

1

ECONOMIC GLOBALISATION AND THE LAW OF THE WTO

1.1.	Introduction	1
1.2.	Economic Globalisation and International Trade	2
1.2.1.	The Emergence of the Global Economy	2
1.2.2.	Economic Globalisation: A Blessing or a Curse?	9
1.2.3.	Trade Liberalisation <i>versus</i> Protectionism.....	15
1.2.4.	Globalisation and Trade to the Benefit of All?	25
1.3	International Trade and the Law of the WTO.....	30
1.3.1.	International Rules for International Trade.....	30
1.3.2	Basic Rules and Principles of WTO Law	34
1.4.	Sources of WTO Law	38
1.4.1.	The Marrakesh Agreement Establishing the WTO.....	38
1.4.2	Other Sources of WTO Law.....	46
1.6.	Summary.....	46

1.1. INTRODUCTION

At the largest-ever gathering of Heads of State and Government, the Millennium Summit of the United Nations in September 2000, 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

It was decided to *halve* the proportion of the world's people living in absolute poverty by the year 2015.² While data of the World Bank shows that the number of people in extreme poverty fell from 1.451 billion in 1981 to 1.101 billion in 2001, the enormity of the task ahead is obvious to all.³ The income gap between the richest 20 per cent of the world's population and the poorest 20 per cent does not cease to grow. During the 1990s, this gap increased from 60:1 to 86:1.⁴ In discussing the greatest challenges that the world faces, Jimmy Carter, the former US President, stated in his Nobel Lecture in December 2002:

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

² *Ibid.*, para. 19.

³ See World Bank, *World Development Indicators 2004*.

See also S. Bhalla, *Imagine There's no Country* (Institute for International Economics, 2002). Note that the cause of the reduction in poverty is primarily the fast economic growth of Asian countries and, in particular, China. Between 1981 and 1999, the proportion of people in the East Asian and Pacific region living on less than \$ 1 per day fell from 56 per cent to 16 per cent. In China, it fell from 61 per cent to 17 per cent. Note, however, that in Sub-Saharan Africa, the share of people living in absolute poverty rose from 42 per cent to 47 per cent. See also M. Wolf, 'An End to Poverty', *Financial Times*, 4 May 2004.

⁴ Note that the income gap between the richest 20 per cent of the world's population and the poorest 20 per cent stood at around 3:1 in 1820, 11:1 in 1913 and 30:1 in 1970.

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.⁵

One of the defining features of today's world is the process of economic globalisation, a process characterised by high levels of international trade and foreign direct investment. This Chapter examines this process and notes the broad consensus among economists and policy-makers that economic globalisation in general, and international trade and foreign direct investment in particular, offer an unprecedented *opportunity* to eradicate poverty and hunger worldwide. The World Bank, for instance, estimated that abolishing all trade barriers could increase global income by 2.8 trillion US dollars and lift 320 million people out of poverty by 2015.⁶

However, to ensure that this opportunity is realised, economic globalisation has to be *managed* and *regulated* at the international level. If not, economic globalisation is likely to be a curse, rather than a blessing to humankind, aggravating economic inequality, social injustice, environmental degradation and cultural dispossession. The law of the World Trade Organisation is currently the most ambitious effort to manage and regulate international trade. By way of introduction to this book, this Chapter discusses the need for international rules on international trade and gives an overview of basic rules and disciplines of WTO law. It also discusses the different sources of WTO law and examines the sometimes contentious relationship of WTO law with other international law and national law.

1.2. ECONOMIC GLOBALISATION AND INTERNATIONAL TRADE

1.2.1. The Emergence of the Global Economy

1.2.1.1. *The concept of 'economic globalisation'*

'Economic globalisation' has been a popular buzzword for more than a decade now. Politicians, government officials, businessmen, labour unionists, environmentalists, church leaders, public health experts, third-world activists, economists and lawyers all speak of 'economic globalisation'. The concepts of 'globalisation', and 'economic globalisation' in particular, have been used by many to describe the defining feature of the post-Cold War world in which we live. But what does it mean?

Joseph Stiglitz, former Chief Economist of the World Bank and winner of the Nobel Prize for Economics 2001, described the concept of globalisation, in his 2002 book *Globalization and its Discontents*, as:

⁵ J. Carter, Nobel Lecture, Oslo, December 10, 2002.

⁶ M. Bacchetta and M. Jansen, *Adjusting to Trade Liberalization, The Role of Policy, Institutions and WTO Disciplines*, WTO Special Studies 7, April 2003, 6. The World Bank's Annual Report for 2004 states that trade talks to reduce agricultural protectionism could produce \$325 billion by 2015, lifting 140 million people out of poverty by that date.

... 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.⁷

In *The Lexus and the Olive Tree: Understanding Globalisation*, Thomas Friedman defined 'globalisation' as follows:

... it 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, cheaper than ever before.⁸

Economic globalisation is a multifaceted phenomenon, which undoubtedly is not yet fully understood. 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 and in many aspects of their daily lives. It affects their jobs, their food, their health, their education and their leisure time. It affects the price people pay for gasoline, bananas and cars, the movies they watch and the health services accessible to them.

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 before the First World War, there were also large cross-border flows of goods and capital and, more than now, of people. In that period, globalisation was driven by the lowering of trade barriers and by significant reductions in transport costs resulting from technological innovations such as railways and steamships. If one looks at the ratio of trade to output, 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.⁹ That earlier attempt at globalisation ended, however, with the First World War and was followed by one of the darkest times of humankind.

Furthermore, while the *trend* towards globalisation is clear, the extent of today's global economic integration can be, and frequently is, exaggerated. International trade should normally force high-cost, domestic producers to lower their prices and bring prices of products and services between different countries closer together. However, large divergences in prices persist. Even within the European Union, price differences from one country to another remain significant for a number of products and services. This is partly due to differences in transport costs, taxes and the efficiency of distribution networks but it is also due, at least outside the European Union, to the continued existence of important barriers to trade. Furthermore, while goods, services and

⁷ J. Stiglitz, *Globalization and its Discontents* (Penguin, 2002), 9.

⁸ T. Friedman, *The Lexus and the Olive Tree: Understanding Globalisation*, 2nd edition (First Anchor Books, 2000), 9.

⁹ 'One World?', *The Economist*, 18 October 1997.

capital move across borders with greater ease, restrictions on the free movement of workers, i.e., restrictions on economic migration, remain multiple and rigorous.

1.2.1.2. *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.¹⁰ 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 markets 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.¹¹ The cost of a three-minute telephone call between New York and London has fallen from \$300 in 1930 to \$1 in 1997 (in 1996 dollars); the cost of computer processing power has been falling by an average of 30 per cent a year in real terms over the last decades.¹² As a result of cheap and efficient communication, companies can locate different parts of their production process in different parts of the world while remaining in close contact. Activities such as, for example, writing software or accounting can be carried out anywhere in the world, far away from the customer or consumer. New technological developments are likely to further accelerate the process of economic globalisation. The second driving force of economic globalisation has been the liberalisation of international trade and foreign direct investment. Over the last fifty years, most developed countries have gradually but significantly lowered barriers to foreign trade and allowed free movement of capital. In recent 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.

Basically along the same lines, but with a different emphasis, Thomas Friedman argued in *The Lexus and the Olive Tree* that what caused globalisation to happen, and what continues to drive the process, are what he calls:

- the democratisation of technology;
- the democratisation of finance; and
- the democratisation of information.

The democratisation of technology refers, in particular, to the way we communicate and is the result of several technological innovations that came together in the 1980s involving computerisation, telecommunication, miniaturisation, compression technology and digitisation.¹³ According to Friedman, this made it possible for hundreds of millions of people around the

¹⁰ See also M. Wolf, 'Global Opportunities', *Financial Times*, 6 May 1997.

¹¹ R. Porter, 'The Global Trading System in the 21st Century', in R. Porter, P. Sauvé, A. Subramanian and A. Beviglia Zampetti, *Efficiency, Equity, and Legitimacy: the Multilateral Trading System at the Millennium* (Brookings Institution Press, 2001), 4.

¹² 'One World?', *The Economist*, 18 October 1997.

¹³ T. Friedman, *The Lexus and the Olive Tree*, 47.

world to connect and exchange information, news, knowledge and money in ways never witnessed before. Friedman argues:

What this democratization of technology means is that the potential for wealth creation becomes geographically dispersed, giving all kinds of previously disconnected people the chance to access and apply knowledge.¹⁴

[...]

Finally, the democratisation of information refers to the change in how knowledge and information is obtained. Thanks to satellite dishes, cable television and, above all the Internet, many people have virtually unlimited access to information. As Friedman notes:

... the days when governments could isolate their people from understanding what life was like beyond their borders or even beyond their village are over. ... Thanks to the democratization of information, we all increasingly know how each other lives ...

What makes the Internet so dangerous for police states is that they can't afford not to have it, because they will fall behind economically if they do. But if they have it, it means they simply can't control information the way they once did.¹⁵

In his book *Has Globalization Gone Too Far?*, Dani Rodrik of the Kennedy School, Harvard University, highlighted yet another, arguably less positive 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.¹⁶

While some politicians and opinion-makers claim otherwise, the process of economic globalisation is not irreversible. History shows that – for better or worse – most man-made changes in society are reversible. 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 communication and the Internet, that governments, with protectionist intentions, will find very difficult to control. Secondly, liberal international trade policies have now 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, such as North Korea, do not flourish in today's world.

¹⁴ *Ibid.*, 51.

¹⁵ *Ibid.*, 67-68.

¹⁶ D. Rodrik, *Has Globalization Gone Too Far?* (Institute for International Economics, 1997), 85.

1.2.1.3. *Facts and figures on world trade and investment*

By 2003, world exports of goods had increased to 7,294 billion, or more than 7.3 trillion US dollars per year. This represents an increase in international trade by more than 12,500 per cent.¹⁷

World exports of commercial services, marginal in 1948, amounted in 2002 to 1,540 billion US dollars.¹⁸

The ratio of global trade in goods and commercial services to world gross domestic product (GDP) is a reliable and much-used measurement of economic globalisation. In 1950, exports of goods and commercial services represented 8 per cent of GDP; in 2002, these exports represented 29 per cent, 0.2 per cent down from 2000, the top year thus far. Between 1990 and 2000, the ratio increased from 19.8 to 29.2 per cent.

Not only the volume and value of world trade in goods and merchandise and the ratio of global trade to GDP changed significantly over the last fifty years. The share of world trade of various regions of the world also changed over this period. Most remarkable is the decline of the share of North America (the United States, Canada and Mexico) from 27.3 per cent in 1948 to 16.6 per cent in 2001; and the increase of the share of Western Europe (primarily the European Union) from 31.5 per cent in 1948 to 41.5 per cent in 2001 (down from 44 per cent in 1993). Equally remarkable is the steep decline of the shares of both Latin-America and Africa and the significant increase of Asia's share.

In the 1990s, developing countries, *as a group*, increased their share of world exports of goods from 23.4 per cent to 29.8 per cent. During the same period, developing countries increased their share of world exports of commercial services from 18.2 per cent to 23.3 per cent. The share of developing countries in world trade has thus increased over the last decade.¹⁹ However, as Hoekman and Kostecki noted:

Global trade flows are dominated by exchanges within and between the three major regions of the global economy (the so-called triad): Europe, North America, and East Asia. Trade flows involving other parts of the globe are relatively small, accounting for some 15 per cent of world trade. ... Intra-EU and intra-North America trade accounts for 52 per cent of industrial trade ...²⁰

Furthermore, it must be noted that all forty-eight least-developed countries together accounted for only 0.5 per cent of world trade. Their share has actually fallen over time – it stood at 1.7 per cent in 1970. South Asia and Sub-Saharan Africa each represent just over 1 per cent of world trade.²¹

Developing countries have registered particularly rapid increases in their ratios of exports to GDP. Exports now account for more than one-quarter of their

¹⁷ See WTO, *International Trade Statistics 2004*.

¹⁸ See WTO, *World Trade Report 2003*, 10.

¹⁹ See WTO, *International Trade Statistics 2002*.

²⁰ B. Hoekman, and M. Kostecki, *The Political Economy of the World Trading System*, 2nd edition (Oxford University Press, 2001), 9.

²¹ *Ibid.*

combined GDP, a proportion which is higher than that of developed countries.²² Also, the composition of exports from developing countries has changed in recent years. While many developing countries remain dependent on 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.²³

With respect to trade between developing countries, Supachai Panitchpakdi, the WTO Director General, noted:

Enhanced South-South activity offers a potentially great source of expanded trade opportunities in the coming decade. Between 1990 and 2001, South-South trade grew faster than world trade with the share of intra-developing country trade in world merchandise exports rising from 6.5% to 10.6%.²⁴

Another development in international trade worth noting is the increased trade within companies. The foreign sales of the largest 100 transnational corporations are equivalent in value to one-quarter of world trade; approximately two-thirds of all trade takes place within companies. The increase in trade within companies has been one of the most powerful forces behind the expansion of world trade.

Next to international trade, an important aspect of economic globalisation is foreign direct investment ('FDI'). FDI inflows have increased from 57 billion US dollars in 1982 to 1,271 billion US dollars in 2000. This represents an increase of 2,230 per cent. During the second half of the 1990s the annual growth rate of foreign direct investment inflows was, on average, 40.8 per cent. Worldwide employment of foreign affiliates increased from 17.5 million people in 1982 to 45.6 million people in 2000.²⁵

[...]

The *Financial Times* reported this telling example of economic globalisation in February 2003:

Dr Martens, boot-maker to generations of punks, skinheads and factory workers, will this month quietly end centuries of volume shoe manufacturing in Britain by moving its production to a dusty plain in southern China.

... The Pearl river delta - an area the size of Belgium that winds inland from Hong Kong through a series of tightly packed islands - produces \$ 10 billion worth of exports and attracts \$ 1 billion of foreign investment a month. Already, 30m people work in manufacturing here; every day thousands more pour off trains from farms further north.

... The catalyst for the delta's explosive export growth is globalisation. China joined the World Trade Organisation last year. Increasing competition, falling transport costs and flagging consumer demand are forcing multi-national manufacturing companies to flock to the region with the lowest production costs.

²² Oxfam, *Rigged Rules and Double Standards: Trade, Globalization and the Fight Against Poverty*, 2002, Summary of Chapter 1.

²³ *Ibid.*

²⁴ Supachai Panitchpakdi, 'The Doha Development Agenda: What's at Stake for Business in the Developing World?', *International Trade Forum*, August 2003.

²⁵ UNCTAD Secretariat, *World Investment Report 2001: Promoting Linkages*, 10.

In Dr Martens' case, fierce price competition from rival US brands already produced in China forced the company's hand. "It was absolutely obvious from the moment I arrived that we had to move to China like everyone else," says David Suddens, managing director. Dr Martens will outsource production to factories owned by Pou Chen and Golden Chang, Taiwanese companies that moved to the mainland to take advantage of lower labour costs.

