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1 International Trade and the Law of the WTO

CONTENTS

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 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:

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.*

> 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, billions of people continue to live in poverty and 'are denied a life of dignity'.[5] Also, there are rising inequalities within 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 have been much less successful.[7] Also, within most countries, both developing and developed, the income gap between the rich and the rest of the population has grown markedly.[8] In its *Global Risks 2014* report, the World Economic Forum identified severe income inequality as the global risk that is most likely to manifest itself over the next ten years.[9] Such income inequality entrenches corruption and injustice, gives rise to xenophobic nationalism and religious fundamentalism, fosters political instability and leads to violence and economic destruction.

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, it 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. One of the defining features of today's world is economic globalisation and the associated

2 *Ibid.*, Preamble. 3 *Ibid.*, 14. These seventeen SDGs are further specified in 169 associated targets.
4 *Ibid.*, para. 2.
5 *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.
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*, 22, and United Nations, *The Millennium Development Goals Report 2015*, 23.
8 See http://inequality.org/income-inequality. 9 See World Economic Forum, *Global Risks 2014*, 13.
10 United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, para. 17.
11 *Ibid.*

high levels of international trade. The question therefore arises whether economic globalisation, in general, and international trade, in particular, can contribute to the achievement of the SDGs or whether, to the contrary, they are more likely to aggravate poverty and hunger in many developing countries and the ever-growing gap between the richest and poorest of the world.

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]

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 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 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, 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.

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

12 These are SDG 2, 3, 8, 10, 14 and 17. See *ibid.*, 16, 17, 20, 21, 24 and 27.
13 On the role of trade in reducing poverty, see World Bank, *Global Monitoring Report 2015/16*, 20–1.

foreign direct investment; 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.[14]

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.[15]

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 smart 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

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

> 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 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.[16]

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 the First World War, there were also large cross-border flows of goods and capital and more economic integration than now.[17]

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.[18] 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 today's process of economic globalisation is strong and was, at least until recently, gathering ever more strength,[19] 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.

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.[20] Due to technological innovations resulting in a dramatic fall in transport, communication and computing costs, the natural barriers of time and space that separate

16 D. Roberts, E. Luce and K. Merchant, 'Service Industries Go Global', *Financial Times*, 20 August 2003.
17 Also, the Roman Empire (27 BC–476 AD) and the Chinese Song dynasty (960–1279) can be seen as (early) examples of economic globalisation.
18 'One World?', *The Economist*, 18 October 1997.
19 On the recent trend in economic globalisation, see below, pp. 6–11.
20 See also M. Wolf, 'Global Opportunities', *Financial Times*, 6 May 1997.

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 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.[21]

The second driving force 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 has become a worldwide trend, including in developing countries, although liberalisation proceeds at different rates 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 second driving force 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.[22]

While the then US President Bill Clinton stated at the 1998 WTO Ministerial Conference in Geneva that '[g]lobalization is not a policy choice – it is a fact',[23] 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]

2.1.3 Economic Globalisation Today

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 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.[25]

21 T. Friedman, *The World Is Flat: A Brief History of the Globalized World in the Twenty-First Century* (Farrar, Straus & Giroux, 2005), 8.
22 D. Rodrik, *Has Globalization Gone Too Far?* (Institute for International Economics, 1997), 85.
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 L. Barber, 'A Symposium of Views: Is Continued Globalisation of the World Economy Inevitable?', *International Economy*, summer 2004, 70.

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In 2016, David Lipton, First Deputy Managing Director of the IMF, observed:

> During the years since the global financial crisis, the future of globalization has darkened. Global growth has slowed, along with international trade. For many, vulnerability and insecurity have become more salient than the gains from interconnectedness, as those linkages have brought market volatility, powerful spillovers, and dislocations. Politics have soured. Whether justified or not, much of the resentment is focused on globalization.[26]

As further discussed below, the growth of international trade has been sluggish in recent years when compared with the growth before the global economic crisis of 2008–9.[27] The ratio of international trade to global GDP has in recent years not increased, but has remained constant or decreased marginally.[28] As the ratio of international trade to global GDP is often considered as a good measurement of economic globalisation,[29] this trend may be an indication that the process of economic globalisation has (at least temporarily) stopped. However, in its 2016 report *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. Digital platforms create more efficient and transparent global markets in which far-flung buyers and sellers find each other with a few clicks. The near-zero marginal costs of digital communications and transactions open new possibilities for conducting business across borders on a massive scale … 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.[30]

In an address delivered at the World Trade Symposium in June 2016, WTO Director-General Roberto Azevêdo also argued that 'globalisation has not stopped'.[31] Azevêdo noted in this regard that while the growth of international trade is lower than before, the share of trade in components has not declined. This is indicative of the spread of global production chains, which is 'a defining feature of the globalization phenomenon'.[32]

