

CHALLENGES AHEAD IN INTERNATIONAL ECONOMIC LAW

Thomas Cottier^{*}

The policy path through the many facts and circumstances which have good or bad effects on world economic situations, and thus on international economic law, is extraordinarily complex and unclear. This 'landscape' truly needs some roadmaps, but few of these exist and those that are used are often misleading (John H. Jackson).¹

Since the conclusion of the Uruguay Round of multilateral trade negotiations and the entry into force of the WTO Agreements in 1995, international economic law has witnessed an unprecedented emphasis on trade regulation. The field has moved centre stage in public international law. The development of a sophisticated case law and jurisprudence by panels and the Appellate Body no longer allowed international law scholars to neglect the field. Many in the community were attracted by and turned to the field, some for a short time, others for good. A new generation of trade lawyers came of age. New curricula emerged in university education; research centres and a new community formed branches of established learned societies or have created new ones in recent years. The establishment of a world-wide Society of International Economic Law (SIEL) was a landmark and it held its first major conference in Geneva in 2008 with great success. The interest of most international economic lawyers centres on international trade regulation and investment, less so on the transactional part of the equation, i.e. contracts, credit and insurance and monetary issues broadly speaking. The many linkages to other fields, in particular, environmental law, human rights, culture and many others, have broadened perspectives and assisted in the process of bringing trade regulation fully into the realm of public international law. The close and particular relationship to economics characterizes the approach, albeit many and different perceptions as to that relationship pertain, and the community is far from embracing the law and economics school of jurisprudence.

^{*} Of the Board of Editors. Professor of European and International Economic Law, Director of the World Trade Institute and the National Centre of Competence in Research NCCR – Trade Regulation, University of Bern, Switzerland. E-mail: thomas.cottier@iew.unibe.ch. I am particularly indebted to my colleague Benno Ferrarini for detailed suggestions, and to Samuel Leutwyler, Krista Nadakavukaren Schefer and Pierre Sauvé for inspiring discussions.

¹ John H Jackson, 'International Economic Law: Complexity and Puzzles' (2007) 10 JIEL 3, 7, 8.

There is no shortage of challenges within the field of international trade regulation narrowly defined and properly speaking. John Jackson offered a wide range of issues and topics in the piece quoted at the outset. Many of them have since been dealt with in the journal, some in a volume commemorating the 10th anniversary of the journal.² Many remain unresolved, in particular, those relating to the sovereignty of nation states, trade regulation and other, non-protectionist and legitimate policy goals. While the trade and environment debate and, in particular, the case law of the Appellate Body gradually brought about a better balance between different policy goals, such a balance still needs to be reached with regard to other linkages, in particular, the protection of human rights and of economic aspirations of justice which they represent. The same is true in investment protection, the emphasis of which has been strongly on the interests of investors with little concern for the impact on domestic regulation and human rights. New linkages are currently emerging, such as the triangle of trade, investment and migration. At the same time, the relationship of WTO agreements to other international agreements remains unsettled, in particular, in constellations of non-reciprocal relations among Members of the WTO.

The complexity and linkages of issues in domestic regulation beyond border measures seriously calls into question traditional modes of consensus-based decision-making in a multipolar world with more than 150 Members of the WTO. The negotiations on the Doha Development Agenda face major challenges in the classical issues of market access, particularly in agriculture, too long neglected and now facing great difficulties in catching up. Consensus-based diplomacy will bring the agenda to a close in 2009 and 2010 one way or another. In the meantime, Members resort to transcontinental preferential trade agreements, further undermining the multilateral system. Structural reform of the WTO is called for, less because of current difficulties than because of a more fundamental inability to successfully deal with complex issues and linkages which require not only interfacing goods, services and intellectual property, but also WTO and other international organizations and regulatory fields of international law. The resulting imbalance of the political process and judicial settlement essentially based upon majority ruling calls for reform and avenues which allow for legislative response and thus a lessening of the burden of the legal process, currently all resting on the shoulders of the Appellate Body. It will be a matter of designing a two-track system which allows for both package deals in market access and an ongoing process of legislation in addressing non-tariff barriers to international trade. The WTO also faces the unresolved problem of graduation, i.e. of shaping rules, rights and obligations in a manner responsive to levels of social and economic development. It is

