Chapter 1

International trade and the law of the WTO

1.1 The need for international rules on international trade

The economic prosperity of many countries largely depends on international trade. In the period 2012–2014, for example, 81 per cent of the gross domestic product (GDP) of Zambia, 63 per cent of the GDP of South Africa and 46 per cent of the GDP of Indonesia depended on international trade in goods. The increasing prosperity of China and India is without doubt largely the result of the explosive increase in their exports. There is broad consensus among economists and policy-makers that economic globalization, in general, and international trade, in particular, offer an unprecedented *opportunity* to stimulate economic development and significantly reduce poverty worldwide.

As UN Secretary General Ban Ki-moon said at the 2014 WTO Public Forum on *Why Trade Matters to Everyone*:

> The question is not whether trade matters, but how we can make trade a better driver of equitable, sustainable development. How can we make trade the foundation of a life of dignity for all?. . . International trade is an essential component of an integrated effort

> to end poverty, ensure food security and promote economic growth. An ounce of trade can be worth a pound of aid . . . Trade can – and should – benefit everyone. That is why the international community needs to avoid protectionism . . . If managed well, international trade can be a key driver of sustainable development.

However, to ensure that this potential is realized, international trade has to be managed and regulated at the international level. If not, economic globalization and international trade are likely to aggravate economic inequality, social injustice, environmental degradation and cultural homogenization instead of improving the current situation.

Developed as well as developing countries need international rules on trade in order to:

- prevent trade-restrictive measures in situations where they are neither necessary nor desirable yet are imposed due to pressure from well-organized interest groups;
- give security and predictability to traders with regard to the national rules that apply to international trade in their products or services;
- ensure that important societal values and interests, such as public health, the environment, consumer safety, minimum labour standards, economic development and public morals, can be adequately protected and promoted; and
- ensure a greater measure of equity in international economic relations by providing disciplines that bind economically powerful and economically weaker countries alike,

enabling the latter to enjoy a fair share of the benefits of international trade.

> Between the strong and the weak, between the rich and the poor . . . it is freedom which oppresses and the law which sets free.
>
> Abbé Jean-Baptiste Lacordaire (1802–61)

1.2 International trade law: bilateral, regional and multilateral agreements

The legal rules governing trade relations between countries are part of international economic law. International trade law (i.e. international rules on trade in goods and services) forms, together with international investment law, the 'hard core' of international economic law. This field of law consists of:

- bilateral trade agreements;
- regional trade agreements; and
- multilateral trade agreements.

There are a multitude of bilateral trade agreements, for example the Agreement on Trade in Wine between the European Union and Australia, as well as the Trade Agreement between the United States and Israel. Regional trade agreements comprise, for example, the North American Free Trade Agreement (NAFTA), a free trade area among Canada, Mexico and the United States, and the

MERCOSUR Agreement, a customs union among Argentina, Brazil, Paraguay, Uruguay and Venezuela.

The most important and broadest of all multilateral trade agreements is the Marrakesh Agreement Establishing the World Trade Organization of 1994 (commonly known as the WTO Agreement). It is the law of this Agreement – the law of the World Trade Organization (WTO) – that forms the subject matter of this introduction to international trade law. The general principles and concepts of WTO law that are set out in this introduction are, however, also applicable to a large extent to bilateral and regional trade agreements.

1.3 WTO law

The WTO was established on 1 January 1995, by the WTO Agreement.

The substantive law of the WTO can be divided into five categories:

- rules on non-discrimination;
- rules on market access;
- rules on unfair trade;
- rules on conflicts between free trade and other societal values and interests; and
- rules promoting the harmonization of national legislation in specific areas.

WTO law further consists of institutional and procedural rules, including rules on decision-making, trade policy review and dispute settlement. Together, all these substantive,

institutional and procedural WTO rules form the multilateral trading system.

1.4 Sources of WTO law

The principal source of WTO law is the WTO Agreement (mentioned in Section 1.3) and its multiple Annexes.

The WTO Agreement consists of only sixteen articles that concisely describe the WTO's objectives, its functions, its bodies, its membership and its decision-making procedures. However, attached to this short agreement are eighteen international agreements that form an integral part of the WTO Agreement. These agreements contain:

- multilateral agreements on trade in goods (Annex 1A), comprising:
  - the General Agreement on Tariffs and Trade 1994 (the GATT 1994) (see Sections 2.2, 2.4, 3.2, 3.3, 3.4, 3.5 4.2, 4.4, 4.5, 4.6, 4.7, 4.8, 5.2 and 5.3); and
  - initially twelve but now eleven agreements on specific aspects of trade in goods, such as:
    - the Agreement on Agriculture (see Sections 4.5.4 and 5.3.7);
    - the Agreement on the Application of Sanitary and Phytosanitary Measures (the SPS Agreement) (see Section 6.3);
    - the Agreement on Technical Barriers to Trade (the TBT Agreement) (see Section 6.2);
    - the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the Anti-Dumping Agreement) (see Section 5.2);

  - the Agreement on Subsidies and Countervailing Measures (the SCM Agreement) (see Section 5.3); and
  - the Agreement on Safeguards (see Section 4.5);
- the General Agreement on Trade in Services (the GATS) (Annex 1B) (see Sections 2.3, 2.5, 3.6, 3.7, 4.3, 4.4, 4.6 and 4.7);
- the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement) (Annex 1C) (see Section 6.4);
- the Understanding on Rules and Procedures Governing the Settlement of Disputes (the DSU) (Annex 2) (see Sections 8.1–8.8);
- the Trade Policy Review Mechanism (the TPRM) (Annex 3) (see Section 7.3.4); and
- two plurilateral agreements: one on government procurement (Section 3.5.4) and one on trade in civil aircraft (Annex 4).