Pou Chen's plants, one in Zhuhai and one in Dongguan, employ 110,000 people and churn out 100m pairs of shoes a year for Nike, Adidas, Caterpillar, Timberland, Hush Puppy, Reebok, Puma and others.

... Dr Martens pays its 1,100 UK workers about \$490 a week and has built a stadium for the local football club. Pou Chen pays about Rmn800 (\$100) a month, or 36 cents an hour, for up to 69 hours a week and provides dormitories for migrant workers who must obey strict curfews. The light, well ventilated working conditions are far better than many visitors expect. Stung by complaints of exploitation, Nike and other buyers have full-time local offices monitoring most aspects of employee life.

... Nevertheless, older shoe factories are beginning to find it hard to attract and retain workers tempted by better-paid jobs in other plants. Pou Chen is opening a factory further inland where labour is more plentiful. ... Although labour rates are creeping up, the economies of scale keep supply costs down and attract even more companies to relocate.²⁶

In August 2003, the *Financial Times* reported on the globalisation of the trade in services with the following story:

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 Centre, 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 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.²⁷

Patients also travel around the world to find good and affordable medical care. An increasing number of foreigners are going to India for heart by-pass operations. The average cost, including air fare, is about \$7,000 - roughly a quarter of what it would be in the UK private sector - and there are no waiting lists. At the Escorts Heart Institute in New Delhi, more than 4,000 heart bypass

²⁶ D. Roberts and J. Kynge, 'The new workshop of the world', *Financial Times*, 3 February 2003.

²⁷ D. Roberts and E. Luce, 'Service industries go global', *Financial Times*, 19 August 2003.

operations - the highest of any single institute in the world - were performed last year. At 0.8 per cent, Escorts' mortality rate was comparable with international standards.²⁸

1.2.2. Economic Globalisation: A Blessing or a Curse?

1.2.2.1. *Backlash against economic globalisation*

Everyone around the world feels the effects of economic globalisation, but these effects are not felt by all in an even or equitable way. In recent years, massive street protests in Seattle, Prague, Montréal, Washington, Geneva, Göteborg, Genoa and Zurich have shown that many people in developed countries are 'dissatisfied' with economic globalisation. Also in developing countries, hostility towards economic globalisation is growing and becoming more vocal. As Fred Bergsten, Director of the Institute for International Economics in Washington D.C. noted at the 2000 Annual Meeting of the Trilateral Commission:

... there is a big backlash against globalization. We see it in the financial world. We certainly see it in the trading world as well. It's much more fundamental than pure economics. We know that globalization does increase income and social disparities within countries. We know that globalization does leave some countries and certainly some groups of people behind. We do know that a lot of Europeans don't want to eat genetically modified American foods and that adds to their resistance to globalization. We know that a lot Americans worry about races to the bottom, labor standards, environmental standards, and other perceived doubts about dealing with the rest of the world. We know that a lot of developing countries are raising doubts about the entire system, and such specifics as whether having agreed to the enshrinement of intellectual property rights is really in their national interest. (They would like to pull it back out of the WTO, having agreed to put it in five or six years ago.) So the list is long of the perceived intrusions of globalization into national sovereignties. There is therefore a backlash against it, which I think we have to take as an extremely serious economic, political, and social matter.²⁹

According to opponents of the current economic globalisation process, there is excessive emphasis on the economic interests of transnational corporations. In their opinion, social, cultural and environmental interests and the interests of developing countries are not sufficiently taken into account. Often, they hold economic globalisation responsible for world poverty and hunger, environmental disasters, unemployment and many other wrongs of today's world. To many, global economic integration is a malignant force that is destroying the livelihood of millions of workers and exacerbates inequality, social injustice and environmental degradation.

A 2001 study by the Institute of International Economics in Washington D.C. concluded that numerous surveys indicated that a significant number of Americans opposed further liberalisation of trade, immigration and foreign direct investment, and that an absolute majority of Americans wanted liberalisation to go more slowly. According to the study, most Americans know the advantages of open markets but tend to view the costs – especially the

²⁸ *Ibid.*

²⁹ F. Bergsten, 'The Backlash Against Globalization', Remarks made to the 2000 Annual Meeting of the Trilateral Commission in Tokyo.

supposedly negative impact on American jobs and wages – as more important.³⁰ In Europe, the popular backlash against economic globalisation is probably even more pronounced. In some European countries and, in particular, France, there is a widespread perception that globalisation is a conspiracy of ruthless Anglo-Saxons.³¹ In 1997, economists at the Brookings Institution in Washington D.C. coined the term ‘globaphobia’ to describe the ‘irrational’ fear of economic globalisation that seems to haunt the popular psyche these days in most industrial countries.³²

In commenting on the arguments of the ‘anti-globalists’, Philip Stevens of the *Financial Times* observed that while there are important truths in these arguments, they are often confused and contradictory:

The anarchists have no need of consistency. But the broader coalition of anti-globalists often seems just as inchoate. Non-governmental organisations want the multinationals tamed. Governments must reclaim the sovereignty lost to unaccountable and unscrupulous business executives. The IMF, the World Trade Organisation and the rest are agents of a new imperialism. And yet then we hear the protesters call for new global rules to protect the environment and prevent exploitation of labour. Self-interested trade unions stand with self-proclaimed idealists in demanding that rich nations protect jobs by imposing their own labour standards on poor ones. Somewhere in all this there is a cry for a different set of values. It is often hard to find. But it is there. And it explains why the protesters are winning.³³

As Stevens correctly observes, the constituency of the ‘anti-globalists’ in developed countries stretches well beyond the mostly young activists protesting on the streets:

Many who abhor their tactics share their unease. Globalisation is unsettling, for the comfortable middle classes as much as for the politically disaffected. The threats, real or imagined, to national and local cultures are widely felt. So, too, are the unnerving shifts in the boundaries between governments, business and multilateral institutions. As consumers we are stronger; as citizens, weaker.³⁴

Moreover, in leading developing countries such as India and Brazil, large sections of the population also appear fearful of, and hostile towards, further trade liberalisation and economic globalisation. Since the disastrous 1999 session of the Ministerial Conference of the WTO in Seattle, a growing number of developing countries have become ever more critical of the current process of economic globalisation.

UN Secretary General Kofi Annan noted in a speech to the World Economic Forum in Davos on 28 January 2001:

For far too many people in the world today, greater openness looms as a threat – a threat to their livelihoods, to their ways of life, and to the ability of their governments to serve and protect them. Even when it may be exaggerated or misplaced, “fear has big eyes,” in the words of the Russian proverb. And, we might add, it has the ear of governments, who feel compelled to respond.³⁵

³⁰ As reported by R. Dale in ‘Anti-Globalization Forces Gain Steam: Movement Brings Together Strange Bedfellows From Right and Left’, *International Herald Tribune*, 16 March 2001.

³¹ F. Bolkenstein, ‘To the Enemies of Globalization’, *Wall Street Journal*, 25 September 2000.

³² R. Dale, ‘Prescribing Fact to Cure “Globaphobia”’, *International Herald Tribune*, 7 October 1997.

³³ P. Stevens, ‘A Poor Case for Globalisation: The world’s leaders are failing to address legitimate questions raised by protesters about the effects of global capitalism’, *Financial Times*, 17 August 2001.

³⁴ *Ibid.*

³⁵ From the Address by UN Secretary General Kofi Annan in Davos, Switzerland, on 28 January 2001 to the World Economic Forum.

The discussion of globalisation and trade liberalisation is often emotionally charged and, therefore, unfortunately not always productive. Oxfam noted in its 2002 study, *Rigged Rules and Double Standards: Trade, Globalization, and the Fight Against Poverty*, the following:

Current debates about trade are dominated by ritualistic exchanges between two camps: the 'globaphiles' and the 'globaphobes'. 'Globaphiles' argue that trade is already making globalisation work for the poor. Their prescription for the future is 'more of the same'. 'Globaphobes' turn this world-view on its head. They argue that trade is inherently bad for the poor. Participation in trade, so the argument runs, inevitably leads to more poverty and inequality. The corollary of this view is 'the less trade the better'.

The anti-globalisation movement deserves credit. It has raised profoundly important questions about social justice - and it has forced the failures of globalisation on to the political agenda. However, the war of words between trade optimists and trade pessimists that accompanies virtually every international meeting is counter-productive. Both world views fly in the face of the evidence - and neither offers any hope for the future.³⁶

1.2.2.2. *Problems of current economic globalisation*

Economic globalisation and international trade currently gives rise to problems and tensions in developed as well as developing countries.

Bill Jordan, General Secretary of the International Confederation of Free Trade Unions, wrote in December 2000:

If you want to belittle a point of view, it is easiest to caricature that point of view as nothing more than a slogan daubed on a placard and paraded through the streets. Too often this has led to misrepresenting the views of labor unions in the face of globalization. ... The international labor movement is not against globalization; indeed we would agree that globalization can be a big part of the answer to the problems of the world's poor. But it also is a big part of the problem. In other words, globalization is neither entirely beneficial nor entirely harmful. It is not an unstoppable force of nature, but is shaped by those who set the rules. And while it has the potential to help lift more than 2 billion people out of poverty, it is not doing so now.³⁷

War on Want, one of the more thought-provoking non-governmental organizations (NGO) with close links to the international labour movement, summarises its position regarding economic globalisation as follows:

Jobs are always welcomed by those who live in the developing world. But many of these employees are paid next to nothing, and work in dangerous conditions facing physical and verbal abuse from their employers. Meanwhile, in the developed world, workers are being laid off at an alarming rate and made to feel that they need to compete with workers in the developing world. The globalisation of trade and investment affects labour standards, working conditions, the environment, human health and many other aspects of our lives. Currently, too little attention is being paid to these effects. We need to ensure there are global rules to govern the effects of a global economy.³⁸

War on Want is not opposed to globalisation, but wants to see the benefits of globalisation more evenly spread across the world. According to this NGO,

³⁶ Oxfam, *Rigged Rules and Double Standards: Trade, Globalization, and the Fight Against Poverty*, 2002, Summary of Chapter 1.

³⁷ B. Jordan, 'Yes to Globalization, But Protect the Poor', *International Herald Tribune*, 21 December 2000.

³⁸ Excerpts from 'The Global Workplace', a project of War on Want.

economic globalisation benefits primarily transnational corporations ('TNCs') and often spells disaster for industries in developing countries as well as for workers worldwide.

TNCs can treat the world like their assembly line - manufacturing goods where labour is cheapest, basing operations where taxes are lowest and selling goods where the price is highest. If taxes or labour laws are imposed in one country, they can simply move to another.

... Reducing restrictions on trade and investment has also caused economic instability. If wages are too high or governments introduce regulations such as a minimum wage, corporations can simply move elsewhere, leaving people with nothing. Increasingly, corporations are finding ways to improve their mobility - for example, many companies don't buy factories anymore, they sign short-term contracts with locally-based operators. This means working people are afraid of fighting for better conditions because corporations threaten not to renew their contracts if conditions are improved. Moreover, it means that the corporations can claim that responsibility for wages and conditions has nothing to do with them.

... Industries in developing economies are often fairly new, and not as resilient as large western corporations. For these local industries, open competition may spell destruction, and this forces these countries to continue their dependence on the production of raw materials and low-cost goods. On the other hand, developed countries often have something to fear from competition with the developing world: lower wages and worse conditions mean that their own companies might be undercut. World trade rules have been designed to prevent unrestricted imports to the developed world and to protect producers in wealthy countries.³⁹

ATTAC, the Association for the Taxation of Financial Transactions for the Aid of Citizens, takes a similar position against 'corporate globalisation' which, it contends, results in:

... the concentration of wealth in the hands of the rich few, growing inequality within and between nations, increasing poverty for the majority of the world's peoples, displacement of farmers and workers especially in third world countries, and unsustainable patterns of production and consumption.⁴⁰

With respect to further liberalisation of trade, ATTAC argues:

The time has come to acknowledge the crises of the international trading system and its main administering institution, the WTO. It is time to stop ... and turn trade around to serve the interest of all. We need to replace this old, unfair and oppressive trade system with a new, socially just and sustainable trading framework for the 21st Century. We need to protect cultural, biological, economic and social diversity; introduce progressive policies to prioritise local economies and trade; secure internationally recognized economic, cultural, social and labor rights; and reclaim the sovereignty of peoples and national and subnational democratic decision making processes. In order to do this, we need new rules based on the principles of democratic control of resources, ecological sustainability, equity, cooperation and precaution.⁴¹

Developing countries' governments and third-world activists commonly argue: first, that developing countries are being forced to open their markets too far, too fast; second, that rich countries are conspiring to keep their markets closed to products from developing countries which compete with their products (agricultural products, textiles and clothing); and third, that developing countries lack the resources and the information to negotiate effectively, to

³⁹ *Ibid.*

⁴⁰ Excerpts from ATTAC Quarterly Report, September 2001, International Trade, N°2, Vol. I.

⁴¹ *Ibid.*

implement trade agreements and to exploit world trade rules to their advantage. As UN Secretary General Kofi Annan once noted:

Try to imagine what globalization can possibly mean to the half of humanity that has never made or received a telephone call; or to the people of Sub-Saharan Africa, who have less Internet access than the inhabitants of the borough of Manhattan?⁴²

While not sharing the extreme positions of anti-globalists and being careful ‘not to make the mistake of attributing to globalization the blemishes of other faces’,⁴³ many observers and scholars recognise the dangers of the economic globalisation process.

In *Globalization and its Discontents*, Joseph Stiglitz reflected on the bright and dark sides of globalisation as follows:

Opening up to international trade has helped many countries grow far more quickly than they would otherwise have done. International trade helps economic development when a country’s exports drive its economic growth. Export-led growth was the centrepiece of the industrial policy that enriched much of Asia and left millions of people there far better off. Because of globalization many people in the world now live longer than before and their standard of living is far better. People in the West may regard low-paying jobs at Nike as exploitation, but for many people in the developing world, working in a factory is a far better option than staying down on the farm and growing rice.

Globalization has reduced the sense of isolation felt in much of the developing world and has given many people in the developing countries access to knowledge well beyond the reach of even the wealthiest in any country a century ago. ... Even when there are negative sides to globalization, there are often benefits. Opening up the Jamaican milk market to U.S. imports in 1992 may have hurt local dairy farmers but it also meant poor children could get milk more cheaply. New foreign firms may hurt protected state-owned enterprises but they can also lead to the introduction of new technologies, access to new markets, and the creation of new industries.⁴⁴

However, Stiglitz continued:

Those who vilify globalization too often overlook its benefits. But the proponents of globalization have been, if anything, even more unbalanced. To them, globalization (which typically is associated with accepting triumphant capitalism, American style) *is* progress; developing countries must accept it, if they are to grow and to fight poverty effectively. But to many in the developing world, globalization has not brought the promised economic benefits.

