1 International Trade and the Law of the WTO

1 INTRODUCTION

On 25 September 2015, after years of intergovernmental negotiations and consultations with civil society and other stakeholders, the 193 Member States of the United Nations (UN) unanimously adopted Resolution 70/1, *Transforming our World: The 2030 Agenda for Sustainable Development*.[1] In the Preamble to this Resolution, the UN Member States declared:

> We are resolved to free the human race from the tyranny of poverty and want and to heal and secure our planet. We are determined to take the bold and transformative steps which are urgently needed to shift the world on to a sustainable and resilient path. As we embark on this collective journey, we pledge that no one will be left behind.[2]

Resolution 70/1 sets out a fifteen-year plan to end poverty and hunger, fight inequality and injustice, and protect our planet. This plan, the 2030 Agenda, provides for seventeen Sustainable Development Goals (SDGs), which are indivisible and balance the three dimensions of sustainable development: the economic, social, and environmental.[3] The SDGs build on the Millennium Development Goals, adopted by the UN General Assembly in September 2000, and 'seek to address their unfinished business'.[4] While significant progress was made with regard to a number of Millennium Development Goals, with hundreds of millions of people emerging from poverty since 2000, too many continue to live in poverty and 'are denied a life of dignity'.[5] Also, there are rising inequalities within

1 United Nations, Resolution adopted by the General Assembly on 25 September 2015, A/RES/70/1, *Transforming Our World: The 2030 Agenda for Sustainable Development*.
2 See ibid., Preamble.
3 See ibid., para. 14. These 17 SDGs are further specified in 169 associated targets.
4 See ibid., para. 2.
5 See ibid., paras. 14 and 16. Note in 1990, 37.1 per cent of the global population (i.e. 1.95 billion people) lived in extreme poverty; in 2015 that number was down to 9.6 per cent (i.e. 702 million people). See World Bank, *Global Monitoring Report 2015/2016*, Figure 0.1.

and among countries.[6] While many developing countries in Asia have made significant progress in terms of economic development and poverty reduction, most of the least-developed countries worldwide have been much less successful.[7] Furthermore, within most countries, both developing and developed, the income gap between the rich and the rest of the population has grown markedly.[8] At present, the world's richest 1 per cent own 44 per cent of the world's wealth.[9] Such income inequality entrenches corruption and injustice, gives rise to xenophobic nationalism and religious fundamentalism, fosters political instability, and may lead to civil unrest and violence preventing economic development.

Reflecting the magnitude and nature of the challenges to be addressed, the SDGs 'go far beyond' the Millennium Development Goals.[10] As Resolution 70/1 states:

> Alongside continuing development priorities such as poverty eradication, health, education and food security and nutrition, [the 2030 Agenda for Sustainable Development] sets out a wide range of economic, social and environmental objectives. It also promises more peaceful and inclusive societies. It also, crucially, defines means of implementation.[11]

To achieve the SDGs by 2030, action in many different fields is needed, including international trade, the subject matter of this book. Between 1990 and the Global Financial Crisis of 2008, international trade contributed considerably to the reduction of global poverty. It continued to do so, albeit to a lesser extent, between 2010 and 2019. With regard to six SDGs, Resolution 70/1 explicitly refers to the role international trade can and should play in the realisation of these goals,[12] and paragraph 68 of the Resolution states:

> International trade is an engine for inclusive economic growth and poverty reduction, and contributes to the promotion of sustainable development. We will continue to promote a universal, rules-based, open, transparent, predictable, inclusive, non-discriminatory and equitable multilateral trading system under the World Trade Organization, as well as meaningful trade liberalization.[13]

But can, and will, international trade be an engine for inclusive economic growth and poverty reduction, and contribute to the promotion of sustainable development in the years to come?

