or all states – will take both creativity and political will. States, as represented by their governments, are but one category of actors on the international stage. While intergovernmental agreements in the form of treaties and conventions that establish rules for states are important, and in some cases necessary, private institutions, most notably multinational corporations, play a crucial role in shaping the reality on the ground. One of the major challenges is to craft incentive structures that encourage private business to make choices that move the planet toward outcomes consistent with public policy goals responsive to the priorities of global society, sometimes known as "collaborative governance".<sup>14</sup> All too often the profit motive, such as mere repackaging of mortgage debt and short-sighted patterns of resource exploitation, produces results that may benefit special interests at the expense of the larger good, a form of rent-seeking behaviour.

Unfortunately, the decentralisation of legal and political authority into more than 190 sovereign states creates gaps that can be exploited by private interests to the detriment of the global public interest. As globalisation accelerates and business pressures intensify to move finished goods, parts and components, services and capital repeatedly across national borders, the inadequacy of the current legal and political system for regulating private interests of all kinds, and multinationals in particular, becomes ever more apparent.

Despite some progress, the current system of international institutions has remained too fragmented to keep up with the challenges presented by the enormous rapidity of change in the real world. Articles in this special issue address challenges in the WTO and regional trade negotiations. Other institutional players include the International Monetary Fund, the World Bank, the Organization for Economic Cooperation and Development (OECD), the International Centre for the Settlement of Investment Disputes and a relatively new institution, the International Accounting Standards Board. The mission, jurisdiction and powers of these international institutions have failed to produce coherent policy responses to real-world challenges, as demonstrated by the topic of this special issue. The inability to reach closure on the Doha Agenda more than a decade and a half after the conclusion of the Uruguay Round is perhaps the most obvious example of institutional failure.<sup>15</sup>

The situation is unfortunately even worse in other components of the multilateral social agenda. The colossal failure of collective will on global climate change makes frustration with Doha look

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14 See for example Lester Salamon (ed) *The Tools of Government: A Guide to the New Governance* (Oxford University Press, Oxford, 2002).

15 See generally Jagdish Bhagwati and Peter Sutherland "The Doha Round: Setting a Deadline, Defining a Final Deal" (Interim Report of the High Level Trade Experts Group, January 2011).

like a success by comparison. Scholars in the field report that the International Labour Organization is essentially irrelevant even in those countries in which, unlike the United States, it was previously a significant force. International human rights bodies do not seem to have a serious impact on the ground. The international community's seemingly preferred vehicle, the International Criminal Court (ICC), may ultimately be successful in bringing a finite number of war criminals to justice. But regardless of its appeal to lawyers, the structure and functioning of the ICC do not seem responsive to the totality of the human rights challenge worldwide. To an even greater extent than is the case with the existing international economic order, the multilateral institutions tasked with addressing these social issues are fragmented and decentralised. For instance, the secretariats of major environmental agreements are each largely separate institutionally and geographically, littered indiscriminately over half of the globe.

One proposed solution to this problem is to establish an international institution equipped with meaningful rule-making and enforcement powers. For example, some have advocated the creation of a Global Environment Organisation as a counterweight to the WTO. While no doubt well-meaning, the concept is fraught with complications, at least at the current stage of development of multilateral institutions. There is a yawning gap between, on the one hand, international governance as it currently exists either now or in the medium term, and, on the other, meaningful institutional structures of the sort found at the national level.<sup>16</sup> Questions such as enforcement that in a municipal legal system may have relatively straightforward answers consequently face seemingly overwhelming impediments when translated to the international level. And a Global Environment Organisation might only encourage further fragmentation of the architecture of multilateral governance. For instance, how would a Global Environment Organisation respond to other, non-environmental issues? Perhaps no more effectively than the WTO responds to non-trade concerns. These considerations suggest that what is called for is a multilateral body, or an organisational structure, that transcends the relatively narrow confines of the functionally-defined institutions that are so important to global governance today.