A growing divide between the haves and the have-nots has left increasing numbers in the Third World in dire poverty, living on less than a dollar a day. Despite repeated promises of poverty reduction made over the last decade of the twentieth century, the actual number of people living in poverty has actually increased by almost 100 million. This occurred at the same time that total world income actually increased by an average of 2.5 per cent annually.⁴⁵

Elsewhere, Stiglitz wrote about the problems and dangers of current economic globalisation and trade liberalisation:

We should be frank. Trade liberalization, conducted in the wrong way, too fast, in the absence of adequate safety nets, with insufficient reciprocity and assistance on the part of developed countries, can contribute to an increase in poverty. ...

⁴² From the Address by UN Secretary General Kofi Annan in Davos, Switzerland, on 28 January 2001 to the World Economic Forum.

⁴³ J. Bhagwati, ‘Globalization in Your Face’, *Foreign Affairs*, July/August 2000, 137.

⁴⁴ J. Stiglitz, *Globalization and its Discontents* (Penguin, 2002), 4-5.

⁴⁵ *Ibid.*, 5.

Complete openness can expose a country to greater risk from external shocks. Poor countries may find it particularly hard to buffer these shocks and to bear the costs they incur, and they typically have weak safety nets, or none at all, to protect the poor. These shocks, resulting essentially from contagion associated with globalization, integration and interdependence can affect workers and employers in the developed world. It must be said, however, that highly industrialized countries are able to deal with these shocks a lot better through re-employment and through other safety nets. ...

In summary, while I recognize that there are costs associated with liberalization, which animate much of the support for restrictive trade practices, I am convinced that the benefits of trade liberalization far outweigh these costs. These do not give us license to ignore the costs. Developed countries have recognized the costs, including the political costs, within their own countries, and have introduced provisions in trade agreements that begin to address them.⁴⁶

Dani Rodrik observed that the international integration of markets for goods, services, and capital is pressuring societies to alter their traditional practices. In response, broad segments of these societies are putting up a fight:

Ask business executives and government officials why these changes are necessary, and you will hear the same mantra repeatedly: "We need to remain (or become) competitive in a global economy". The opposition to these changes is no less tangible and sometimes makes for strange bedfellows. Labor unions decrying unfair competition from underage workers overseas and environmentalists are joined by billionaire businessmen Ross Perot and Sir James Goldsmith in railing against the North American Free Trade Agreement (NAFTA) and the World Trade Organization (WTO). In the United States, perhaps the most free-market-oriented of advanced industrial societies, the philosophical foundations of the classic liberal state have come under attack not only from traditional protectionists but also from the new communitarian movement, which emphasizes moral and civic virtue and is inherently suspicious of the expansion of markets ... The process that has come to be called "globalization" is exposing a deep fault line between groups who have the skills and mobility to flourish in global markets and those who either don't have these advantages or perceive the expansion of unregulated markets as inimical to social stability and deeply held norms.⁴⁷

Rodrik identified and discussed three sources of tension between the global market and social stability in developed countries:

First, reduced barriers to trade and investment accentuate the asymmetry between groups that can cross international borders (either directly or indirectly, say through outsourcing) and those that cannot. In the first category are owners of capital, highly skilled workers, and many professionals, who are free to take their resources where they are most in demand. Unskilled and semiskilled workers and most middle managers belong to the second category. ... The fact that "workers" can be more easily substituted for each other across national boundaries undermines what many conceive to be a post-war social bargain between workers and employers, under which the former would receive a steady increase in wages and benefits in return for labor peace. ...

Second, globalization engenders conflicts within and between nations over domestic norms and the social institutions that embody them. As the technology for manufactured goods becomes standardized and diffused internationally, nations with very different sets of values, norms, institutions, and collective preferences begin to compete head on in markets for similar goods. And the spread of globalization creates opportunities for trade between countries at very different levels of development. ... Trade becomes contentious when it unleashes forces that undermine the norms implicit in domestic practices. ... We cannot understand what is

⁴⁶ J. Stiglitz, 'Addressing Developing Country Priorities and Needs in the Millennium Round', in R. Porter and P. Sauvé (eds.), *Seattle, the WTO and the Future of the Multilateral Trading System* (Harvard University, 2000), 31-60, at 53-55.

⁴⁷ D. Rodrik, *Has Globalization Gone Too Far?* (Institute for International Economics, 1997), 2.

happening in these new areas until we take individual preferences for processes and the social arrangements that embody them seriously. In particular, by doing so we can start to make sense of people's uneasiness about the consequences of international economic integration and avoid the trap of automatically branding all concerned groups as self-interested protectionists. ...

Third, globalization has made it exceedingly difficult for governments to provide social insurance—one of their central functions and one that has helped maintain social cohesion and domestic political support for ongoing liberalization throughout the postwar period. In essence, governments have used their fiscal powers to insulate domestic groups from excessive market risks, particularly those having an external origin. In fact, there is a striking correlation between an economy's exposure to foreign trade and the size of its welfare state. ... At the present, however, international economic integration is taking place against the background of receding governments and diminished social obligations. ...

Moreover, the increasing mobility of capital has rendered an important segment of the tax base footloose, leaving governments with the unappetizing option of increasing tax rates disproportionately on labor income. Yet the need for social insurance for the vast majority of the population that remains internationally immobile has not diminished. ... The question therefore is how the tension between globalization and the pressures for socialization of risks can be eased. If the tension is not managed intelligently and creatively, the danger is that the domestic consensus in favor of open markets will ultimately erode to the point where a generalized resurgence of protectionism becomes a serious possibility.⁴⁸

In reply to the question contained in the title of his book *Has Globalization Gone Too Far?*, Rodrik stated that, in his opinion, this is not the case if 'policymakers act wisely and imaginatively'.⁴⁹

In *The Lexus and the Olive Tree* Thomas Friedman also saw the need for government action when he noted:

... the more I observed the system of globalization at work, the more obvious it was that it had unleashed forest-crushing forces of development and Disney-round-the-clock homogenization, which, if left unchecked, had the potential to destroy the environment and uproot cultures at a pace never before seen in human history.⁵⁰

1.2.3. Trade Liberalisation *versus* Protectionism

1.2.3.1. *The case for international trade and trade liberalisation*

Economic globalisation in general and international trade in particular is blamed by many for much that is wrong in today's world: from hunger and child labour to environmental pollution and cultural impoverishment. Is international trade beneficial to anyone other than multinational corporations, the well-educated in developed countries and privileged elites in developing countries? Can economic globalisation in general and international trade in particular benefit all humankind?

Most economists agree that countries can benefit from international trade. In 1776, Adam Smith wrote in his classic book, *The Wealth of Nations*:

It is the maxim of every prudent master of a family, never to attempt to make at home what it will cost him more to make than to buy. The tailor does not attempt to make his own shoes, but

⁴⁸ *Ibid.*, 4-6.

⁴⁹ *Ibid.*, 9.

⁵⁰ T. Friedman, *The Lexus and the Olive Tree: Understanding Globalisation*, 2nd edition (Anchor Books, 2000), 23.

he buys them from the shoemaker. The shoemaker does not attempt to make his own cloths, but employs a tailor. The farmer attempts to make neither the one nor the other, but employs those different artificers. All of them find it for their interest to employ their whole industry in a way in which they have some advantage over their neighbours, and to purchase with a part of its produce, or what is the same thing, with the price of a part of it, whatever else they have occasion for.

What is prudence in the conduct of every private family, can scarce be folly in that of a great kingdom. If a foreign country can supply us with a commodity cheaper than we ourselves can make it, better buy it of them with some part of the produce of our own industry, employed in a way in which we have some advantage. The general industry of the country, ... will not thereby be diminished, no more than the above-mentioned artificers; but only left to find out the way in which it can be employed with the greatest advantage. It is certainly not employed to the greatest advantage, when it is thus directed towards an object which it can buy cheaper than it can make.⁵¹

Smith's lucid and compelling argument for specialisation and international trade was further built upon by David Ricardo, who in his 1817 book, *The Principles of Political Economy and Taxation*, developed the theory of 'comparative advantage'. This theory is still the predominant explanation for why countries, even the poorest, can and do benefit from international trade.

What did the classical economist David Ricardo (1772–1823) mean when he coined the term *comparative advantage*? Suppose country A is better than country B at making automobiles, and country B is better than country A at making bread. It is obvious (the academics would say "trivial") that both would benefit if A specialized in automobiles, B specialized in bread and they traded their products. That is a case of *absolute* advantage. But what if a country is bad at making everything? Will trade drive all producers out of business? The answer, according to Ricardo, is no. The reason is the principle of comparative advantage, arguably the single most powerful insight in economics. According to the principle of comparative advantage, countries A and B still stand to benefit from trading with each other even if A is better than B at making everything, both automobiles and bread. If A is much more superior at making automobiles and only slightly superior at making bread, then A should still invest resources in what it does best — producing automobiles — and export the product to B. B should still invest in what it does best — making bread — and export that product to A, even if it is not as efficient as A. Both would still benefit from the trade. A country does not have to be best at anything to gain from trade. That is *comparative* advantage. The theory is one of the most widely accepted among economists. It is also one of the most misunderstood among non-economists because it is confused with *absolute* advantage. It is often claimed, for example, that some countries have no comparative advantage in anything. That is virtually impossible. Think about it ...⁵²

The Ricardo model is of course a vast simplification, in that it is built on two products and two countries only and assumes constant costs and constant prices. Many of the complexities of the modern economy are not taken into account in this model. Economists in the twentieth century have endeavoured to refine and build on the classic Ricardo model. While pushing the analysis further, the refined models, such as the Heckscher-Ohlin model, have confirmed the basic conclusions drawn from the Ricardo model concerning the theory of comparative advantage and the gains from trade via specialisation.⁵³

⁵¹ A. Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776), edited by E. Cannan (University of Chicago Press, 1976), Volume 1, 478-479.

⁵² WTO Secretariat, *Trading into the Future*, 2nd edition (WTO, 1998), 8-9.

⁵³ Note, however, as Jagdish Bhagwati does, that: The case of free trade rests on the extension to an open economy of the case for market-determined allocation of resources. If market prices reflect "true" or social costs, then clearly

While the theory of comparative advantage has won approval from most economists ever since the early nineteenth century and continues to win approval,⁵⁴ Jagdish Bhagwati observed in *Free Trade Today* that it has only infrequently carried credibility with the populace at large. In search for an explanation, he noted:

Part of the reason has to do with the counterintuitive nature of the argument that free trade leads to greater good. When asked by the mathematician Stanislaw Ulam (the brother of the great historian Adam Ulam) which proposition in the social science was the most counterintuitive yet compelling, Paul Samuelson chose the law of comparative advantage: in other words, the underlying argument for free trade. Most people think it intuitively sound that you should do most things that you do better than others, not specialize.⁵⁵

Paul Samuelson, Nobel Prize Winner for Economics, wrote that there is essentially only one - but one very powerful - argument for freer trade:

Free trade promotes a mutually profitable division of labor, greatly enhances the potential real national product for all nations, and makes possible higher standards of living all over the globe.⁵⁶

In *Trading into the Future*, the WTO argued for open international trade as follows:

The data show a definite statistical link between freer trade and economic growth. Economic theory points to strong reasons for the link. All countries, including the poorest, have assets — human, industrial, natural, financial — which they can employ to produce goods and services for their domestic markets or to compete overseas. Economics tells us that we can benefit when these goods and services are traded. Simply put, the principle of “comparative advantage” says that countries prosper first by taking advantage of their assets in order to concentrate on what they can produce best, and then by trading these products for products that other countries produce best.

Firms do exactly that quite naturally on the domestic market. But what about the international market? Most firms recognize that the bigger the market the greater their potential — they can expand until they are at their most efficient size, and they can have access to large numbers of customers.

In other words, liberal trade policies — policies that allow the unrestricted flow of goods and services — multiply the rewards that result from producing the best products, with the best design, at the best price.⁵⁷

Supachai Panitchpakdi, WTO Director-General, commented in August 2003:

The international business community knows from experience that severe impediments to trade hurt economic growth. A growing body of evidence indicates that open, export-oriented countries have succeeded in their development efforts, while heavily protected, inward-looking

Adam Smith’s invisible hand can be trusted to guide us to efficiency; and free trade can correspondingly be shown to be the optimal way to choose trade (and associated domestic production). But if markets do not work well, or are absent or incomplete, then the invisible hand may point in the wrong direction: free trade cannot then be asserted to be the best policy. See J. Bhagwati, *Free Trade Today* (Princeton University Press, 2002), 12.

⁵⁴ For a dissenting, neo-Marxist view from legal scholars, see M. H. Davis and D. Neacsu, ‘Legitimacy, Globally: The Incoherence of Free Trade Practice, Global Economics and their Governing Principles of Political Economy’, *Kansas City Law Review*, 2001, 733-790.

⁵⁵ J. Bhagwati, *Free Trade Today* (Princeton University Press, 2002), 5.

⁵⁶ P. Samuelson, *Economics*, 10th edition (1976), 692.

⁵⁷ WTO Secretariat, *Trading into the Future*, 2nd edition (WTO, 1998), 8-9.

countries have not. There is a clear positive correlation between openness and income and there is little evidence that countries that have protected infant or so-called 'dynamic sectors' have done better than more open, export-oriented economies.

...

An open economy that specializes in its areas of comparative advantage can make more effective investments and, at the same time, create incentives for additional investment. This generally leads to a faster rate of growth than can be achieved in less open economies.⁵⁸

On the question whether free international trade, or rather freer international trade, leads to greater economic *growth*, Jagdish Bhagwati concluded:

So those who assert that free trade will also lead necessarily to greater growth *either* are ignorant of the finer nuances of theory and the vast literature to the contrary on the subject at hand *or* are nonetheless basing their argument on a different premise: that is, that the preponderant evidence on the issue (in the postwar period) suggests that freer trade tends to lead to greater growth after all.⁵⁹

A 2001 study by the World Bank showed that the developing countries that increased their integration into the world economy in the 1980s and 1990s achieved higher growth in incomes, longer life expectancy and better schooling. These countries, home to some three billion people, enjoyed an average 5 per cent growth rate in income per capita in the 1990s compared to 2 per cent in developed countries. Many of these countries, including China and India, have adopted domestic policies and institutions that have enabled people to take advantage of global markets and have thus sharply increased the share of trade in their GDP. These countries have been catching up with the rich ones – their annual growth rates increased from 1 per cent in the 1960s to 5 per cent in the 1990s. Indeed, the World Bank's Annual Report for 2004 states that India provides 77% of South Asia's GDP and that its GDP grew by 6.8% in 2003. The GDPs of Bangladesh, Pakistan and Sri Lanka also grew by approximately 5.5% in 2003. However, not all countries have integrated successfully into the global economy. The World Bank's 2001 report found that some 2 billion people – particularly in sub-Saharan Africa, the Middle East, and the former Soviet Union – live in countries that are being left behind. On average, these economies have contracted, poverty has increased, and education levels have risen less rapidly than in the more globalised countries.⁶⁰

As a 2000 WTO Study, *Trade, Income Disparity and Poverty*, on the relationship between international trade and poverty concluded, the evidence seems to indicate that trade liberalisation is *generally* a positive contributor to poverty alleviation. It allows people to exploit their productive potential, assists economic growth, curtails arbitrary policy interventions and helps to insulate against shocks in the domestic economy. The study warned, however, that most trade reforms will create some losers (some even in the long run), and poverty may be exacerbated temporarily, but the appropriate policy response in those cases is to alleviate the hardship and facilitate adjustments rather than abandon

⁵⁸ Supachai Panitchpakdi, 'The Doha Development Agenda: What's at Stake for Business in the Developing World?', *International Trade Forum*.

