1 International Trade and the Law of the WTO

CONTENTS

1 INTRODUCTION

At the Millennium Summit of the United Nations in September 2000, the largest ever meeting of Heads of State and Government, the UN General Assembly solemnly declared:

> We will spare no effort to free our fellow men, women, and children from the abject and dehumanizing conditions of extreme poverty, to which more than a billion of them are currently subjected. We are committed to making the right to development a reality for everyone and to freeing the entire human race from want.[1]

1 United Nations General Assembly, *UN Millennium Declaration*, Resolution adopted on 8 September 2000, para. 11.

This magnanimous ambition was translated into eight Millennium Development Goals, the most important of which is the eradication of extreme poverty and hunger. The Millennium Development Goals also include achieving universal primary education, promoting gender equality, reducing child and maternal mortality, combating HIV/AIDS, malaria and other diseases, and ensuring environmental sustainability. With regard to the eradication of extreme poverty and hunger, the target set was to *halve* the number of people living in extreme poverty and suffering from hunger by the year 2015.[2] In the *World Development Indicators 2012*, the most recent progress report on the Millennium Development Goals, the World Bank noted:

> We will *not* achieve *all* the targets we set for ourselves, but progress measured against 1990 benchmarks accelerated in the last decade, lifting millions of people out of poverty, enrolling millions of children in school, and sharply reducing loss of life from preventable causes.[3]

While poverty and hunger remain a shameful reality,[4] fewer people – both in absolute numbers and as a percentage of the world population – now live in extreme poverty or suffer from hunger than did two decades ago. The percentage of the world population living on less than US$1.25 a day fell from 43 per cent in 1990 to 22 per cent in 2008.[5] Over the last four years, the global economic crisis has worsened the situation of vulnerable populations and has slowed down poverty reduction in some countries. However, global poverty rates have continued to fall. According to the World Bank, preliminary estimates for 2010 show that the target to halve the number of people living in extreme poverty has been reached five years early. Further progress in poverty reduction is possible and likely by the 2015 target date if developing countries maintain strong economic growth. The reduction in the number of people living in extreme poverty as well as progress on other Millennium Development Goals over the past two decades have been, to a large extent, due to the impressive economic growth rates in developing countries in East Asia and the Pacific region. In China, extreme poverty fell from 60 per cent in 1990 to 13 per cent in 2008. Also, developing countries in South Asia, and in particular India, as well as developing countries in Sub-Saharan Africa have known robust economic growth, which has contributed to the reduction of the percentage of people living in extreme poverty. In South Asia, the poverty rate fell from 54 per cent in 1990 to 36 per cent in 2008. The poverty

2 *Ibid.*, para. 19.
3 World Bank, *World Development Indicators 2012*, 1. Emphasis added.
4 According to the latest data available, in 2008, 1.28 billion people lived on less than US$1.25 a day, the standard used by the World Bank to define extreme poverty; 739 million people were without adequate daily food intake; and more than 100 million children under age five remain malnourished. Since 1990, the number of people – in absolute numbers – living in extreme poverty has fallen in all regions except Sub-Saharan Africa, where the rate of population growth exceeded the rate of poverty reduction, increasing the number of extremely poor people from 290 million in 1990 to 356 million in 2008. The largest number of poor people remain in South Asia, where 571 million people live on less than US$1.25 a day. See World Bank, *World Development Indicators 2012*, 2–3.
5 For the data referred to in this paragraph, see *ibid.* 2.

rate in Sub-Saharan Africa fell 4.8 percentage points to less than 50 per cent between 2005 and 2008. This was the largest drop since international poverty rates have been computed. The progress made over the past decades has been impressive, and, importantly, this progress is likely to continue.[6] However, as the World Bank emphasised in its *World Development Indicators 2012*:

> hundreds of millions of people will remain mired in poverty, especially in Sub-Saharan Africa and South Asia and wherever poor health and lack of education deprive people of productive employment; environmental resources have been depleted or spoiled; and corruption, conflict, and misgovernance waste public resources and discourage private investment.

