1 International Trade and the Law of the WTO

1.1 Introduction

At the time of writing, international trade is in deep crisis as a result of the COVID-19 pandemic and this calamity's impact on the global economy. In September 2020, it was estimated that in 2020 international trade in goods would, in volume terms, be 9.2 per cent lower than in 2019, and this estimate is subject to much uncertainty since it depends on the unpredictable trajectory of the COVID-19 pandemic and government responses to it. It is important to note, however, that international trade, and the multilateral trading system that facilitates it, was in crisis *before* anyone had heard of the COVID-19 virus. Already, in 2019, global trade in goods declined and growth in trade in commercial services was paltry compared with preceding years.

In its 2020 *Report on Trade and Investment Barriers*, the European Commission found that in 2019 the overall number of trade barriers worldwide had increased and noted that 'protectionism has now become ingrained in trade relations with many partners'.

There are multiple causes for this development in international trade but the dramatic shift in the trade policy of the United States (US) since President Trump took office in 2017 has arguably been the most important among these causes. Under the Trump Administration, the US evolved from being the 'champion' of the multilateral trading system to being its strongest critic. Since Donald Trump assumed the US presidency, economic nationalism, trade protectionism, and challenging head-on the State-capitalist economic system of China have become the main features of US trade policy.

It is, however, not only the US that 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 those who have been negatively affected by globalisation and international trade, and have catered to the latter's 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, United Nations (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 co-operative 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 international trade and the very foundation of the rules-based multilateral trading system. These trade tensions are a major setback for the revitalization of the global partnership required for sustainable development.'

This introductory chapter briefly deals with: (1) the need for international rules on international trade; (2) the law of bilateral, regional, and multilateral trade agreements; (3) the basic rules and sources of WTO law; and (4) the relationship of WTO law with other international law and national law.

1.2 The Need for International Rules on International Trade

The economic prosperity of many countries largely depends on international trade. In 2019, for example, 91 per cent of the gross domestic product (GDP) of

the European Union (EU), 70 per cent of the GDP of Zambia, 65 per cent of the GDP of Canada, 59 per cent of the GDP of South Africa, 40 per cent of the GDP of India, 37 per cent of the GDP of Indonesia and Japan, 36 per cent of the GDP of China, and 26 per cent of the GDP of the US depended on international trade (2020 World Bank data). The increasing prosperity of China and other emerging economies over the last twenty years is, without doubt, largely the result of the explosive increase in their exports. There is broad consensus among economists and policymakers that economic globalisation, in general, and international trade, in particular, offer an unprecedented opportunity to stimulate economic development and significantly reduce poverty.

As the then 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 realised, international trade has to be managed and regulated at the international level. If not, economic globalisation and international trade are likely to aggravate economic inequality, social injustice, environmental degradation, and cultural homogenisation 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-organised interest groups;
- provide 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 (1802–1861)

1.3 The Law of Bilateral, Regional, and Multilateral Trade 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. The field of international trade law consists of:

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

There are a multitude of bilateral and regional trade agreements, for example, the Comprehensive Economic and Trade Agreement between the EU and Canada (CETA), the Agreement between the US and Japan, the ASEAN Free Trade Area Agreement, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), the African Continental Free Trade Agreement (AfCTA), the US-Mexico-Canada Agreement (USMCA), and the Common Market of the South (MERCOSUR) Agreement. Aside from the many bilateral and regional trade agreements, there are a number of multilateral trade agreements, such as the International Convention on the Harmonized Commodity Description and Coding System (HS Convention) and the International Convention on the Simplification and Harmonization of Customs Procedures, as amended (Kyoto Convention). The most important and broadest of all multilateral trade agreements is the Marrakesh Agreement Establishing the World Trade Organization of 1994 (WTO Agreement). It is the law of this Agreement – the law of the World Trade Organization (WTO) – that forms the subject matter of this book. However, the general principles and concepts of WTO law that are set out in this book are also – to a large extent – applicable to bilateral and regional trade agreements.

1.4 Basic Rules and Sources of WTO Law

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

- rules on non-discrimination (see Chapter 4);
- rules on market access (see Chapter 5);
- rules on balancing trade liberalisation with other societal values and interests (see Chapter 6);

- rules on unfair trade (see Chapter 7); and
- rules promoting the harmonisation of national legislation in specific areas (see Chapter 8).

