1 Introduction

1 The WTO and its coverage

The coming into being of the World Trade Organization (WTO) on January 1, 1995 has been described as "a watershed moment for the institutions of world economic relations"[1] and the international agreement that gave birth to this international organization has been viewed as "the most important event in recent world economic history."[2] The creation of the WTO lay in a trade negotiating round, namely the Uruguay Round of Multilateral Trade Negotiations (UR), that, in turn, has been described as "the largest and most complex negotiation concerning international economics in history" or even as "the largest and most complex negotiation ever."[3] None of these remarks may appear to be an overstatement if seen in the light of the WTO legal and institutional framework, which consists of about 30,000 pages of rules and concessions.[4]

The Uruguay Round was launched in 1986 by the Contracting Parties of the General Agreement on Tariffs and Trade (GATT), the rather modest predecessor of the WTO, and, after eight years of negotiations by more than 120 nations, culminated in the signing of the Final Act embodying the results of the UR negotiations on April 15, 1994. The Final Act comprises the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement) and various Ministerial Decisions and Declarations. Set out in the WTO Agreement are the purposes and objectives of the WTO and its institutional framework. Numerous

[1] Jackson 1998, 1. [2] Bierman *et al*. 1996, 845.
[3] Jackson 1997a, 1. On the UR negotiating history see: T. P. Stewart 1993; and (for a concise "non-technical" account) Croome 1999.
[4] See Bacchus 2003, 8.

other agreements and legal instruments, covering a very broad and diverse range of subject-matters and establishing a multifaceted normative framework – consisting of substantive, institutional and implementation aspects – are set out in three annexes to the WTO Agreement that form integral parts of the WTO Agreement and are binding on all Members.[5] All of these entered into force when the WTO came into existence in 1995 with seventy-six Members, i.e. the countries that had ratified the WTO agreements by that time. The number of Members has rapidly increased since then and is 150 at present, with many other nations engaged in negotiations for accession.

Much has happened in the world of international trade since the completion of the Uruguay Round and the coming into being of the WTO. In the third WTO Ministerial Conference[6] held in Seattle in 1999 the international trade community witnessed the failure and breakdown of efforts to launch a new round of trade negotiations. However, a new round was launched at the next WTO Ministerial held in Doha in 2001. In terms of market access or new disciplines, the goals originally set for the Doha Round were no less, perhaps even more, ambitious than the Uruguay Round.[7] In addition, for the first time in history, a trade negotiation round was expressly linked to development by designating the new round as the Doha Development Agenda. The Doha Round has seen many ups and downs in subsequent Ministerials at Cancún and Hong Kong, at the WTO headquarters in Geneva and in various capitals of the world. Most recently, in July 2006, the round was suspended because gaps between the key negotiating WTO Members have remained too wide even after five years of negotiations.

At the time this book went to press, Doha negotiations were yet to be resumed.[8] The cost of a failure of the Doha Round would certainly be huge, but it would not unravel the established multilateral trading

[5] WTO Agreement, Article II:2. There is also a fourth annex that sets out four agreements known as Plurilateral Trade Agreements, which are binding on those Members that have accepted them (see Article II:3, WTO Agreement). (Two plurilateral agreements have since been terminated.) Throughout this book the Marrakesh Agreement Establishing the World Trade Organization, without its annexes, is referred to as the "WTO Agreement" and the WTO Agreement together with the annexed agreements and associated legal instruments are collectively referred to as the "WTO agreements" or "WTO treaty."

[6] The Ministerial Conference is the highest-level decision-making body of the WTO.

[7] Lamy 2006.

[8] Latest information on the Doha Round can be found through the Doha Agenda Gateway of the WTO website at www.wto.org/english/tratop_e/dda_e/dda_e.htm.

system. The existing agreements under the umbrella of the WTO will remain well in place and so will the highly successful WTO dispute settlement mechanism. This book is devoted to an analysis of the state of the relationship between WTO law and national law. If eventually there is a successful outcome to the Doha negotiations, the analysis contained herein will be relevant in understanding the relation between national law and the new subjects, disciplines and market access commitments that the negotiations will bring under the WTO umbrella. In the unhappy event of a failure of the Doha Round, the analysis would continue to be relevant for the existing multilateral trading system.