⁵⁹ J. Bhagwati, *Free Trade Today* (Princeton University Press, 2002), 42.

⁶⁰ See P. Collier and D. Dollar, *Globalization, Growth and Poverty: Building an Inclusive World Economy* (World Bank, 2001).

the reform process.⁶¹ A 2003 WTO study, *Adjusting to Trade Liberalization*, concluded that adjustment costs are typically smaller, and sometimes much smaller, than the gains from trade.⁶² Also, governments can identify individuals and groups that are likely to suffer from the adjustment process and they can develop policies to alleviate the burden on those adversely affected.⁶³

In its 2002 study, *Rigged Rules and Double Standards: Trade, Globalization, and the Fight Against Poverty*, Oxfam stated:

History makes a mockery of the claim that trade cannot work for the poor. Participation in world trade has figured prominently in many of the most successful cases of poverty reduction - and, compared with aid, it has far more potential to benefit the poor.

If developing countries increased their share of world exports by just 5 per cent, this would generate \$ 350 billion - seven times as much as they receive in aid. The \$ 70 billion that Africa would generate through a 1 per cent increase in its share of world exports is approximately five times the amount provided to the region through aid and debt relief.

Apart from the financial benefits, export growth can be a more efficient engine of poverty reduction than aid. Export production can concentrate income directly in the hands of the poor, creating new opportunities for employment and investment in the process. ...

Experience from East Asia illustrates what is possible when export growth is broadbased. Since the mid-1970s, rapid growth in exports has contributed to a wider process of economic growth which has lifted more than 400 million people out of poverty. In countries such as Vietnam and Uganda, production for export markets has helped to generate unprecedented declines in the levels of rural poverty. Where export growth is based on labour-intensive manufactured goods, as in Bangladesh, it can generate large income gains for women.⁶⁴

International trade not only has the potential for bringing economic benefits, there may also be considerable non-economic gains. International trade increases both the incentives for not making war and the costs of going to war. International trade intensifies cross-border contacts and exchange of ideas, which may contribute to better mutual understanding. In a free trading world, other countries and their people are more readily seen as business partners, less as enemies. On the contrary, a country taking trade restrictive measures directly inflicts economic hardship upon exporting countries. Therefore, trade protectionism is a festering source of conflict. Likewise, international trade can make an important contribution to peaceful and constructive international relations. Just two weeks after the terrorist attacks of 11 September 2001 on the World Trade Center in New York and on the Pentagon in Washington DC, US Trade Representative Robert Zoellick made the following simple but profound statement about the importance of continued openness in trade:

⁶¹ See D. Ben-David, H. Nordström, and A. Winters, *Trade, Income Disparity and Poverty*, Special Studies Series (WTO, 2000), 6.

⁶² See M. Bacchetta and M. Jansen, *Adjusting to Trade Liberalization, The Role of Policy, Institutions and WTO Disciplines*, WTO Publications, 7 April 2003, 6.

⁶³ *Ibid.*

⁶⁴ Oxfam, *Rigged Rules and Double Standards: Trade, Globalization, and the Fight Against Poverty*, 2002, Summary of Chapter 2.

Let me be clear where I stand: Erecting new barriers and closing old borders will not help the impoverished. It will not feed hundreds of millions struggling for subsistence. It will not liberate the persecuted. It will not improve the environment in developing countries or reverse the spread of AIDS. It will not help the railway orphans I visited in India. It will not improve the livelihoods of the union members I met in Latin America. It will not aid the committed Indonesians I visited who are trying to build a functioning, tolerant democracy in the largest Muslim nation in the world. ...⁶⁵

However, as Edward Alden wrote in the *Financial Times* in February 2003:

US trade policy risks isolating the Muslim states that are on the front line in the war on terrorism, according to a study released on Tuesday. The report - from the Washington-based Progressive Policy Institute - warns that the Muslim world has been "the blank spot on the map of the Bush administration's trade policy". It adds: "That policy risks undermining, rather than supporting, the war on terrorism." The failing economies of many Muslim states have been repeatedly acknowledged by the White House as fertile recruiting grounds for terrorist groups. But critics say the US has done little to tackle the problem, and has been stingy with trade concessions to some of its closest allies in the war on terrorism. Kursheed Kasuri, Pakistan's foreign minister, said last week that "economics is the key to fighting terrorism", and criticised Washington for failing to offer greater trade concessions. Pakistan had hoped for about \$ 1 billion in additional sales of textiles and clothing to the US to offset the costs of the war on terrorism, but - under pressure from its own textile industry - the US granted just \$143m.⁶⁶

Apart from peaceful relations between nations, open international trade may also promote democracy. In *Free Trade Today*, Jagdish Bhagwati observed:

One could argue this proposition by a syllogism: openness to the benefits of trade brings prosperity that, in turn, creates or expands the middle class that then seeks the end of authoritarianism. This would fit well with the experience in South Korea, for instance. It was also the argument that changed a lot of minds when the issue of China's entry into the WTO came up in the U.S. Congress recently. I guess there is something to it.⁶⁷

It has been reported that international trade and investment have already had a certain impact on the political system in China:

Not only is the southern boom town of Shenzhen about to be designated a test-bed for the boldest political reform since the 1949 revolution but cities in coastal China are also embarking on experiments to introduce checks and balances to single party rule. Yu Youjun, mayor of Shenzhen, said in an interview that the wishes of multinational corporations were one motive for the city's experiment. Foreign companies, especially those establishing high-technology factories, are mindful of the need to protect intellectual property. For this, they need a fair local government. "Every multinational company and investor is influenced by the investment environment created by governments," said Mr Yu, whose city was chosen 22 years ago as a laboratory for China's first capitalist reforms and now leads the country in per capita income. The "hard environment" of roads, railways, ports and telecommunications was important for multinationals, Mr Yu said. But more crucial was the "soft environment", meaning a government that is "democratic" and transparent. "We have made achievements in building our economic structural reform," said Mr Yu. "Now we need to make reforms to our political system to promote democratic politics."⁶⁸

⁶⁵ As reported by the then WTO Director-General Mike Moore in a speech to the Foreign Affairs Commission of the French Assemblée Nationale in October 2001.

⁶⁶ E. Alden, 'US trade policy "isolates Muslim states"', *Financial Times*, 3 February 2003.

⁶⁷ J. Bhagwati, *Free Trade Today* (Princeton University Press, 2002), 43-44.

⁶⁸ D. Roberts and J. Kynge, 'The New Workshop of the World', *Financial Times*, 3 February 2003.

1.2.3.2. *Reasons and excuses for protectionist trade policies*

While most economists advise that countries should - in their own interest and that of the world at large - pursue policies aimed at promoting international trade and exchange goods and services on the basis of their comparative advantage, political decision-makers do not necessarily heed this wise advice. In fact, countries actively intervene in international trade by adopting trade restrictive measures. Why do countries adopt protectionist trade measures? Why do they restrict international trade?

There are numerous and varied reasons why countries take trade restrictive measures. A prime reason for a country to take trade restrictive measures is to protect a domestic industry and employment in that industry from competition arising from imported products or commercial services. As noted in the 2003 WTO study on *Adjusting to Trade Liberalization*:

In the United States, for instance, 45,000 steelworkers have lost their jobs since 1997 and 30 per cent of the country's steel making capacity has filed for bankruptcy since 1998, while steel imports were on the rise. In Mozambique liberalization of trade in cashew nuts resulted in 8,500 of 10,000 cashew processing workers losing their jobs.⁶⁹

When a domestic industry is in crisis and jobs are lost, the political decision-makers may well 'scramble for shelter'⁷⁰ by adopting protectionist measures. This may happen even when the decision-makers are well aware that such measures are by no means the best response to the crisis in the industry concerned. While the import competition would probably benefit most of their constituents (through lower prices, better quality and/or more choice), import competition is likely to hurt a small group of their constituents significantly (through lower salaries or job loss). If this small group is vocal and well organised, as it often is, it will put a great deal of pressure on the elected decision-makers to take protectionist measures for the benefit of the few and to the detriment of the many. In such a situation, protectionism can constitute 'good' politics.⁷¹ The *public choice theory* explains that, when the majority of the voters are unconcerned with the (*per capita* small) losses they suffer, the vote-maximising political decision-makers will ignore the interests of the many, and support the interests of the vocal and well-organised few. However, as discussed above, such measures eventually leave everyone worse off. Joseph Stiglitz, reflecting on his own experience as Chairman of the Council of Economic Advisors in the Clinton Administration, observed in this respect:

One might have thought that each country would promote liberalization in those sectors where it had most to gain from a societal perspective; and similarly, that it would be most willing to give up protectionism in those sectors where protection was costing the most. But political logic prevails over economic logic: after all, if economic logic dominated, countries would engage in trade liberalization on their own. High levels of protection are usually indicative of strong political forces, and these higher barriers may be the last to give way. ... The political force

⁶⁹ M. Bacchetta and M. Jansen, *Adjusting to Trade Liberalization, The Role of Policy, Institutions and WTO Disciplines*, WTO Publications, 7 April 2003, 6.

⁷⁰ *The Economist*, 3 October 1998, Survey World Trade, 3.

⁷¹ B. Hoekman and M. Kostecki, *The Political Economy of the World Trading System*, 2nd edition (Oxford University Press, 2001), 22.

behind the resistance to free trade is a simple one: Although the country as a whole may be better off under free trade, some special interests will actually be worse off. And although policy could in principle rectify this situation (by using redistribution to make everybody better off), in actuality, the required compensations are seldom paid. ... We must recognize that because the real costs to particular individuals of trade liberalization are likely to be greater in the developing world, as these countries become more democratic, the trade liberalization agenda may be increasingly difficult...⁷²

Another reason for national decision-makers to pursue a protectionist trade policy is *infant industry protection*. The argument for infant industry protection was already made by Alexander Hamilton in 1791, Friedrich List in 1841 and John Stuart Mill in 1848, and has been invoked many times since. In the nineteenth century, the infant manufacturing industries of the United States and Germany were protected against import competition on the basis of this argument. Today, this argument may be of particular relevance to developing countries, which may find that while they have a potential comparative advantage in certain industries, new producers in developing countries cannot (yet) compete with established producers in the industrial countries. By means of a customs duty or other import restriction, temporary protection is then given to the national producers to allow them to become strong enough to compete with well-established producers. The infant industry argument for protectionist measures has definitely some appeal and validity. However, protecting the new producers from import competition does not necessarily remedy the problems that caused the new producers to be non-competitive. Furthermore, the success of an infant industry policy crucially depends on a correct diagnosis of which industries could over time become competitive. It is often very difficult for governments to identify, in an objective manner and free from pressure from special interest groups, the new industries that merit protection. Moreover, in practice, the protection, which is by nature intended to be temporary, frequently becomes permanent. When it becomes clear that the protected national industry will never 'grow up' and will always be unable to face import competition, it is often politically difficult to remove the protection in place.⁷³

When a country is in a position to lower the price it pays for imports by restricting its imports, national decision-makers of that country may also be tempted to adopt trade restrictive measures on the basis of the *optimal tariff* argument. If a country can reduce world demand for a product, by raising the tariff on that product, it may make economic sense to raise the tariff, and thus restrict trade, because this will lead to the cutting of the world price of the product concerned. In this way, a country can tilt the terms of trade in its favour. Alan Deardorff and Robert Stern noted in this respect:

The idealized assumptions of the classic argument for free trade imply the optimality of free trade only for the world as a whole. For individual countries the optimality of free trade requires the additional assumption that the country is too small to have any influence, through its policies, over the prices at which it trades. Without that assumption it is well known that free

⁷² J. Stiglitz, 'Addressing Developing Country Priorities and Needs in the Millennium Round', in R. Porter and P. Sauvé (eds.), *Seattle, the WTO and the Future of the Multilateral Trading System* (Harvard University, 2000), 51-53.

⁷³ A. Deardorff and R. Stern, 'Current Issues in U.S. Trade Policies: An Overview', in R. Stern (ed.), *U.S. Trade Policies in a Changing World Economy* (MIT, 1987), 39-40.

trade is not optimal from a national perspective and instead that there exists an optimal degree of trade intervention, known as the optimal tariff, that works by turning the country's terms of trade in its favor. ... This argument is sometimes thought to require that the country in question be large and therefore to apply only to such large industrialized countries as the U.S. However, the argument applies to some extent to any country that is not insignificantly small. Furthermore the size that is important is not the size of the country as a whole but rather its share of world trade in markets in which it exports and imports.

However, as Deardorff and Stern observed, it is a key feature of the optimal tariff argument that it involves gains by one country at other countries' expense. It is thus referred to as an 'exploitative intervention' policy.

Such policies are typically available to more than one country, each of which can have adverse effects on the others, (and even many), and therefore require that strategic issues be considered. Like other forms of exploitative intervention the optimal tariff argument is likely to find countries in the classic position of the Prisoners' Dilemma; that is, each country has available a policy that will benefit itself at the expense of others, but if all countries simultaneously pursue that policy, all are likely to lose.⁷⁴

A relatively new argument for national decision-makers to opt for trade restrictions is the *strategic trade policy* argument. In an industry with economies of scale a country may, by imposing a tariff or quantitative restriction and thus reserving the domestic market for a domestic firm, allow that firm to cut its costs and undercut foreign competitors in other markets. This may work in an industry where economies of scale are sufficiently large that there is only room for very few profitable companies in the world market. Economists reckon that this might be the case for civil aircraft, semi-conductors and cars.⁷⁵ The aim of government intervention is to ensure that the domestic rather than a foreign company establishes itself on the world market and thus contributes to the national economic welfare. However, as Paul Krugman noted:

Strategic trade policy aimed at securing excess returns for domestic firms and support for industries that are believed to yield national benefits are both beggar-thy-neighbour policies and raise income at the expense of other countries. A country that attempts to use such policies will probably provoke retaliation. In many (though not all) cases, a trade war between two interventionist governments will leave both countries worse off than if a hands-off approach were adopted by both.⁷⁶

This does not mean that such policies will not be pursued, because as Krugman also pointed out:

Governments do not necessarily act in the national interest, especially when making detailed microeconomic interventions. Instead, they are influenced by interest group pressures. The kinds of interventions that new trade theory suggests can raise national income will typically raise the welfare of small, fortunate groups by large amounts, while imposing costs on larger, more diffuse groups. The result, as with any microeconomic policy, can easily be that excessive or misguided intervention takes place because the beneficiaries have more knowledge and influence than the losers.⁷⁷

⁷⁴ *Ibid.*, 38.

⁷⁵ Survey World Trade, *The Economist*, 3 October 1998, 6.