Also note that the United Nations Development Programme (UNDP) stated in its *Human Development Report 2011* that:

> [f]orecasts suggest that continuing failure to reduce the grave environmental risks and deepening social inequalities threatens to slow decades of sustained progress by the world's poor majority – and even to reverse the global convergence in human development.[7]

The progress made in reducing poverty worldwide should not hide the fact that the income gap between the richest and poorest citizens has continued to grow. In discussing the greatest challenges that the world faces, Jimmy Carter, the former US President, stated in his Nobel Peace Prize Lecture in December 2002:

> Among all the possible choices, I decided that the most serious and universal problem is the growing chasm between the richest and poorest people on earth. The results of this disparity are root causes of most of the world's unresolved problems, including starvation, illiteracy, environmental degradation, violent conflict, and unnecessary illnesses that range from guinea worm to HIV/Aids.[8]

In its *Global Risks 2013* report, the World Economic Forum identified severe income disparity as the global risk that is most likely to manifest itself over the next ten years.[9] Such income disparity entrenches corruption and injustice, gives rise to xenophobic nationalism and religious fundamentalism, fosters political instability and leads to violence and economic destruction.

Finally, while their problems are obviously different in nature, scale and/or intensity, many developed countries have, in particular over the last years, experienced little, if any, economic growth, and are struggling with high unemployment. In November 2012, the unemployment rate in the Eurozone was at a record high of 11.8 per cent. In Spain, the unemployment rate was at 26.6 per cent.[10]

One of the defining features of today's world is the process of economic globalisation. The question therefore arises whether this process has contributed

6 See *ibid.*, 2.
7 United Nations Development Programme, *Human Development Report 2011*, ii.
8 US President Jimmy Carter, Nobel Lecture, Oslo, 10 December 2002, at http://nobelprize.org/nobel_prizes/peace/laureates/2002/carter-lecture.html.
9 See World Economic Forum, *Global Risks 2013*, 10.
10 See http://epp.eurostat.ec.europa.eu/portal/page/portal/eurostat/home.

to the impressive, albeit still insufficient, progress towards the achievement of the Millennium Development Goals or whether this process has instead aggravated the continuing poverty and hunger in many developing countries, the ever growing gap between the richest and poorest of the world, and the current economic woes of developed countries. This chapter deals in turn with: (1) economic globalisation and international trade; (2) the law of the WTO; (3) the sources of WTO law; and (4) WTO law in context, i.e. its relationship with other international law and national law.

2 ECONOMIC GLOBALISATION AND INTERNATIONAL TRADE

'Economic globalisation' has been a popular buzzword for more than two decades now. Politicians, government officials, businesspeople, trade unionists, environmentalists, church leaders, public health experts, third-world activists, economists and lawyers all speak of 'economic globalisation'. This section deals with economic globalisation and international trade. It discusses: (1) the concept of 'economic globalisation' and the emergence of the global economy; (2) whether economic globalisation, the emergence of the global economy, and, in particular, international trade, are a blessing or curse; (3) what are the arguments for free trade and the arguments for restrictions on trade; and (4) whether international trade can be to the benefit of all.

2.1 Emergence of the Global Economy

Over the past two decades and as a result of the process of economic globalisation, a *global* economy has been emerging, gradually but at an ever-increasing speed replacing the patchwork of national economies. This sub-section discusses in turn: (1) the concept of 'economic globalisation'; (2) the forces driving economic globalisation and creating the global economy; (3) facts and figures on international trade and foreign direct investment in the global economy; and (4) the changing nature of international trade in the global economy.

