Leiden Journal of International Law (2014), 27, pp. 677–700
 doi:10.1017/S0922156514000260

International Economic Law at a Crossroads: Global Governance and Normative Coherence

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Abstract

International economic law (IEL) is now at a crossroads regarding the reconfiguration of the international economic order. Many scholars regard the multilateral trading system as a major legal achievement and agree that the World Trade Organization (WTO) has performed as expected with respect to the 2008 crisis. By contrast, the recent financial crisis has demonstrated the inability of the international financial architecture to ensure financial stability. However, this article will review the strength of the multilateral trading system and the challenges that it now faces regarding its main goal (the stability of trade relations). A material reform in the mode of a horizontal expansion in order to protect societal values other than trade liberalization seems to be needed if we want the WTO to be up to the tasks and demands flowing from global governance. Similarly, this article will analyse the current structure of the international financial system as well as the elements that would need to be changed in order to achieve the aim of financial stability. To accomplish that end, an institutional reform in the mode of a vertical expansion of IEL is proposed. Global governance and normative coherence have been used as the theoretical tools to unveil the similarities stemming from the functions performed and the need for transformation that both areas of IEL have in common. The reform proposals submitted for both areas of law would introduce a meaningful step from negative regulation towards a more positive approach to regulation.

Key words

Doha Round; financial regulation; G20; International Monetary Fund; World Trade Organization

1. Introduction

There is a core and undeniable regulation within international economic law (IEL) that relates to trade, and to the monetary and financial system. This regulation is the result of the co-ordination efforts undertaken after Second World War at the Bretton Woods Conference, which in turn originated some of the most well-known international economic institutions, such as the International Monetary Fund (IMF), the World Bank (WB), and a multilateral treaty, the General Agreement on Trade and Tariffs (GATT), which subsequently was transformed into the World Trade Organization (WTO) in 1995.

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However, IEL is now at a crossroads regarding the reconfiguration of the international economic order. On the one hand, IEL has been successful at creating a multilateral trading system through the GATT-1947, later reinforced by the WTO and its very advanced dispute settlement system, thus providing security and predictability in the trade area. The WTO has been praised as a major achievement within IEL and international law in general. It has become a very solid institution, itself the product of hard law, with the power to authorize the imposition of stiff economic sanctions to those infringing the agreed trade norms. According to the prevailing accounts, the 2008 economic crisis, already termed as the Great Recession,[1] has confirmed that the WTO has performed as expected and so it can be acclaimed as the most suitable institutional dyke against the adoption of restrictive trade measures among states. On the other hand, in the monetary and financial arenas IEL shows a very different record. Since their inception, the WB and especially the IMF have been unable to achieve a similar status as their role and legitimacy in the regulation and sanction of economic behaviour in these fields have diminished over time.[2] Moreover, the Global Financial Crisis (GFC) and the ensuing Great Recession have placed IEL regulating the financial system centre stage. Governments and civil society have turned to IEL in search of an international, co-ordinated answer. While in the trading system the WTO has been instrumental for an institutional answer, in the financial system this reaction has come mainly through G20 meetings, together with a timid response by the IMF, which has adopted decisions in the form of traditional soft law.

Why is this the case? Why has IEL performed so unevenly in these two areas? Is there any fundamental difference between the regulation of trade, on the one hand, and the regulation of money and finance, on the other? Are the regulatory functions accomplished by IEL so distinctively disconnected in these two areas of economic activity? Is there another reading of the extant situation?

The second section of this article will be devoted to testing the strength of the multilateral trading system and the challenges that it is now facing. We will briefly describe the elements that make the trade regime comparatively strong, and then will focus on whether the WTO institutional setting has had such a good performance during the crisis. We will then review the challenges posed by the Doha Round deadlock and the 'trade and . . . ' debate still in need of response. A material reform seems to be needed if we want the WTO to be up to the tasks and demands flowing from global governance. The third section of this article will analyse the current structure of the international financial system. The recent reform of the global financial architecture led by the G20 will be assessed as well as the elements that would need to be changed in order to cope with the main regulatory objective, i.e., financial stability. An institutional reform in the mode of a vertical expansion of IEL

1 See R. B. Ahdieh, 'After the Fall: Financial Crisis and the International Order', (2010) 24 *Emory International Law Review* 1, at 4.

2 See H. R. Torres, 'Reforming the International Monetary Fund – Why its Legitimacy is at Stake', (2007) 10 *Journal of International Economic Law* 443, at 447.

is proposed in this article. A final conclusion will summarize the findings obtained in this study.

2. Global governance and the world trading system

As is very well known, the extant multilateral trading system had its origins in the adoption of the GATT in 1947, just before the plan to create the International Trade Organization was abandoned because of non-ratification issues. The GATT-1947 system was the first organized framework to deal with trade issues on a global basis, although it was more diplomatically-orientated than is the case today.[3] However, there has always been a deep aspiration in order to reconfigure the trade system into a more legally-orientated regime, an outcome largely achieved through the establishment of the WTO in 1995.

The current trade regime based on the workings of the WTO system has been best explained as the intellectual triumph of the model purporting 'economic efficiency'.[4] This efficiency model, and the economic liberalization that it promotes, has operated as the normative benchmark of the trading system for approximately the last three decades, to the detriment of the collective action model and, above all, the embedded liberalism model.[5] The legalization of the trade regime poses at least two questions: (i) whether the WTO system has been up to the promise of the compliance with legal obligations agreed by WTO members in the face of the crisis; and (ii) whether the WTO legal system is in need of material reform regarding the Doha Round stalemate and the continuing challenges stemming from the 'trade and . . . ' debate.

2.1. The strength of the WTO and the economic crisis

As previously mentioned, the WTO has attained a high level of legalization and institutionalization, compared to the situation that prevailed at the time of the GATT-1947. This is to a great extent due to the Dispute Settlement System (DSS) set up in Annex 2 of the WTO Agreement. The DSS is at the heart of a management system, which avoids recourse to alternative schemes for the settlement of trade differences, and it is shaped as an integrated system, which eludes the GATT *à la carte* practice that existed before 1995. As has been noted, the WTO is the 'envy'[6] of other international organizations and its DSS can be aptly described as 'legally rigorous, *de facto* compulsory, well-functioning and enforceable'.[7] Moreover, the implanting of 'teeth' by the WTO negotiators in the form of authorized sanctions

3 See R. E. Hudec, 'The GATT Legal System: A Diplomat's Jurisprudence', (1970) 4 *Journal of World Trade Law* 615; J. H. H. Weiler, 'The Rule of Lawyers and the Ethos of Diplomats: Reflections on the WTO Dispute Settlement', in R. B. Porter et al. (eds.) *Efficiency, Equity and Legitimacy: The Multilateral Trading System at the Millenium* (2001), at 334.

4 See J. L. Dunoff, 'The Death of the Trade Regime', (1999) 10 EJIL 733, at 752.

5 See J. Ruggie, 'International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order', (1982) 36 *International Organization* 379, at 393.

6 See J. E. Alvarez, 'How Not to Link: Institutional Conundrums of an Expanded Trade Regime', (2001) 7 *Widener Law Symposium Journal* 1.

7 See G. Marceau and J. Wyatt, 'Dispute Settlement Regimes Intermingled: Regional Trade Agreements and the WTO', (2010) 1 *Journal of International Dispute Settlement* 67, at 67–8.

https://doi.org/10.1017/S0922156514000260 Published online by Cambridge University Press

has been regarded as one of the key achievements of the Uruguay Round, and a very significant step in the evolution of IEL.[8]

From an institutional point of view, the debate over the constitutionalization of the WTO has also served to reinforce its strength and powers. John Jackson[9] has been singled out as the scholar most influential in the project to articulate the trade regime as having constitutional features,[10] in which institutions and the management of a system of rules takes centre stage. Together with the constitutionalization of the 'institutional managerialism' type,[11] there have been other projects, like the rights-based one,[12] perhaps both mutually supportive. Nevertheless, those constitutionalization projects have attracted a lot of criticism of various sorts.[13]

One of the most debated questions among trade policy officials and international trade lawyers since the outbreak of the economic crisis in 2008 has been whether WTO rules have worked as an actual deterrent for the adoption of trade barriers by members. In other words, the success of the current multilateral trade regime should be measured in terms of its ability to avoid the across-the-board tariff increases similar to those adopted by states in the aftermath of the Great Depression, in the inter-war period. One should remember that the enactment of the Smoot-Hawley Tariff Act of 1930 by the US was at the origin of the most devastating trade wars among developed countries[14] that resulted in the doubling of the tariff rates from 1929 to 1930.[15]

According to the reports prepared by the WTO Secretariat, WTO members have achieved a good record during the recent crisis, as they have, on average, avoided adopting protectionist measures, that would have led to a situation comparable to that of the Great Depression. Specifically, these reports[16] have been produced in response to the request by the G20 to the WTO, together with the OECD and the UNCTAD, 'to

8 See S. Charnovitz, 'Should the Teeth be Pulled? An Analysis of WTO Sanctions', in D. L. M. Kennedy and J. D. Southwick (eds.), *The Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec* (2002), at 602.

9 See, e.g., J. H. Jackson, *The World Trade Organization: Constitution and Jurisprudence* (1998).

10 See R. Howse, 'Tribute – The House that Jackson Built: Restructuring the GATT', (1999) 20 *Michigan Journal of International Law* 107, at 108; D. Kennedy, 'The International Style in Postwar Law and Policy: John Jackson and the Field of International Economic Law', (1995) 10 *American University Journal of International Law and Policy* 671, at 712, who stresses Jackson's strategic epistemology of an imagined trade constitution.