⁷⁶ P. Krugman, 'Is Free Trade Passé?', *Journal of Economic Perspectives*, 1987, 141.

⁷⁷ *Ibid.*

Trade restrictive measures, and, in particular, customs duties, have also been and still are imposed to *generate revenue for government*. Taxing trade is an easy method to collect revenue. While taxation of trade for revenue is no longer significant for developed countries, for many developing country governments customs duties remain a significant source of revenue.

Governments also adopt trade restrictive measures for reasons of *national security* and *self sufficiency*. The steel industry, as well as farmers, can, for example, be heard to argue that their presence and prosperity is essential to the national security of the country. The basic argument is that a country should be able to rely on its domestic industries and farmers to meet its basic needs for vital material and food, because it will be impossible to rely – in times of crisis and conflict - on imports from other countries. Allan Sykes noted in this respect:

The likelihood of imports becoming unavailable in wartime must then be carefully considered. For a nation like the United States, serious interruption of seaborne commercial traffic seems unlikely to occur for most goods and commodities in any scenario short of global conventional conflict on the scale of World War II. The probability of such conflict seems small at best in the nuclear age. Further, in the event of an interruption in seaborne traffic, adjacent trading partners may be able to take up much of the slack on many items ...

Where interruption of necessary imports seems a serious risk, the next issue is whether domestic capacity can be restored with reasonable dispatch. Even if an industry has closed down certain productive facilities that might be needed in wartime, it does not follow that those facilities cannot be reopened or rebuilt quickly enough to satisfy essential needs.

Finally, stockpiling during peacetime may well be a superior alternative to the protection of domestic capacity. Where the item in question is not perishable, a nation might be better off by buying up a supply of vital material at low prices in an open trading system than to burden itself over time with the high prices attendant on protectionism as a hedge against armed conflict. The funds tied up in a stockpile have some opportunity cost to be sure, but this cost can easily be smaller than the costs of excluding efficient foreign suppliers from the domestic market. In the end, therefore, arguments for protectionism from the national security perspective require careful scrutiny and will rarely hold up to it.⁷⁸

Finally, and to an ever more significant extent, governments adopt trade restrictive measures, or measures that have a trade restrictive effect, in pursuit of non-economic societal values such as public morals, public health, consumer safety, a clean environment and cultural identity. Trade in products or services that do not meet specific health, safety or environmental regulations or standards or that may, more generally, threaten a fundamental societal value may be prohibited or significantly limited. Many of such trade restrictive measures are not only legitimate but also necessary. Other such measures, however, are mere fronts for protectionist measures intending to shield domestic producers from import competition. Protectionism can take on very sophisticated guises.

⁷⁸ J. Jackson, W. Davey and A. Sykes, *Legal Problems of International Economic Relations*, 4th edition (Westgroup, 2002), 20-21.

1.2.4. Globalisation and Trade to the Benefit of All?

In presenting the United Nations Millennium Report to the UN General Assembly in April 2000, Secretary General Kofi Annan spoke of addressing the inequities of globalisation as the ‘overarching challenge’ of our times. In this presentation to the General Assembly, he argued as follows:

... the benefits of globalization are obvious ...: faster growth; higher living standards; and new opportunities, not only for individuals, but also for better understanding between nations, and for common action. One problem is that, at present, these opportunities are far from equally distributed. How can we say that the half of the human race, which has yet to make or receive a telephone call, let alone use a computer, is taking part in globalization? We cannot, without insulting their poverty. A second problem is that, even where the global market does reach, it is not yet underpinned, as national markets are, by rules based on shared social objectives. In the absence of such rules, globalization makes many people feel they are at the mercy of unpredictable forces.

So, Mr. President, the overarching challenge of our times is to make globalization mean more than bigger markets. To make a success of this great upheaval, we must learn how to govern better, and -- above all -- how to govern better together. We need to make our States stronger and more effective at the national level. And we need to get them working together on global issues, all pulling their weight and all having their say.⁷⁹

In the Millennium Declaration adopted by the UN General Assembly on 8 September 2000, the Heads of State and Government of the Members of the United Nations solemnly declared:

We believe that the central challenge we face today is to ensure that globalization becomes a positive force for all the world’s people. For while globalization offers great opportunities, at present its benefits are very unevenly shared, while its costs are unevenly distributed. We recognize that developing countries and countries with economies in transition face special difficulties in responding to this central challenge. Thus, only through broad and sustained efforts to create a shared future, based upon our common humanity in all its diversity, can globalization be made fully inclusive and equitable. These efforts must include policies and measures, at the global level, which correspond to the needs of developing countries and economies in transition and are formulated and implemented with their effective participation.⁸⁰

Three years later, at the Cancún Session of the WTO Ministerial Conference in September 2003, Kofi Annan noted not without a certain measure of frustration:

The reality of the international trading system today does not match the rhetoric (of improving the quality of life). Instead of open markets, there are too many barriers that stunt, stifle and starve. Instead of fair competition, there are subsidies by rich countries that tilt the playing field against the poor. And instead of global rules negotiated by all, in the interest of all, and adhered to by all, there is too much closed-door decision-making, too much protection of special interests, and too many broken promises.

In its 2002 study *Rigged Rules and Double Standards: Trade, Globalization, and the Fight Against Poverty*, Oxfam formulated recommendations and suggestions to make economic globalisation and international trade work for the poor. According to Oxfam, international trade can realise its full potential only

⁷⁹ United Nations General Assembly, *UN Millennium Declaration*, Resolution adopted on 8 September 2000, para. 11.

⁸⁰ *Ibid.*, para. 5.

if rich and poor countries alike take action to *redistribute opportunities* in favour of the poor. This will require action at the national level, new forms of international co-operation, and a new architecture of global governance at the WTO. With respect to action at the national level, Oxfam observed:

The challenge of extending opportunity at the national level goes beyond the narrow confines of trade policy. Inequalities in health and education services, and in the ownership of assets, are a formidable barrier to making markets work for poor people. Lacking access to land, marketing infrastructure, and financial resources, the poor are often least equipped to take advantage of market opportunities, and the most vulnerable to competition from imports.

In many countries, extensive corruption and excessive bureaucracy act as a tax on trade - and the tax falls most heavily on the poor.⁸¹

With respect to international cooperation, Oxfam noted:

International co-operation must be strengthened in a range of areas. Developing countries need development assistance if they are to integrate into world markets on more favourable terms and to extend opportunities to the poor.

Yet rich countries reduced their aid budgets by \$ 13 billion between 1992 and 2000. Some of the heaviest cuts fell on the poorest countries and in areas - such as agriculture - where well-targeted aid can make a difference to levels of poverty.

Failure to resolve the long-standing debt problems of low-income countries, and to respond effectively to new problems in private capital markets, poses further threats. There is a growing danger that many developing countries will be forced by unsustainable debt to transfer the wealth that is generated by exports to creditors in rich countries.⁸²

With respect to a new architecture of global governance at the WTO, Oxfam stated:

The WTO is one of the youngest international institutions, but it is old before its time. Behind the façade of a 'membership-driven' organisation is a governance system based on a dictatorship of wealth. Rich countries have a disproportionate influence. This is partly because of a failure of representational democracy. Each WTO country may have one vote, but eleven of its members among the least-developed countries are not even represented at the WTO base in Geneva.

Informal power-relations reinforce inequalities in negotiating capacity at the WTO. Meanwhile, beyond the WTO, powerful TNCs exercise a disproportionate influence over the direction of trade policy. Reforms to trade governance are needed in order to make trade work for the poor at all levels.⁸³

Oxfam correctly states that just as in any national economy, economic integration in the global economy can be a source of shared prosperity and poverty reduction, or a source of increasing inequality and exclusion:

Managed well, the international trading system can lift millions out of poverty. Managed badly, it will leave whole economies even more marginalised. The same is true at a national level. Good governance can make trade work in the interests of the poor. Bad governance can make it work against them.⁸⁴

⁸¹ Oxfam, *Rigged Rules and Double Standards: Trade, Globalization, and the Fight Against Poverty*, 2002, Summary of Chapter 9.

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ *Ibid.*

According to Oxfam, international trade is at present badly managed, both at the global level and, in many countries, at the national level.⁸⁵

In a reaction to this study, the European Commission took issue with Oxfam's finding that the European Union is the most protectionist of the large trading entities *but* fully supported Oxfam's analysis of how trade could help to fight poverty. Commenting on the report, EU Trade Commissioner Pascal Lamy said:

The Oxfam report is a substantive and in general well-researched contribution to the debate on the link between trade and development. I fully share the basic philosophy underlying the report: trade has the potential to lift millions out of poverty (and this is borne out by past experience, for instance in East Asia), but the benefits of trade are not automatic - a lot depends on the domestic context.⁸⁶

In a speech to the G-20 Finance Ministers and Central Bank Governors in November 2001, James Wolfensohn, the President of the World Bank, made the following analysis of the challenge of economic globalisation:

In my view, with the improvements in both technology and policies that we have seen over recent decades, some form of globalization is with us to stay. But the kind of globalization is not yet certain: it can be either a *globalization of development and poverty reduction* – such as we have begun to see in recent decades, although this trend still cannot be taken for granted – or a *globalization of conflict, poverty, disease, and inequality*. What can we do to tip the scales decisively toward the right kind of globalization?⁸⁷

To ensure that economic globalisation and trade liberalisation contribute to economic development, equity and the well-being of all people, the President of the World Bank advocated the following four-point agenda for action: better governance, reduction of trade barriers, more development aid and better international cooperation.

First, developing countries must continue the move toward *better policies, investment climate, and governance*. Despite progress in macroeconomic management and openness, there remain many domestic barriers to integration. Many countries have fallen short in creating an investment climate for productivity, growth, entrepreneurship, and jobs. These domestic barriers include inadequate transport infrastructure, poor governance, bureaucratic harassment of small businesses, a lack of electric power, an unskilled workforce. Even with access to foreign markets, a firm is unlikely to export if the environment hinders entrepreneurship and productive activity. And countries also need to make possible the participation of poor people in growth, through support for targeted education, health, social protection, and their involvement in key decisions that shape their lives. Poor people need much greater voice.

Second, all countries – developed and developing – must *reduce trade barriers* and give developing countries a better chance in world markets. ... Rich countries must increase market access for the exports of developing countries, through both multilateral negotiations and unilateral action, to increase the payoffs to developing-country policy and institutional reforms. Dismantling trade barriers, as our recent publication *Global Economic Prospects: Making Trade Work for the World's Poor* shows, could increase income in developing countries by an estimated \$1.5 trillion over a decade and increase GDP growth in the developing countries by

⁸⁵ *Ibid.*

⁸⁶ European Commission, Memorandum, Brussels, 22 April 2002.

⁸⁷ 'Responding to the Challenges of Globalization', Remarks to the G-20 Finance Ministers and Central Bank Governors by James D. Wolfensohn, President, World Bank Group, Ottawa, 17 November 2001.

0.5 per cent per year over the long run. This in turn would lift an additional 300 million people out of poverty by 2015 (even beyond the 600 million that will escape poverty with the growth we are currently anticipating). But to make this happen, the developed countries must be willing to put textiles on the negotiating table in addition to agriculture. We must also press ahead with capacity-building to help developing countries negotiate as equal partners. Outside the WTO framework, the Bank, together with other international financial institutions and agencies, can provide “aid for trade” through stepped-up development assistance. This means supporting both the hard and soft infrastructure inside the border – for example, modern ports as well as an efficient customs service – that makes trade expansion possible.

Third, developed countries must *increase development aid*, but allocate it better and cut down the burden its implementation can impose. Private capital flows to developing countries are falling sharply, from \$ 240 billion in 2000 to an estimated \$ 160 billion this year. This makes it still more important that governments increase official assistance. The evidence from the Bank’s research is that well-directed aid, combined with strong reform efforts, can greatly reduce poverty. If we are serious about ensuring a beneficial globalization and meeting multilateral development goals we have all signed up to, we must double ODA from its current level of about \$ 50 billion a year.

Fourth, we must *act as a global community* where it really matters. Effective globalization requires institutions of global governance, and multilateral action to confront global problems and provide global public goods. This means confronting terrorism, internationalized crime, and money laundering, as we are doing in response to September 11th. But it also means that as a community, we need to address longer-term needs, by: combating communicable diseases like AIDS and malaria; building an equitable global trading system; promoting financial stability to prevent deep and sudden crises; and safeguarding the natural resources and environment on which so many poor people depend for their livelihoods. As we do all this, we must bring poor countries into the decision-making of this global community. ... If we can act on these four priorities, we will have created the climate to achieve true global integration and reach the multilateral development goals that we have all embraced.⁸⁸

It must be noted, however, that not all share the ‘optimism’ of Annan, Oxfam and Wolfensohn. In a reaction to what some call the rhetoric of ‘globalisation as opportunity’, the President of Tanzania, Benjamin Mkapa, said in a statement made at the 2000 Annual Meeting of the World Economic Forum in Davos:

Globalisation can deliver, just as Tanzania can play in the World Cup and win it.⁸⁹

It is clear that economic openness is a necessary but not a sufficient condition for economic development and prosperity. The simple spread of markets will not eliminate poverty. A global economy and more international trade will not automatically lead to rising prosperity for all countries and for all people. Good governance is undoubtedly as important as international trade. Without functioning State institutions and a legal system that protects fundamental rights and property and enforces contracts, globalisation will not bring prosperity but, on the contrary, poverty, corruption and exploitation.

Also former GATT & WTO Director General and EU Commissioner, Peter Sutherland, emphasised that more than free markets are needed to eradicate poverty and inequality:

⁸⁸ *Ibid.*

⁸⁹ As reported by J. Harris, in ‘Globalisation and World’s Poor’, *Economic and Political Weekly*, 9 June 2001, 2034.