2.1.1 The Concept of 'Economic Globalisation'

The concepts of 'globalisation', and, in particular, 'economic globalisation', have been used by many to describe one of the defining features of the world in which we live. But what do these terms mean? Joseph Stiglitz, former Chief Economist of the World Bank and winner of the Nobel Prize for Economics in 2001, described the concept of globalisation in his 2002 book, *Globalization and Its Discontents*, as:

the closer integration of the countries and peoples of the world which has been brought about by the enormous reduction of costs of transportation and communication, and the breaking down of artificial barriers to the flow of goods, services, capital, knowledge, and (to a lesser extent) people across borders.[11]

In *The Lexus and the Olive Tree: Understanding Globalisation*, Thomas Friedman, the award-winning journalist of the *New York Times*, defined 'globalisation' as follows:

[I]t is the inexorable integration of markets, nation-states and technologies to a degree never witnessed before – in a way that is enabling individuals, corporations and nation-states to reach around the world farther, faster, deeper and cheaper than ever before, and in a way that is enabling the world to reach into individuals, corporations and nation-states farther, faster, deeper and cheaper than ever before.[12]

Economic globalisation is a multifaceted phenomenon. In essence, however, economic globalisation is the gradual integration of national economies into one borderless global economy. It encompasses both (free) international trade and (unrestricted) foreign direct investment. Economic globalisation affects people everywhere in many aspects of their daily lives. It affects their jobs, their food, their health, their education and their leisure time. Innumerable examples of economic globalisation could be given, ranging from the clothes we wear, the cars we drive, the movies we watch, the bananas we eat, the coffee we drink, the insurance policies we buy, the university education we get, to the mobile phones we so rely on. However, to give but one example, consider the following story which featured in the *Financial Times* in August 2003, but which illustrates today's reality of economic globalisation even better than it did a decade ago:

Clutching her side in pain, the woman with suspected appendicitis who was rushed to a hospital on the outskirts of Philadelphia last week had little time to ponder how dependent her life had become on the relentless forces of globalisation. Within minutes of her arrival at the Crozer-Chester Medical Center, the recommendation on whether to operate was being made by a doctor reading her computer-aided tomography (CAT) scan from a computer screen 5,800 miles away in the Middle East. Jonathan Schlakman, a Harvard-trained radiologist based in Jerusalem, is one of a new breed of skilled professionals proving that geographic distance is no obstacle to outsourcing even the highest paid jobs to overseas locations. The migration of white-collar work has moved up the value chain from call centre operators and back-office clerks to occupations such as equity research, accounting, computer programming and chip design. The trend – still only a trickle at present – may look to some like a temporary fad pursued by companies seeking to cut costs. For trade unions in the US and Europe, it heralds a fundamental restructuring of rich-world economies, akin to the globalisation of manufacturing in the 1980s and the outsourcing of unskilled service jobs in the 1990s. At present, only 35 patients' scans are transmitted each day from US emergency rooms to Dr Schlakman's small team of doctors in Israel. But with senior radiologists costing up to $300,000 a year to hire in the US and many emergency cases arriving at night, the

11 J. Stiglitz, *Globalization and Its Discontents* (Penguin, 2002), 9.
12 T. Friedman, *The Lexus and the Olive Tree: Understanding Globalisation*, 2nd edn (First Anchor Books, 2000), 9.

use of medical expertise based in a different time zone and earning less than half US rates is almost certain to rise. 'It's much more expensive to use night staff in the US because they need time off the following day', says Dr Schlakman.[13]

While economic globalisation is often presented as a new phenomenon, it deserves to be mentioned that today's global economic integration is not unprecedented. During the fifty years preceding the First World War, there were also large cross-border flows of goods and capital and, more than now, of people.[14] David Livingstone, the famous nineteenth-century medical missionary and Africa explorer wrote about this period of economic globalisation:

The extension and use of railroads, steamships [and] telegraphs break down nationalities and bring peoples geographically remote into close connection commercially and politically. They make the world one, and capital, like water, tends to a common level.[15]

If one looks at the ratio of trade to GDP, Britain and France are only slightly more open to trade today than they were in 1913, while Japan is less open now than it was then.[16] However, this earlier period of economic globalisation ended abruptly in 1914 and was followed by one of the darkest periods in the history of humankind. Today's process of economic globalisation is strong and gathering ever more strength. However, the extent of global economic integration already achieved can be, and frequently is, exaggerated. International trade should normally force high-cost domestic producers to lower their prices and bring the prices of products and services between different countries closer together. However, large divergences in prices persist. This may be due to, *inter alia*, differences in transport costs, taxes and the efficiency of distribution networks. But this is also due to the continued existence of significant barriers to trade. Furthermore, while goods, services and capital move across borders with greater ease, restrictions on the free movement of workers, i.e. restrictions on economic migration, remain multiple and rigorous.