11 See D. Z. Cass, *The Constitutionalization of the World Trade Organization* (2005), 97.

12 See, e.g., E.-U. Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law* (1991). *Contra* R. Howse and P. Alston, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann', (2002) 13 EJIL, at 815.

13 See N. Walker, 'The EU and the WTO: Constitutionalism in a New Key', in G. de Búrca and J. Scott (eds.), *The EU and the WTO: Legal and Constitutional Issues* (2001), at 38, stating that constitutionalization language is a form of wish-fulfilment; R. Howse and K. Nicolaïdis, 'Legitimacy and Global Governance: Why Constitutionalizing the WTO Is a Step Too Far', in R. B. Porter et al. (eds.) *Efficiency, Equity and Legitimacy: The Multilateral Trading System at the Millenium* (2001), 227 at 228, warning against the door-closing function of the constitutionalization conceptualization.

14 See some of the most illustrative examples in D. A. Irwin, *Peddling Protectionism: Smoot-Hawley and the Great Depression* (2011), at 159.

15 See J. B. Madsen, 'Trade Barriers and the Collapse of the World Trading System during the Great Depression', (2001) 67 *Southern Economic Journal* 848, at 848.

16 There have been already ten reports, issued on 14 September 2009, 8 March 2010, 14 June 2010, 4 November 2010, 24 May 2011, 25 October 2011, 31 May 2012, 31 October 2012, 17 June 2013, and 18 December 2013. From the third report on, there is a Joint Summary only and, separately, a Trade Report prepared by the WTO and an Investment Report prepared by the OECD and the UNCTAD.

monitor and report publicly on G20 adherence to their undertakings on "resisting protectionism and promoting global trade and investment"".[17] Furthermore, the information about the measures which are the object of the analysis in the report has been collected from formal notifications submitted by G20 members and from other official and public sources.[18] The trade measures covered by the reports are what might be called traditional trade measures,[19] that is, border measures, behind the border measures, and trade defence measures, although in subsequent reports the coverage has been expanded, including sanitary and phytosanitary measures (SPS) and technical barriers to trade (TBT).

The picture described by these reports may look uneven. The initial reports produced by the WTO/OECD/UNCTAD showed that there was 'no indication of a descent into high-intensity protectionism as a reaction to the crisis, involving widespread resort to trade or investment restriction or retaliation'.[20] However, the Sixth Report of October 2011 indicated that 'there is a growing perception that trade protectionism is gaining ground in some parts of the world as a political reaction to current local economic difficulties'.[21] Moreover, the Seventh Report insists on the 'revival of protectionist rhetoric in some countries'[22] which, together with the continuing implementation of new trade restrictions, the accumulation effect of trade restrictions since the outbreak of the crisis, and the very slow pace of removal of existing restrictions,[23] all add to depict a worrying situation in terms of free trade and open markets.

As well as the WTO, the EU produces its own reports devoted to evaluating the trade restrictive measures 'identified in the context of the economic crisis' (as stated in the subtitles of these reports). The EU has published already ten reports, the first one being in February 2009[24] and prepared in the aftermath of the November 2008 G20 summit in Washington, DC. The EU reports evaluate trade measures which are potentially trade restrictive, including border measures (import and export restrictions), behind-the-border measures (TBTs, government procurement, services, and

17 See OECD/WTO/UNCTAD, Report on G20 Trade and Investment Measures, 14 September 2009, at 5, <www.wto.org/english/news_e/news09_e/trdev_14sep09_e.htm>.

18 Ibid.

19 See B. Ruddy, 'The Critical Success of the WTO: Trade Policies of the Current Economic Crisis', (2010) 13 *Journal of International Economic Law* 475, at 481.

20 See OECD/WTO/UNCTAD, Report on G-20 Trade and Investment Measures, 14 September 2009, *supra* note 17, at 6.

21 See WTO, Report on G-20 Trade Measures (May to mid-October 2011), 25 October 2011, at 1, <www.wto.org/english/news_e/news11_e/igo_26oct11_e.htm>. This Report also conveys a strong concern regarding the possible revival of industrial policies by G20 members, orientated to help national champions. Similarly, there are indications on the use of import substitution measures to back up those policies. All combined may make the situation worsen the crisis 'by triggering a spiral of tit-for-tat reactions in which every country will lose'.

22 See WTO Report on G-20 Trade Measures (mid-October 2011 to mid-May 2012), 31 May 2012, at 1–2, <www.wto.org/english/news_e/news12_e/igo_31may12_e.htm>.

23 The trade coverage of the restrictive measures put in place since October 2008 hit 3.9% of world merchandise imports, see WTO Report on G-20 Trade Measures (mid May 2013 to mid November 2013), 18 December 2013 at 2, <http://www.wto.org/english/news_e/news13_e/g20_wto_report_dec13_e.pdf>.

24 See European Commission, Directorate-General for Trade, Early Warning Report on potentially protectionist measures, February 2009, (Report to the 133 Committee), <www.rijksoverheid.nl/bestanden/documenten-en-publicaties/kamerstukken/2009/03/03/early-warning-report-on-potentially-protectionist-measures/9035715-bijlage3.pdf>.

investment restrictions), stimulus packages and export support measures, and trade defence instruments.[25] There is also an annex at the end of the report which collects potentially trade restrictive measures adopted or planned since October 2008.[26] Whereas the first EU report highlighted that there was no generalized race towards protectionism,[27] the latest reports stress the danger accruing from the rising number of potentially trade restrictive measures.[28] Other reports come from private organizations. For instance, Global Trade Alert – which is co-ordinated by the think tank called Centre for Economic Policy Research, elaborates the GTA Database collecting national government measures taken during the current global economic downturn that are likely to discriminate against foreign commerce.[29] GTA has produced several very critical reports, warning that worsening macroeconomic prospects have already prompted more protectionism, and more protectionism of the most harmful kind, that is, across-the-board.[30] Moreover, the evidence presented in one of its latest reports 'casts doubts on the strength of international restraints on the resort to protectionism by governments, in particular by G20 governments'.[31]

Nevertheless, from an economic point of view, there is a strong feeling and evidence that G20 members and other governments have been able to succeed in the overall management of the political process of keeping domestic protectionist pressures under control. WTO reports have shown that, although trade restrictive measures have been adopted and are on the rise even to this day, it is, however, true that 'the multilateral trading system has been instrumental in maintaining trade openness during the crisis'.[32] This is so because the identified trade restrictive measures apply to a narrow range of trade and for a short period of time, which means that they have a limited economic effect.[33] As the EU Ninth Report states, the past years show that overall recourse to trade protectionism has been sidestepped, and trade openness preserved.[34]

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25 See European Commission, Directorate-General for Trade, Tenth Report on Potentially Trade-Restrictive Measures, 1 May 2012 – 31 May 2013, at 18, <http://trade.ec.europa.eu/doclib/docs/2013/september/tradoc_151703.pdf>.

26 Ibid., at 46.

27 See European Commission, Directorate-General for Trade, Early Warning Report on potentially protectionist measures, *supra* note 24, at 3.

28 See European Commission, Directorate-General for Trade, Ninth Report on Potentially Trade Restrictive Measures, September 2011 – 1 May 2012, at 3, <http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149526.pdf>. In particular, the EU points to the use of restrictive measures as part of new industrialization policies, aimed at shielding domestic markets from international competition, ibid., at 10.

29 See S. J. Evenett (ed.), *Resolve Falters As Global Prospects Worsen: The 9th GTA Report* (Global Trade Alert, July 2011), at iv, <http://www.globaltradealert.org/9th_GTA_Report>.

30 See S. J. Evenett (ed.), *Trade Tensions Mount: The 10th GTA Report* (Global Trade Alert, November 2011), at 7, <http://www.globaltradealert.org/gta-analysis/trade-tensions-mount-10th-gta-report>.

31 See S. J. Evenett (ed.), *Débâcle: The 11th GTA Report on Protectionism* (Global Trade Alert, June 2012), at 1, <http://www.globaltradealert.org/sites/default/files/GTA11_0.pdf>.

32 See WTO, Report on G-20 Trade Measures (May to mid-October 2011), 25 October 2011, *supra* note 21, at 2–3.

33 See Ruddy, *supra* note 19, at 485–6. However, the trade coverage of import restrictive measures has increased in the latest period under examination by the WTO, accounting for 3.9% of world merchandise imports, see WTO Report on G-20 Trade Measures (mid May 2013 to mid November 2013), 18 December 2013, *supra* note 23, at 2.

34 See European Commission, Directorate-General for Trade, Ninth Report on Potentially Trade Restrictive Measures, *supra* note 28, at 2.

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However, from a legal point of view, the assessment might be very different. There have been many instances of adoption of trade barriers and subsidization in the form of bailouts or otherwise[35] that the system is not addressing, as WTO members have not decided to initiate proceedings before the DSS.[36] This might be interpreted as if there were a concealed consensus between the main players on various forms of government intervention in the presence of a big market failure like the economic crisis of 2008. This non-compliance phenomenon might be avoided if the DSS were open to complainants other than WTO Members (even with the help of a prosecutor or otherwise), or if individuals could resort directly to their domestic courts to enforce their trade rights, but of course that would imply a very different world trading system (very similar to the 'rights-based' one already mentioned[37]).