There are those who oppose redistribution policies in principle, whether in the domestic or the international context. This is wrong. It is morally wrong, it is pragmatically wrong, and we ought not be ashamed to say so. I have been personally and deeply committed to promoting the market system through my entire career. Yet it is quite obvious to me that the market will never provide all of the answers to the problems of poverty and inequality. The fact is that there are those who will not be able to develop their economies simply because market access has been provided. I do not believe that we in the global community will adequately live up to our responsibility if we have done no more than provide the poorest people and the poorest countries with an opportunity to succeed. We must also provide them with a foundation from which they have a reasonable chance of seizing that opportunity – decent health care, primary education, basic infrastructure.⁹⁰

It is worth noting that there may also be a cultural dimension to the issue of globalisation which may make it harder for certain countries and people to make use of the opportunity globalisation, and international trade, offers for economic development:

Much of Latin America, for example, abandoned trade protectionism and favoritism for local companies. Between 1985 and 1996, average tariffs fell from 50 per cent to 10 per cent. The results have been modest. What explains the contrasts? Perhaps culture. The gospel of capitalism presumes that human nature is constant. Given the proper incentives – the ability to profit from hard work and risk taking – people will strive. Maybe not. In a recent book, “Culture Matters: How Values Shape Human Progress”, scholars from the United States, Africa and Latin America argue that strong social and moral values predispose some peoples for and against economic growth. As a result of history, tradition and religion, some societies cannot easily adopt capitalist attitudes and institutions. Even when they try, they often fail because it is so unnatural. “Competition is central to the success of an enterprise, the politician, the intellectual and the professional,” writes Mariano Grondona, an Argentine political scientist and columnist. “In resistant societies, competition is condemned as a form of aggression.” Daniel Etounga-Manguelle of Cameroon contends that Africa suffers from a reverence for its history. “In traditional African society, which exalts the glorious past of ancestors through tales and fables, nothing is done to prepare for the future,” he writes. Once stated, culture’s impact seems obvious.⁹¹

However, culture, though deep, is not immutable. Culture is changed by experience. There are multiple examples of cultures changing over time. One such example, India, has shifted since the late 1980s from protectionism and State control towards pro-market policies, thereby raising annual economic growth to about 6 per cent.⁹²

Reflecting on the ‘acceptability’ of economic globalisation and international trade in particular in developed countries, Dani Rodrik concluded his book *Has Globalization Gone Too Far?* as follows:

The broader challenge for the 21st century is to engineer a new balance between market and society, one that will continue to unleash the creative energies of private entrepreneurship without eroding the social basis of cooperation. The tensions between globalization and social cohesion are real, and they are unlikely to disappear of their own accord.⁹³

⁹⁰ P. Sutherland, ‘Beyond the Market, a Different Kind of Equity’, *International Herald Tribune*, 20 February 1997.

⁹¹ R. Samuelson, ‘Persistent Poverty Defies the Wisdom on Globalization’, *International Herald Tribune*, 21 September 2000.

⁹² *Ibid.*

⁹³ D. Rodrik, *Has Globalization Gone Too Far?* (Institute for International Economics, 1997), 85.

The General Secretary of the International Confederation of Free Trade Unions, Bill Jordan, wrote in December 2000:

... globalization is neither entirely beneficial nor entirely harmful. It is not an unstoppable force of nature, but is shaped by those who set the rules. ... The labor movement's position is simply that the rules governing globalization should protect the interests of the poor and not just the rich, and that the benefits of increased trade and increased global output should be shared by all.⁹⁴

Joseph Stiglitz described, in *Globalization and its Discontents*, the experience of the United States during the nineteenth century with the formation of its national economy and the regulating and supporting role played by the federal government in that process.⁹⁵ According to Stiglitz, the experience of the United States makes a good parallel for today's globalisation. The contrast helps illustrate the successes of the past and today's failures:

Today, with the continuing decline in transportation and communication costs, and the reduction of man-made barriers to the flow of goods, services, and capital (though there remain serious barriers to the free flow of labor), we have a process of "globalization" analogous to the earlier processes in which national economies were formed. Unfortunately, we have no world government, accountable to the people in every country, to oversee the globalization process in a fashion comparable to the way national governments guided the nationalization process. Instead, we have a system that might be called *global governance without global government*, one in which a few institutions – the World Bank, the IMF, the WTO – and a few players – the finance, commerce, and trade ministries, closely linked to certain financial and commercial interests – dominate the scene, but in which those affected by their decisions are left almost voiceless. It's time to change some of the rules governing the international economic order, to think once again about how decisions get made at the international level – and in whose interests – and to place less emphasis on ideology and to look more at what works. ... Globalization can be reshaped, and when it is, when it is properly, fairly run, with all countries having a voice in policies affecting them, there is a possibility that it will help to create a new global economy in which growth is not only more sustainable and less volatile but the fruits of this growth are more equitably shared.⁹⁶

1.3 INTERNATIONAL TRADE AND THE LAW OF THE WTO

As discussed above, economic globalisation and international trade need to be properly managed if they are to be of benefit to all humankind. This section discusses:

- the need for and existence of international rules for international trade; and
- the basic rules and disciplines of WTO law.

1.3.1. International Rules for International Trade

1.3.1.1. *Need for international rules*

Former GATT and WTO Director General, Peter Sutherland, wrote in 1997:

⁹⁴ B. Jordan, 'Yes to Globalization, But Protect the Poor', *International Herald Tribune*, 21 December 2000.

⁹⁵ J. Stiglitz, *Globalization and its Discontents* (Penguin, 2002), 21.

⁹⁶ *Ibid.*, 21-22.

The greatest economic challenge facing the world is the *need to create an international system* that not only maximizes global growth but also achieves a greater measure of equity, a system that both integrates emerging powers and assists currently marginalized countries in their efforts to participate in worldwide economic expansion. ... The most important means available to secure peace and prosperity into the future is to develop effective multilateral approaches and institutions.⁹⁷ [Emphasis added]

These multilateral approaches and institutions, to which Sutherland referred, embrace many structures and take many forms but, as John Jackson noted:

... it is very clear that law and legal norms play the most important part of the institutions which are essential to make markets work. The notion that 'rule of law' (ambiguous as that phrase is) or a *rule-based or rule-oriented system* of human institutions is essential to a beneficial operation of markets, is a constantly recurring theme in many writings.⁹⁸ [Emphasis added]

Ronald Coase, Nobel Prize winner for Economics, wrote:

It is evident that, for their operation, markets ... require the establishment of legal rules governing the rights and duties of those carrying out transactions ... *To realize all the gains of trade*, ... there has to be a legal system and political order⁹⁹ [Emphasis added]

But what exactly is the role of legal rules and, in particular, international legal rules in international trade? How do international trade rules allow countries to realise the gains of international trade?

There are basically four, related reasons why there is a need for international trade rules. *First* of all, countries must be restrained from adopting trade-restrictive measures both in their own interest and in that of the world economy. International trade rules *restrain* countries from taking trade-restrictive measures. As noted above, national policy-makers may come under considerable pressure from influential interest groups to adopt trade-restrictive measures in order to protect domestic industries from import competition. Such measures may benefit the specific, short-term interests of the groups advocating them but they very seldom benefit the general economic interests of the country adopting them.¹⁰⁰ As Ernst-Ulrich Petersmann observed:

Governments know very well ... that by "tying their hands to the mast" (like Ulysses when he approached the island of the Sirenes), reciprocal international pre-commitments help them to resist the siren-like temptations from "rent-seeking" interest groups at home.¹⁰¹

Countries also realise that if they take trade-restrictive measures, other countries will do so too. This may lead to an escalation of trade-restrictive measures, a disastrous move for international trade and for global economic welfare. International trade rules help to avoid such escalation.

⁹⁷ P. Sutherland, 'Beyond the Market, a Different Kind of Equity', *International Herald Tribune*, 20 February 1997.

⁹⁸ J. Jackson, 'Global Economics and International Economic Law', *Journal of International Economic Law*, 1998, 5.

⁹⁹ R. Coase, *The Firm, the Market and the Law* (reprint of 1960 article), Chapter 5, as quoted by J. Jackson, in *Journal of International Economic Law*, 1998, 4.

¹⁰⁰ See above, p. ##. On the optimal tariff argument and the strategic trade policy argument, see above, p. ##.

¹⁰¹ E.U. Petersmann, *The GATT/WTO Dispute Settlement System, International Law, International Organizations and Dispute Settlement*, (Kluwer Law International, 1997), 36-37.

A *second* and closely related reason why international trade rules are necessary is the need of traders and investors for a degree of *security and predictability*. International trade rules offer a degree of security and predictability. Traders and investors operating, or intending to operate, in a country that is bound by such legal rules, will be able to predict better how that country will act in the future on matters affecting their operations in that country. The predictability and security resulting from international trade rules will encourage investments and trade and will thus contribute to global economic welfare. As John Jackson wrote:

At least in the context of economic behaviour ..., and particularly when that behaviour is set in circumstances of decentralized decision-making, as in a market economy, rules can have important operational functions. They may provide the only predictability or stability to a potential investment or trade-development situation. Without such predictability or stability, trade or investment flows might be even more risky and therefore more inhibited than otherwise. ... To put it another way, the policies which tend to reduce some risks, lower the "risk premium" required by entrepreneurs to enter into international transactions. This should result in a general increase in the efficiency of various economic activities, contributing to greater welfare for everyone.¹⁰²

A *third* reason why international trade rules are necessary is that national governments alone simply cannot *cope with the challenges presented by economic globalisation*. The protection of important societal values such as public health, a clean environment, consumer safety, cultural identity and minimum labour standards, is, as a result of the greatly increased levels of trade in goods and services, no longer a purely national matter but ever more a matter with significant international ramifications. Attempts to ensure the protection of these values at the national level alone are doomed to be ineffective and futile. Worse, domestic regulatory measures regarding, for example, product safety, health, environmental protection and labour conditions, may constitute important barriers to trade. These measures are often not directly or expressly related to the regulation of trade but the fact that they differ from country to country acts as a significant constraint on trade. International trade rules serve to ensure that countries only maintain national regulatory measures that are *necessary* for the protection of the key societal values referred to above. Furthermore, international trade rules may introduce a degree of harmonisation of domestic regulatory measures and thus ensure an effective, international protection of these societal values.

A *fourth* and final reason why international trade rules are necessary is the need to achieve a *greater measure of equity* in international economic relations. As Father Lacordaire already stated in his renowned 1835 Conferences at the Notre Dame in Paris:

Entre le faible et le fort, entre le riche et le pauvre, ... c'est la liberté qui opprime et la loi qui affranchit.¹⁰³

¹⁰² J. Jackson, 'Global Economics and International Economic Law', *Journal of International Economic Law*, 1998, 5-6.

¹⁰³ Translation: 'Between the weak and the powerful, between the rich and the poor, ... it is freedom that oppresses and the law that sets free'. Abbé Jean-Baptiste Lacordaire (1802-1861) was the greatest French pulpit orator of the nineteenth century.

Without international trade rules, binding and enforceable on the rich as well as the poor, and rules recognising the special needs of developing countries, many of these countries would not be able to integrate fully in the world trading system and derive an equitable share of the gains of international trade.

However, for international legal rules to play these multiple roles, such rules have, of course, to be observed. It is clear that international trade rules are not always adhered to. Yet while most attention, of both media and academia, is inevitably paid to instances of breach, it should be stressed that international trade rules are generally well observed. Countries realise that they cannot expect other countries to observe the rules if they do not do so themselves. The desire to be able to depend on other countries' compliance with the rules leads many countries to observe the rules even though this might be politically inconvenient in a given situation.¹⁰⁴

All countries and their people benefit from the existence of rules on international trade making the trading environment more predictable and stable. However, provided the rules take into account their specific interests and needs, developing countries, with generally limited economic, political and military power, should benefit even more from the existence of rules on international trade. The weaker countries are likely to suffer most where the law of the jungle reigns. They are more likely to thrive in a *rules-based*, rather than power-based, international trading system.

1.3.1.2. *International economic law and WTO law*

The legal rules, discussed above, governing trade relations between countries are part of international economic law. International economic law is a very broad field of international law. John Jackson once suggested that 90 per cent of international law work relates in fact to international economic law in some form or another. He also observed that international economic law does not enjoy as much glamour or media attention as work on armed conflicts and human rights do.¹⁰⁵

International economic law can be defined, broadly, as covering all those international rules pertaining to economic transactions and relations, as well as those pertaining to governmental regulation of economic matters. As such, international economic law includes international rules on trade in goods and services, economic development, intellectual property rights, foreign direct investment, international finance and monetary matters, commodities, food, health, transport, communications, natural resources, private commercial transactions, nuclear energy, etc. International rules on international trade in

¹⁰⁴ See L. Henkin, *How Nations Behave*, 2nd ed. (1979); R. Fisher, *Improving Compliance With International Law* (1981); and A. Chayes, *The New Sovereignty: Compliance With International Regulatory Agreements* (1995) as referred to in J. Jackson, 'Global Economics and International Economic Law', *Journal of International Economic Law* 1998, 5.

¹⁰⁵ J. Jackson, 'International Economic Law: Reflections on the "Boilerroom" of International Relations', *American University Journal of International Law & Policy*, 1995, 596.

goods and services, i.e. international trade law, constitute the ‘hard core’ of international economic law.

International trade law consists of, on the one hand, numerous bilateral or regional trade agreements and, on the other hand, multilateral trade agreements. Examples of bilateral and regional trade agreements are manifold. The North American Free Trade Agreement (NAFTA) and the Mercosur Agreement are typical examples of regional trade agreements. The Trade Agreement between the United States and Israel or the Agreement on Trade on Wine between the European Community and Australia are examples of bilateral trade agreements. The number of multilateral trade agreements is more limited. This group includes, for example, the 1983 International Convention on the Harmonised Commodity Description and Coding System (the ‘Brussels Convention’) and the 1973 International Convention on the Simplification and Harmonization of Customs Procedures, as revised in 2000 (the ‘Kyoto Convention’). The most important and broadest of all multilateral trade agreements is the *Marrakesh Agreement Establishing the World Trade Organization*, concluded on 15 April 1994. It is the law of this Agreement - the law of the WTO - which is the subject matter of this book.

1.3.2 Basic Rules and Principles of WTO Law

The law of the WTO is complex and specialised. It deals with a broad spectrum of issues, ranging from tariffs, import quotas and customs formalities to intellectual property rights, food safety regulations and national security measures. However, six groups of *basic rules and principles* can be distinguished:

- the principles of non-discrimination;
- the rules on market access, including rules on transparency;
- the rules on unfair trade;
- the rules on conflicts between trade liberalisation and other societal values and interests;
- the rules on special and differential treatment for developing countries; and,
- a number of key institutional and procedural rules relating to decision-making and dispute settlement.

These basic rules and principles of WTO law make up what is commonly referred to as the *multilateral trading system*. Referring to this system, Peter Sutherland and others wrote in 2001:

The multilateral trading system, with the World Trade Organization (WTO) at its centre, is the most important tool of global economic management and development we possess.¹⁰⁶

Martin Wolf of the *Financial Times* noted in 2001:

¹⁰⁶ P. Sutherland, J. Sewell, and D. Weiner, ‘Challenges Facing the WTO and Policies to Address Global Governance’, in G. Sampson, *The Role of the World Trade Organization in Global Governance* (United Nations University Press, 2001), 81.

The multilateral trading system at the beginning of the twenty-first century is the most remarkable achievement in institutionalized global economic cooperation that there has ever been.¹⁰⁷

The following sections of this Chapter briefly review these basic rules and principles constituting the multilateral trading system.

1.3.2.1. Principles of non-discrimination

There are two principles of non-discrimination in WTO law: the most-favoured-nation (MFN) treatment obligation and the national treatment obligation.

The *MFN treatment obligation* requires a WTO Member that grants certain favourable treatment to another country to grant that same favourable treatment to all other WTO Members. A WTO Member is not allowed to discriminate *between* its trading partners by, for example, giving the products imported from some countries more favourable treatment with respect to market access than the treatment it accords to the products of other Members.¹⁰⁸ The MFN treatment obligation is the single most important rule in WTO law. Without this rule the multilateral trading system could and would not exist.