Questions and Assignments 1.1

How would you define 'economic globalisation'? Does economic globalisation also affect non-economic matters? Give three concrete examples of how *you* are affected by economic globalisation. Is economic globalisation a historically unique and all-pervasive phenomenon?

2.1.2 Forces Driving Economic Globalisation

It is commonly argued that economic globalisation has been driven by two main forces. The first, *technology*, makes globalisation feasible; the second, the

13 D. Roberts, E. Luce and K. Merchant, 'Service Industries Go Global', *Financial Times*, 20 August 2003.
14 Also the Roman Empire (27 BC–476 AD) and the Chinese Song dynasty (960–1279) can be seen as (early) examples of economic globalisation.
15 David Livingstone, *The Last Journals of David Livingstone* (originally published in 1880, now published by The Echo Library, 2005), 351.
16 'One World?', *The Economist*, 18 October 1997.

liberalisation of trade and foreign direct investment, makes it happen.[17] Due to technological innovations resulting in a dramatic fall in transport, communication and computing costs, the natural barriers of time and space that separate national economies have been coming down. Between 1920 and 1990, average ocean freight and port charges for US import and export cargo fell by almost 70 per cent. Between 1930 and 1990, average air-transport fares per passenger mile fell by 84 per cent.[18] The cost of a three-minute telephone call between New York and London has fallen from US$300 in 1930 to US$1 in 1997 (in 1996 dollars); the cost of computer processing power has been falling by an average of 30 per cent per year in real terms over recent decades.[19] As noted by Thomas Friedman in his 2005 book, *The World Is Flat – A Brief History of the Globalized World in the Twenty-First Century*:

> Clearly, it is now possible for more people than ever to collaborate and compete in real time with more other people on more different kinds of work from more different corners of the planet and on more equal footing than at any previous time in the history of the world – using computers, e-mail, networks, teleconferencing, and dynamic new software.[20]

The second driving force of economic globalisation has been the liberalisation of international trade and foreign direct investment. Over the last sixty years, most developed countries have gradually but significantly lowered barriers to foreign trade and investment. Over the last twenty years, the liberalisation of trade and investment has become a worldwide trend, including in developing countries, although liberalisation still proceeds at different speeds in different parts of the world. In his book, *Has Globalization Gone Too Far?*, Dani Rodrik, of the John F. Kennedy School of Government at Harvard University, observed with regard to this dimension of globalisation:

> Globalization is not occurring in a vacuum. It is part of a broader trend that we may call marketization. Receding government, deregulation, and the shrinking of social obligations are the domestic counterparts of the intertwining of national economies. Globalization could not have advanced this far without these complementary forces.[21]

While some politicians and opinion-makers claim otherwise, the process of economic globalisation is not irreversible. Lionel Barber, editor of the *Financial Times*, noted in 2004:

> For all its merits, globalization must never be taken for granted. The continued integration of the world economy depends on support not only from rich beneficiaries in the west but increasingly from the still disadvantaged in Africa, India, and Latin America. Cultural barriers also pose increasingly powerful obstacles to globalization. The rise of Islamic

17 See also M. Wolf, 'Global Opportunities', *Financial Times*, 6 May 1997.
18 R. Porter, 'The Global Trading System in the 21st Century', in R. Porter, P. Sauvé, A, Subramanian and A. Beviglia Zampetti (eds.), *Efficiency, Equity and Legitimacy: The Multilateral Trading System at the Millennium* (Brookings Institution Press, 2001), 4.
19 'One World?', *The Economist*, 18 October 1997.
20 T. Friedman, *The World is Flat – A Brief History of the Globalised World in the Twenty-first Century* (Farrar, Straus & Giroux, 2005), 8.
21 D. Rodrik, *Has Globalization Gone Too Far?* (Institute for International Economics, 1997), 85.