What decision-making structures can facilitate the adoption of robust rules against a background of the downward drag of the need for consent and consensus? How can meaningful incentives for compliance be created, and are punitive sanctions even a plausible part of the mix?<sup>17</sup> More specifically, even if an institution such as the International Accounting Standards Board could

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16 Whether this gap is an evolutionary one, or a deliberate stance in favour of powerful actors who can exploit it, depends in part upon one's view. See for example Chios Carmody, Frank J Garcia and John Linarelli "Conclusion: An Agenda for Research and Action" in Chios Carmody, Frank J Garcia and John Linarelli (eds) *Global Justice and International Economic Law: Opportunities and Prospects* (Cambridge University Press, Cambridge, 2012) 287 at 292–293. Analysis and prescriptions for global economic governance reform depend upon one's view of the global economy, its aims and its fairness.

17 See for example Robert Howse and Kalypso Nicolaidis "Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?" (2003) 16 *Governance* 73.

produce an effective corpus of global standards, what assurances are there to business and the public that those requirements will be effectively monitored and enforced? What does a meaningful system of governance look like without a court of general jurisdiction? After all, only a restricted subset of situations that are plausibly characterised as international disputes ever reach the level of resolution by a binding, neutral, third-party court-like mechanism.

## ***V STRUCTURAL AND INSTITUTIONAL EVOLUTION***

Although it is difficult to identify a universal remedy for these difficulties – the dichotomy between unilateral and multilateral action; institutional failures; and, systemic challenges – there are nonetheless a number of observations that can be made at this stage. First, there is a need to move towards more of a sense of shared future and collective social responsibility necessary to produce benefits in the form of global public goods. Examples include an open trading system, a stable economic order and a healthy climate.<sup>18</sup> In other words, there is a need for an ever more vigorous, robust multilateralism that transcends the largely artificial boundaries of trade, investment, human rights and sustainability that have accreted over time. The United States and other OECD members should lead by example in rethinking the "rules of the game".

One very encouraging development in this regard has been the tentative willingness of the United States, the European Union, Japan and other agricultural exporters to take on agricultural subsidies in their own countries.<sup>19</sup> Developing countries have complained that, while they have been asked to open their markets as a strategy to promote growth and economic development, the continued maintenance of agricultural subsidies by large, developed country exporters has been a failure to respond in good faith. The degree of "interconnectedness" in this area started to become apparent when developing countries began to criticise the United States Farm Bill, the principal vehicle for delivering United States agricultural subsidies each year.<sup>20</sup> This juncture highlighted in concrete terms the perspective, currently being expressed in the Doha Agenda, that developing countries have been asked to open their markets as a strategy to encourage economic development, while the same countries demanding market access abroad, among them the United States, European

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18 It can be argued that globalisation itself is contributing to this shared view. See Frank J Garcia "Globalization, Global Community and the Possibility of Global Justice" (Boston College Law School Faculty Paper No 33, 2005).

19 See Bhagwati and Sutherland, above n 15. But see Raj Bhala "Poverty, Islamist Extremism, and the Debacle of Doha Round Counter-Terrorism; Part One of a Trilogy – Agricultural Tariffs and Subsidies" (2012) 9 U St Thomas LJ 5.

20 The current Farm Bill is the Food, Conservation and Energy Act of 2008 PL 110-246. The 2012 Farm Bill is the Agriculture Reform, Food and Jobs Act of 2012 S 3240. On agricultural trade barriers such as farm subsidies and tariffs, see Sunjoon Cho "The Demise of Development in the Doha Round Negotiations" (2010) 45 Tex Int'l LJ 573.

Union and Japan, have declined to eliminate economic subsidies that make developing country agricultural exports less competitive.

Second, there should be a conscious expansion of opportunities for participation by civil society and the public worldwide in shaping, moulding, channelling and focusing the current and future direction of globalisation and consumerism. Progress in this direction would help assure trajectories and endpoints that achieve desirable social policy outcomes that are good for people and the planet worldwide, and not just for certain privileged interests.<sup>21</sup>

The task is large but not insurmountable. As but one example, the international community could re-examine rules governing trade, foreign investment and bilateral and multilateral aid to ensure that intellectual property rules encourage rather than undermine preservation of indigenous cultural knowledge. This knowledge may be of tremendous use in preserving biological diversity as the "raw material" of the recent boom in genetic engineering.<sup>22</sup> More generally, failure to meet multilaterally-established minimum standards in areas such as climate change by laggards, holdouts, free riders and scofflaws can usefully be conceptualised as subsidies that distort trade. Although there are technical questions related to existing WTO rules on subsidies, the concept is a powerful tool if effectively deployed, and endorsed by no less a personage than Nobel laureate Joseph Stiglitz.<sup>23</sup>

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21 See for example Sebastiano Maffettone "The Fragile Fabric of Public Reason" in Ricardo Dottori (ed) *Reason and Reasonableness (The Dialogue)* (LIT Verlag, Munich, 2005) 407.