International trade is currently in a deep crisis as a result of the COVID-19 pandemic and this calamity's impact on the global economy.[14] In April 2020, the

6 United Nations, Resolution adopted by the General Assembly on 25 September 2015, A/RES/70/1, *Transforming our world: the 2030 Agenda for Sustainable Development*, para. 14.
7 See World Bank, *Global Monitoring Report 2014/15*, p. 22; and United Nations, *The Millennium Development Goals Report 2015*, p. 23.
8 See http://inequality.org/income-inequality.
9 See Credit Suisse Research Institute, *Global Wealth Report 2019* at www.credit-suisse.com/about-us/en/reports-research/global-wealth-report.html.
10 United Nations, *Transforming Our World: The 2030 Agenda for Sustainable Development*, para. 17.
11 See ibid.
12 These are SDGs 2, 3, 8, 10, 14, and 17. See also fn. 10, paras. 16, 17, 20, 21, 24, and 27.
13 On the role of trade in reducing poverty, see World Bank, *Global Monitoring Report 2015/16*, pp. 20–1.
14 In 2020, the global economy contracted by 4.3 per cent. See https://news.un.org/en/story/2021/01/1081392.

WTO predicted that the volume of international trade in goods would decline between 13 and 32 per cent in 2020.[15] While still quite devastating, international trade in goods eventually fell by 'only' 5.3 per cent and is expected to increase by 8 per cent in 2021.[16] It is, however, very difficult to estimate how devastating the impact of the COVID-19 pandemic on international trade will ultimately be as much depends on the future trajectory of the pandemic and how governments will respond to it. It is also important to note that international trade, and the multilateral trading system which facilitates it, was in crisis before anyone had heard of COVID-19 or considered 'social distancing' a civil duty (rather than deviant behaviour). Already in 2019, global trade in goods declined by 3 per cent in value terms and global trade in commercial services only grew by a paltry 2 per cent.[17] In its latest *Report on Trade and Investment Barriers*, the European Commission found that, in 2019, the overall number of trade barriers kept increasing and noted that 'protectionism has now become ingrained in trade relations with many partners'.[18]

There are multiple causes for this development in international trade but the dramatic shift in the trade policy of the United States (US) after President Trump took office in 2017 has arguably been the most important among these causes. The multilateral trading system and its principal institution, the WTO, have been for four years now under unprecedented criticism from the US, which under the Trump administration evolved from the 'champion' of the system for the past seventy years to its strongest critic, because President Trump was convinced that other Members, above all China, are taking advantage of the system to the detriment of the US. Under the Trump administration, economic nationalism, trade protectionism, aggressive efforts to open up export markets, and challenging head-on the State–capitalist economic system of China have become the main features of US trade policy. The benefits for the US of a rules-based multilateral trading system and of membership of the WTO were openly and repeatedly questioned by both President Trump and members of the US Congress.[19] In its criticism of China's external trade policies and domestic economic system, the US does not stand alone. While other WTO Members share many US concerns over China's policies, such as the Belt and Road Initiative or tightening control over society and business by the Communist Party, they disapproved of the trade policy methods chosen by the Trump administration to tackle them. Among the most controversial actions

15 See www.wto.org/english/news_e/pres21_e/pr876_e.htm.

16 See www.wto.org/english/news_e/pres20_e/pr858_e.htm.

17 See https://timeseries.wto.org.

18 See European Commission, *Report from the Commission to the European Parliament and the Council on Trade and Investment Barriers* (1 January 2019 to 31 December 2019), COM(2020) 236 final, dated 15 June 2020.

19 See, e.g. www.cnbc.com/2018/08/30/trump-threatens-to-withdraw-from-world-trade-organization.html (on President Trump's statement that the US would withdraw from WTO if it 'did not shape up'); and www.hawley.senate.gov/senator-hawley-introduces-joint-resolution-withdraw-wto (on the joint resolution to withdraw from the WTO introduced by Senator Josh Hawley). See Section 2.2.

taken by the Trump administration were: (1) its unilateral measures on Chinese imports because China 'does not play by the rules of a market economy', which triggered a trade war on an unprecedented scale;[20] (2) its indiscriminate invocation of the national security exception to restrict imports, including imports from traditional allies;[21] and (3) its blocking of the appointment of members of the Appellate Body which ultimately led to the paralysis of the latter and has undermined the whole WTO dispute settlement system.[22] At present, it is not clear yet what kind of trade policy the new Biden administration will pursue. Note, however, that, Joe Biden, as a presidential candidate, claimed that 'economic security is national security', promised to create millions of manufacturing jobs, pledged to diminish America's dependence on China, planned to strengthen 'Buy American' rules, and did not voice any support for a rules-based WTO dispute settlement system.[23]