fundamentalism offers an alternative vision of society, one which will appeal to all those left behind in countries with exploding populations and persistent high unemployment among young people.[22]

However, it would be very difficult, and foolhardy, for governments to reverse the current globalisation process. Three reasons come to mind. First, new technology has created distribution channels especially for services, such as satellite communications and the Internet, that governments with protectionist intentions will find very difficult to control. Secondly, liberal international trade policies now have a firm institutional basis in the multilateral trading system of the WTO, discussed in detail in this book. Thirdly, the price to be paid in terms of economic prosperity for withdrawing from the global economy would be very high. Autarkies do not flourish in today's world. Arguably in recognition of the limited control policy-makers have over the process of globalisation, US President Bill Clinton stated at the 1998 WTO Ministerial Conference in Geneva: 'Globalization is not a policy choice – it is a fact.'[23] However, note that Lord Jordan, former General Secretary of the International Confederation of Free Trades Unions, wrote in December 2000 that globalisation 'is not an unstoppable force of nature, but is shaped by those who set the rules'.[24]

Questions and Assignments 1.2

What explains the process of economic globalisation? Could governments reverse the process of economic globalisation? Should they?

2.1.3 Facts and Figures on International Trade and Foreign Direct Investment

In 1948, world merchandise exports, i.e. exports of goods, amounted to US$59 billion per year. In 2011, world merchandise exports amounted to US$17,816 billion, or almost US$18 trillion, per year.[25] World exports of commercial services, marginal in 1948, amounted in 2011 to US$4,170 billion, or almost US$4.2 trillion.[26] At the height of the global economic crisis, in 2009, world merchandise exports shrunk by 12 per cent in volume terms (the sharpest decline since the Second World War),[27] but in 2010 grew again by 14 per cent and in 2011 by 5 per cent.[28] However, in 2012, world merchandise exports were projected to grow by only 2.5 per cent.[29] The merchandise exports of developed countries

22 L. Barber, 'A Symposium of Views: Is Continued Globalisation of the World Economy Inevitable?', *The International Economy*, Summer 2004, 70.
23 See www.wto.org/english/thewto_e/minist_e/min99_e/english/book_e/stak_e_3.htm.
24 B. Jordan, 'Yes to Globalization, But Protect the Poor', *International Herald Tribune*, 21 December 2000.
25 See WTO, *International Trade Statistics 2012*, at www.wto.org/english/res_e/statis_e/its2012_e/its12_world_trade_dev_e.pdf.
26 See *ibid.*
27 The volume of world merchandise exports fell on three other occasions after 1965 (down 0.2 per cent in 2001; down 2 per cent in 1982; and down 7 per cent in 1975). See www.wto.org/english/news_e/pres10_e/pr598_e.htm.
28 See *ibid.* 29 See www.wto.org/english/news_e/pres12_e/pr676_e.htm.