² William J Davey and John H Jackson, 'The Future of International Economic Law' (2007) 10 JIEL 439-747.

recognized that traditional perceptions of Special and Differential Treatment do not work. A new approach remains to be developed within a single undertaking or, alternatively, with a future structure of variable geometry and sectoral agreements. There is plenty of work for the community of trade and investment lawyers and academics, staying within the proper field of international trade regulation.

The financial crisis of autumn 2008 and the turmoil of financial markets building up since 2007 call the familiar preoccupation of the trade law community with WTO law and its fascinating intricacies brutally into question. The sub-prime mortgage crisis unravelling in the US market triggered a severe loss of confidence in and within the international banking system. The ensuing credit crunch brought down some of the most established players in Wall Street and abroad. Others were kept afloat through massive rescue packages and interventions by the US Federal Reserve and government. In 2008 alone, the S&P 500 and NASDAQ Composite indices plunged by about 40%, wiping out nearly USD 7 trillion of stock market value. Many households have lost their savings; most have seen their wealth shrink. With the global economy sliding into a major recession, many risk losing their jobs too. Growth in global trade has plunged and the World Bank deems it likely that 2009 will mark a decline in global trade volume for the first time since the early 1980s. Governments are tempted to take recourse to protectionist measures. Developing countries' accomplishments in terms of global trade shares are imperilled and with this one of the main factors legitimatizing the multilateral trading system and its fairness.

WTO law may resist overt protectionist measures, due to firm rules and bindings, and the risk of the imposition of harmful trade sanctions. But the open trading system today is threatened from an angle for which it is badly prepared, and for which no legal disciplines of comparable importance and effectiveness are in place in international economic law. It risks being outflanked, ambushed and stabbed in the back. The weapons, defences and tools with which the WTO was equipped, and the threats for which it was prepared, risk remaining without effect. The perils to welfare and prosperity which has been based upon open markets, come from different angles, largely unregulated in international law. Flexible exchange rate arrangements have been instrumental to growth and prosperity; at the same time fluctuations carry the risk and potential of trade barriers far greater than any present tariff or non-tariff regulated under the WTO law. Today, loss of income and spending power, limitations of credit or excessive insurance costs threaten to bring trade to a halt both on the supply and demand sides, far more than any measures of trade or investment protection. The theatre of war has dramatically changed.

The phenomenon, of course, is not new and is a recurring one. Since the Dutch tulip bulb bubble in 1613 and up to the present one, the world has

seen, according to economic historians, 10 truly major financial crises with comparable characteristics, causes and traits.³ Bubbles and crashes ever since the first have accompanied and influenced international trade. The relationship of the Wall Street Crash of 1929 with trade policy forms part of any textbook on trade regulation. Smooth-Hawley remains a symbol and paradigm which eventually triggered new trade policies under New Deal and the post-war emerging welfare state. The General Agreement on Tariffs and Trade (GATT) consolidated bilateral agreements and led the multi-lateral foundations for long-term reduction of tariff and non-tariff barriers. The institutions of Bretton Woods offered support in reconstruction, and later in development, and in achieving monetary stability under the gold standard. The relationship of trade and finance, however, did not emerge as a subject studied in combination with public international law. The institutional architecture of the Bretton Woods system dissociated the planned International Trade Organization and subsequently the GATT both from the United Nations and the financial system. The law and policy of the GATT was only loosely linked to the International Monetary Fund (IMF) in the field of balance of payment restrictions. It did not cover a broader macro-economic dimension of monetary and financial policy. Nor did the fragmentation produce a working relationship of trade policies pursued in GATT and within the World Bank in fostering social and economic development. The functional approach left the different areas more or less isolated. The GATT and the WTO brought about stability based upon the rule of law. The IMF and the World Bank, other than for constitutional structures and facilities, developed upon the basis of informal policy choices and programmes shaped by the Washington consensus aiming at open and liberal market structures as a prime tool of social and economic development. Conditional lending agreements were simply the legal form for implementing economic policies. Substantive international law plays a minor part in this field.⁴ The same, albeit to a lesser extent, is true of domestic law. Monetary policy is essentially exercised on the basis of broad discretion and within international networks. There is hardly any hard law. Supervision of financial services is essentially addressed in domestic law. It amounts to one of the most dense and specialized areas of regulation. But there is hardly any international law on the subject. The Basle Accords are key examples of soft law and were praised as an alternative to law in bringing about international cooperation. Key issues, such as determination of the supply and cost of money, have remained matters of policy and are withdrawn from government and parliament in order to avert inflation. Most is left to informal cooperation and