It is, however, not only the US which has turned away from international trade and the multilateral trading system. Worldwide, anti-globalism, economic nationalism, and trade protectionism have been on the rise in recent years. There are mounting concerns over globalisation and policymakers in many countries rethink reliance on global or regional value chains. Among the multiple explanations for this development, three reasons stand out. First, populist politicians have given voice to the fears and frustrations of the losers of globalisation and international trade, and have catered to the demand for job security and their professed need for protection from import competition. Second, the geopolitical superpower confrontation over economic hegemony between the US and China has not only resulted in their current bilateral trade war, but has also spilled over and affected their respective trade policies with other countries and, in a domino effect, the trade policies of these other countries. Third, there have been, and not without good reason, ever-mounting concerns regarding the environmental and social sustainability of globalisation, economic growth, and international trade. In May 2019, UN Secretary-General António Guterres noted:

> Not all countries have been able to take full advantage of the opportunities afforded by globalized trade, and new technologies and economic integration. As a result, many countries, regions and people continue to lag behind … Furthermore, we are seeing growing inequality in many societies. More than 700 million people, or 10 per cent of the world population, still live in extreme poverty, including many in middle-income countries that have managed to benefit from global trade. These growing inequalities have underscored the fact that globalization creates both winners and losers. Anti-globalization sentiments among those who feel left behind have been spreading rapidly. They undermine trust between peoples and their political establishments and are eroding social support for more open cooperative approaches in many countries, rich and poor alike. In the face of this growing discontent with globalization, trade tensions have escalated over the past year to threaten growth in

20 See Section 2.2. 21 Ibid. 22 See Section 4.2.1.
23 'Continuity Candidate: How Much Would Joe Biden Change Trade Policy? Less Than You Think', *The Economist* (19 September 2020).

international trade and the very foundation of the rules-based multilateral trading system. These trade tensions are a major set-back for the revitalization of the global partnership required for sustainable development.[24]

This chapter deals in turn with: (1) economic globalisation, international trade, and sustainable development; (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, INTERNATIONAL TRADE, AND SUSTAINABLE DEVELOPMENT

'Economic globalisation' has been a popular buzzword for many years 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, international trade, and sustainable development. 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, is a blessing or a 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 and contribute to sustainable economic development.

2.1 Emergence of the Global Economy

Over the past three decades and as a result of the process of economic globalisation, a *global* economy has been emerging, gradually replacing the patchwork of national economies. This subsection 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; and (4) the changing nature of international trade in the global economy. Particular attention will be given to the recent trend of alleged 'deglobalisation'.

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

24 See www.un.org/sg/en/content/sg/statement/2019-05-10/secretary-generals-remarks-special-general-council-of-the-world-trade-organization-delivered.

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:

> [T]he 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.[25]

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.[26]

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 how economic globalisation affects each of us 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 smartphones on which we are so reliant. 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 nearly two decades 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 ... 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 use of medical expertise based in a different time zone and earning less than half US rates is almost

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

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.[27]

While economic globalisation is often presented as a new phenomenon, it is worth noting that today's global economic integration is not unprecedented. During the fifty years preceding World War I, there was also a large cross-border flow of goods and capital and arguably more economic integration than now.[28] 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.

While the process of economic globalisation has been strong over the past three decades and, at least until recently, gathering ever more strength,[29] 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. In the last few years, and most recently in response to the economic havoc caused by the COVID-19 pandemic, advocacy and public support for economic self-sufficiency, re-shoring of manufacturing, and less reliance on international trade have increased notably.

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 *liberalisation* of trade and foreign direct investment, makes it happen.[30] 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. 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

27 D. Roberts, E. Luce, and K. Merchant, 'Service Industries Go Global', *Financial Times* (20 August 2003).
28 In a recent book, Yale historian Valerie Hansen makes the claim that high levels of connectivity and cultural exchange – staple elements of globalisation – prevailed as early as the turn of the first millennium. See V. Hansen, *The Year 1000: When Explorers Connected the World – and Globalization Began* (Scribner, 2020). Additionally, the Roman Empire (27 BC–AD 476) and the Chinese Song dynasty (960–1279) might be seen as possible (early) examples of economic globalisation.
29 On the recent trend in economic globalisation, see Sections 2.1.3–2.1.4.
30 See also M. Wolf, 'Global Opportunities', *Financial Times* (6 May 1997).