As some readers may not be familiar with the coverage of the WTO, it is worth pointing out the subject areas and matters dealt with under the current WTO agreements. The basic legal texts of the WTO (i.e. the WTO agreements exclusive of schedules of tariff, services trade and other concessions) alone take more than 500 pages;[9] and the coverage is as extensive. While the predecessor, GATT, dealt only with trade in goods (that too with some significant exceptions, e.g. agricultural trade was de facto excluded from the scope of the GATT), through the WTO international discipline was extended for the first time to trade in services[10] and to trade-related aspects of intellectual property rights.[11] In addition, in the goods sector many new innovations and improvements were introduced.[12] The principal agreement concerning trade in goods is the GATT 1994, which consists of the provisions in the GATT 1947 and a number of protocols, decisions and understandings that either entered into force under the GATT 1947 or were agreed upon during the UR.[13] In addition, twelve new agreements were introduced dealing with two particular sectors of trade, namely agriculture[14] and textiles,[15] and addressing substantive subjects as diverse as sanitary and phytosanitary measures,[16]

[9] See World Trade Organization 1994.
[10] See GATS, WTO Agreement, Annex 1B.
[11] See TRIPS Agreement, WTO Agreement, Annex 1C.
[12] See the Multilateral Agreements on Trade in Goods set out in Annex 1A of the WTO Agreement.
[13] See para. 1 of the GATT 1994. Throughout this book the expression "GATT 1994" is used to refer to the General Agreement on Tariffs and Trade 1994 as contained in Annex 1A of the WTO Agreement, while the expression "GATT 1947" is used to refer to the General Agreement on Tariffs and Trade, opened for signature October 30, 1947, 55 UNTS 194. The acronym "GATT" is used to refer to the de facto institution that came into being under the auspices of the GATT 1947.
[14] See Agriculture Agreement, WTO Agreement, Annex 1A.
[15] See ATC, WTO Agreement, Annex 1A.
[16] See SPS Agreement, WTO Agreement, Annex 1A.

technical standards,[17] trade-related investment measures,[18] customs valuation,[19] preshipment inspection,[20] rules of origin,[21] import licensing,[22] dumping,[23] subsidies[24] and safeguards.[25] On the institutional and implementation side, in addition to the WTO Agreement, two more agreements were introduced: one of them provided for a new set of dispute settlement procedures[26] and the other established a mechanism for periodic review of Members' trade policies.[27]

2 Aims, objects and relevance of the study

The complexities of the WTO legal framework is such that Professor Jackson, a leading scholar in the field, on the basis of his interviews with WTO officials and Uruguay Round negotiators, has observed that: "the WTO Agreement, including all its elaborate Annexes, is probably fully understood by no nation that has accepted it, including some of the richest and most powerful trading nations that are members."[28] Thus it is no wonder that since its inception the WTO has attracted a considerable amount of attention from all quarters: governments, academics and professionals (coming from a range of disciplines – legal, socio-political, economic and so on) and, of course, from the public at large. Commensurately with this increased attention, the scrutiny and analysis of the international trading system has also increased. For instance, two foremost academic publishing houses in England have commenced publication of two newly established journals devoted, largely, to WTO-related legal issues.[29] Leading legal periodicals published from Europe, North America and elsewhere have already devoted thousands of pages to research and analysis concerning the WTO system. The number of books on WTO and international trade topics that have been published

[17] See TBT Agreement, WTO Agreement, Annex 1A.
[18] See TRIMS Agreement, WTO Agreement, Annex 1A.
[19] See Customs Valuation Agreement, WTO Agreement, Annex 1A.
[20] See PSI Agreement, WTO Agreement, Annex 1A.
[21] See ARO, WTO Agreement, Annex 1A.
[22] See Licensing Agreement, WTO Agreement, Annex 1A.
[23] See ADA, WTO Agreement, Annex 1A. [24] See ASCM, WTO Agreement, Annex 1A.
[25] See Safeguards Agreement, WTO Agreement, Annex 1A.
[26] See DSU, WTO Agreement, Annex 2. [27] See TPRM, WTO Agreement, Annex 3.
[28] Jackson 1998, 1.
[29] These are the *Journal of International Economic Law* from Oxford University Press, established in 1998 under the editorship of Professor Jackson and with a multinational editorial board, and the *World Trade Review* from Cambridge University Press, established in 2002 on the initiative of the WTO itself.

since the completion of the Uruguay Round is equally remarkable.[30] So far as legal scholarship is concerned, many conceivable aspects and implications of the WTO – covering constitutional and substantive issues, dispute settlement, implications of the WTO for "non-WTO subjects" such as environment, labor, competition, investment and so on – have been subjected to extensive and rigorous research and analysis.

Nonetheless, given the complex and multifaceted labyrinth of the WTO legal framework it is unconvincing to argue, as former Director-General of the WTO Mike Moore has put it, "that there is ever enough research and analysis."[31] The aim of this book is to attempt to bring into proper focus an aspect of the WTO legal order that as yet remains relatively less explored.