³ See Charles P Kindleberger, Robert Z Aliber, *Manias, Panics and Crashes: A History of Financial Crisis* (5th edn Palgrave Macmillan, Houndsmill, New York 2005) 8.

⁴ See, in particular, Rosa M Lastra, *Legal Foundations of International Monetary Stability* (Oxford University Press, Oxford 2006).

networking of central banks and monetary authorities and to domestic schemes of banking supervision. Deregulation and the neoliberal philosophy of seeing the law as a restriction of markets and of freedom, rather than a foundation of markets and of freedom, further eroded potential limitations and disciplines on these markets. The quest for liberalization of financial services after the Asian crisis was informed by the alleged need to create international competition in order to improve badly run domestic banking in emerging economies. At the time, implosion, starting in the real estate market in Thailand, was caused by excessively secluded markets and default-prone loans of domestic banks or conglomerates. The philosophy of market access and foreign competition was thus an appropriate answer. But the General Agreement on Trade in Services (GATS) did not sufficiently consider the issue of international cooperation and possible harmonization of international supervisory standards. The matter was carved out and simply left to the Basle Accords without legally obliging countries to comply.

For many years and decades, the triad of multilateral institutions seemed to work in a mutually supportive manner. Yet, the pace and sequence of crises has been increasing since World War II. No less than 18 financial crises and burst bubbles, both minor and larger ones on a national or regional scale have been reported during this time.⁵ Since 1995 alone, we can think of five to six crises. Global institutions helped to calm these turmoils and show the path to recovery. But they largely failed to address the 2008 crisis of the industrialized countries, and to prevent the world from sliding into recession. The shortcomings of a fragmented international architecture became apparent. They were largely recognized by the Group of 20 leading economies in November 2008. Governments pledged to improve transparency, enhancing sound regulation and integrity of markets, reinforcing international cooperation and reforming international financial institutions in the coming months and years.⁶

The fundamentally different legal approach in trade and monetary and financial affairs in international economic law may partly be due to diverging power structures and to the nature of the subject matter. It is conventional wisdom that monetary affairs do not lend themselves to regulation, at least to the same extent as international trade, even though financial services are strongly regulated in domestic law. It seems paradoxical that financial services are among the most regulated businesses in domestic law, but that no rules of such significance exist on the global level for the most advanced

⁵ Carmen M Reinhardt, Kenneth S Rogoff, 'Is the 2007 U.S. Sub-prime Financial Crisis so Different?: An International Historical Comparison' (February 2008) <http://www.economics.harvard.edu/faculty/rogoff/files/Is_The_US_Subprime_Crisis_So_Different.pdf> accessed 8 January 2009.

