

WTO LAW ON TECHNICAL BARRIERS TO TRADE & SANITARY AND PHYTOSANITARY MEASURES

Semester: Fall Semester – HS 2020

Root number: 448997

ECTS: 3

Lecturers: Arthur Appleton & Christian Häberli

Location: In response to the COVID-19 pandemic and following the guidelines established by the University of Bern, all courses of the 2020 WTI Summer Academy will only be held online. This course will have live sessions on Zoom.

Dates: 22 – 26 June 2020 (+ Saturday, 26 June: Take home assignment)

Audience:

- Government officials; Embassy staff; people working for international organisations and NGOs
- Master of Advanced Studies of International Law and Economics (MILE) Students
- Joint LL.M. / Diploma of Advanced Studies Trade and Investment Law (TRAIL+) Students - World Trade Institute / Faculty of Law, Unibe
- Certificate of Advanced Studies / Diploma of Advanced Studies in International Law and Economics (CAS ILE & DAS ILE) Students - World Trade Institute, Unibe
- Students from different universities across Switzerland and abroad (we will take into consideration different time zones.)

Course Description

This course builds on basic knowledge regarding GATT obligations and applies this knowledge to trade-related regulatory issues that affect the business community and civil society. The classroom activities will focus on the policy space that Members have under the WTO Agreements on Technical Barriers to Trade (TBT) and Sanitary and

Phytosanitary Measures (SPS) to regulate trade in goods, including the production and sale of goods that have social and environmental implications. Based on participant interest, we will discuss trade and investment-related issues arising under the WTO and regional trade agreements (RTAs) including climate change mitigation, public health, obesity, food and beverage safety, gender, consumer protection, child and forced labour, public morals, the protection of the environment, and similar issues. (Pandemic- and Brexit-related issues may also be discussed.) Particular attention will also be given to the needs of the business community – businesses thrive when government regulations are legitimate, transparent, and stable. It is not enough just to look at the needs of either business or civil society. Both must be examined to develop good regulations.

WTO rules allow Members to develop regulatory policies to further their legitimate objectives, and limit a Member's use of trade policy for protectionist purposes. This module will help participants determine where the line is between licit and illicit trade measures, and where Members have room to regulate.

This module examines three important WTO Agreements affecting a Member's ability to apply regulatory policies. It reviews Articles I, III and XX of the General Agreement on Tariffs and Trade (GATT 1994), then focuses on the Agreements on Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary Measures (SPS). The objective is to enable participants to better understand the policy space that Members enjoy, and the limits that these Agreements impose on a Member's regulatory power, thereby allowing policy makers to craft WTO-consistent national legislation that achieves their trade-related health, safety, environmental, business, and trade policy objectives.

Readings, lectures, class discussions, and group presentations will focus on the implementation of the GATT, TBT and SPS Agreements, and the types of regulatory practices and governance failures that might violate these agreements. Participants will gain a solid understanding of the operation of these Agreements, the relevant WTO "case law" applying these Agreements, and how WTO Members use taxation schemes, technical regulations, health-related import prohibitions, standards and testing, and certification and labelling programmes as a means to further their objectives. Special attention will be given to the WTO compatibility of pandemic-related health and other trade measures.

Learning Objectives

After the end of the course, participants should be able to:

- Understand the scope, legal operation and limitations imposed on Members by Articles I, III, and XX of GATT 1994 – in particular the non-discrimination principle
- Be familiar with the distinction between a “non-tariff measure” (NTM) and a “non-tariff barrier” (NTB)
- Distinguish between GATT, TBT and SPS, measures and understand which agreement or agreements apply with respect to particular trade measures
- Demonstrate familiarity with the core legal principles and obligations in the TBT and SPS Agreements and relevant TBT and SPS jurisprudence
- Apply the GATT, SPS and TBT Agreements to trade-related health, environmental, social, and consumer issues; understand the limits imposed by the GATT, TBT and SPS Agreements on a Member's national policy space; and distinguish between measures based on legitimate regulatory objectives and protectionist restrictions on trade
- Discuss the relevance and adequacy of public international law, the sustainable development goals, and the Vienna Convention on the Law of Treaties in WTO negotiations and disputes
- Understand the TBT and SPS terms “non-discrimination”, “technical regulation”, “standard”, “conformity assessment procedure”, “risk assessment”, “appropriate level of protection”, “precaution”, “science”, “international standards”, “harmonization”, “mutual recognition”, “equivalence”, and “transparency”
- Appreciate the importance of international standards, the difference between the US and EU approaches to standardization, including in some of their Regional Trade Agreements, and the benefits for WTO Members inherent in the TBT Code of Good Practice (Annex 3)
- Explain the special challenges faced by developing countries seeking to meet the obligations of the TBT and SPS Agreements in their trade relations