2.2. The prospects of the trade regime

Even if we assume that the trade regime has performed ably during the recent economic crisis, there are many open questions surrounding the future of the multilateral trading system. The Doha Round deadlock for more than ten years reveals in a stark way the exhaustion that the model is experiencing. To start with, developing countries are nowadays willing to resist pressures unless they see their demands for a bigger part of the pie satisfied in the marketplace.[38] But the biggest loser of the Doha Round fiasco might be the WTO system itself as its credibility may suffer irreparable damages.[39] However, the Bali Package recently agreed at the Ninth Ministerial Conference in December 2013, specially the Agreement on Trade Facilitation,[40] has been praised as the 'first major agreement among WTO members since [the WTO] was formed in 1995'.[41] Therefore, the bargain struck in Bali might be considered as a relief, considering the previous lack of progress.[42] Nevertheless, the Bali Package does not solve the problems at the heart of the 2001 agenda[43] and has actually been

35 See R. Baldwin and S. J. Evenett (eds.), *The Collapse of Global Trade, Murky Protectionism, and the Crisis: Recommendations for the G20* (2009).

36 But see P. Delimatsis, 'Transparent Financial Innovation in a Post-Crisis Environment', (2013) 16 *Journal of International Economic Law* 159, at 197, warning that complaints may still rise in the near future.

37 See Petersmann, *supra* note 12.

38 See F. Ismail, 'An Assessment of the WTO Doha Round July – December 2008 Collapse', (2009) 8 *World Trade Review* 579, at 581, underlining that the main reason for the failure of the Doha Round in 2008 was the persistence of protectionism in the major developed country markets together with the marginalization of developing country interests.

39 See S. Cho, 'Is the WTO Passé?: Exploring the Meaning of the Doha Debacle', (2009), at 29, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1403464>.

40 See B. J. Taylor and J. S. Wilson, 'Doha and Trade Facilitation: Lending Specificity to the Multilateral Trade and Development Agenda', in W. Martin and A. Mattoo (eds.), *Unfinished Business? The WTO's Doha Agenda* (2013), at 213.

41 See WTO, 'Days 3, 4 and 5: Round-the-clock consultations produce "Bali Package"', at 2, <http://www.wto.org/english/news_e/news13_e/mc9sum_07dec13_e.htm>. See also 'WTO Reaches First Global Trade Deal', *New York Times*, 7 December 2013, at <http://www.nytimes.com/2013/12/08/business/international/wto-reaches-first-global-trade-deal.html?_r=0>.

42 See B. Hoekman, W. Martin, and A, Mattoo, 'Conclude Doha. It Matters!', (2010) 9 *World Trade Review* 505, at 506, submitting that the liberalization that the Doha Round implies is very important in the present context of economic crisis, as it would provide an improvement to world demand in a period in which many countries will be seeking to diminish fiscal stimulus measures.

43 See R. Baldwin, 'WTO agreement: The Bali Ribbon', at 1, <http://www.voxeu.org/article/wto-agreement-bali-ribbon>.

https://doi.org/10.1017/S0922156514000260 Published online by Cambridge University Press

regarded as a small deal.[44] Even if we assume that the Doha Development Agenda was already dated by the time negotiators met in 2001,[45] the WTO cannot move on new issues until it achieves the Doha political goals of 'rebalancing' the trading system from the point of view of developing countries.[46]

The WTO should perhaps place less emphasis on the periodic negotiations towards new commitments to liberalize trade further, and focus more on the enforcement of the existing agreements. The most pressing concerns faced by the world trading system today are the efficacy and fairness of the dispute settlement mechanism together with the integration of other 'flanking policies' within the WTO system, i.e. industrial policies or development, on the one hand, and environmental, human rights, and labour policies, on the other.[47] Both kinds of issues are linked together.

First, the suggestion to incorporate these other policies within the WTO is of course not new. In fact, the 'trade and . . . ' debate has been with us for quite a few years, pointing to the need to overcome the persistent trade bias found in the multilateral trading system.[48] This trade bias stems from the non-consideration of the non-trade issues linked to trade, a result that should be attributed to the fragmentation of international trade law.[49] As is well known, the functional specialization of international organizations and treaty regimes is the origin of the so-called fragmentation of international law, which has only been avoided to date by efforts towards a coherent interpretation of the different legal systems using the principle of 'systemic integration'.[50] The first suggested approach to solve the aforementioned trade bias has been much discussed by trade commentators since the end of the 1990s. They generally purport that the WTO dispute settlement system should embrace public international law in order to bring in a broader legal and normative order, hence amplifying the WTO's narrow mandate exclusively focused on the trade regime.[51] Contrary to other opinions,[52] this view submits that the WTO does not constitute

44 See C. Boonekamp, 'Simplify and Complete the DDA', in S. J. Evenett and A. Jara (eds.), *Building on Bali: A Work Programme for the WTO* (2013), at 37.

45 See G. Aldonas, 'Trade, Global Value Chains and the World Trade Organization', in Evenett, ibid., at 53.

46 See Baldwin, *supra* note 43, at 1.

47 See J. Pauwleyn, 'New Trade Politics for the 21st Century', (2008) 11 *Journal of International Economic Law* 559, at 565, 571, who stresses the need to adopt an 'embedded liberalism' (that combines economic globalization with the 'flanking policies') and the need to abandon the 'economic straight-jacket' of the Washington consensus in the 1990s (free trade, fiscal austerity, no capital controls). See also A. Mattoo and A. Subramanian, 'Multilateralism Beyond Doha', in W. Martin and A. Mattoo (eds.), *Unfinished Business? The WTO's Doha Agenda* (2013), at 393, submitting that the international trade architecture cannot ignore critical international policy areas such as environmental protection or financial security.

48 See *contra* J. O. McGinnis and M. L. Movsesian, 'Against Global Governance in the WTO', (2004) 45 *Harvard International Law Journal* 353, at 354.

49 See T. Cottier et al., '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* (2011), 1 at 12.

50 See M. Koskenniemi, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, UN Doc. A/CN.4/L.682 (2006), para. 37.

51 See J. Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?, (2001) 95 AJIL, at 535; J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Relates to Other Rules of International Law* (2004).

52 See J. P. Trachtman, 'The Domain of WTO Dispute Resolution', (1999) 40 *Harvard International Law Journal*, 333, at 342; J. P. Trachtman, 'Institutional Linkage: Transcending "Trade and . . . "', (2002) 96 AJIL 77, at 88, highlighting the limited role of the WTO dispute settlement system.

a self-contained regime, but must be open to other sources of public international law.[53] Or, at least, that the WTO should not be considered as an isolated legal system and that non-WTO law may be relevant in the interpretation of WTO law.[54] According to this view, this recourse to interpretative norms of general international law gives the WTO more legitimacy.[55] The WTO's Appellate Body was apparently willing to apply this expanded or co-ordinated approach and therefore to avoid reading WTO law 'in clinical isolation from public international law' in some of the already key cases decided in the 1990s, like the *Gasoline* or the *Shrimp* cases.[56] However, in the 2000s the Appellate Body has adopted a more restrained approach and has avoided adopting a strong stance on several very sensitive issues, like in the *Hormones* and the *Biotech* cases,[57] a result very much criticized.[58] Possibly, the Appellate Body has implicitly sent out the message that, even though non-WTO law must be resorted to where technical questions are at stake, other issues of political or constitutional bearing may only be solved at the political level.[59]

If the approach based on the dispute settlement system seems to be of limited value, then recourse should be made to the political arena. There are two ways in which the articulation of trade and non-trade issues could be solved at the treaty or policy-making level. First, the introduction of a 'social clause' has been proposed since the mid-1990s.[60] However, the Singapore Ministerial Declaration in 1996 reached a compromise between supporters and those against the integration of a social clause, which has resulted in the practical abandonment of this approach within the WTO, although the US and the EU are pursuing this path in their bilateral and regional trade agreements.[61] Second, another venue could be the establishment of some kind of primacy or hierarchy among trade rules, on the one hand, and

53 See D. Palmeter and P. C. Mavroidis, 'The WTO Legal System: Sources of Law', (1998) 92 AJIL 398, at 399; T. Schoenbaum, 'WTO Dispute Settlement: Praises and Suggestions for Reform', (1998) 47 ICLQ 647; L. Bartels, 'Applicable Law in WTO Dispute Settlement Proceedings', (2001) 35 *Journal of World Trade* 499.

54 See G. Marceau, 'A Call for Coherence in International Law: Praise for Prohibition Against 'Clinical Isolation' in WTO Dispute Settlement', (1999) 33 *Journal of World Trade Law* 87, at 113.

55 See Howse and Nicolaïdis, *supra* note 13, at 244, 'stating that '[r]eference to interpretative norms of general public international law enhances the legitimacy of the dispute settlement organs in adjudicating competing values'; R. Howse, 'From Politics to Technocracy – and Back Again: The Fate of the Multilateral Trading Regime', (2002) 96 AJIL 94, at 110.

56 See Appellate Body Report, United States – Standards for Reformulated and Conventional Gasoline, adopted 20 May 1996, WT/DS2/AB/R, at 17; Appellate Body Report United States – Import Prohibition of Certain Shrimp and Shrimp Products, adopted 6 November 1998, AB-1998–4, WT/DS58/AB/R, para. 130; Appellate Body Report Korea – Measures Affecting Government Procurement, adopted 19 June 2000, WT/DS163/R, para. 7.96.

57 See Appellate Body Report, EC – Measures Concerning Meat and Meat Products (Hormones), adopted 13 February 1998, WT/DS26/AB/R and WT/DS48/AB/R, para. 123; see Panel Report, European Communities – Measures Affecting the Approval and Marketing of Biotech Products, adopted 21 November 2006, WT/DS291–3/R, paras. 7.88–7.89.