⁶ Declaration of the Summit on Financial Markets and the World Economy, Washington, November 15, 2008 <<http://www.whitehouse.gov/news/releases/2008/11/20081115-1.html>> accessed 8 January 2009.

global players. Trading money with a mouse click rendered the financial industry the paradigm of globalization. Yet, it remains short of being addressed in international law. There are no rules and disciplines, comparable to WTO law, which would address state failure in regulating financial markets. There is no hard international law calling for regulation of investment banking, despite the global reach of the industry. It is another paradox that the management of risks was essentially developed in and for financial services.⁷ Instead, it entered international law in the fields of environmental law and food safety only. The jury is out to assess and define the potential role of international law in financial and monetary risk management. At this juncture, there are many more questions than answers.

It may well be that trade and finance, in the end, will need diverging regulatory approaches and legal structures. The point, however, I wish to make is that myself and most of my generation of international lawyers have simply taken conventional wisdom for granted. Trade lawyers have left the monetary part of the equation largely outside their radar screen and field of interest. Despite recurring bubbles and regional crises, the community largely failed to address the threat of outflanking and undermining hard-fought and achieved market access rights and protection of legitimate expectations as to fair conditions of competition. If at all, we developed an interest in institutional and constitutional issues in monetary affairs, but entirely left policies to the economists. The same was essentially true when the European Monetary Union was formed. International lawyers, it would seem, largely failed to study the extent to which levels of capital reserves, monetary supply regimes and international supervision of financial instruments are suitable for binding legal regulation; or to what extent these matters are justiciable and could be subject to international dispute settlement in the process of globalization. I certainly failed to do so, but there has not been a broad stream of work discussing the problem of international harmonization and formal cooperation of monetary policy and banking supervision as can be observed in the field of trade regulation and investment properly speaking. Theories of multilayered governance, induced by trade regulation and protection of human rights, were not extended to global monetary affairs, despite the key experience of the European Monetary Union. All this explains why lawyers today are virtually without voice in the aftermath of the banking crisis. They will pick up the debris, but they largely failed to work preventively on risk assessment and risk management, as they did and do in the field of foodstuffs. No binding international rules to identify and deter poisonous assets have emerged.

The financial crisis not only identifies and recalls omissions of international lawyers, and trade lawyers, in particular. Worse, it shows a loss of

⁷ See Peter L. Bernstein, *Against the Gods: The Remarkable Story of Risk* (John Wiley, New York 1996).

faith in the profession to which the field of monetary affairs was assigned. Orthodox economics, largely associated with new classical economics, suffered a terrible blow. It has been conventional wisdom that stock market bubbles are inherently part of the system and its efficient market-based readjustment. Financial assets were held to reflect all known information, including and mainly about fundamentals to which asset prices are bound to return. The course of fluctuations and subsequent recoveries seemed to prove the point. Capitalism both induces growth and recessions. But this time, and in the Asian crisis before, it seems that mainstream economics failed to identify and anticipate the potential size of an implosion of the magnitude of the crisis building up in 2007 and 2008 and of the repercussions it will have on the global economy at large. It is too early to tell whether its effects will be comparable to those of former crises, or whether it will drive the world into a recession comparable to that of the 1930s. The prospects look gloomy.⁸ The crucial point is that the overall system failed to take preventive action. With notable exceptions, in particular Nouriel Roubini, financial and monetary economists failed to bring about and to communicate a proper risk assessment and risk management on the basis of mathematical projections in finance and monetary affairs.⁹

⁸ See *The Worst is Yet to Come*, articles by Nouriel Roubini, Stephen Roach, David M Smick, Robert Shiller and Dean Baker, *Foreign Policy*, pp. 63–68, (January/February 2009).