The agreements in Annexes 1, 2 and 3 to the WTO Agreement are multilateral agreements and are binding on all WTO Members. Annex 4 contains two plurilateral agreements that are only binding on those WTO Members that have expressly agreed to them. The WTO Agreement comprises more than 25 000 pages, including its Annexes. Of this, 95 per cent consists of Schedules of Concessions (concerning trade in goods) and of Schedules of Specific Commitments (concerning trade in services) (see Sections 2.5, 3.2.2 and 3.6.1). In addition, the Protocols of Accession of each new WTO Member are an integral part of the WTO Agreement (see Section 7.5.2).

The WTO Agreement is not the only source of WTO law. There are other sources, but they are not of the same nature or legal status as the WTO Agreement. Most of the other sources do not, in and of themselves, provide for specific, enforceable rights or obligations. They do, however, assist in 'clarifying' or 'defining' the law that applies between WTO Members on WTO matters.

Most important among the other sources of WTO law is WTO case law (see Section 8.2). Rulings of WTO dispute settlement panels and the WTO Appellate Body are, in principle, only legally binding on the parties to the dispute in question. However, the clarifications of WTO law contained in dispute settlement reports have legal relevance beyond the dispute at issue. Especially the rulings of the Appellate Body have great authority and are, in practice, followed in later disputes on the same matter.

> In *US – Stainless Steel (Mexico) (2008)* the Appellate Body held that '[e]nsuring "security and predictability" in the dispute settlement system, . . . implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case'.

Additionally, the acts of WTO bodies, agreements concluded in the context of the WTO, customary international law and general principles of law are also recognized sources of WTO law.

An example of an act of a WTO body is the decision of the WTO TBT Committee on Principles for the Development of International Standards, Guidelines and Recommendations. According to the Appellate Body in *US – Tuna II (Mexico) (2012)*, this decision can be considered as a 'subsequent agreement' under Article 31(3)(a) of the Vienna Convention on the Law of Treaties, and, to the extent that it 'bears specifically' on a provision of the TBT Agreement it will inform the application and interpretation of that provision.

1.5 WTO law in context

1.5.1 WTO law and international law

In the past, international trade law, and in particular GATT law (the predecessor of WTO law), was often considered to be an independent body of legal rules at the margins of international law. In the current era of economic globalization, it is uncontested that WTO law is an integral part of international law, and its role is steadily increasing in importance.

In its very first case, *US – Gasoline (1996)*, the Appellate Body ruled that WTO law 'is not to be read in clinical isolation from public international law'.

However, the relationship between WTO rules and other rules in international law is not always clear. It is

generally accepted that customary international law and general principles of law are applicable within WTO law, unless WTO law expressly contains clearly deviating rules. It is also generally accepted that international law plays an important role in the interpretation of the provisions of WTO law. WTO rules should, if possible, be interpreted in such a way that they do not conflict with other rules of international law.

> In *US – Shrimp* (1998), the Appellate Body took into account multilateral environmental agreements, including the Convention on Biological Diversity and the Convention on International Trade in Endangered Species (CITES), in interpreting the exception for measures relating to the conservation of 'exhaustible natural resources' in Article XX(g) of the GATT 1994. Relying on these international agreements, the Appellate Body found that the term 'exhaustible natural resources' includes both living and non-living resources, and thus that the United States could invoke this exception to justify its regulation that aimed at the protection of sea turtles.

Nevertheless, it cannot be excluded that a conflict exists between WTO law and other international law that cannot be resolved through interpretation. In such cases, the question arises whether provisions of international agreements on the environment, human rights or minimum labour standards can be relied upon in trade disputes as justifications for violations of WTO obligations.

This issue is subject to much academic debate. Some scholars argue that WTO Members that are parties to a specific non-WTO agreement can invoke its rules in a WTO dispute between them as a defence against a claim of violation of WTO rules. This position is controversial and strongly contested by other WTO scholars, who point out that, as explicitly stated in Article 3.2 of the Dispute Settlement Understanding (DSU), the WTO dispute settlement system 'serves to preserve the rights and obligations of Members under the covered [WTO] agreements, and to clarify the existing provisions of those agreements'. WTO dispute settlement panels and the WTO Appellate Body may not 'add to or diminish the rights and obligations' of WTO Members as set out in the WTO agreements (see Section 8.2).

In *Mexico – Taxes on Soft Drinks (2006)*, the Appellate Body found that there is 'no basis in the DSU for panels and the Appellate Body to adjudicate non-WTO disputes'.

It is important to note that, to date, a situation of an irreconcilable conflict between an obligation or right under a WTO agreement and an obligation or right under a non-WTO agreement has not yet arisen in WTO dispute settlement.

1.5.2 WTO law in the European and national legal orders

With regard to the relationship between WTO law and the national law of WTO Members, Article XVI:4 of the WTO