58 See B. McGrady, 'Fragmentation of International Law or "Systemic Integration" of Treaty Regimes: EU – Biotech Products and the Proper Interpretation of Article 31(3)(c) of the Vienna Convention on the Law of Treaties', (2008) 42 *Journal of World Trade* 589; Cottier, *supra* note 49, at 18.

59 See A. Lang, *World Trade Law After Neoliberalism: Re-Imagining the Global Economic Order* (2011), at 150–3.

60 See R. Wilkinson and S. Hughes, 'International Labour Standards and World Trade: No Role for the World Trade Organisation?', (1998) 3 *New Political Economy* 375; see, *contra*, S. Charnovitz, 'Triangulating the World Trade Organization', (2002) 96 AJIL 28.

61 See S. A. Aaronson and J. M. Zimmerman, *Trade Imbalance: The Struggle to Weigh Human Rights Concerns in Trade Policymaking* (2008), at 133–5 and 163 ff.

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human rights, environmental or labour rules, on the other.[62] Nevertheless, neither the strategy consisting of setting conflict clauses in subsequent multilateral agreements (e.g. the Biosafety Protocol), nor the articulation of solutions within the WTO itself (whether in the form of general decisions, authoritative interpretations, or waivers as provided for by Article IX of the WTO Agreement[63]) has led to a working solution (the work of the Committee on Trade an Environment has shown itself devoid of any clear resolve[64]).

In spite of the aforementioned difficulties, there is, however, a growing consensus within the discipline on the need to address from within the WTO the 'trade and . . . ' question. If it is assumed that nowhere in the WTO Agreements it is stated that free trade is the objective to be pursued by the organization,[65] then WTO law could serve as a vehicle for global governance, where liberal trade would be on an equal footing vis-à-vis other societal values.[66] After all, 'there is no persuasive overarching rationale to explain the choice for embodying intellectual property rights in a trade agreement but not labour rights, for instance'.[67] Therefore, even law and economic analyses[68] recommend incorporating into the WTO those ever-increasing concerns related to trade, such as the protection of human rights, the environment, and labour rights. A material reform of the WTO architecture to integrate those areas is the most practical solution, which could take the form of plurilateral agreements or codes to which WTO members would progressively adhere.[69] Furthermore, the plurilateral path is preferable to the bilateral approach that the US and the EU have adopted in their recent trade agreements. This substantive reform in turn may or may not trigger an institutional reform.[70] Nevertheless, other scholars have submitted that the WTO should limit itself to the anti-discrimination model, thus rejecting the expansion of its material authority and conversely promoting national regulatory autonomy,[71] which in turn would leave environmental and labour policies to be dealt

62 See Alvarez, *supra* note 6, at 4, opting for explicit provisions in order to clarify the question of the status of WTO Agreements vis-à-vis other conventions.

63 See, e.g., B. Choudhury et al., 'A Call for a WTO Ministerial Decision on Trade and Human Rights', in T. Cottier and P. Delimatsis (eds.), *The Prospects of International Trade Regulation: From Fragmentation to Coherence* (2011), at 323.

64 See R. Tarasofsky, 'The WTO in Crisis: Lessons Learned from the Doha Negotiations on the Environment', (2006) 82 *International Affairs* 899, at 905.

65 See B. M. Hoekman and P. C. Mavroidis, *The World Trade Organization* (2007), at 14, stating that the formal objective of the WTO is not free trade (trade is a means to achieve the objectives listed in the Preamble of the WTO Agreement); A. von Bogdandy, 'Law and Politics in the WTO – Strategies to Cope with a Deficient Relationship', (2001) 5 *Max Planck Yearbook of United Nations Law* 609, at 659.

66 See M. Bronckers, 'More Power to the WTO?', (2001) 4 *Journal of International Economic Law* 41, at 53.

67 See Howse and Nicolaïdis, *supra* note 13, at 235; see also C. Thomas, 'The WTO and Labor Rights: Strategies of Linkage', in S. Joseph, D. Kinley, and J. Waincymer (eds.), *The World Trade Organization And Human Rights – Interdisciplinary Perspectives* (2009), 257, at 276.

68 See J. P. Trachtman, *The Future of International Law: Global Government* (2013), at 249.

69 See Howse, *supra* note 55, at 113–14.

70 See A. T. Guzman, 'Global Governance and the WTO', (2004) 45 *Harvard International Law Journal* 303, at 309, introducing an institutional reform of the WTO consisting of the setting of a new departmental structure; see Bogdandy, *supra* note 65, at 632, highlighting the possibilities that the impressive institutional framework of the WTO currently offers.

71 See J. O. McGinnis and L. M. Movsesian, 'The World Trade Constitution', (2000) 114 *Harvard Law Review* 511, at 566.

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with by other international organizations in the field.[72] However, the existing model has already intruded into national sovereignty, if only partially,[73] which means it is only a question of time before we witness more far-reaching clashes between regulatory goals and free trade. Moreover, promoting scale back towards a purely non-discrimination model implies a 'radical departure from the existing rules'[74] that seems nowadays politically unfeasible. Therefore, as long as the world trading system is dominated by economic liberalism,[75] the incorporation of social and related issues into the WTO may well help solve the questions of global governance and coherence among regimes in the meantime, if only in an incomplete manner.[76]

Second, development issues must also be addressed by the WTO more intensely. As a general criticism, it has been submitted that IEL has taken developing countries as 'objects' rather than 'subjects'.[77] However, the adoption of the Doha Development Agenda in the current Doha Round reveals the importance of and the agreement attached to the need of solving the question of economic and social development. To a large extent, the stalemate that this Doha Round is experiencing is due to the major differences expressed by developed and developing countries on the approaches and expectations of each group.[78] As noted, the concerns voiced by developing countries after the Uruguay Round are very similar to those articulated three or four decades ago.[79] Moreover, the proposals submitted during the first years of the Doha Round are similarly based on the current special and differential treatment that has by now shown its limits.[80] However, the recent Bali Package agreed in December 2013 has adopted several decisions on development issues.[81] In addition to the 'Aid for Trade' and 'Cotton' Decisions, the Bali Package includes four decisions affecting least-developed countries.[82] But, in the long run, what is needed is an approach that not only addresses development as an incidental issue that needs to be fixed on an ad hoc basis, but that embraces development as a normative project that 'is grounded in an

72 See S. Lester, 'The Role of the International Trade Regime in Global Governance', (2011) 16 *UCLA Journal of International Law & Foreign Affairs* 209, at 272.
73 See McGinnis and Movsesian, *supra* note 71, at 589.
74 See Lester, *supra* note 72, at 270.
75 See R. Howse, 'Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The Early Years of WTO Jurisprudence', in J. H. H. Weiler (ed.), *The EU, The WTO and the NAFTA: Towards a Common Law of International Trade* (2000), 36, at 37, stating that values other than liberal trade have not been privileged by legal and institutional arrangements of globalization.
76 See Lang, *supra* note 59, at 135, 347. According to this author, the several reform projects aimed at achieving the proper balance between trade values and other social values do not serve to the objective of re-imagining the world trading system in terms of a new legitimating collective purpose. See also D. Kennedy, 'The Politics of the Invisible College: International Governance and the Politics of Expertise', (2001) 1 EHRLR 463, at 467 ff.
77 See J. Faundez and C. Tan, 'Introduction', in J. Faundez and C. Tan (eds.), *International Economic Law, Globalization and Developing Countries* (2010), 1 at 2.
78 See S. Cho, 'The Demise of Development in the Doha Round Negotiations', (2010) 45 *Texas International Law Journal* 573, at 574.
79 See S. E. Rolland, *Development at the WTO* (2012), at 59.
80 Ibid., at 251.
81 See WTO, 'Days 3, 4 and 5: Round-the-clock Consultations Produce "Bali Package"', *supra* note 41, at 3.
82 The Bali Ministerial Declaration refers to four decisions whose texts remained unchanged from their Geneva versions: Preferential Rules of Origin for Least-Developed Countries; Operationalization of the Waiver Concerning Preferential Treatment to Services and Service Suppliers of Least-Developed Countries; Duty-Free and Quota-Free Market Access for Least-Developed Countries; and Monitoring Mechanism on Special and Differential Treatment; ibid, at 2–3.

affirmative understanding of the balancing between trade liberalization objectives and development priorities'.[83] Some authors have suggested institutional reforms in order to advance the development agenda within the WTO.[84]

3. The global financial system: Normative coherence

The International Monetary and Financial System was founded at the Bretton Woods Conference in 1944. The IMF and the WB are among the main achievements accruing from this Conference – although this article will only focus on the financial area. These international organizations had performed reasonably well until the end of the fixed exchange rate system in the 1970s and the first financial crises of the 1980s.[85] Indeed, the financial crisis witnessed in western countries from 2007–10 onwards (the European countries are still dealing with a huge sovereign debt crisis) is not a unique event. In fact, there have been several recurrent financial crises like the Latin American debt crisis in the 1980s, the South-East Asian financial crisis in 1997–8, the Russian crisis in 1996–9, and the sovereign default crisis of Argentina in 2002.[86]

The question arises whether IEL was and is normatively well equipped to prevent or even deal with these crises. International financial stability is a very contemporary concept that, in any case, can be considered as a public good[87] consisting of the avoidance of systemic risk from unfolding uncontrollably in the market.[88] It is true that monetary and financial stability was difficult to achieve taking into account the huge changes the international economy has gone through since the end of the system based on fixed exchange rates in the 1970s. Open markets in trade and finance favoured by loose or tolerant national regulation (due to neo-liberal policies) has led to ever increasing capital flows. Financial transactions have grown exponentially thanks to financial innovation combined with quick telecommunications technologies (the internet). Most importantly, in the absence of an international strategy, this openness and interconnectedness have led to global imbalances in the financial markets which are at the origin of the crisis.[89]

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83 See Rolland, *supra* note 79, at 331; see also F. Ismail, 'Mainstreaming Development in the World Trade Organization', (2005) 39 *Journal of World Trade* 11.