⁹ Professor Nouriel Roubini predicted the crisis well in advance. Excerpts from a *New York Times* report are worth reproducing: ‘On Sept. 7, 2006, Nouriel Roubini, an economics professor at New York University, stood before an audience of economists at the International Monetary Fund and announced that a crisis was brewing. In the coming months and years, he warned, the United States was likely to face a once-in-a-lifetime housing bust, an oil shock, sharply declining consumer confidence and, ultimately, a deep recession. He laid out a bleak sequence of events: homeowners defaulting on mortgages, trillions of dollars of mortgage-backed securities unraveling worldwide and the global financial system shuddering to a halt. These developments, he went on, could cripple or destroy hedge funds, investment banks and other major financial institutions like Fannie Mae and Freddie Mac. The audience seemed skeptical, even dismissive. As Roubini stepped down from the lectern after his talk, the moderator of the event quipped, “I think perhaps we will need a stiff drink after that.” People laughed—and not without reason. At the time, unemployment and inflation remained low, and the economy, while weak, was still growing, despite rising oil prices and a softening housing market. And then there was the espouser of doom himself: Roubini was known to be a perpetual pessimist, what economists call a “permabear.” When the economist Anirvan Banerji delivered his response to Roubini’s talk, he noted that Roubini’s predictions did not make use of mathematical models and dismissed his hunches as those of a career naysayer.’ Stephan Mihn, Dr. Doom, *New York Times*, 15 August 2008 <<http://www.nytimes.com/2008/08/17/magazine/17pessimist-t.html>> accessed 8 January 2009. For archive articles by Professor Roubini see www.rge.com. Also, *The Economist* had long warned about the housing bubble. It also pointed to the Fed’s failure to avoid its build-up. For example, the weekly wrote in October 2007: ‘Credit and asset-price booms can leave an awful lot of wreckage behind them. The casualty list after America’s housing crash includes: an overhang of unsold property; a huge fall in construction; the risk of weakening consumer spending as house prices fall; a trail of bankruptcies; big write-downs among the investment banks; and the unprecedented seizing-up of some financial markets on both sides of the Atlantic. You might conclude from this that central banks would try to stop asset prices getting out of hand in the first place.

Those who warned were not heard, because people hear what they like to hear in good times.¹⁰

It is obviously impossible to precisely predict the advent and contours of a financial crisis, much as it is impossible to predict bull markets and eras of high profits due to fundamental uncertainty (Keynes). This indeed is part of the capitalist system. But the crux of the problem identified is that economic models of states of equilibrium face a multitude of good or bad equilibria which coexist and may alternate without fundamental reason. Critics make the point that classical economics fails to sufficiently understand the realities of wild markets, and it is argued that lessons need to be learnt from physics, as Jean Philippe Bouchard writes: ‘Surprisingly, classical economics has no framework through which to understand “wild” markets, even though their existence is so obvious to the layman. Physics, on the other hand, has developed several models that explain how small perturbations can lead to wild effects. The theory of complexity shows that although a system may have an optimum state, it is sometimes so hard to identify that the system never settles there. This optimum state is not only elusive, it is also hyper-fragile to small changes in the environment, and therefore often irrelevant to understanding what is going on.’ He calls for a new approach, taking into account human behaviour to a much larger extent than today, and for improved regulations and crash-testing of new instruments in financial services.¹¹ Moreover, it was the conventional wisdom of monetarism to discard the policies of Keynes in the era of neo-liberalism. It came as a surprise to see how quickly conventional wisdom became outdated with governments in crisis turning to anti-cyclical policies and investment.¹² Rescue packages and fiscal stimuli were rapidly introduced in an unprecedented manner and amount and mark a fundamental difference to

But you would be wrong. Ask a central banker what his job is—on a day when he’s not busy trying to save the financial system—and he will probably say he must “maintain price stability” or “control some measure of inflation”. Decoded, that means he cares about the rate of increase in consumer prices, not the prices of houses, shares or other financial assets.’ *The Economist*, 18 October 2007 <http://www.economist.com/specialreports/displaystory.cfm?story_id=E1_JJSNVQJ> accessed 8 January 2009.

¹⁰ As one observer put it: ‘Although people endlessly ask for predictions, they rarely really want the answers. It was only late – too late – in life that I realized that when people said, “we really want you to challenge our ideas”, they mostly did not. They wanted instead to be congratulated on their wisdom. Similarly, when they ask, “What is going to happen?”, they seek reaffirmation rather than insight into the future.’ John Kay, *Kudos for the contrarian*, *Financial Times*, 29 December 2008, 7.