The *national treatment obligation* requires a WTO Member to treat foreign products, services and service suppliers not less favourably than it treats 'like' domestic products, services and service suppliers. Where the national treatment obligation applies, foreign products, for example, should, once they have crossed the border and entered the domestic market, not be subject to less favourable taxation or regulation than 'like' domestic products. Pursuant to the national treatment obligation, a WTO Member is not allowed to discriminate *against* foreign products, services and service suppliers. The national treatment obligation is an important rule in WTO law which has given rise to many trade disputes. For trade in goods, the national treatment obligation has *general* application on all trade.¹⁰⁹ On the contrary, for trade in services, the national treatment obligation does not have such general application. The national treatment obligation applies only to the extent a WTO Member has explicitly committed itself to grant 'national treatment' in respect of specific service sectors.¹¹⁰ Such commitments to give 'national treatment' are made in a Member's Schedule of Specific Commitments on Services.

1.3.2.2. Rules on market access

WTO law contains four groups of rules regarding market access:

- rules on *customs duties* (i.e., tariffs);
- rules on *other duties and financial charges*;
- rules on *quantitative restrictions*; and

¹⁰⁷ M. Wolf, 'What the World Needs from the Multilateral Trading System', in G. Sampson, *The Role of the World Trade Organization in Global Governance* (United Nations University Press, 2001), 182.

¹⁰⁸ Article I of the GATT 1994 and Article II of the GATS.

¹⁰⁹ Article III of the GATT 1994.

¹¹⁰ Article XVII of the GATS.

- rules on *other 'non-tariff barriers'*, such as rules on transparency of trade regulations; technical regulations; standards; sanitary and phytosanitary measures; customs formalities and government procurement practices.

Under WTO law, the imposition of customs duties is not prohibited and, in fact, WTO Members impose customs duties on many products. However, WTO law calls upon WTO Members to negotiate mutually-beneficial reductions of customs duties.¹¹¹ These negotiations result in tariff concessions or bindings, set out in a Member's Schedule of Concessions. For those products for which a tariff concession or binding exists, the customs duties may no longer exceed the maximum level of duty agreed to.¹¹²

While customs duties are, in principle, not prohibited, quantitative restrictions on trade in goods are, as a general rule, forbidden.¹¹³ Unless one of many exceptions applies, WTO Members are not allowed to ban the importation or exportation of goods or to subject them to quotas. With respect to trade in services, quantitative restrictions are, in principle, prohibited in service sectors for which specific market-access commitments have been undertaken.¹¹⁴ In those sectors, quantitative restrictions can be imposed if such restrictions have been inscribed in a Member's Schedule of Specific Commitments.

Among 'other non-tariff barriers', the lack of transparency of national trade regulations definitely stands out as a major barrier to international trade. Uncertainty and confusion regarding the trade rules applicable in other countries has a chilling effect on trade. Likewise, the arbitrary application of these rules also discourages traders and hampers trade. Non-tariff barriers to trade, such as technical regulations and standards, sanitary and phytosanitary measures, customs formalities and practices of government procurement are, for many products and in many countries, more important barriers to trade than customs duties or quantitative restrictions.¹¹⁵

1.3.2.3 Rules on unfair trade

WTO law, at present, does not provide for general rules on unfair trade practices, but it does have a number of relatively detailed rules that relate to specific forms of 'unfair' trade. These rules deal with dumping and subsidised trade.

Dumping, i.e., bringing a product onto the market of another country at a price less than the normal value of that product is condemned but not prohibited in WTO law. However, when the dumping causes or threatens to cause material injury to the domestic industry of a Member, WTO law allows that Member to

¹¹¹ Article XXVIII *bis* of the GATT 1994.

¹¹² Article II of the GATT 1994.

¹¹³ Article XI of the GATT 1994.

¹¹⁴ Article XVI of the GATS. In fact, the prohibition of Article XVI of the GATS applies more broadly to 'market access barriers' as defined in Article XVI:2.

¹¹⁵ Furthermore, note that many quantitative restrictions, and, in particular, many import bans, are now in the form of technical regulations (see, e.g., the ban on asbestos and asbestos products in *EC – Asbestos*) or sanitary or phytosanitary measures (see, e.g., the ban on hormone-treated meat in *EC – Hormones*).

impose anti-dumping duties on the dumped products in order to offset the dumping.¹¹⁶

Subsidies, i.e., a financial contribution by a government or public body that confers a benefit, are subject to an intricate set of rules.¹¹⁷ Some subsidies, such as export subsidies, are, as a rule, prohibited. Other subsidies are not prohibited but when they cause adverse effects to the interests of other Members, the subsidising Member should withdraw the subsidy or take appropriate steps to remove the adverse effects. If the subsidising Member fails to do so, countermeasures commensurate with the degree and nature of the adverse effect may be authorised. If a prohibited or other subsidy causes or threatens to cause material injury to the domestic industry of a Member producing a 'like' product, that Member is authorised to impose countervailing duties on the subsidised products to offset the subsidisation. Subsidies relating to agricultural products are subject to different (more lenient) rules.¹¹⁸

1.3.2.4 Trade liberalisation versus other societal values and interests

Apart from the basic rules and principles referred to above, WTO law also provides for a number of rules that address the conflict between trade liberalisation and other economic and non-economic societal values and interests. These rules allow WTO Members to take account of economic and non-economic values and interests that compete or conflict with free trade. The non-economic values and interests include the protection of the environment, public health, public morals, national treasures and national security. The relevant rules can be found in, for example, Articles XX and XXI of the GATT 1994 and Articles XIV and XIV *bis* of the GATS. The economic interests include the protection of a domestic industry from serious injury inflicted by an unexpected and sharp surge in imports, the safeguarding of the balance of payments and the pursuit of regional economic integration. These 'exceptions' may be invoked by all WTO Members and allow them, *if* they meet certain specific conditions, to deviate from the basic rules and disciplines. The relevant rules can be found in, for example, Articles XII, XIX and XXIV of the GATT 1994, Articles V, X and XII of the GATS and the *Agreement on Safeguards*. The WTO rules allowing Members to take into account economic or non-economic values and interests that may conflict with free trade.

1.3.2.5 Special and differential treatment for developing country Members

Recognising the need for positive efforts designed to ensure that developing country Members, and especially the least developed countries among them, are integrated into the multilateral trading system, WTO law includes many provisions granting a degree of special and differential treatment to developing country Members.¹¹⁹ These provisions attempt to take the special needs of

¹¹⁶ Article VI of the GATT 1994 and the *Anti-dumping Agreement*.

¹¹⁷ Articles VI and XVI of the GATT 1994 and the *Agreement on Subsidies and Countervailing Measures* (the 'SCM Agreement').

¹¹⁸ Articles 6 to 11 of the *Agreement on Agriculture*.

¹¹⁹ For example, Article XVIII and Part IV of the GATT 1994 as well as the Enabling Clause.

developing countries into account. In many areas, they provide for fewer obligations or differing rules for developing countries as well as for technical assistance.

1.4. SOURCES OF WTO LAW

WTO law is, by international law standards, a sprawling and complex body of law. This section reviews the sources of WTO law. Not all sources of WTO law reviewed below are of the same nature or on the same legal footing. Some sources provide for specific legal rights and obligations for WTO Members that these Members can enforce through WTO dispute settlement.¹²⁰ Many other sources, reviewed below, do not in and by themselves provide for specific, enforceable rights and obligations. They are nevertheless source of WTO law as they ‘clarify’ or ‘define’ the law that applies between WTO Members on WTO matters.¹²¹

The *principal sources* of WTO law is the *Marrakesh Agreement Establishing the World Trade Organization*, concluded on 15 April 1994 and in force since 1 January 1995. *Other sources* of WTO law include WTO dispute settlement reports, acts of WTO bodies, agreements concluded in the context of the WTO, customary international law, general principles of law, other international agreements, subsequent practice of WTO Members, teachings of the most highly qualified publicists and, finally, the negotiating history.

1.4.1. The Marrakesh Agreement Establishing the World Trade Organization

The *Marrakesh Agreement Establishing the World Trade Organization* (the ‘*WTO Agreement*’) is the most ambitious and far-reaching international trade agreement ever concluded. It consists of a short basic agreement (of sixteen articles) and numerous other agreements and understandings included in the annexes to this basic agreement.

AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION

ANNEX 1

ANNEX 1A: Multilateral Agreements on Trade in Goods

- General Agreement on Tariffs and Trade 1994
- Agreement on Agriculture
- Agreement on the Application of Sanitary and Phytosanitary Measures
- Agreement on Textiles and Clothing
- Agreement on Technical Barriers to Trade
- Agreement on Trade-Related Investment Measures
- Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994

¹²⁰ I.e., Members can claim the violation of these rights and obligations before WTO dispute settlement bodies.

¹²¹ Arguably the respondent Member in a dispute could invoke rules ‘generated’ by these sources of WTO law in defence of a claim of violation. This is, however, controversial.

Agreement on Implementation of Article VII of the General
Agreement on Tariffs and Trade 1994
Agreement on Preshipment Inspection
Agreement on Rules of Origin
Agreement on Import Licensing Procedures
Agreement on Subsidies and Countervailing Measures
Agreement on Safeguards

ANNEX 1B: General Agreement on Trade in Services and Annexes

ANNEX 1C: Agreement on Trade-Related Aspects of Intellectual Property
Rights

ANNEX 2: Understanding on Rules and Procedures Governing the Settlement of
Disputes

ANNEX 3: Trade Policy Review Mechanism

ANNEX 4: Plurilateral Trade Agreements
Agreement on Trade in Civil Aircraft
Agreement on Government Procurement

On the relationship between the *WTO Agreement* and its Annexes as well as on the binding nature of the Annexes, Article II of the *WTO Agreement* states:

2. The agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as “Multilateral Trade Agreements”) are integral parts of this Agreement, binding on all Members.
3. The agreements and associated legal instruments included in Annex 4 (hereinafter referred to as “Plurilateral Trade Agreements”) are also part of this Agreement for those Members that have accepted them, and are binding on those Members. The Plurilateral Trade Agreements do not create either obligations or rights for Members that have not accepted them.

While the *WTO Agreement* consists of many agreements, the WTO Appellate Body in one of the first cases before it, *Brazil – Deseccated Coconut*, stressed the ‘single undertaking’ nature of the *WTO Agreement*.¹²² All multilateral WTO agreements apply equally and are equally binding on all WTO Members. The provisions of these agreements represent ‘an *inseparable package* of rights and disciplines which have to be considered in conjunction’.¹²³

Furthermore, Article XVI:3 of the *WTO Agreement* provides:

In the event of a conflict between a provision of this Agreement and a provision of any of the Multilateral Trade Agreements, the provision of this Agreement shall prevail to the extent of the conflict.

Most of substantive WTO law is found in the agreements contained in Annex 1. This Annex consists of three parts. Annex 1A contains thirteen multilateral agreements on trade in goods, Annex 1B contains the *General Agreement on Trade in Services* (the ‘GATS’) and Annex 1C the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (the ‘TRIPS Agreement’). The most

¹²² See Appellate Body Report, *Brazil – Deseccated Coconut*, 177.

¹²³ See, for example, Appellate Body Report, *Argentina – Footwear (EC)*, para. 81.

important of the thirteen multilateral agreements on trade in goods, contained in Annex 1A, is the *General Agreement on Tariffs and Trade 1994* (the ‘GATT 1994’). The plurilateral agreements in Annex 4 also contain provisions of substantive law but they are only binding upon those WTO Members that are a party to these agreements.

Annexes 2 and 3 cover, respectively, the *Understanding on Rules and Procedures for the Settlement of Disputes* and the *Trade Policy Review Mechanism* and contain procedural provisions.

1.4.1.1 General Agreement on Tariffs and Trade (1994)

The GATT 1994 sets out the basic rules for trade in goods. This agreement is, however, somewhat unusual in its appearance and structure. Paragraph 1 of the introductory text of the GATT 1994 states:

The General Agreement on Tariffs and Trade 1994 ('GATT 1994') shall consist of:

- (a) the provisions in the General Agreement on Tariffs and Trade, dated 30 October 1947, annexed to the Final Act Adopted at the Conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment (excluding the Protocol of Provisional Application), as rectified, amended or modified by the terms of legal instruments which have entered into force before the date of entry into force of the WTO Agreement;
- (b) the provisions of the legal instruments set forth below that have entered into force under the GATT 1947 before the date of entry into force of the WTO Agreement:
 - (i) protocols and certifications relating to tariff concessions;
 - (ii) protocols of accession (excluding the provisions (a) concerning provisional application and withdrawal of provisional application and (b) providing that Part II of GATT 1947 shall be applied provisionally to the fullest extent not inconsistent with legislation existing on the date of the Protocol);
 - (iii) decisions on waivers granted under Article XXV of GATT 1947 and still in force on the date of entry into force of the WTO Agreement;
 - (iv) other decisions of the CONTRACTING PARTIES to GATT 1947;
- (c) the Understandings set forth below:
 - (i) Understanding on the Interpretation of Article II:1(b) of the General Agreement on Tariffs and Trade 1994;
 - (ii) Understanding on the Interpretation of Article XVII of the General Agreement on Tariffs and Trade 1994;
 - (iii) Understanding on Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994;
 - (iv) Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994;
 - (v) Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994;
 - (vi) Understanding on the Interpretation of Article XXVIII of the General Agreement on Tariffs and Trade 1994; and
- (d) the Marrakesh Protocol to GATT 1994.

The GATT 1994 would obviously have been a less confusing and more user-friendly legal instrument if the negotiators had drafted a *new* text reflecting the basic rules on trade in goods as agreed during the Uruguay Round. The current arrangement obliges one to consult the provisions of the GATT 1947, the provisions of relevant GATT 1947 legal instruments and the Understandings agreed upon during the Uruguay Round in order to know what the GATT 1994

rules on trade in goods are. The negotiators, aware that this arrangement might lead to some confusion, felt the need to state explicitly in Article II:4 of the *WTO Agreement*:

The General Agreement on Tariffs and Trade 1994 as specified in Annex 1A (hereinafter referred to as “GATT 1994”) is legally distinct from the General Agreement on Tariffs and Trade, dated 30 October 1947 ... (hereinafter referred to as “GATT 1947”).

[...]