One of the many topics that the establishment of the WTO has generated interest in is the relationship between WTO law and national law.[32] There are two different aspects of this relationship, namely, (i) the relation in a domestic context, and (ii) the relation in WTO law. There already exists an enormous amount of scholarly research and vibrant analysis devoted to many important issues that arise in the former context.[33] Thus much has been written – to note just a few selected issues – on various matters concerning implementation of WTO obligations in the domestic laws of Member countries (including the contentious question of giving or denying self-executing or direct effect to WTO norms), the procedures under national law to enable private businesses to take advantage of the international trade discipline or the lack of such procedures, the question of interpretation of WTO agreements by national courts, the doctrine of consistent interpretation (i.e. construing

[30] For lists of selected titles see JIEL book surveys in: 1(3) JIEL 492 (1998); 4(1) JIEL 261 (2001); 5(1) JIEL 245 (2002); 6(1) JIEL 263 (2003); 7(1) JIEL 183 (2004); 8(1) JIEL 245 (2005); 9(1) JIEL 237 (2006); and 10(1) JIEL 181 (2007).

[31] M. Moore 2002.

[32] Since the EC itself is a Member of the WTO, for purposes of this work, the expression "national law" should be understood as including, where appropriate, EC/EU law. Similarly, references to national governments, legislative bodies or courts should be understood as including relevant EU institutions.

[33] The following is a list of only a very few representative materials: Jackson & Sykes 1997 (this publication surveys the position in a number of domestic jurisdictions including those of the richest and most powerful trading countries); Hilf & Petersmann 1993; Applebaum & Schlitt 1995; T. P. Stewart 1996; Eeckhout 1997 and 2002; Hilf 1997; Schaefer 1997 and 2000; Cottier & Schefer 1998; Yamane 1998; Bourgeois 2000a; Griller 2000; Iwasawa 2000; Lauwaars 2000; Louis 2000; S. N. Lester 2001; and Zhang 2003. As regards the wider issue of the effects of international treaties in domestic law see Jacobs & Roberts 1987; Jackson 1992; Eisenmann 1996; and Henkin 1996, 198–211.

national law in accordance with WTO obligations), etc. In marked contrast, the question of how national law is treated in WTO law, important as it is, has not received the necessary critical attention.[34] Although recently one or two discrete issues that can be viewed as specific facets of this question have started to gain prominence,[35] as yet no study has been undertaken that looks at the matter in a more comprehensive manner. The purpose of this book is to begin this wider analysis by drawing together and underscoring the significance of the vital issues concerning national law that exist or arise at the WTO level.

However, apart from the above, there are other important systemic and policy reasons for undertaking a project such as the present one. Compared to any other contemporary international treaty, the WTO agreements make it much more common for international and national legal norms to have endless points of contact between them. There are a number of reasons for this. First, the WTO treaty establishes rules and discipline for the conduct of international trade, which as a subject-matter is more heavily legislated by national legislatures than most other subjects. In addition, WTO rules and discipline cover, and either regulate or hinge on, a very wide array of matters relating to trade (some of which have already been referred to[36]), ranging from customs, tax and fiscal matters to dumping and subsidies, product standards, environment, health, national security and so on (perhaps almost anything under the sun that can affect and hamper movement of goods or services or the protection of intellectual property rights). Thus it is only natural for every WTO Member to have an enormous amount of laws, regulations and other instruments that address the same subject-matters as the WTO agreements. As a result, there are innumerable points of contact between WTO norms and national laws. Second, such contacts become all the more frequent because of the level of detail at which the massive WTO treaty, in its more than 500 pages of legal texts, seeks to regulate various conducts and relations.

One should also be mindful of the value of the economic activities covered by the WTO treaty,[37] which surpasses, by far, the economic value

[34] Cottier & Schefer 1998 briefly notes this aspect of the relationship (three and a half pages) before turning to issues that arise at the national level.

[35] The problem of standard of review that forms the subject-matter of Chapter 6 below is an example of such a topic.

[36] See text at nn. 10–27 above.

[37] For instance, in 2006 the value of world merchandise trade was US $11.76 trillion and that of commercial services was US $2.71 trillion: see WTO Press Release, Press/472.

represented by most other international treaties. The enormity of economic interest at stake makes it all the more common to have conflicts of interest or disputes between WTO Members.[38] Such disputes are almost inevitably animated by the disputing parties' perception of the relevant WTO norms and the national trade and "trade-related" laws and policies that may be in question. Thus disputes play a vital role in making the interaction between WTO law and national law more explicit.