84 See Y.-S. Lee, 'World Trade Organization and Developing Countries – Reform Proposal', in Y.-S., Lee et al. (eds.), *Law and Development Perspective on International Trade Law* (2011), 105, at 108, submitting the creation of a Council for Trade and Development within the WTO; see also J. P. Trachtman, 'Legal Aspects of a Poverty Agenda at the WTO: Trade Law and "Global Apartheid"', (2003) 6 *Journal of International Economic Law* 3, at 19–20, advising the assessment of poverty reduction within the Trade Policy Review Mechanism, although this author warns that this proposal could be regarded as a form of interventionism or even neo-colonialism.

85 See A. F. Lowenfeld, 'The International Monetary System: A Look Back over Seven Decades', (2010) 13 *Journal of International Economic Law* 575, at 581.

86 See C. Reinhart and K. S. Rogoff, *This Time is Different: Eight Centuries of Financial Folly* (2011).

87 See G20, *Declaration of the Summit on Financial Markets and the World Economy*, Washington DC, 15 November 2008, para. 8, at <www.g20.utoronto.ca/2008/2008declaration1115.html>.

88 See C. Ohler, 'International Regulation and Supervision of Financial Markets After the Crisis', (2010) *European Yearbook of International Economic Law* 3, at 16.

89 See Reinhart and Rogoff, *supra* note 86, stating that most of the historical crises were preceded by financial liberalization by which financial entities or instruments were under-regulated or not regulated at all.

3.1. Weak institutions and soft law

International monetary and financial law is an area of IEL which revolves around the activities carried by two main international organizations, namely, the IMF and the WB. The objectives of these organizations were to encourage monetary policy co-operation, ensure currency convertibility, deliver credit for the reconstruction of countries after the war, and provide loans and technical assistance to member countries.[90]

These international organizations are based on hard law rules, specifically international treaties, have international institutions or organs proper within their structure, and are endowed with a large and permanent staff. However, they have not played a significant role in the administration of the financial system. This is due to the fact that they are devoid of the necessary regulatory powers (and maybe expertise) to adequately perform as financial regulators.[91] As has been pointed out, the IMF and the WB do not normally create regulatory standards.[92]

Instead, the standard-setting function has been assumed in this area by several international bodies, which in turn have produced soft law rules aimed at protecting the stability of the financial system. Political bodies like the G10 or the G7, then the G8, since the 1970s progressively assumed the task of creating those international bodies that would be entrusted with the job of providing the standards needed to cope with the increasing globalization in the financial domain. As a result, the Basel Committee on Banking Supervision (BCBS), the International Association of Insurance Supervisors, and the International Organization of Securities Commission were created and rank among the most prominent bodies.[93] These heterogeneous bodies were progressively created as a way to fill the gap left after the demise of the Bretton Woods System in the 1970s. They are not formal international organizations and do not have law-making powers. The latter feature makes them rely on the adoption of Principles, Codes, and Guidelines, for example, which in turn are to be implemented at the national level, thereby setting up a decentralized enforcement mechanism.[94] These bodies are generally known as Transnational Regulatory Networks (TRN), and bear many differences among them regarding their quality or composition (from central bank officials to private non-governmental actors).[95] As

90 See D. Carreau and P. Juillard, *Droit International Économique* (2010), at 577.

91 See E. Pan, 'Challenge of International Cooperation and Institutional Design in Financial Supervision: Beyond Transgovernmental Networks', (2010) 11 *Chicago Journal of International Law* 243, at 244.

92 See C. Brummer, 'Why Soft Law Dominates International Finance – and not Trade', (2010) 13 *Journal of International Economic Law* 623, at 627.

93 Other bodies are the Committee on the Global Financial System, the Committee on Payment and Settlement Systems, the International Association of Insurance Supervisors, and the International Accounting Standards Board. See M. Giovanoli, 'The Reform of the International Financial Architecture After the Global Crisis', (2009) 42 *New York University Journal of International Law and Politics* 81, at 100, providing a table with the bodies that make up the international financial architecture.

94 See A. Viterbo, *International Economic Law and Monetary Measures* (2012), 107.

95 See D. Zaring, 'International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations', (1998) 33 *Texas International Law Journal* 281; see also the seminal work A.-M. Slaughter, *A New World Order* (2004), on 'government networks'.

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a way to achieve co-ordination among these different bodies, the Financial Stability Forum was established in 1999 by the G7.[96]

The soft-law standard-setting method used by these bodies over the years has been described as 'an alternative form of international law-making without the burden of cumbersome treaty formation rules'.[97] Furthermore, the resulting international financial soft law regulatory framework has been regarded as 'more coercive than traditional theories of international law predict',[98] because they 'are more than soft law'; they 'reflect mutual commitments made after intense negotiations, and taken together, they contain both incentives for compliance and at least the suggestion of meaningful sanctions for non-compliance'.[99] Among these international financial standards, the main regulatory outcome has been produced by the BCBS which adopted in 1988 the 'Basel Accord' establishing minimum capital requirements for banks (Basel I), subsequently substituted by the Basel Accord II in 2004.

However, the soft law-making process carried out by these TRNs and the resulting international financial standards have also generated substantial criticism as they present several limitations. First, the process has been condemned because of a lack of political legitimacy and accountability,[100] as developing countries are not given a voice within the bodies that produce those standards, later imposed on them by developed countries.[101] Second, the TRNs' effectiveness in solving concrete international regulatory problems is doubtful when co-operation involves distributive implications and enforcement problems.[102] Certainly, soft law financial regulation as a product has been disregarded because of the absence of mechanisms to ensure its enforcement. The IMF surveillance activity is mainly performed bilaterally (by way

96 See M. Giovanoli, 'The International Financial Architecture and Its Reform After the Global Crisis', in M. Giovanoli and D. Devos (eds.) *International Monetary and Financial Law* (2010) 3 at 5; J. Liberi, 'The Financial Stability Forum: A Step in the Right Direction … Not Far Enough', (2003) 24 *University of Pennsylvania Journal of International Economic Law* 549.

97 See K. Alexandern, 'Global Financial Standard Setting, G10 Committees, and International Economic Law', (2009) 34 *Brooklyn Journal of International Law* 861, at 879.

98 See C. Brummer, 'How International Financial Law Works (and How It Doesn't)', (2011) 99 *Georgetown Law Journal* 257, at 262.

99 See A. Lowenfeld, *International Economic Law* (2008), at 845.

100 See K. Alexander, R. Dhumale, and J. Eatwell, *Global Governance of Financial Systems: The International Regulation of Systemic Risk* (2005), 153.

101 See S. J. Toope, 'Emerging Patterns of Governance and International Law', in Michael Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (2000), 91, at 96–7; K. Raustiala, 'The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law', (2002) 43 *Virginia Journal of International Law* 1, at 24–5. See also P. Alston, 'The Myopia of the Handmaidens: International Lawyers and Globalization', (1997) 8 EJIL 435, at 446; D. Kennedy, 'When Renewal Repeats: Thinking against the Box', (2000) 32 *New York University Journal of International Law and Politics* 335, at 412. More recently, see J. Black, Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes, (2008) *LSE Law, Society and Economy Working Papers 2/2008*, at 13, <http://eprints.lse.ac.uk/23040/1/WPS2008–02_Black.pdf>.

102 See P. H. Verdier, 'Transnational Regulatory Networks and Their Limits', (2009) 34 *Yale Journal of International Law* 113, at 120–30. Verdier stresses that regulators participating in TRNs are accountable to their domestic political interests which makes TRNs effective only when there are pure co-ordination games. However, when international regulatory co-operation encompasses distributive and enforcement problems (the most likely scenario) it is very unlikely that TRNs would promote international co-operation for its own sake: dominant national interests within TRNs 'may clash over alternative rules, attempt to resist or dilute international standards, and resist compliance', ibid. at 121. See also the critique made by K. Anderson, 'Squaring the Circle? Reconciling Sovereignty and Global Governance through Global Government Networks', (2005) 118 *Harvard Law Review* 1255, at 1276.

of Article IV, Section 1) and through the Financial Sector Assessment Programme (by way of Article V, Section 2, b) and the Reports on the Observance of Standards and Codes (together with the WB) which are, nevertheless, voluntary.[103] Indeed, there are neither centralized procedures nor sanctions available to achieve full compliance of those standards.[104] The possibility of a cheap exit from commitments by states has been tested in the recent crisis and proves that soft-law standards are barely constraining.[105]

Finally, the current structure of the international financial regulation, consisting of the TRNs and soft law, is the product of historical path dependence and the political actors involved, i.e., national regulators, the financial industry, and great powers governments.[106] After the demise of the fixed-rate system in the 1970s, and absent any formal international framework to address the challenges posed by trans-border finance, informal networks and non-binding standards were the path chosen, which has prevailed to this day. Within this informal context, the record of international financial soft law standards has been uneven, very successful at liberalizing international finance, yet very poor at raising prudential standards or establishing cross-border bank resolution mechanisms.[107]

3.2. Failure during and after the crisis

Recent studies have tried to ascertain the main causes of the financial crisis[108] so that today they can be classified between macro- and micro-causes or failures.[109] From the macro aspect, the main reasons for the crisis were relaxed monetary and fiscal policies together with trade imbalances, regulatory failure regarding prudential control and supervision, and massive and unrestrained capital flows. From the micro aspect, the features that fuelled the crisis were excessive risk and leverage taking, inadequate compensation structures within private entities, inappropriate amassing of public and private debt, shortcomings of credit ratings by private agencies, and flawed use

103 See Giovanoli, *supra* note 93, at 119–20.

104 However, it is true that, pursuant to Article IV of the IMF Agreement, this organization might carry a surveillance activity of financial systems with more teeth than has been the case until now, see Brummer, *supra* note 98, at 318.

