Preface

When we were approached to edit a collection on International Agricultural Trade Law, we eschewed an approach which would have examined the existing provisions of the Agreement on Agriculture (AoA) and the agriculture negotiations in the Doha Round. A major factor in this decision was that a significant body of commentary and literature already exists on the rules of the AoA, a significant proportion of it authored by the contributors to this volume. We did not wish to repeat or reproduce that literature here. Instead, we have chosen to focus on the ‘new’ issues that are closely linked to the international regulation of agricultural production and trade, but that have neither been sufficiently covered by the rules of the AoA nor adequately addressed in the literature. Many of these issues are either left to some other non-WTO instruments and systems (e.g. climate change under the UNFCCC system, etc.), raising the issue of relations with the WTO regime as a key question, or simply fall in the cracks between the WTO and those other regimes (as the food security issue appears to be). This volume focuses on these borderline issues. At the same time, we also needed to put these issues within the context of the existing legal terrain. We use the Introduction chapter to provide the necessary background information, where we examine the provisions of the AoA, as informed by the jurisprudence of WTO Panels and the Appellate Body. This introduction also offers a very brief synopsis of the Doha negotiations, which concentrates on the content of the latest version of the Modalities issued by the Chair of the Special Session of the Committee on Agriculture in December 2008. Progress since then has been slow and, as one of our contributors concludes, also ‘fruitless.’

In Chapter 2, Fiona Smith addresses food security, one of the most sensitive and least-understood issues in the field of international law. Dr Smith argues that what is needed is to address old problems from new perspectives. For her, changing all the international agricultural trade rules on food security does not necessarily imply improving them and, even if they were to be changed, this could result in consequential effects which might adversely impact on different aspects of international agricultural trade regulation. She concludes that the temptation to overload the rules addressing food security should be resisted and argues that the existing rules may be more than able to
accommodate some contemporary food security concerns through small, incremental changes that may also maintain the integrity of the existing rules.

In Chapter 3, Christian Häberli picks up the argument and asks, rather provocatively, if WTO rules improve or impair the Right to Food. After demonstrating that this still lacks an adequate response under the present multilateral regime applying to food production and trade, Dr Häberli presents the issue as a systemic challenge of how to end the fragmentation between international humanitarian law and international trade law. He argues that such fragmentation cannot excuse WTO inaction and there is a need for a better regulatory framework in the WTO. This framework would enshrine the Right to Food within the WTO whilst also allowing food-insecure developing countries the necessary policy space to address the many aspects of this problem.

It is this issue of policy space that Alan Matthews discusses in Chapter 4. Professor Matthews examines the subject of policy space, focusing mainly on the so-called ‘development box’ issues of special products and the SSM, two areas of the Doha negotiations that are essentially about developing countries’ ability to take certain measures for food security and other reasons. Examining the difficult negotiations on these instruments, reflecting as they do different conceptions of the Agreement on Agriculture and various views on what these instruments are intended to achieve, although there is room for compromise, he argues that developing countries do not require permanent exceptions to WTO rules to promote their food security, livelihood security and rural development goals. Matthews concludes that what is needed is an investment in agricultural production, infrastructure and institutions by both the developing countries themselves and donors.

One potential area for investment in the service of food security and overall development relates to the protection of intellectual property in plant varieties, a subject that Graham Dutfield addresses in Chapter 5. Outlining the scope of this intellectual property right, Professor Dutfield examines the International Convention for the Protection of New Varieties of Plants (UPOV) and asks whether this system is the most optimal legal system given the variety of conditions around the world. Dutfield argues that UPOV provides a one-size-fits-all solution for everything, making it insufficiently sensitive to the specific needs and realities of a diverse range of countries. He concludes that there is a huge lack of awareness about plant variety protection and, given the implications of such protection for issues such as biodiversity and rural
development, this should be addressed either within or outside of UPOV.

A further aspect of agricultural investment relates to the use of new technology, in particular that of Genetically Modified Organisms (GMOs), which is addressed in Chapter 6 by Kym Anderson and Lee Ann Jackson. After examining the economic consequences of the diverse policy approaches by the enthusiasts and sceptics of GMOs, the chapter examines the evolving EU policy landscape in this area, including the developments after the WTO dispute on biotech products in 2007. The authors argue that the uncertainty about the EU regulatory environment operates as a major disincentive to further research in this area and the adoption of GMOs by other countries. They conclude that by investing in this technology developing countries would stand to gain in terms of alleviating poverty and adapting to the problems posed by climate change.