¹¹ Jean-Philippe Bouchard, ‘Economics Needs a Scientific Revolution’ (2008) 455 *Nature* 1181. See also Nassim Nicholas Taleb, *The Black Swan: The Impact of the Highly Improbable* (London, Penguin 2007).

¹² The Undeniable Shift to Keynes, *Financial Times*, 30 December 2008, 3. (‘The resurgence of Keynesian policy is a stunning reversal of orthodox views.’)

the 1930s. Another discrepancy between mainstream theories and reality in policy making and government became apparent.

It is not for the lawyer to assess economic theories, nor whether monetarists or new Keynesians are right. There is lively debate within economics. In particular, orthodox perceptions of rational behaviour of *homo economicus* are fundamentally challenged by behavioural economics and the effort to capture irrational behaviour is well up on the agenda. But the lawyer will observe that the economic fundamentals upon which current approaches to international monetary policies and financial law—or the lack of it—are based upon theory which did not stand the test of the day. We can no longer be prepared to leave matters as before. Alan Greenspan, the long-time chairman of the US Federal Reserve Board and architect of neo-liberal policies, recently conceded a flaw in his logic of essentially leaving markets to autoregulation and largely on their own.¹³ Indeed, the ups and downs of capital markets will somehow need to remain within certain bounds which neither exist in economics nor in law. Formal parameters would need to indicate limitations and provide warning signals. New yardsticks are compellingly required. Yet again, the lack of tradition in developing a proper chapter and disciplines in substantive international monetary and financial law leaves us with an almost blank sheet upon which to draw up future regulations. Advised by economics, we have failed to do our homework as a legal community. Hardly ever have we so far lost our way through the landscape, since the post-war Bretton Woods institutions were built.

A comparison comes to mind. Global warming has been on the agenda of scientists for some twenty years. The scientific community has been increasingly effective in warning the public and generating a debate within the United Nations and among the public at large, supported by globally active NGOs and due to the personal efforts of former US Vice President Al Gore. The effort and campaign rests upon the findings of science and scientists.¹⁴ No similar effort, to the best of my knowledge, was ever made in the realm of the financial system. Apart from individual voices,

¹³ “Yes, I found a flaw,” Greenspan said in response to grilling from the House Committee on Oversight and Government Reform. “That is precisely the reason I was shocked because I’d been going for 40 years or more with very considerable evidence that it was working exceptionally well.” Greenspan said he was “partially” wrong in opposing regulation of derivatives and acknowledged that financial institutions didn’t protect shareholders and investments as well as he expected. “We cannot expect perfection in any area where forecasting is required,” he said. “We have to do our best but not expect infallibility or omniscience.” Part of the problem was that the Fed’s ability to forecast the economy’s trajectory is an inexact science,” he said. “If we are right 60 percent of the time in forecasting, we are doing exceptionally well; that means we are wrong 40 percent of the time,” Greenspan said. “Forecasting never gets to the point where it is 100 percent accurate.” See <<http://www.bloomberg.com/apps/news?pid=20601087&refer=&sid=ah5qh9Up4rIg>> accessed 20 January 2009.

¹⁴ For a comprehensive review see Nicolas Stern, *The Economics of Climate Change: The Stern Review* (Cambridge University Press, Cambridge 2007).

no comparable joint and concerted warnings were given by the communities of economists and lawyers to the world at large. Have we failed as social scientists? Have we been sufficiently critical, or have we become accustomed to leaving critique to NGOs, to follow suit, but to remain silent where no significant NGO or producer organization exists?