2.1.4 Facts and Figures on International Trade and Foreign Direct Investment

In 1948, world merchandise exports, i.e. exports of goods, amounted to US$58 billion per year. In 2015, world merchandise exports amounted to US$16.5 trillion.[33] World exports of commercial services, marginal in 1948, amounted in

26 David Lipton, 'Can Globalization Still Deliver?', Stavros Niarchos Lecture, 24 May 2016, Peterson Institute for International Economics, at www.imf.org/external/np/speeches/2016/052416a.htm.
27 See below, p. 8. 28 See below, p. 8.
29 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.
30 McKinsey Global Institute, *Digital Globalization: The New Era of Global Flows*, Executive Summary, March 2016, 9–10.
31 R. Azevêdo, 'Trade and Globalisation in the 21st Century: the Path to Greater Inclusion', speech delivered at the World Trade Symposium, London, 7 June 2016, at www.wto.org/english/news_e/spra_e/spra126_e.htm.
32 *Ibid.*
33 See WTO Statistics Database, at http://stat.wto.org. In 1968, 1988 and 2008, world merchandise exports amounted to US$242 billion, US$2.9 trillion and US$15.2 trillion respectively. See *ibid.*

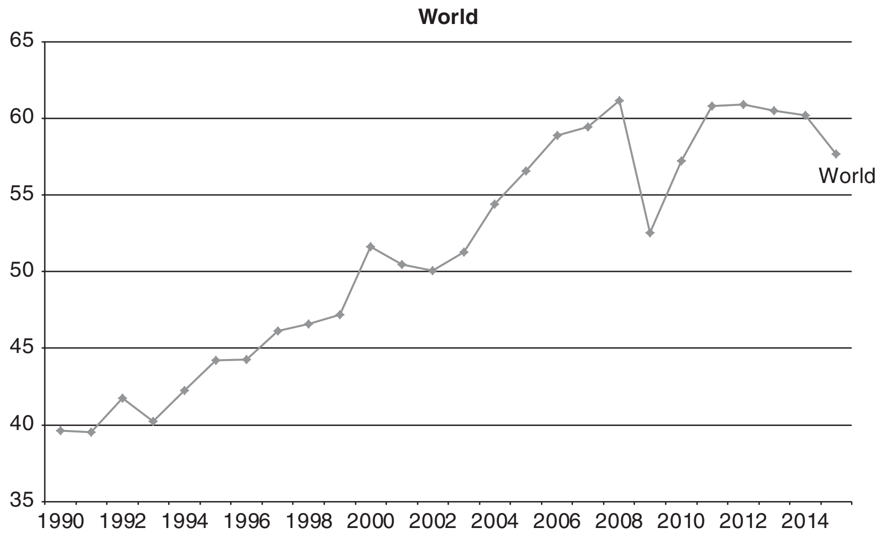

Figure 1.1 Ratio of global trade in merchandise and commercial services to global GDP (1990–2015)

2015 to US$4.75 trillion.[34] 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 economic crisis, world merchandise exports shrunk by 22.3 per cent in value terms (the sharpest decline since the Second World War), but in 2010 grew again by 21.8 per cent and in 2011 by 19.8 per cent.[35] In recent years, however, world merchandise exports have grown between a mere 0.25 and 2.4 per cent in value terms; and, in 2015, fell by 13.2 per cent.[36] Exports of commercial services shrunk by 10.8 per cent in value terms at the height of the global economic crisis in 2009, but grew again by 8.7 per cent in 2010 and 13.2 per cent in 2011.[37] In 2015, the exports of commercial services declined 6.1 per cent in value terms.[38]

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 economic globalisation picked up again. 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, plummeting to 52.5 per cent in 2009, increasing to 60.8 per cent in 2011 and remaining almost constant from 2012–14 and then dropping to 57.0 in 2015.[39]

34 See *ibid*. In 1995 and 2005, world exports of commercial services amounted to US$1.2 trillion and US$2.5 trillion respectively. See *ibid*.
35 Calculated on the basis of data found in the WTO Statistical Database, at http://stat.wto.org. In volume terms, world merchandise exports fell in 2009 by 12 per cent. In the last thirty years, the volume of world merchandise exports fell only on one other occasion, namely in 2001 by 0.2 per cent. See *ibid*.
36 See *ibid*.
37 Calculated on the basis of data found in the WTO Statistical Database, at http://stat.wto.org.
38 See *ibid*.
39 See http://data.worldbank.org/indicator/NE.TRD.GNFS.ZS?end=2015&start=1990.