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.[31]

The second driver of economic globalisation has been the liberalisation of international trade and foreign direct investment. Since the late 1940s, most developed countries have gradually but significantly lowered barriers to foreign trade and investment. Over the last thirty years, the liberalisation of trade and investment was a worldwide trend, including in developing countries, although liberalisation proceeds at different rates in different parts of the world. In recent years, however, the fragility of this second driver of globalisation has become obvious. While some have argued that globalisation 'is not a policy choice' but 'a fact', others have correctly observed that globalisation 'is not an unstoppable force of nature, but is shaped by those who set the rules'.[32]

2.1.3 Economic Globalisation Today

In recent years, fear – motivated by a multitude of factors, both real and imagined – has served as a catalyst for empowering populist movements that are anathema to economic globalisation. Also, economic, social, and environmental science increasingly questions globalisation when it is not accompanied by the internalisation of transport, climate change, and other environmental and social costs. Globalisation is being rethought with a view to generating development that matches the standards of sustainability like the goals endorsed by the United Nations, while scientists tend to agree that solutions to many of these problems need to be of a global scale. Combined with the emergence of geopolitical superpower confrontation between the US and China, and ever-mounting concerns regarding the environmental and social sustainability of globalisation, populist trade policies make the future of economic globalisation uncertain.

As noted above and further discussed below, the growth of international trade has been sluggish in recent years when compared with the rapid growth before the Global Financial Crisis of 2008–9.[33] Also, the ratio of international trade to global GDP has not increased but has actually remained constant or decreased.[34] As the ratio of international trade to global GDP is often considered as a good measurement of economic globalisation,[35] this trend may be an indication of

31 T. Friedman, *The World Is Flat: A Brief History of the Globalized World in the Twenty-First Century* (Farrar, Straus, & Giroux, 2005), p. 8.

32 See, e.g. US President Bill Clinton in 1998 at the WTO Ministerial Conference in Geneva, at www.wto.org/english/thewto_e/minist_e/min99_e/english/book_e/stak_e_3.htm; and General Secretary of the International Confederation of Free Trades Unions Bill Jodan in 2000 in 'Yes to Globalization, But Protect the Poor', *International Herald Tribune* (21 December 2000).

33 See Section 2.1.4. 34 Ibid.

35 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.

what *The Economist* called 'slowbalisation',[36] if not an indication of 'deglobalisation'. However, in its 2016 Report titled *Digital Globalization: The New Era of Global Flows*, the McKinsey Global Institute noted in this regard:

> Many observers point to this trend as evidence that globalization has stopped. We have a different view: globalization has instead entered a new era defined by data flows that transmit information, ideas, and innovation. ... While global flows of trade and finance have lost momentum, the volume of data being transmitted across borders has surged, creating an intricate web that connects countries, companies, and individuals.[37]

Whether the current period should be characterised as one of 'slowbalisation' or 'deglobalisation', or whether the digitisation of the economy has simply transformed the manner how globalisation works in the twenty-first century, it is definitely a new era for economic globalisation. This was already the case before the onslaught of the COVID-19 pandemic, but it is even more so since.

2.1.4 Facts and Figures on International Trade

In 1948, world merchandise exports, i.e. exports of goods, amounted to US$58 billion per year. In 2019, world merchandise exports amounted to US$18.9 trillion.[38] World exports of commercial services, marginal in 1948, amounted in 2019 to US$6 trillion.[39] Especially during the period from 2002 to 2008, world merchandise exports and exports of commercial services boomed. In 2009, at the height of the Global Financial Crisis, world merchandise exports dropped dramatically but recovered quickly in 2010 and 2011.[40] Over the last decade, world merchandise exports trends have resisted easy categorisation, with years of relative stasis, along with years marked by either significant decreases or double-digit increases.[41] By contrast, exports of commercial services have shown a strong upward trend, with only two instances of negative growth over the last fifteen years.[42]

As shown by Figure 1.1, the period from 1990 until the financial crisis year of 2009 saw significant growth in the ratio of global trade to GDP, indicating the extent of economic globalisation in these years. In 2010, this trend of economic