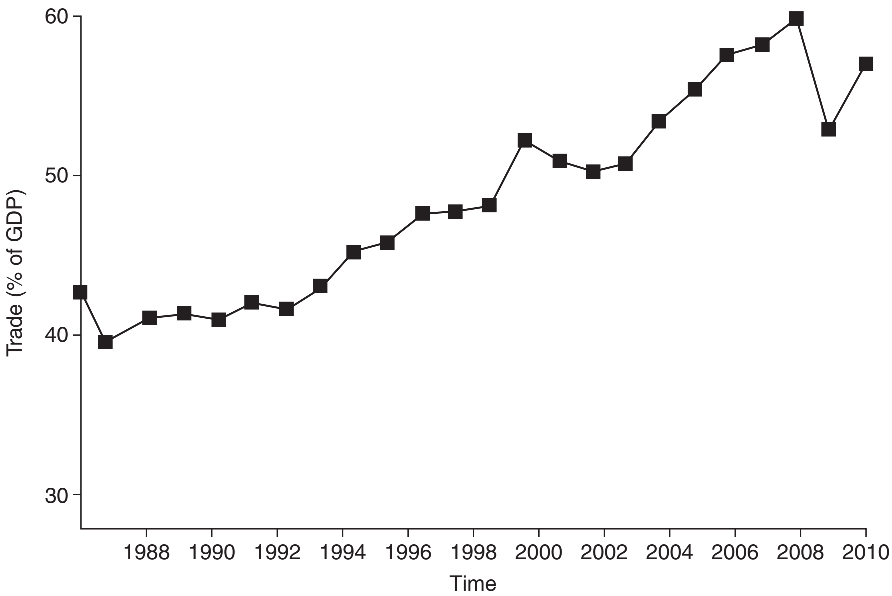

Figure 1.1 Ratio of global trade in merchandise and commercial services to GDP (1988–2010)

were expected to increase by a mere 1.5 per cent, while the merchandise exports of developing countries were expected to increase by 3.5 per cent, confirming a well-established trend of the developing countries outperforming the developed countries. Exports of commercial services shrunk by 12 per cent in 2009, but grew again by 10 per cent in 2010 and 11 per cent in 2011. Like merchandise exports, exports of commercial services were expected to grow considerably less in 2012 than in the two previous years.[30] The global economy, and in particular the economy of developed countries, clearly remains fragile. Recovery from the global economic crisis is a protracted process.

The ratio of global trade in merchandise and commercial services to GDP is a good measurement of economic globalisation.[31] As shown by Figure 1.1, over the past two decades, before the crisis year of 2009, the ratio of global trade to GDP increased significantly, indicating the extent of economic globalisation in these years. As is also shown, in 2010, this trend of ever more economic globalisation picked up again. The ratio of global trade to GDP increased from 37 per cent in 1988 to an all-time high of 59 per cent in 2008, then dropped in 2009 to 51 per cent, but increased again to 56 per cent in 2010.

30 See *ibid.*
31 The trade-to-GDP ratio indicates the dependence of domestic producers on foreign demand (exports) and of domestic consumers and producers on foreign supply (imports), relative to the country's economic size (GDP). The trade-to-GDP ratio is a basic indicator of openness to foreign trade and economic integration. See http://data.worldbank.org/news/new-data-visualizers-for-trade-data. For a world map of trade-to-GDP ratios, see www.wto.org/english/res_e/statis_e/statis_maps_e.htm.

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More information

Country	1990	2010
Bangladesh	18	43
Brazil	17	23
Canada	53	61
China	31	55
EU (including intra-EU trade)	54	79
India	15	46
Indonesia	45	48
Mexico	38	62
Russia	43	52
South Africa	52	55
South Korea	66	102
United States	20	29

Figure 1.2 Ratio of trade in merchandise and commercial services to GDP for selected countries (1990–2010)

The degree of economic globalisation, when measured as the ratio of trade to GDP, varies from country to country, but has increased in all major trading nations over the past two decades.

As shown by the data in Figure 1.2, the economies of many countries are to a large and ever-increasing degree dependent on trade. This is true for developed as well as developing countries. Note the extent to which, for example China (from 31 to 55 per cent), India (from 15 to 46 per cent), Bangladesh (from 18 to 43 per cent) and Mexico (from 38 to 62 per cent) have 'globalised' over the past two decades. It is interesting, and perhaps surprising to some, that least-developed countries are more 'globalised' than OECD countries. Brazil and the United States have the least 'globalised' economies of all major trading nations. South Korea has the most 'globalised' economy of all major trading nations. Note that the data on the EU include trade between EU Member States, i.e. intra-EU trade. When one considers only EU trade with non-EU countries, the ratio of trade to GDP for the EU was 30 per cent in 2010.[32]

It is not only the value and volume of world trade and the ratio of global trade to GDP that have changed significantly over the years. The share of world trade of various countries and regions of the world also changed significantly.[33] Overall, the

32 See http://stat.wto.org/CountryProfile/WSDBCountryPFView.aspx?Language=E&Country=E27.
33 See www.wto.org/english/res_e/statis_e/world_region_export_11_e.pdf, with additional information from WTO, *International Trade Statistics 2007*, at www.wto.org/english/res_e/statis_e/its2007_e/section1_e/i06.xls.