WTO law further consists of institutional and procedural rules, including rules on decision-making, trade policy review, and dispute settlement (see Chapters 2 and 3). Together, all these substantive, institutional, and procedural WTO rules form the multilateral trading system.

The principal source of WTO law is the WTO Agreement (see 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 consist of:

- the multilateral agreements on trade in goods (see Annex 1A), comprising:
  - the General Agreement on Tariffs and Trade 1994 (the GATT 1994) (see Sections 4.2, 4.4, 5.2, 5.3, 5.4, 5.5, 6.2, 6.4, 6.5, 6.6, 6.7, 6.8, 7.2, and 7.3); and
  - twelve agreements on specific aspects of trade in goods, such as:
    - the Agreement on Agriculture (see Sections 6.5.4 and 7.3.7);
    - the Agreement on the Application of Sanitary and Phytosanitary Measures (the SPS Agreement) (see Section 8.3);
    - the Agreement on Technical Barriers to Trade (the TBT Agreement) (see Section 8.2);
    - the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the Anti-Dumping Agreement) (see Section 7.2);
    - the Agreement on Subsidies and Countervailing Measures (the SCM Agreement) (see Section 7.3);
    - the Agreement on Safeguards (see Section 6.5); and
    - the Agreement on Trade Facilitation (see Section 5.5.3)
- the General Agreement on Trade in Services (the GATS) (see Annex 1B) (see Sections 4.3, 4.5, 5.6, 5.7, 6.3, 6.4, 6.6, and 6.7);
- the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement) (see Annex 1C) (see Section 8.4);
- the Understanding on Rules and Procedures Governing the Settlement of Disputes (the Dispute Settlement Understanding or DSU) (see Annex 2) (see Sections 3.1–3.8); and
- the Trade Policy Review Mechanism (TPRM) (see Annex 3) (see Section 2.4.4).

All these agreements, which are contained in Annexes 1, 2, and 3 to the WTO Agreement, are multilateral agreements and are binding on *all* WTO Members. Annex 4 to the WTO Agreement contains two plurilateral agreements, namely the Agreement on Trade in Civil Aircraft and the Agreement on Government Procurement (see Section 5.5.4). These plurilateral agreements are only binding

on those WTO Members that have expressly agreed to them. Finally, note that also the Protocols of Accession of each new WTO Member are an integral part of the WTO Agreement (see Section 2.5.2).

The WTO Agreement and its many annexes are, however, 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 3.2). 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 recognised 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 (VCLT), 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 globalisation, 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 (see Section 6.2.4). 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 US 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 3.2).

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 Agreement obliges WTO Members to ensure that their national laws are consistent with WTO law. National law, including constitutional law, may not be relied upon to justify a violation of WTO obligations.

Producers of chocolate bars in Industria, a WTO Member, are negatively affected by Industria's ban on cocoa beans that have not been certified as 'slavery free' because the complex and expensive certification process means that they can now only source their cocoa bean inputs from a restricted number of foreign suppliers and at much higher prices. They would like to bring a case before their national courts challenging Industria's ban on cocoa beans that have not been certified as 'slavery free' on the grounds that this ban violates WTO law.

The WTO Agreement does not specify what legal effect WTO provisions are to have in the national legal order of WTO Members. It is left up to Members to decide whether national legislation or governmental measures can be challenged in national courts on grounds of WTO inconsistency. Most WTO Members do not allow WTO law to be directly invoked in disputes before their national courts. In other words, WTO law has no direct effect in the national legal orders of most WTO Members. The European Court of Justice (ECJ) has repeatedly refused to

grant direct effect to WTO provisions. The ECJ referred in this context to the specific nature of the WTO dispute settlement system (see Sections 3.1–3.8) and to the fact that the most important trading partners of the EU also do not grant direct effect to WTO law. Only in exceptional cases is direct effect given to WTO law, for example, when EU legislation explicitly refers to WTO provisions. Also, in the US, Japan, China, and India no direct effect is given to WTO law. By contrast, WTO law has direct effect in Mexico.

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