Accordingly, the process that makes the interaction highly prominent at the WTO level – not to mention much more prominent than under any other international treaty or before any other international forum – is the WTO's unique dispute settlement system. While some of the aspects and threads of that system relevant for purposes of the present study are discussed later in Chapter 4, a few general but salient features may be mentioned here. Put succinctly, WTO dispute settlement is at once "compulsory," "exclusive" and "automatic." The first of these characteristics does not require much elaboration: it means that the jurisdiction of various dispute settlement organs of the WTO is compulsory[39] and any Member can unilaterally trigger against another Member any of the various procedures set out in the WTO text on dispute settlement, namely, the Dispute Settlement Understanding (DSU). Because all of the 150 Members of the WTO are bound by the DSU, it is, as has been rightly noted, "the most extensive network of compulsory dispute settlement obligations in contemporary international law."[40] So much so that seasoned commentators have suspected that the WTO procedures are destined to "exert a gravitational pull, drawing into the WTO system disputes that could not easily find a forum elsewhere, and recasting them as 'trade' disputes."[41]

(April 12, 2007). Although exact data regarding trade among WTO Members are not readily available, as regards merchandise trade it can be estimated that about 95 percent of the stated trade of US $11.76 trillion was among WTO Members and, as such, was done under the WTO rules and discipline: see, e.g., World Trade Organization 2006, 28–29.

[38] The word "dispute" or "conflict" should not be understood as having a negative connotation. In any legal system disputes or conflicts do serve a very useful and positive role of accommodating the interests of every one of the actors through necessary adjustments of their relationship. On this theme see Collier & Lowe 1999, 1–2.

[39] Cf. the jurisdiction of the International Court of Justice (ICJ) with regard to a state that makes a declaration under Article 36(2) of the Court's Statute accepting, in relation to any other states making similar declarations, the jurisdiction of the ICJ "as compulsory *ipso facto* and without special agreement."

[40] Collier & Lowe 1999, 104. [41] Ibid.

The system is "exclusive" in the sense that with regard to disputes concerning matters provided for in the WTO agreements Members are required to have recourse to the DSU procedures *to the exclusion of any other procedure or system*.[42] The standard procedure under the DSU comprises ad hoc panels and a standing Appellate Body (hereinafter also AB). Thus, a dispute is referred in the first instance to an ad hoc panel and from its decision an appeal can be made to the standing Appellate Body. In addition, the DSU envisages arbitration for certain disputes concerning implementation of recommendations and rulings issued through the panel and appeal procedure.[43] The only alternative to the standard panel process is "arbitration *within the WTO*" under Article 25 of the DSU.[44] However, such arbitrations are subject to multilateral control in that any agreement to arbitrate must be notified to all Members and the award must be notified to the Dispute Settlement Body (which is a plenary organ representing all Members) as well as to any relevant council or committee where Members may raise any point relating to it.[45] Thus the WTO, or, more specifically, various dispute settlement organs established under the DSU taken together, is the "exclusive forum" for the adjudication of all "trade-related" disputes among Members.

The words "automatic" and "automaticity" have been coined to describe the binding nature and timeliness of the WTO dispute settlement system.[46] Once the dispute settlement mechanism is set in motion by a complainant, various procedural steps envisaged in the DSU – for instance, establishment of a panel and its terms of reference, selection of panelists, circulation and adoption of panel and Appellate Body reports, taking retaliatory measures, etc. – are triggered "automatically" in accordance with a strict time-frame set out in the DSU. Thus the respondent government can neither block nor delay the proceedings at any stage.

The above characteristics of the WTO dispute settlement system, coupled with the broad substantive coverage of the WTO agreements, have

[42] See Article 23.1 of the DSU which provides as follows: "When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding." See also Panel Report, *US – Section 301*, para. 7.43 (describing Article 23.1 as an "exclusive dispute resolution clause"); and Jackson 1997a, 124.

[43] See further, Chapter 4, pp. 112–14.

[44] Until now Article 25 arbitration has been used only once. See further, Chapter 4, p. 91.

[45] See DSU Article 25. See also Article 3.6, which requires mutually agreed solutions to be similarly notified.