The financial crisis, in my humble view, is also a crisis of social sciences, in particular of law, economics and international relations theory. It epitomizes the failures of a strictly disciplinary tradition of fragmentation and specialization, and the lack of truly interdisciplinary research. The financial crisis will hopefully have a profound effect, and offer a chance to rethink and improve the global economic system and its legal instruments. We essentially face five challenges:

First, the debate and discussion on the relationship between international economic law and economics needs deepening. We have to accept that economic models in financial and monetary affairs are not able to reflect the complexities of the real world. There is reason to believe that the same is methodologically true across the board. Theories alone cannot serve as a basis for the operation of markets and the exercise of discretionary powers in the real world. The philosophy of leaving matters to unregulated markets is conceptually flawed. Markets and the exercise of power need roadmaps and regulation. They are essentially constituted by law, often beyond basic institutions of protecting contracts, property and competition. Risks to the system, to consumers or the environment must be addressed and contained by legal means. The proper question relates to the proper form and adequate degree of regulation. Answers vary from field to field and give rise to argument and debate. Yet, clearly, there is more to international economic law than implementing economics. We must recall what lawyers bring to the table: a principled approach to problems combined with case by case assessment, the ability to deal with exceptions and irregularity, the relevance of values and justice, the relevance of human experience and psychology, the expertise in institutional design and in due process decision making with fairness and transparency. At this point, it is timely to recall the seminal characterization of law by Oliver Wendell Holmes: ‘The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.’¹⁵

¹⁵ From the first of 12 Lowell Lectures delivered by Oliver Wendell Holmes Jr on 23 November 1880 <http://www.law.harvard.edu/library/collections/special/online-collections/common_law/index.php> accessed 20 January 2009.

These qualities also inform the evolution of international economic law, and WTO law perhaps amounts to one of the most prominent examples of this process. They complement economics and induce qualities which abstract and mathematical models lack. The experience of WTO law shows that the traditions of legal thinking and legalization and economic theory are not mutually exclusive but supportive. It is not at all a matter of reducing economics to irrelevance. Law depends upon other social sciences in bringing about appropriate answers to real problems. Law as a normative discipline depends upon fundamentals developed in political philosophy and economics. It depends upon effective fact finding and empirical research. Both economics and political science, in particular international relations theory, are of critical importance. International economic law should form a close tie with empirical research both in economics and international relations in order to identify realities to be dealt with. We might have found more and better roadmaps than those available today. Perhaps, it would have helped to avoid the meltdown and crisis in the first place. Today, efforts to bring about a proper dialogue among these and perhaps other disciplines are of paramount importance. Interdisciplinary efforts emanating from trade regulation can and should be equally employed in the other challenging fields of international economic law that lie ahead, in particular, financial and monetary regulation and climate change mitigation and adaptation.

Second, the debate on horizontal problems of fragmentation and functionalism of international organizations and different regulatory fields in international economic law needs to be accelerated. Much of public international law, in the end, is economic law. The law of permanent sovereignty of natural resources, the law of the sea, environmental law, the law of human rights and the laws of war are all ultimately linked to economic interests and cannot be separated from economic law strictly speaking, even if a narrow definition is adopted. The boundaries are blurred and the fields interact. The traditional mode of classifying different areas into different fields and interest groups will no longer do. Clear-cut definitions are lacking. Problems are highly interdependent in reality and cannot be neatly allocated to one or the other institutional framework. It is thus important to clarify the interfacing of different fields and institutions, such as the WTO, IMF and the World Bank, as well as other pertinent bodies. For example, the depletion of oceans cannot be effectively addressed in the framework of FOA and the Law of the Sea Convention without addressing WTO-related subsidies to the fishing industry. Health issues dealt with by the World Health Organization (WHO) cannot be dealt with without taking into account WTO law, in particular intellectual property rights, equally assigned to the World Intellectual Property Organization (WIPO). Climate change mitigation and adaptation requires a close interface of carbon dioxide

reduction targets, emission trading and trade rules. Financial regulations addressed by the BIS and possibly the IMF will need coordination with the regulation of services in GATS. The main challenges consist of bringing about appropriate procedural devices of discourse and interaction on the level of international organizations. While cooperation on the level of secretariats has made progress in recent years, it has not extended to decision making by Member States. Policy coordination is a main responsibility of national governments. But experience shows that it needs completion on the international level properly speaking. The reform of decision making thus must be comprehensive. Clearly, it cannot be isolated and limited to single organizations, such as the WTO. We need to develop a more comprehensive view of regulating the global economic system. We need a broader view of international economic law.