36 See 'Goodbye Globalisation', *The Economist* (16 May 2020), p. 8.
37 McKinsey Global Institute, *Digital Globalization: The New Era of Global Flows*, Executive Summary (March 2016), pp. 9–10.
38 See WTO Statistics Database, at https://timeseries.wto.org. In 1968, 1988, 2008, and 2018, world merchandise exports amounted to US$242 billion, US$2.9 trillion, US$16.2 trillion, and US$19.5 trillion, respectively. See ibid.
39 See ibid. In 1995, 2005, 2015, and 2018, world exports of commercial services amounted to US$1.2 trillion, US$2.5 trillion, US$5 trillion, and US$5.9 trillion respectively. See ibid.
40 See ibid.
41 2012, 2013, and 2014 saw modest growth rates, while 2016 saw a relatively small negative growth rate. However, in 2015 world merchandise exports fell significantly, while 2017 and 2018 saw double digit. See ibid.
42 Global trade in commercial services shrunk significantly in 2009 at the height of the Global Financial Crisis of 2008–9, and marginally in 2015. After both of these downturns, trade in commercial services rebounded quickly. See ibid.

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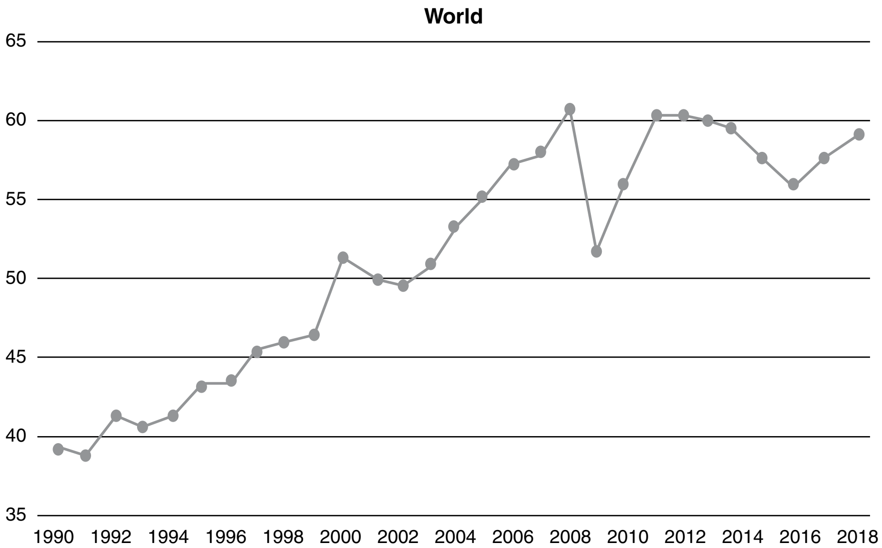

Figure 1.1 Ratio of global trade in merchandise and commercial services to global GDP (1990–2018)[43]

globalisation picked up again but started to falter as from 2012, before rebounding somewhat in 2017 and 2018.[44] The ratio of global trade to GDP increased from 39 per cent in 1990 to an all-time high of 61.1 per cent in 2008, falling to 52.5 per cent in 2009, increasing to 60.8 per cent in 2011, and remaining relatively flat (at about 60 per cent) for the remainder of the decade.[45]

The degree of economic globalisation, when measured as the ratio of trade to GDP, varies from country to country but has generally increased in all major trading nations over the course of the past three decades.[46]

As shown by the data in Figure 1.2, the economies of many countries are to a large and increased degree dependent on trade. This is true for developed as well as developing countries. Note the extent to which, for example, China (from 24 to 37 per cent), India (from 15 to 43 per cent), Bangladesh (from 19 to 38 per cent), and Mexico (from 38 to 80 per cent) have 'globalised' over the past three decades. It is interesting, and perhaps surprising to some, that least-developed countries are more 'globalised' than OECD countries. Brazil (29 per cent) and the US (27 per cent) have the least 'globalised' economies of all major trading nations. The European Union (EU) (91 per cent) has the most 'globalised' economy of all major trading nations if trade between EU Member States, i.e. intra-EU

43 See https://data.worldbank.org/indicator/NE.TRD.GNFS.ZS?end=2018&start=1990.
44 See ibid. 45 See ibid.
46 For data on trade-to-GDP ratios for individual countries, see https://data.worldbank.org/indicator/NE.TRD.GNFS.ZS.