[46] See, e.g., Jackson 1998, 76.

resulted in its extensive use.[47] Beginning from its inception in 1995 until now, 363 cases have been initiated and 136 panel reports, 81 Appellate Body reports and 38 arbitration awards – in total more than 48,000 pages of reports and awards – have been issued.[48] This huge body of jurisprudence has already been seen as reflecting the emergence of "a distinct WTO legal system."[49]

In terms of length, breadth of the substantive coverage, value of the economic interest represented and number of states parties, the treaty that, at least to an extent, can be compared to the WTO treaty is the United Nations Convention on the Law of the Sea of 1982 (UNCLOS).[50] However, the dispute settlement mechanism provided in UNCLOS is neither as exclusive nor as compulsory as that of the DSU.[51] More importantly, the states parties to UNCLOS are not finding it necessary to make an extensive use of that mechanism. Thus, for instance, until now a total of only thirteen cases have been brought before the International Tribunal for the Law of the Sea – the central dispute settlement forum established by UNCLOS.[52]

It may also not be beside the point to say a few words about two other international (or more accurately "regional") treaty regimes that have,

[47] See Bacchus 2002, 1025–26.

[48] For a recent statistical analysis of the WTO dispute settlement see Leitner & Lester 2007.

[49] McRae 2004, 5.

[50] In a single treaty (of about 200 pages) UNCLOS provides a universal and comprehensive legal framework to regulate all ocean space, its uses and resources – including management and conservation of resources, protection of the marine environment, marine scientific research, development and transfer of marine technology, etc.: see United Nations 1983. There are currently 153 states parties to UNCLOS.

[51] Under UNCLOS states have the right to settle any dispute between them by peaceful means of their own choosing (see Articles 279–82); and the "compulsory procedures" set out in the Convention come into play only if settlement is not possible by means chosen by the parties to the dispute (Article 286). Again, the parties are free to choose between four different "compulsory procedures": the International Tribunal for the Law of the Sea (ITLOS); the International Court of Justice; arbitration (under Annex VII of UNCLOS); and special arbitration (under Annex VIII of UNCLOS) (see Article 287). Finally, the obligation to submit disputes to any of these procedures is subject to certain limitations *ratione materiae* (see Articles 297–98). For an overview of the dispute settlement provisions of UNCLOS see Collier & Lowe 1999, 84–95, and Sands *et al*. 1999, 39–61 (the latter work also provides a useful bibliography).

[52] ITLOS is of similar age to the WTO dispute settlement system. While UNCLOS entered into force on November 16, 1994, ITLOS was established on August 1, 1996, and first judges of the Tribunal were sworn in on October 18, 1996. Information about UNCLOS and its dispute settlement can be found on the UN Law of the Sea web site, www.un.org/Depts/los/; and copies of the judgments and orders of the Tribunal can be obtained from the ITLOS web site, www.itlos.org.

in terms of both subject-matters and details, a substantive coverage similar – indeed even wider – to the WTO agreements. These are the European Communities or the European Union (EC/EU) and the North American Free Trade Agreement (NAFTA), both of which are trade liberalization regimes and, as such, in respect of many substantive matters share with the WTO "a common legal vocabulary."[53] There are also well-developed and compulsory dispute settlement systems established under the EC Treaty and the NAFTA. However, both the EC/EU and NAFTA have a very limited number of member states or states parties, respectively. The EU used to comprise fifteen developed countries of Western Europe until the recent enlargement that took place in May 2004, when ten other European nations joined the group. NAFTA has only three states parties – two developed countries (Canada and the United States) and a developing country (Mexico).

Thus, WTO dispute settlement organs stand out for their nearly universal compulsory jurisdiction and for having such jurisdiction over a set of international obligations that is truly extensive. As discussed in greater detail in Chapter 4 below, the disputes before the WTO are about the WTO-compatibility of national measures, i.e. national laws and other governmental (administrative, judicial or quasi-judicial) acts. As a result, WTO adjudicative bodies confront issues of national law on a rather regular basis: obviously, they do so in cases where they are called upon to review the WTO-compatibility of national *laws*; but issues of national law can also be important in cases where the review concerns other national measures such as administrative or judicial *decisions*, because such decisions are often taken in pursuance of a *law*. Thus, much of the more than 48,000 pages of WTO jurisprudence relates in different ways to Members' national laws.

Another notable aspect of the WTO legal regime is that the WTO treaty imposes certain obligations on Members regarding their national laws that are not only far-reaching but are also "systemic" in character. As discussed in Chapter 3 below, broadly, there are four categories of such obligations: obligations to implement WTO commitments in domestic laws and to ensure conformity of such laws with the WTO agreements; obligations to ensure transparency in respect of national laws through their publication and notification to the WTO; obligations to administer national laws in a certain (e.g. in a uniform, impartial, reasonable, consistent, neutral, fair, equitable, objective) manner; and obligations to

[53] J. H. H. Weiler 2000a, 1.