Third, international economic law continues to face the challenge of appropriate vertical allocation of powers. Emerging doctrines of constitutionalization and multilayered governance will be of assistance in shaping new regimes, in particular in financial and monetary affairs. Criteria defining allocations of powers need further discussion and debate in the context of redefining the functions of national sovereignty.¹⁶ The financial crisis showed that regimes essentially based upon the nation state are no longer able to cope with the challenges. Informal networking was useful in bringing about relief, but was not able to prevent the crisis. It needs completion by more formal and binding roadmaps in the future.

Fourth, we need to debate the proper structures of legal research and teaching. The traditions of functionalism and fragmentation no longer serve us well. Moving from fragmentation to greater coherence will render research more complex. Do we have the structures to address the complexity of these issues? Can they be addressed by single scholars mirroring the virtues of individualist scholarship, or do we need to work much more in research groups bringing specialists in different areas of law, economics and international relations to the table? How do we better integrate scholars in developing countries and emerging economies? How do we bring about true interdisciplinarity not only among different disciplines, but also within the different fields of international economic law? To what extent do we need to adjust qualification and selection processes at universities in order to achieve these goals? We cannot expect teamwork if selection for academic positions is based upon purely individual qualities and achievements. What is the best form for a research organization to take? How should we structure research and teaching institutions? What can we learn from the hard sciences? What can we learn, in particular, from the process of climate

¹⁶ See, in particular, John H Jackson, 'Sovereignty-Modern: A New Approach to an Outdated Concept' (2003) 97 AJIL 782-802; John H Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law* (Cambridge University Press, Cambridge 2006).

change research? What can we learn from physics dealing with instabilities? It is evident that the complex challenges outlined will require new forms of organization, cooperation, qualification and transnational funding. Conferences and informal networks, based upon modern communication technology will be important, but not sufficient to provide appropriate structures of research.

Finally, we need to rethink our priorities in research and its role in international policy making. The financial crisis caught us by surprise and on the wrong foot. We need to discuss how this came about. Are we sufficiently independent from those holding power in the private and public sector? Do we depend on NGOs in detecting and voicing critique? It may well be that the prominence of trade and environment on the one hand, and the neglect of trade and finance on the other is largely due to the power and past arrogance of financial institutions and the relative weakness of NGOs in the field. Do our research agendas look sufficiently far ahead or do they tend to follow politics and the fashion of the day? Are we thinking sufficiently outside the box, taking seriously those who do and who are not afraid to meet the orthodox and realist critique? How do we need to be organized in order to perform a critical public function and to have a proper voice of our own in international affairs and a media-driven world? Again, what can be learned from the process of bringing climate change to the table, combining United Nations fora and the scientific community in the Intergovernmental Panel on Climate Change (IPCC) way ahead of impending disaster and catastrophe? What needs to be done to achieve similar effects and debate on preventing further degradation of the seas or the erosion of the multilateral trading system, and in preventing further excessive bubbles and crises in financial markets? There is a vast array of subjects and issues to be taken up in future volumes of the journal. It is hoped that the challenges identified beyond trade regulation and investment protection will be taken up in depth and that a new impetus emerges out of the present economic crisis. The year 2009 and beyond is also a time of hope and aspiration. The questions raised also imply that these challenges are not only a matter of substance and topics, but profoundly also of the structures within which we operate, serving the noble cause of developing international economic law. Perhaps, in coming years, the journal will see more publications authored by interdisciplinary teams in search of roadmaps to guide us in the varied and complex landscape of international economic law.