105 See Report of the Commission of Experts of the President of the United Nations General Assembly on Reforms of the International Monetary and Financial System (Stiglitz Report), New York, 21 September 2009, at 96.

106 See P. H. Verdier, 'The Political Economy of International Financial Regulation', (2013) 88 *Indiana Law Journal* 1405. According to Verdier 'national regulators value some international cooperation, but also want to preserve their extensive domestic authority and resist binding rules and international oversight. The financial industry is willing to support some regulatory harmonization to facilitate cross-border activity, but resists costly prudential regulations. For their part, the great powers typically prefer fragmented and informal international governance over strong collective institutions where they can less easily wield their influence [...] As a result, most of IFR is simply the lowest common denominator of what these actors are willing to do (or tolerate)'; ibid., at 1408.

107 Ibid., at 1439 ff.

108 See among others: R. M. Lastra and G. Wood, 'The Crisis of 2007–09: Nature, Causes, and Reactions', (2010) 13 *Journal of International Economic Law* 531, at 537–8; N. Roubini and S. Mihm, *Crisis Economics: A Crash Course in the Future of Finance* (2010); S. Charnovitz, 'Addressing Government Failure Through International Financial Law' (2010), 13 *Journal of International Economic Law* 743, at 746.

109 See E. Avgouleas, *Governance of Global Financial Markets* (2012), 89; Viterbo, *supra* note 94, at 6; Ohler, *supra* note 88, at 6.

https://doi.org/10.1017/S0922156514000260 Published online by Cambridge University Press

of financial innovation. A historical account with the sequence of events has been described in detail in the *Larosière Report*.[110]

As has been suggested, from a legal point of view it may seem surprising that the 2008 financial crisis happened despite the existence of a 'comprehensive' corpus of international financial standards that had been developed over the last 35 years.[111] However, one of the main problems regarding this crisis was the ineffective implementation and enforcement of existing regulations.[112] Second, another major mistake was that financial standards produced by transnational regulatory networks had over relied on self-regulation by the market (due to neo-liberal and deregulation policies).[113] Third, and as a consequence, the extant regulation excessively focused on the micro-prudential supervision of individual financial entities and left outside the macro-stability of the whole financial system,[114] while risk taking through financial innovation and interconnectedness of too-big-to-fail financial entities should have become the primary objects of supervision on a trans-border basis. Specifically, there is some evidence suggesting that some of those international financial standards like the Basel I and Basel II rules have contributed to aggravating or spreading the crisis (through massive securitization, misguided pro-cyclicality and over-reliance on private credit rating agencies).[115] Furthermore, multilateral surveillance (through IMF) did not function efficiently.

Once the crisis erupted, the international financial architecture based mainly on the activity of TRNs has been useless at coping with the financial meltdown witnessed in 2007–10[116] and still present in many countries, especially the European countries. In the absence of a centralized international mechanism to address the challenge, the reaction to the financial crisis has mainly come from unilateral measures taken individually by states with no co-ordination and even at the cost of originating important inconsistencies among them.[117]

From an institutional point of view, the answer to the crisis has been in the form of a revitalization of the G20.[118] The G20 has acted as a co-ordinating executive, as a mega-network,[119] and the G20 meetings held after the eruption of the crisis have produced two changes: the establishment of the Financial Stability Board (FSB),

110 See J. de Larosière, *High-Level Group on Financial Supervision in the EU* (2009), at 11–12, <http://ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf>.

111 See Giovanoli, *supra* note 96, at 6.

112 See P. Troberg, 'Global Capital Markets and National Reporting: International Regulation but National Application?', in J. Klabbers and T. Piiparinen (eds.), *Normative Pluralism and International Law* (2013), at 301, providing a recent empirical assessment regarding International Financial Reporting Standards.

113 See Avgouleas, *supra* note 109, at 110; Stiglitz Report, *supra* note 105, at 48.

114 See Larosière Report, *supra* note 110, at 11; K. P. Follak, 'The Basel Committee and EU Banking Regulation in the Aftermath of the Credit Crisis', in M. Giovanoli and D. Devos (eds.) *International Monetary and Financial Law* (2010), 177 at 179.

115 See Larosière Report, *supra* note 110, at 9 and 11–12.

116 See D. Zaring, 'International Institutional Performance in Crisis', (2010) 10 *Chicago Journal of International Law* 475, at 478; see also Pan, *supra* note 91, at 244.

117 See Pan, *supra* note 91, at 264.

118 See R. H. Weber, 'Legitimacy of the G-20 as Global Financial Regulator', (2012) *Society of International Economic Law (SIEL), Third Biennial Global Conference, Working Paper No. 2012/13*, at 10, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2088315>.

119 See S. Cho and C. R. Kelly, 'Promises and Perils of New Global Governance: A Case of the G20', (2012) 12 *Chicago Journal of International Law* 491, at 553.

https://doi.org/10.1017/S0922156514000260 Published online by Cambridge University Press

previously the FSF, and the pledge to strengthen the IMF. The FSB has an undefined legal status from an international law point of view[120] and may be deemed as another example of a TRN with the aim of supervising regulatory policies and standards. Together with other standard-setting bodies (like the BCBS), the FSB has tried to solve the problems regarding legitimacy and accountability through the broadening of its membership to include emerging economies from the G20. However, governance problems are not completely solved, as the FSB remains a TRN with no binding powers or meaningful tools to accomplish its function. Commitments undertaken by FSB member states are still of a soft law nature.[121] As to the IMF, its primary surveillance role has been recognised by an IMF/FSF Joint Letter in 2008 and reinforced by the 2010 Executive Board Decision to integrate FSAP stability valuations within the IMF ability to carry out bilateral assessments (Article IV, Section 1).[122] Nevertheless, there is still an important gap concerning surveillance as IMF Article VII, Section 5 allows member states not to disclose data regarding individuals or corporations.[123] But then again what would be needed precisely is the mandatory international supervision of private financial entities.[124]

From a substantive point of view, there has been an effort to harden the soft law financial standards. A new Basel Accord (Basel III) was adopted in 2010 by the BCBS and will be fully implemented at national level by 2019.[125] Other standards have also been revised.[126] The regulatory and supervision financial standards under scrutiny go from capital and liquidity requirements to risk management, accounting standards, credit rating agencies, derivatives markets, hedge funds, systemically important financial institutions, and cross-border crisis management and resolution mechanisms.

To sum up, although some steps have been taken in order to make the international financial system more integrally co-ordinated (like the Non-Cooperative Jurisdictions Initiative[127]), the truth is that the soft law approach and the voluntary, non-binding character of international financial obligations still prevails.[128] In other words, the post-crisis reforms have shown a preference for a model of governance

120 See L. Catá Backer, 'Private Actors and Public Governance Beyond the State: The Multinational Corporation, the Financial Stability Board and the Global Governance Order', (2011) 18 *Indiana Journal of Global Legal Studies* 751.

121 See FSB Charter Art. 16 stating that the Charter does not create any legal rights or obligations. See, *contra*, Viterbo, *supra* note 94, at 120, who considers FSB member state obligations as 'unilateral promises'.

122 Although limited to those 25 jurisdictions deemed to host systemically important financial institutions.

123 See S. Hagan, 'Enhancing the IMF's Regulatory Authority', (2010) 13 *Journal of International Economic Law* 955, at 963.

124 See Pan, *supra* note 91, at 246.

125 See M. Hellwig, 'Capital Regulation after the Crisis: Business as Usual?', (2010) *Max Planck Institute for Research on Collective Goods Pre-print, No. 2010/31*, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id = 1645224##>, providing a criticism of the new Basel Accord because, as the previous Basel II, it is based on risk-calibrated capital requirements, in particular under the model-based approach which may again lead to the undercapitalization of banks witnessed in the 2008 financial crisis. That is why Basel II has been qualified as a new failure of TRNs, see Cho and Kelly, *supra* note 119, at 532.

126 See <http://www.financialstabilityboard.org/list/fsb_publications/tid_177/index.htm>.

127 The Non-Cooperative Jurisdictions Initiative promoted by the G20 and carried by the FSB in order to oblige those jurisdictions to comply with prudential standards raises some problems of legitimacy, i.e., the legal basis of G20 members to force third countries to abide by standards not legally binding on G20 member States in the first place, see Giovanoli, *supra* note 93, at 122.