22 Some such activities are already mandated and occurring, and could serve as models for other productive reviews of extant obligations. As noted by the World Trade Organization Secretariat (World Trade Organization "TRIPS: ISSUES: Article 27.3b, traditional knowledge, biodiversity" <www.wto.org>):

The TRIPS Agreement [Agreement on Trade-Related Aspects of Intellectual Property Protection, the principal vehicle for incorporating intellectual property rules into the WTO institutional structure] requires a review of Article 27.3(b) which deals with patentability or non-patentability of plant and animal inventions, and the protection of plant varieties. Paragraph 19 of the 2001 Doha Declaration has broadened the discussion. It says the TRIPS Council should also look at the relationship between the TRIPS Agreement and the UN Convention on Biological Diversity, the protection of traditional knowledge and folklore. It adds that the TRIPS Council's work on these topics is to be guided by the TRIPS Agreement's objectives (Article 7) and principles (Article 8), and must take development issues fully into account.

This discussion has not progressed. Indeed, there is opposition in the TRIPS Council to this discussion of the relationship between the TRIPS Agreement and the Convention on Biological Diversity. Some members have taken the view that the TRIPS Council does not have a mandate to progress this discussion which has become entwined with the geographical indications debate: see *Multilateral System of Notification and Registration of Geographical Indications for Wines and Spirits* TN/IP/20, 22 March 2010 (Report by the Chairman) at [4].

23 See Robert Howse and Antonia L Eliason "Domestic and International Strategies to Address Climate Change: An Overview of the WTO Legal Issues" in Thomas Cottier, Olga Nartova and Sadeq Z Bigdeli

Some maturation in this direction is already apparent. Global civil society, in part due to breakthroughs in communications technology, has become a more organised force as a healthy counterweight to the hegemony of corporate interests. Taking advantage of the trend toward decentralisation and a less state-centric world, the global movement to promote fair trade coffee is only one of many such efforts. Instead of relying on the endless skirmishes among states in trade disputes as a proxy forum, the interests concerned can directly address their message to the court of public opinion.

Enhanced information flow resulting from the reduction in transaction costs associated with rapid technological advances is a partial, but not entirely satisfactory, response to the international governance problem. It is not clear, for instance, how amorphous and diffuse, as opposed to focused and intense, concerns find expression in this new milieu. Nonetheless, collective action by civil society is certainly effective at bypassing the difficulties presented by an otherwise state-centric system. In a more sophisticated form, such as voluntary certification schemes for sustainably harvested timber, non-economic social interests can directly engage with their corporate counterparts. By doing so, they avoid the complexities and inertia inherent in trying to influence either domestic governments or their international alter egos, multilateral institutions. Indeed, it is not uncommon to encounter business-industry partnerships that result in greater effectiveness for civil society agendas, while still creating an orderly and structured environment for business to engage with civil society on public policy questions. In a world in which both business and civil society have experienced a trend toward globalisation, in part through an explosion in the communications media, it is only to be expected that the court of public opinion has gained importance as a tribunal of choice.

A simultaneous development has been the increasing importance of organised industry self-regulation, including mechanisms for third-party certification. The best-known example on the international level is the International Organization for Standardization (ISO). ISO is not an intergovernmental organisation governed by public international law. Instead, many of its members are private standardising entities.<sup>24</sup> Through an immensely complicated process, ISO adopts harmonised, non-binding standards essentially addressed from industry directly to industry. On the one hand, some observers approach this process with scepticism due to its potential to displace public regulation by governments, which at least in principle could address the entire subject matter covered by this special issue. On the other hand, with so many countries running deficits and government funds at a premium, private voluntary standards can play a useful ancillary role in areas such as food inspection, which is an increasingly challenging task given the explosion of

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(eds) *International Trade Regulation and the Mitigation of Climate Change* (Cambridge University Press, Cambridge (UK), 2009) 48 at 73–76.