Whether conventional or biotech-based, everyone agrees that engaging in international trade is good for the participants in terms of general welfare as well as specific cases of food security. Agricultural trade liberalisation is being pursued today exactly for that reason. However, agricultural trade can also pose risks to human, animal and plant life or health and all liberalisation efforts have to be tempered with national regulation that is intended to eliminate or minimise such risks. There is therefore a balance that has to be struck at any point in time between these interests. Add to this the many other requirements that are set by supermarket chains and other private players and the issue of standards is bound to be controversial. These very issues are addressed in Chapter 7 and Chapter 8 which deal, respectively, with governmental or regulatory standards and private standards.

In Chapter 7, Eugenia Laurenza and Ignacio Carreño argue that in order to ensure that the benefits of tariff liberalisation and commercial concessions on agricultural products are not unduly impaired by trade concerns arising from the application of regulatory measures, negotiations and commercially meaningful results on regulations, standards and requirements affecting agricultural trade and falling within the scope of WTO Agreements should be factored into the ongoing multilateral trade negotiations, and accompany negotiations on agricultural tariff liberalisation and market access concessions. This novel approach to regulatory problems, the authors argue, could allow for technical and financial assistance to be offered to developing countries to ensure their compliance with the standards for products that are of particular interest to them. Tim Josling then addresses, in Chapter 8, the rapid growth in the number and scope of private
standards, which is seen as a response to the evolution of public standards. Professor Josling assesses whether private standards facilitate or restrict trade, whether they conflict with public standards, and whether they pose problems for the WTO. Although there has been no major conflict with multilateral trade rules and a limited trade impact, Josling concludes that future conflict could be defused by the clarification of the place of private standards in the SPS Agreement, the use of codes of best practice for private standard-setting bodies, and a simplification of the task facing producers to comply with multiple standards.

The challenges posed by regulatory and private standards to agricultural trade and their implications for such issues as food security and overall welfare can be, and indeed are, negotiable between WTO member states or in other fora. The challenges posed to agricultural trade by climate change are of a different type; adaptation rather than negotiation will be the option. David Blandford addresses this issue in Chapter 9. This issue extends across the GATT and a number of WTO Agreements and Professor Blandford examines the interactions between climate change and agriculture policies. Blandford’s discussion on biofuels highlights this interaction very clearly, and concludes that the WTO framework was not set up to deal with issues that have broad international implications such as climate change and that the preferential treatment afforded to agriculture may be a source of future conflict. Such conflict will be complicated as agriculture is a significant contributor to global greenhouse gas emissions but could also contribute to mitigation activities.

In Chapter 10, Stephanie Switzer takes the issue of biofuels further and addresses the challenges arising from increased use of biofuels, which include the potential impact that the use of agricultural products as feedstocks for biofuels could have on the availability and price of food and problems concerning environmental protection. Dr Switzer argues that both of these are recognised in the AoA as non-trade concerns. Echoing Smith’s discussion in Chapter 2, Switzer argues that whilst leaving certain issues incompletely theorised may at times be both necessary and desirable there are occasions when more complete theorisation may be required to guard against the risk of inconsistency. Using the example of biofuels, she argues that communicative space is required within the trade regime to offer new understandings of non-trade concerns.

For now all issues that are related to agriculture, but that are not fully or directly addressed by the AoA, are loosely called non-trade concerns. It is this more general concept that Michael Cardwell
addresses in the last chapter of this volume. Professor Cardwell examines this concept under the title of multifunctionality, a term often associated with the EU’s efforts to broaden the scope of agriculture-related discussions and negotiations particularly in the WTO context so that the implication of agricultural production and trade policies for such issues as the environment, climate change, food security etc. would be taken into account. Having examined the boundaries of multifunctionality, the contestation of the concept within the WTO and its continued prominent position within the EU, Cardwell concludes that it is not easy to determine whether food security and climate change fit within conventional notions of multifunctionality. He suggests further analytical work exploring how to avert clashes between potentially conflicting multifunctional public goods so that the major policy challenges of food security and climate change may be simultaneously achieved.

As editors, we are delighted and honoured to bring together the excellent contributions in this volume; it was a privilege to work with each of our contributors – by responding with good grace and timeliness to all our requests for changes to their work, they made our work enjoyable. We thank them all. Our thanks also go to all at Edward Elgar Press, in particular Ben Booth and John-Paul McDonald, for their patience with us as editors. However, the largest thanks must go to our respective wives and families for their constant support and encouragement.