128 See Viterbo, *supra* note 94, at 128.

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based on more or less informal government networks over more formal intergovernmentalism of the Bretton Woods Conference.[129] In doing so, they perpetuate pre-crisis patterns as they 'do not fundamentally replace TRNs and soft law, but rather attempt to expand, rationalize, and strengthen the existing system in various ways'.[130]

3.3. Towards a more institutionalized financial law

It is a fact that initiatives undertaken after a crisis like the one initiated in 2008 normally imply a decline in reliance on private standards and self-regulation.[131] However, as previously seen, the reaction to the financial meltdown of 2008 at the international level has mainly come through the response of an invigorated G20, which has taken over the global reform and oversight of the financial system. Its Declarations and Statements look more for the strengthening of the existing regulatory apparatus, based on TRNs, than for a radical transformation of it. In other words, instead of launching a new institutional vertical approach, the furtherance of a horizontal approach of intergovernmental co-operation was chosen. Furthermore, after the recent reform of the international financial architecture, domestic jurisdictions still keep the exclusive competence to incorporate international financial standards into their national legislation, regulation, and supervisory process. Indeed, as those standards are not based on a formal, hard law type international treaty, their implementation is still 'voluntary'.[132]

However, the reinforcement of this kind of trans-governmental regulatory network seems to fall very short of what is needed within the international financial system. The G-20 speedy reaction of 2008 will very likely blur overtime as the urgent needs of the day dissipate and there is some recovery from the financial and economic crises.[133] Reinforced international co-operation through the G-20 is doomed to lose political momentum and seems to be only a temporary solution.[134] If the aim consists of establishing an international framework to avoid a new financial crisis such as the one recently witnessed then there are other choices available in international law based on a more supranational attitude.

The alternative options which transmit a hard-law regulation approach and a more vertical or institutionalized financial system at the international level have already been advanced. All of them revolve around the idea that a formal

129 See E. Helleiner, 'A Bretton Woods Moment? The 2007–2008 Crisis and the Future of Global Finance', (2010) 86 *International Affairs*, 619, at 632.

130 See Verdier, *supra* note 106, at 1461–62. According to Verdier, in the post-crisis reform scenario regulators retain considerable control over the process of raising prudential standards; great powers maintain their discretion to address failures on an ad hoc basis; and surveillance is reinforced only in a formal not a substantive way, ibid., at 1463–70.

131 See E. Helleiner and S. Pagliari, 'Crisis and the Reform of International Financial Regulation', in E. Helleiner, S. Pagliari, and H. Zimmermann (eds.), *Global Finance in Crisis* (2009), 1, at 4, 6–8.

132 See Giovanoli, *supra* note 93, at 90–91, 99, and 101.

133 See Cho and Kelly, *supra* note 119, at 526, highlighting that the G20 initial political impetus appears to be waning. Moreover, at the outbreak of the financial crisis in 2008, there were two meetings of the G20 per year. Nowadays, these meetings have been reduced to one per year, see <http://www.g20.utoronto.ca/summits/index.html>.

134 See Pan, *supra* note 91, at 245.

https://doi.org/10.1017/S0922156514000260 Published online by Cambridge University Press

international treaty establishing some kind of supra-national body would be the most effective solution to the problems posed by international finance. First, there is a proposal to craft a formal international organization that could be termed the World Financial Authority (WFA)[135] or the World Financial Organization (WFO), maybe even in the image of the WTO.[136] This WFO would produce compulsory international financial standards for those states seeking market access for home financial entities in foreign countries. This international organization should also be invested with the power to sanction members whose national regulatory policies fail to comply with those international standards,[137] by way of authorized countermeasures or otherwise.[138] A very similar scheme introduces the setting up of a treaty-established *Governing Council* that would probably delegate to other bodies the authority to develop those standards and even the tasks of surveillance and enforcement.[139] In a highly elaborated intellectual framework, one author suggests that this Governing Council should oversee the activities of up to four regulatory and supervisory international authorities.[140] The rationale of this proposal follows very closely the one that the Stiglitz Report advises for the whole economic area.[141] Other authors, building on the 'Global Administrative Law' project,[142] have suggested the establishment of an international administrative body in the form of an independent college of supervisors that would be entrusted with financial regulatory, but most importantly, supervisory powers.[143] This administrative agency should also have

135 See J. Eatwell and L. Taylor, *Global Finance at Risk: The Case for International Regulation* (2000), 208 ff. According to these authors, the WFA could be created from an expanded Bank for International Settlements (BIS) (expanded authority, remit, role and membership); an alternative could be to place the WFA function within the IMF, ibid., at 235–7.

136 See C. Reinhart and K. Rogoff, 'Regulation should be International', *Financial Times*, 18 November 2008, at 13; B. Eichengreen, 'Not a Bretton Woods, but a New Bretton Woods process', in B. Eichengreen and R. Baldwin (eds.), *What G20 Leaders Must Do to Stabilise Our Economy and Fix the Financial System* (2008), at 25, <www.voxeu.org/sites/default/files/file/G20_Summit.pdf>; L. Garicano and R. M. Lastra, 'Towards a New Architecture for Financial Stability: Seven Principles', (2010) 13 *Journal of International Economic Law* 597, at 619; P. Boone and S. Johnson, 'Will the Politics of Global Moral Hazard Sink Us Again?', in A. Turner et al., *The Future of Finance* (2010), 247, at 269.

137 Independent panels of experts would have the task of determining whether countries are in compliance with their obligations as members of the new organization, see B. Eichengreen, 'International Financial regulation after the Crisis', (2010) *Daedalus*, 107, at 113–14.

138 See B. Eichengreen, 'Out of the Box Thoughts About the International Financial Architecture' (2009), *IMF Working Paper No. 09/116*, at 19, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1415173>.

139 See Alexander et al., *supra* note 100, at 163, speaking of a Global Financial Governance Council.

140 See Avgouleas, *supra* note 109, at 429 ff. The 'Treaty-established *governing council*' would oversee the work of four authorities under it: a global macro-prudential supervisor (a revamped IMF); a global micro-prudential authority (a reconstituted and expanded FSB); a global financial policy, regulation and risk knowledge authority (the OECD together with the research division of BIS); and a brand new global resolution authority. This global prudential (systemic risk) authority would be in a position to face those problems that the recent reform has not properly addressed, namely, the cross-border supervision of very big financial institutions, the management of emerging and unpredictable risks, and the resolution of cross-border financial groups.

141 See Stiglitz Report, *supra* note 105, at 87, discussing the advantages of establishing a Global Economic Co-ordination Council.

142 See B. Kingsbury, N. Krisch, and R. B. Stewart, 'The Emergence of Global Administrative Law', (2005) 68 *Law and Contemporary Problems* 15.

143 See Lord Adair Turner, *The Turner Review: A Regulatory Response to the Global Banking Crisis* (2009), Financial Services Authority, at 9, Recommendation 25, <http://www.fsa.gov.uk/pubs/other/turner_review.pdf>.

the means to impose sanctions when national financial institutions do not conform to the legal standards.[144]

Second, a very similar result could be achieved through a strengthening of the IMF. The financial crisis of 2008 has demonstrated how necessary a world financial authority is for the smooth functioning of global markets. Therefore, it would be wise to have recourse to the IMF because it 'is not only the international monetary institution *par excellence*; the IMF is also at the centre of the international financial system'.[145] Within this alternative, there are different degrees: on the one hand, as the IMF has statutory responsibility for surveillance of international economies and has the power and responsibility of an international lender, incorporating the function of a WFA would be like combining the 'roles of a quasi-central bank and a quasi-regulator'.[146] On the other hand, a less ambitious scheme would only attribute supervisory tasks to the IMF, but not a regulatory or a dispute settlement role. Nonetheless, as a 'global sheriff', the IMF is the institution best placed to 'monitor the compliance with standards through its function of surveillance and through its assessment of the health of the financial sector'. Although it would be advisable to expand the IMF's powers through an amendment to its Articles of Agreement, a creative interpretation of Article I and Article IV would be enough to reinforce its function of surveillance over issues of financial stability.[147]

Finally, other less ambitious approaches, even admitting the superiority of a proposal based on hard law, put forward some intermediate steps which would serve to harden specific features of the soft law model strengthened in the post-crisis reforms.[148] One of those steps would consist of the establishment of a dispute settlement mechanism similar to the one existing within the WTO in order to solve differences over international burden-sharing in the event of trans-border financial institution failures.[149]

These alternative frameworks for introducing some degree of institutionalization regarding the international financial structure have been qualified as politically unfeasible.[150] We are reminded that there is no consensus among states regarding the

144 See Pan, *supra* note 91, at 273–5. See also D. Aldford, 'Supervisory Colleges: The Global Financial Crisis and Improving International Supervisory Coordination', (2010) 24 *Emory International Law Review* 57.

145 See R. M. Lastra, 'The Role of the IMF as a Global Financial Authority', (2011) *European Yearbook of International Economic Law* 121, at 122.

146 See Eatwell and Taylor, *supra* note 135, at 236.

147 See Lastra, *supra* note 145, at 122–3.

148 See D. W. Arner and M. W. Taylor, 'The Global Financial Crisis and the Financial Stability Board: Hardening the Soft-Law of International Financial Regulation?', (2009) 32 *University of New South Wales Law Journal*, at 488. According to these authors, both supervision and crisis management arrangements for cross-border international financial institutions are issues that truly demand hard law regime answers; ibid., at 490, 496.

149 Ibid., at 490. See also D. Schoenmaker and A. Siegmann, 'Can European Banks Bailouts Work?', (2013) *Journal of Banking and Finance*, at 4, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2134066>, analysing the European context and submitting that, after a supranational approach, a second best solution would be a binding rule among national governments to share the burden of failing banks in order to maintain financial stability.

150 See L. G. Baxter, 'Exploring the WFO Option for Global Banking', in L. Boulle (ed.), *Globalisation and Governance* (2011), 113, at 116, stating that the WFO idea is misconceived and doomed to failure. See also Brummer, *supra* note 98, at 312.