24 See International Organization for Standardization "Structure and Governance" <[www.iso.org](http://www.iso.org)>.

international trade in agricultural commodities.<sup>25</sup> Other examples of voluntary schemes, such as the Kimberley Process for certifying conflict-free diamonds, are something of a hybrid, involving partnerships among governments and business interests, often with the active involvement of non-governmental organisations.<sup>26</sup>

Interestingly, the structural picture comes full circle with private voluntary standards, whether of the ISO variety or certification schemes such as those for fair trade coffee or sustainably harvested timber. The Uruguay Round Agreement on Technical Barriers to Trade (TBT),<sup>27</sup> which has only in recent years begun to generate significant jurisprudence, both energises and disciplines private voluntary efforts. ISO standards are expressly identified as international norms, whose incorporation into national policy is entitled to a presumption of legitimacy in the WTO dispute settlement process. At the same time, voluntary standards are subject at least to some extent to discipline under the TBT.<sup>28</sup> To date, both of the important disputes under the TBT have involved labelling, a public policy strategy that again lessens the role of government and puts choices directly in the hands of consumers by providing them with information to make informed choices.

## **VI CONCLUSION**

In the subject matter addressed by this special issue, as well as many others, the process of globalisation has presented a dizzying array of possible trajectories and outcomes. At the same time, it feels as if many of these processes are out of control, subject to little or no influence from outside. This address suggests some reasons for this, including the inadequacy and fragmentation of existing international institutions, which in turn stem from a failure of political will. If the political will is present, then the institutional pieces will fall into place, often through creative legal solutions that enjoy policy support. The converse is nevertheless equally true: the international system is biased toward stasis, and in the absence of political momentum little is likely to change.

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25 See for example Tracey Epps "Demanding Perfection: Private Food Standards and the SPS Agreement" in Meredith Kolsky Lewis and Susy Frankel (eds) *International Economic Law and National Autonomy* (Cambridge University Press, Cambridge (UK), 2010) 73.

26 The Kimberly Process "KP Participants and Observers" <[www.kimberleyprocess.com](http://www.kimberleyprocess.com)>.

27 Agreement on Technical Barriers to Trade 1868 UNTS 120 (opened for signature 15 April 1994, entered into force 1 January 1995).

28 Not all private voluntary standards are subject to discipline by the Technical Barriers to Trade Agreement, including, notably, those related to food quality, such as the Global Food Safety Initiative and Global Gap. The implications of this apparent under inclusiveness are not yet clear. For instance, developing countries have complained about these private schemes, but there are few if any requirements in World Trade Organization agreements that might discipline these voluntary business-based efforts. See for example "Members take first steps on private standards in food safety, animal-plant health" WTO News (30–31 March 2011). On the one hand, there might be some utility to letting "a thousand flowers bloom", to determine empirically which schemes work best. On the other hand, the constriction of market access resulting from schemes that are not harmonised may not justify the divergence in approaches.

When one looks past states as the primary or sole actors, however, the picture becomes much richer. Private voluntary standards addressed to industry and the mobilisation of civil society, particularly in the form of certification schemes, to a certain extent fill the gap created by the absence of collective action by states. Again, this is only a partial response to challenges of international governance. Although increasingly important, these private models of action are different in kind from interventions that have been, and continue to be, required from governmental authorities. One of the challenges for the future is to integrate the two in coherent ways that complement the strengths, as well as minimising the institutional weaknesses, of each.

So globalisation has indeed brought a world of options, many of them perhaps inconceivable as recently as a generation ago. The tools to facilitate meaningful choices among those possibilities are still somewhat primitive, sometimes competing and contradictory, and evolving over time away from a state-dominated model and in the direction of concerted behaviour by private parties. A decade or two from now, this moment will likely appear as a transitional juncture, at which the magnitude and extent of the consequences of globalisation have catalysed concern for the development of judicious tools to facilitate meaningful public policy choices without stifling the energy behind the globalisation imperative. And no doubt the articles presented in this special issue will be instrumental in this critical "big think".