1.4.1.2. *Other multilateral agreements on trade in goods*

In addition to the GATT 1994, Annex 1A to the *WTO Agreement* contains a number of other multilateral agreements on trade in goods. These agreements include:

- the *Agreement on Agriculture*, which requires the use of tariffs instead of quotas or other quantitative restrictions, imposes minimum market access requirements and provides for specific rules on domestic support and export subsidies in the agricultural sector;
- the *Agreement on the Application of Sanitary and Phytosanitary Measures* (the ‘*SPS Agreement*’), which regulates the use by WTO Members of measures adopted to ensure food safety and protect the life and health of humans, animals and plants from pests and diseases;
- the *Agreement on Textiles and Clothing*, which provides for the gradual elimination by 2005 of quotas on textiles and clothing;
- the *Agreement on Technical Barriers to Trade* (the ‘*TBT Agreement*’), which regulates the use by WTO Members of technical regulations and standards and procedures to test conformity with these regulations and standards;
- the *Agreement on Trade-Related Investment Measures* (the ‘*TRIMS Agreement*’), which provides that Members’ regulations dealing with foreign investments must respect the obligations in Articles III (national treatment obligation) and Article XI (prohibition on quantitative restrictions) of the GATT 1994;
- the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the ‘*Antidumping Agreement*’), which provides for detailed rules on the use of antidumping duties;
- the *Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994* (the ‘*Customs Valuation Agreement*’), which sets out in detail the rules to be used by national customs authorities for valuing goods for customs purposes;
- the *Agreement on Preshipment Inspection*, which regulates activities relating to the verification of the quality, the quantity, the price and/or the customs classification of goods to be exported;
- the *Agreement on Rules of Origin*, which sets out disciplines to govern the application of rules of origin, both during and after a transition period, and provides for negotiations aimed at the harmonisation of rules of origin;

- the *Agreement on Import Licensing Procedures*, which sets out rules on the use of import licensing procedures;
- the *Agreement on Subsidies and Countervailing Measures* (the ‘SCM Agreement’), which provides for detailed rules on subsidies and the imposition of countervailing duties; and,
- the *Agreement on Safeguards*, which provides for detailed rules on the use of safeguard measures and prohibits the use of voluntary export restraints.

1.4.1.3 General Agreement on Trade in Services

Unlike the GATT 1994, the *General Agreement on Trade in Services* (the ‘GATS’) is a totally new agreement. It is the first ever multilateral agreement on trade in services. The GATS established a regulatory framework within which WTO Members can undertake and implement commitments for the liberalisation of trade in services.

The GATS covers all measures of Members affecting trade in services.¹²⁴ Trade in services is defined in Article I:2 of the GATS as the supply of a service:

- from the territory of one Member into the territory of any other Member (cross-border supply);
- in the territory of one Member to the service consumer of any other Member (consumption abroad);
- by a service supplier of one Member, through commercial presence in the territory of any other Member (supply through commercial presence); and,
- by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member (supply through the presence of natural persons).

‘Services’ includes any service in any sector except services supplied in the exercise of governmental authority.¹²⁵ The supply of services includes the production, distribution, marketing, sale and delivery of a service.¹²⁶ It is clear from the third mode of supply, i.e., supply through commercial presence, that the GATS also covers measures relating to foreign investment by suppliers of services.

The GATS contains provisions on most-favoured-nation treatment (Article II), transparency (Article III), increasing participation of developing countries (Article IV); economic integration (Article V); domestic regulation (Article VI); recognition (Article VII); emergency safeguard measures (Article X); payments and transfers (Article XI); restrictions to safeguard the balance of payments (Article XII); government procurement (Article XIII); general exceptions (Article XIV); security exceptions (Article XIV *bis*); subsidies (Article XV); market access (Article XVI); national treatment (Article XVII); negotiation and

¹²⁴ Article I:1 of the GATS.

¹²⁵ Article I:3 (b) of the GATS.

¹²⁶ Article XXVIII (b) of the GATS.

schedules of specific commitments (Articles XIX and XXI); dispute settlement (Articles XXII and XXIII) and institutional issues (Articles XXIV to XXVI). Attached to the GATS are a number of annexes, including the Annex on Article II Exceptions, the Annex on Movement of Natural Persons Supplying Services under the Agreement and the Annexes on Financial Services. The Schedules of Specific Commitments of all WTO Members concerning their market access and national treatment commitments are also attached to the GATS and form an integral part thereof.¹²⁷

On the relationship between the GATS and the GATT 1994, and in particular, the question of whether they are mutually exclusive agreements, the Appellate Body ruled in *EC – Bananas III*:

The GATS was not intended to deal with the same subject matter as the GATT 1994. The GATS was intended to deal with a subject matter not covered by the GATT 1994, that is, with trade in services. Thus, the GATS applies to the supply of services. ... Given the respective scope of application of the two agreements, they may or may not overlap, depending on the nature of the measures at issue. Certain measures could be found to fall exclusively within the scope of the GATT 1994, when they affect trade in goods as goods. Certain measures could be found to fall exclusively within the scope of the GATS, when they affect the supply of services as services. There is yet a third category of measures that could be found to fall within the scope of both the GATT 1994 and the GATS. These are measures that involve a service relating to a particular good or a service supplied in conjunction with a particular good. In all such cases in this third category, the measure in question could be scrutinized under both the GATT 1994 and the GATS. However, while the same measure could be scrutinized under both agreements, the specific aspects of that measure examined under each agreement could be different. Under the GATT 1994, the focus is on how the measure affects the goods involved. Under the GATS, the focus is on how the measure affects the supply of the service or the service suppliers involved. Whether a certain measure affecting the supply of a service related to a particular good is scrutinized under the GATT 1994 or the GATS, or both, is a matter that can only be determined on a case-by-case basis.¹²⁸

1.4.1.4 Agreement on Trade-Related Aspects of Intellectual Property Rights

The *Agreement on Trade-Related Aspects of Intellectual Property Rights* (the ‘*TRIPS Agreement*’) is not an agreement concerning trade or trade measures. However, the value of many goods and services, particularly those traded by developed countries, is largely determined by the idea, the design or the invention they incorporate. If that value is not protected by protecting the intellectual property rights on the idea, the design or the invention, trade in these products will not thrive. For that reason, developed country Members sought and obtained the inclusion in the *WTO Agreement* of an agreement specifying minimum standards of protection of intellectual property rights and requiring the effective enforcement of these rights. The *TRIPS Agreement* covers seven types of intellectual property:

- copyright and related rights (Articles 9-14);
- trademarks (Articles 15-21);
- geographical indications (Articles 22-24);
- industrial designs (Articles 25-26);

¹²⁷ Article XX of the GATS.

¹²⁸ Appellate Body Report, *EC – Bananas III*, para. 221.

- patents (27-34);
- layout-designs (topographies) of integrated circuits (Articles 35-38); and
- undisclosed information, including trade secrets (Article 39).

With regard to these types of intellectual property, the *TRIPS Agreement* provides for minimum standards of protection. With regard to copyright, for example, Article 12 provides:

Whenever the term of protection of a work, other than a photographic work or a work of applied art, is calculated on a basis other than the life of a natural person, such term shall be no less than 50 years from the end of the calendar year of authorized publication, or, failing such authorized publication within 50 years from the making of the work, 50 years from the end of the calendar year of making.

Furthermore, the *TRIPS Agreement* requires WTO Members to ensure that enforcement procedures and remedies are available to permit effective action against any act of infringement of the intellectual property rights referred to above, including civil and administrative procedures and remedies, provisional measures and criminal procedures (Articles 41-61). Pursuant to Articles 3 and 4 of the *TRIPS Agreement*, each WTO Member must accord other WTO Members national treatment and most-favoured-nation treatment, subject to a number of exceptions. The *TRIPS Agreement* frequently refers to other intellectual property agreements, such as the *Paris Convention for the Protection of Industrial Property* (1967), the *Bern Convention for the Protection of Literary and Artistic Works* (1971), the *Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations* (1961) and the *Washington Treaty on Intellectual Property in Respect of Integrated Circuits* (1989), making provisions of these agreements applicable to all WTO Members.¹²⁹

1.4.1.5 Understanding on Rules and Procedures for the Settlement of Disputes

The *Understanding on Rules and Procedures for the Settlement of Disputes*, commonly referred to as the *Dispute Settlement Understanding* or DSU, is arguably the single most important achievement of the Uruguay Round negotiations. The WTO dispute settlement system applies to all disputes between WTO Members arising under WTO agreements. In 1997, Renato Ruggiero, then Director General of the WTO, referred to the dispute settlement system provided for by the DSU as:

... in many ways the central pillar of the multilateral trading system and the WTO's most individual contribution to the stability of the global economy.¹³⁰

Building on almost fifty years of experience with settling trade disputes in the context of the GATT 1947, the DSU provides for a dispute settlement system,

¹²⁹ E.g., Article 2.1 of the *TRIPS Agreement* (with regard to the Paris Convention); and Article 9 of the *TRIPS Agreement* (with regard to the Bern Convention).

¹³⁰ As reported in WTO, *Trading into the Future 2nd ed* (WTO April, 1999), 38.

characterised by compulsory jurisdiction, short timeframes, an appellate review process and an enforcement mechanism.

[...]

1.4.1.6 Trade Policy Review Mechanism

It is very important for WTO Members, their citizens and companies involved in trade to be informed as fully as possible about trade regulations and policies of other WTO Members. To that end, many of the WTO agreements referred to above provide for an obligation on WTO Members to inform or notify the WTO of new trade regulations, measures or policies or changes to existing ones. In addition, however, the WTO conducts regular reviews of individual Members' trade policies. The procedural rules for these reviews are set out in Annex 3 on the *Trade Policy Review Mechanism*.

1.4.1.7 Plurilateral Agreements

All agreements in Annexes 1 to 3 are binding on all WTO Members. Membership of the WTO is conditional upon the acceptance of these 'multilateral agreements'. Annex 4 contains 2 agreements, referred to as 'plurilateral agreements', which are only binding on those WTO Members that are a party to these agreements.

The first plurilateral agreement is the *Agreement on Trade in Civil Aircraft*. This is, in fact, an agreement concluded during the 1979 Tokyo Round of trade negotiations. Attempts during the Uruguay Round to negotiate a new agreement failed. The *Agreement on Trade in Civil Aircraft*, which is of particular interest to the United States and the European Communities:

- provides for duty-free trade in civil aircraft and parts thereof;
- prohibits quotas and other trade restrictions; and,
- addresses the issue of government support to aircraft manufacturers.

Disputes relating to this agreement *cannot* be brought to the WTO dispute settlement system for resolution.

The second plurilateral agreement is the *Agreement on Government Procurement*. Under GATT 1994 and GATS rules, WTO Members are free to discriminate in favour of domestic products, services and service suppliers in the context of government procurement. This is an important exception to the national treatment obligations of Article III of the GATT 1994 and Article XVII of the GATS. Under the terms of the *Agreement on Government Procurement*, the parties have agreed to accord national treatment in respect of government procurement by designated government entities. The agreement also obliges parties to make procurement opportunities public and requires parties to provide for a procedure allowing unsuccessful bidders to challenge a procurement award. Disputes under the *Agreement on Government Procurement* can be, and have already been, brought to the WTO dispute settlement system for resolution.¹³¹

¹³¹ E.g., Panel Report, *Korea – Procurement*.

When the *WTO Agreement* entered into force on 1 January 1995, Annex 4 held four, and not two, plurilateral agreements. However, the *International Dairy Agreement* and the *International Bovine Meat Agreement* were terminated at the end of 1997.

1.4.1.8 Ministerial Decisions and Declarations

Finally, note the twenty-seven Ministerial Decisions and Declarations, which together with the *WTO Agreement* form the Final Act adopted in Marrakesh in April 1994 at the end of the Uruguay Round negotiations. These Ministerial Decisions and Declarations include, for example, the Decision on Measures in Favour of Least-Developed Countries, the Declaration on the Contribution of the World Trade Organization to Achieving Greater Coherence in Global Economic Policymaking and the Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes. These Ministerial Decisions and Declarations do not generate specific rights and obligations for WTO Members which can be enforced through WTO dispute settlement.

1.4.2 Other Sources of WTO Law

While the *WTO Agreement* with its multiple annexes is undisputedly the principal sources of WTO law, it is not the only source of WTO law. This section examines:

- WTO dispute settlement reports;
- acts of WTO bodies;
- agreements concluded in the context of the WTO;
- customary international law;
- general principles of law;
- other international agreements;
- subsequent practice of WTO Members;
- teachings of the most highly qualified publicists; and
- the negotiating history.

All the above may, to varying degrees, clarify or define the law applicable between WTO Members on WTO matters.

[...]

1.6. SUMMARY

One of the defining features of today's world is the process of economic globalisation, with high levels of international trade and foreign direct investment. There is broad consensus among economists and policy-makers that economic globalisation in general and international trade in particular offer an unprecedented *opportunity* to eradicate poverty and hunger. However, to ensure that this opportunity is realised, economic globalisation and international trade have to be *managed* and *regulated* at the international level. If not, economic globalisation and international trade are likely to be a curse, rather than a blessing to humankind, aggravating economic inequality, social injustice, environmental degradation and cultural dispossession. Managing and

regulating economic globalisation and international trade so that they benefit all is one of the prime challenges of the twenty-first century.

For countries to realise the gains of international trade and for international trade to benefit all of mankind, international rules on trade are necessary for basically four related reasons:

- to restrain countries from taking trade-restrictive measures;
- to give traders and investors a degree of security and predictability regarding the trade policies of other countries;
- to cope with the challenges presented by economic globalisation with respect to the protection of important societal values such as public health, a clean environment, consumer safety, cultural identity and minimum labour standards; and
- to achieve a greater measure of equity in international economic relations.

WTO law, which is the core of international economic law, provides for such rules on international trade. There are six groups of basic rules and principles of WTO law:

- the principles of non-discrimination;
- the rules on market access, including rules on transparency;
- the rules on unfair trade;
- the rules on conflicts between trade and other societal values and interests;
- the rules on special and differential treatment for developing countries; and
- the rules relating to decision-making and dispute settlement.

The principal source of WTO law is the *WTO Agreement*, in force since 1 January 1995. The *WTO Agreement* is a short agreement (of sixteen articles) establishing the World Trade Organization but with, in annex, a significant number of agreements with substantive and/or procedural provisions, such as the GATT 1994, the GATS, the *TRIPS Agreement*, and the DSU. However, the *WTO Agreement* is not the only source of WTO law. WTO dispute settlement reports, acts of WTO bodies, agreements concluded in the context of the WTO, customary international law, general principles of law, other international agreements, subsequent practice of WTO Members, teachings of the most highly qualified publicists and the negotiating history may all, to varying degrees, be sources of WTO law. Note that not all these sources of WTO law are of the same nature or on the same legal footing. Some sources, such as the *WTO Agreement* and most of the agreements annexed to it, provide for specific legal rights and obligations for WTO Members that these Members can enforce through WTO dispute settlement. Other sources, such as the WTO dispute settlement reports, general principles of law, customary international law and non-WTO agreements, do not provide for specific, enforceable rights and obligations but nevertheless they do 'clarify' and 'define' the law that applies between WTO Members on WTO matters.

While for many years international trade law was not part of the mainstream of international law, WTO law is now the 'new frontier' of international law. Nobody questions that WTO law is an integral part of public international law. However, the relationship between WTO rules and other, conflicting rules of public international law, such as rules of MEAs, is controversial. A generally accepted view on this relationship is yet to emerge.

With regard to the relationship between WTO law and the national law of WTO Members, note that while some WTO scholars forcefully plead for the granting of direct effect to WTO law in the domestic legal order of WTO Members, none of the major trading nations grants such effect to WTO law. In most WTO Members, a breach of WTO law obligations cannot be challenged or invoked in national courts.