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The degree of economic globalisation, when measured as the ratio of trade to GDP, varies from country to country, but has, until 2015, increased in all major trading nations over the past two decades.[40]

Country	1990	2015
Bangladesh	19	42
Brazil	15	27
Canada	50	65
China	30	41
EU (including intra-EU trade)	51	83
India	15	49
Indonesia	49	42
Mexico	38	73
Russian Federation	36	51
South Africa	43	63
South Korea	53	85
United States	20	28

Figure 1.2 Ratio of trade in merchandise and commercial services to GDP for selected countries (1990–2015)[41]

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 30 to 41 per cent), India (from 15 to 49 per cent), Bangladesh (from 19 to 42 per cent) and Mexico (from 38 to 73 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 33.9 per cent.[42]

It is not only the value and volume of world trade and the ratio of 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.

Overall, the share of world trade of developed countries has in recent years dropped from 80 per cent in 1995 to 54 per cent in 2014, while the share of

40 For a world map of trade-to-GDP ratios, see www.wto.org/english/res_e/statis_e/statis_maps_e.htm.
41 See *ibid*. For India, the data relate to the year 2014. 42 See *ibid*.

developing countries has increased from 20 per cent in 1995 to 44 per cent in 2014.[43] Remarkable is the decline of the share of North America (the United States, Canada and Mexico) from 28.1 per cent in 1948 to 13.5 in 2014, and the modest increase of the share of Western Europe (primarily the European Union) from 35.1 per cent in 1948 to 36.8 per cent in 2014 (down from 45.9 per cent in 2003).[44] Equally remarkable are the steep decline of the shares of South and Central America (down from 11.3 per cent to 3.8 per cent) and Africa (down from 7.3 per cent to 3 per cent) and the significant increase of Asia's share (up from 14 per cent to 32 per cent).[45] The share of the least-developed countries increased in recent years from 0.5 to 1 per cent (although note that it stood at 1.7 per cent in 1970).

Further, the composition of the trade of developing countries has also undergone a change. While many developing countries remain dependent on their exports of primary commodities, the share of manufactured goods has been growing. Since the early 1990s, there has been a boom in high-technology exports, with countries such as China, India and Mexico emerging as major suppliers of cutting-edge technologies, as well as labour-intensive goods. The data referred to above clearly indicate that there is, with regard to trade in merchandise and commercial services, a 'redistribution of the geopolitical deck of cards on a global scale'.[46]

The leading exporters of merchandise in 2015 were: China (17.4 per cent), the European Union (15.2 per cent), the United States (11.5 per cent), Japan (4.8 per cent) and Korea (4.0 per cent).[47] The leading importers of merchandise were: the United States (17.3 per cent), the European Union (14.4 per cent), China (12.6 per cent), Japan (4.9 per cent) and Hong Kong, China (4.2 per cent).[48] The leading exporters of commercial services in 2015 were: the European Union (24.9 per cent), the United States (18.8 per cent), China (7.8 per cent), Japan (4.3 per cent) and India (4.2 per cent).[49] The leading importers of commercial services were: the European Union (20.2 per cent), the United States (12.9 per cent), China (12.9 per cent), Japan (4.8 per cent), Singapore (3.9 per cent) and India (3.4 per cent).[50]

43 See *WTO International Trade Statistics 2015*, 35. 44 *Ibid.*, table 1.5 45 *Ibid.*

46 See Pascal Lamy in his welcome address to the participants in the WTO's Public Forum, 24 September 2012, at: www.wto.org/english/news_e/sppl_e/sppl244_e.htm.

47 See WTO, *World Trade Statistical Review 2016*, table A7. Note that this ranking is on the basis of world merchandise trade excluding intra-EU trade. Also, note that Hong Kong, China was the sixth biggest exporter of merchandise (3.9 per cent) (before Canada (3.1 per cent), Mexico (2.9 per cent), Singapore (2.7 per cent), and the Russian Federation (2.6 per cent)); and that India was the thirteenth (2.0 per cent) and Brazil the eighteenth biggest exporter of merchandise (1.5 per cent).

48 See *ibid.* Note that India was the ninth (2.9 per cent), the Russian Federation the seventeenth (1.5 per cent) and Brazil the eighteenth biggest importer of merchandise (1.3 per cent).

49 See *ibid.*, table A9. Note that this ranking is on the basis of world trade in commercial services excluding intra-EU trade. Note also that Singapore was the sixth biggest exporter of commercial services (3.8 per cent) before Switzerland (2.9 per cent), Hong Kong, China (2.8 per cent), Korea (2.6 per cent) and Canada (2.1 per cent). The Russian Federation was the thirteenth (1.4 per cent), Brazil the twentieth (0.9 per cent) biggest exporter of commercial services.

50 See *ibid.* Note that the Russian Federation was the tenth (2.4 per cent) and Brazil the twelfth biggest importer of commercial services (1.9 per cent).