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establishment of an international framework of a mandatory type in this realm.[151] Truly, developed countries home to the largest private international institutions or in control of the most important financial centres (New York, London) will be reluctant to risk the political weight they currently enjoy.[152] Indeed, creating an international financial organization goes against their national interests and against those of their domestic financial champions[153] in areas like investment banking or credit rating. However, normatively speaking, the solution consisting of building an international financial framework based on a formal international organization with legal powers is superior to the one chosen after the 2008 crisis. If crises are recurrent, it might be wise to try to avoid them or limit their negative effects as much as possible through more, not less, hard law/formal regulation of the kind suggested in this article. As has been stated, '[t]he key to effectively managing systemic risk is having regulatory authorities who operate in the same domain as the institutions they regulate'.[154] If 'informal cooperation has reached the limits of effectiveness' then the optimal solution from a normative point of view is a WFA that performs the same tasks that are performed today by efficient national regulators, 'namely information, authorisation, surveillance, guidance, and policy' (including the macroeconomic and microeconomic level).[155] Moreover, from a political theory point of view, an institutionalized international organization would be in a better position to resist the domestic political pressures that government networks and national regulators currently face.[156] Finally, it is true that this proposal entails some dangers regarding overintegration in economic life.[157] However, firstly only those states wanting to engage in deeper financial integration should commit to new and more elaborated institutional frameworks.[158] Second, the proposed institutional reconfiguration does not rule out other tools like the dynamic management of a country capital account,[159] thus enhancing policy space and national regulatory autonomy.

Indeed, the EU experience is a case in point regarding deeper integration of finance internationally. The EU had completed its agenda to liberalize financial markets just prior to the crisis. Following the GFC, there were two main routes to be followed: more Europe or less Europe. After the demise of the paradigm based on deregulation

151 However, a coherent intellectual framework that promotes a complete overhaul of financial regulation is still very much needed, see F. Allen, A. Babus, and E. Carletti, *Financial Crisis: Theory and Evidence*, at 29–30, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1422715>.

152 See Avgouleas, *supra* note 109, at 431, highlighting the expected opposition of big stakeholders like the US and the EU to a supra-national governance system.

153 See S. Gadinis, 'The Politics of Competition in International Financial Regulation', (2008) 49 *Harvard International Law Journal* 447, at 450, highlighting that domestic interest groups' preferences have a direct influence on national policies, especially in a dominant state like the U.S., towards international co-ordination in financial regulation.

154 See Eatwell and Taylor, *supra* note 135, at 219.

155 Ibid., at 220.

156 See Reinhart and Rogoff, *supra* note 136, at 13.

157 See D. Kennedy, 'Law and the Political Economy of the World', (2013) 26 LJIL 7, at 20.

158 See D. Rodrik, 'A Plan B for Global Finance', *The Economist*, 12 March 2009, at 3, <http://www.economist.com/node/13278147>.

159 See Stiglitz Report, *supra* note 105, para. 204. See also J. D. Ostry et al., 'Capital Inflows: The Role of Controls', (2010) *IMF Staff Position Note No. 10/04*, conveying a real change in the IMF's stance towards the use of capital controls.

https://doi.org/10.1017/S0922156514000260 Published online by Cambridge University Press

and/or self-regulation,[160] and ruling out inaction or the re-nationalization of this field (together with less open markets) as possible answers, the reaction has been in the form of more Europe.[161] The mismatch between a pan-European market for financial services and the nationally-based supervision and resolution regimes has called for more centralized regulation concerning prudential regulation, crisis management, market efficiency, and a new institutional structure.[162, 163] However, the sovereign debt crisis has led the EU to reinforce its own powers by strengthening those of the European Central Bank through a recent Regulation[164] setting up a Single Supervisory Mechanism that will definitely further the path towards a European Banking Union.[165]

Similarly, given that the globalization of finance is unlikely to be reversed, the regulatory stance at the international level cannot consist once again of a market-based stance through regulatory competition,[166] as this brought about the regulatory arbitrage underlining the GFC.[167] Some improved international co-operative mechanism is necessary to avoid repeating the same mistakes recently witnessed.

4. Conclusion

Conventional wisdom argues that international trade law and international financial law are very different branches of IEL. The functions performed by these two areas of IEL are radically separated. The multilateral trading system aims at liberalization to ensure competitive markets, whereas the international financial system is concerned mostly with regulation to secure financial stability. Accordingly, international trade law is equipped with instruments that look for the liberalization of national markets, like the principle of non-discrimination. This principle does not support the establishment of regulations, which could very well explain why it is almost unknown within the remit of international financial law.[168]

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160 See E. Ferran and K. Alexander, 'Can Soft Law Bodies be Effective? The Special Case of the European Systemic Risk Board', (2010) 35 *European Law Review* 751, at 761, noting the institutional weaknesses of the Lamfalussy framework in place within the EU before the GFC broke.

161 See N. Moloney, 'EU Financial Market Regulation after the Global Financial Crisis: "More Europe" or More Risks?', (2010) 47 *Common Market Law Review* 1317, at 1325.

162 Ibid., at 1319, 1326. In the new institutional structure, the European Systemic Risk Board, which monitors macro-prudential risk, together with the three European Supervisory Authorities (the European Banking Authority, the European Securities and Markets Authority, and the European Insurance and Occupational Pensions Authority) form the European System of Financial Supervisors.

163 But see G. Hertig, R. Lee, and J. A. McCahery, 'Empowering the ECB to Supervise Banks: A Choice-Based Regulation', (2010) 7 *European Company and Financial Law Review* 171, at 172–3, submitting that the national authorities would still have substantial supervisory discretion and that additional supervisory centralization was needed.

164 See Council Regulation (EU) No. 1024/2013, of 15 October 2013, conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, *DO* L 287, 29.10.2013, at 63.

165 See R. M. Lastra, 'Banking Union and Single Market: Conflict or Companionship?', (2013) 36 *Fordham International Law Journal* 1190; See also T. Beck (ed.), *Banking Union for Europe: Risks and Challenges* (2012).

166 See, e.g., L. Zingales, 'Is the US Capital Market Losing its Competitive Edge?', (2007) *ECGI - Finance Working Paper No. 192/2007*, at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1028701>.

167 See Moloney, *supra* note 161, at 1356.

168 See T. Cottier and M. Krajewski, 'What Role for Non-Discrimination and Prudential Standards in International Financial Law', (2010) 13 *Journal of International Economic Law* 817, at 823.

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However, as we have seen there is some evidence that point towards a more nuanced understanding. To begin with, international trade law and international financial law have similar functions in that both aim to achieve system stability (whether in trade or financial trans-border operations).[169] The multilateral trading system has developed a higher level of institutionalization and legalization but at some cost. First, as we have seen, the trade system allows the main players to adopt protectionist measures if there is a big market failure (the 2008 economic crisis). Second, the 'trade and …' debate shows that the trade regime is not complete as long as other societal values are not incorporated. The protection of human rights, labour rights, the environment, and the real promotion of development must be addressed at the WTO system if we want to preserve it from irrelevance in the near future. After all, it is not at all clear that the world trading system is only about free trade. The Preamble to the WTO Agreement encompasses other objectives together with trade liberalization (like raising standards of living, ensuring full employment, sustainable development, and the preservation of the environment). In the end, it is only a question of enabling the trading system to get rid of the pervasive economic liberalism that has been dominating it during the last decades and adopting a true global governance stance that accords with the goals stated and needs observed within the trade regime.

Second, with respect to finance, there is a real need to change the structure of the financial architecture. Soft law standards produced by TRNs were once acclaimed because they could solve the globalization paradox. However, these government networks have been unable to cope with the task once assumed, that is, that of ensuring the stability of the international financial system. As attested by the recent crises, those financial standards convey important problems regarding effectiveness and enforcement. They do not solve the crucial issues related to international banking regulation like the supervision of prudential regulation and the application of bank-resolution mechanisms for cross-border financial institutions. Moreover, their lack of accountability and inclusiveness make them an instrument for developed countries to impose their standards on non-participating countries, mostly developing countries. A proposal for reform would consist of the establishment of a WFO, although there are more modest approaches that may serve as an intermediate step. The current unfeasibility of this approach predicated by its critics may not change its normative coherence weight: collective problems may only be solved through the most appropriate co-ordinated responses which in this case require an institutional or vertical articulation in the form of an international organization.[170]

As this article has tried to demonstrate, the recent economic and financial crisis has put IEL at a crossroads in the two areas under scrutiny, trade law and financial

169 See P. C. Mavroidis, 'Free Lunches? WTO as Public Good, and the WTO's View of Public Goods', (2012) 23 EJIL 731, underlining the idea that the public good is not free trade but instead the WTO understood as a forum that is necessary to address (negative) external effects stemming from the unilateral definition of trade policies.

170 See G. Shaffer, 'International Law and Global Public Goods in a Legal Pluralist World', (2012) 23 EJIL 669, at 683, who highlights the role of international organizations in the provision of global public goods. See generally Symposium, 'Global Public Goods and the Plurality of Legal Orders' in the same issue.

law. Global governance and normative coherence have been used as the theoretical tools to unveil the similarities stemming from the functions performed and the need for transformation that both areas of IEL have in common. Trade law and financial law are in need of reform at the international plane, be it a substantive reform in the first case or an institutional reform in the second. Of course, this change in both areas of law would introduce a meaningful step from negative regulation towards a more positive approach to regulation (an outcome already achieved with the TRIPS Agreement). Some scholars have already forecast this as the likely way forward.[171]

171 See Trachtman, *supra* note 68, at 277.

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