Biography of the Lecturers

Arthur E. Appleton, JD, PhD

Adjunct Professor, Johns Hopkins School of Advanced
International Studies (SAIS – Europe)
Appleton Luff – International Lawyers

(Appleton@appletonluff.com)



Arthur E Appleton is an Adjunct Professor of International Law at the Johns Hopkins School of Advanced International Studies in Bologna (SAIS-Europe), where he teaches International Trade and investment Law. He is also on the visiting faculty and the Advisory Board of the World Trade Institute (University of Bern), and teaches Executive Education courses at the Graduate Institute of International Studies and Development in Geneva, Switzerland. He has published widely in the field of international trade law and international arbitration (4 books and approximately 45 articles). He sits on the Editorial Advisory Board, of *Legal Issues of Economic Integration* (Journal of the Europa Institute and the Amsterdam Center for International Law), and the Advisory Committee, of *The Latin American Journal of International Trade Law*.

Arthur is also a founding partner of [Appleton Luff – International Lawyers](#), a boutique international law firm with offices worldwide. He has 30 years of experience in international trade law working with international businesses, sovereign States, and international and regional organizations. He has worked throughout Europe, the Middle East, Africa, Asia, and Latin America, and has appeared before the WTO Appellate Body. Arthur has served as a Consultant for many international and regional organizations including the World Bank, the WTO, the ADB, the IDB, UNCTAD, UNITAR, the ITC, CLDP and the EU. He is on the List of Experts (Chairpersons) for Trade and Sustainable Development Disputes arising under five EU FTAs.

Dr Christian Häberli, PhD (Law)

WTI Fellow

(Christian.Haeberli@wti.org)

Christian Häberli has been a Fellow of the World Trade Institute (Bern University) since 2007 and is a consultant for scientific research and outreach activities in Europe, Asia, Africa, and in the Americas. He has produced over 60 publications on trade and investment issues related to agriculture, food security and food safety, obesity and malnutrition, water, climate change, employment, multilateral and regional trade, and development. In 1977 he earned a PhD with a thesis in African Investment Law (Basel University). He also



has university degrees in Development Sciences from Geneva (1975) and in Theology from Bern (2009).

His professional career started in 1978 with the International Labour Organization (ILO) and with the Swiss Government, based in Madagascar, Thailand, Nepal, and Switzerland. Christian Häberli was a trade negotiator for Switzerland in the GATT and the WTO during the Uruguay and the Doha Rounds (1986 to 2007). He was Chair of the WTO Committee on Agriculture (Regular Session, 2005 – 07) and WTO Panellist 1996 – 2015, in 20 stages of 5 dispute settlement cases. He also served as Chair (every other year) of the Joint Committee of the Agriculture Agreement Switzerland–EU (2002 to 2007). He presently chairs the Arbitration Panel established on 28 January 2020, initiated by the EU on restrictions applied by Ukraine on exports of certain wood products.

Grading

Basic Knowledge Tests

- 40% of the final course grade (one quiz on Monday and a presentation on Friday – worth 20% and 20%, respectively, of your final grade).

Take Home Assessment

- 60% of the final course grade (one question will deal with the TBT Agreement and one question will deal with the SPS Agreement; either or both may have a GATT element).

Class Participation

- The lecturers reserve the right to add points to the grades of well-prepared participants and to subtract points from unprepared or inactive participants (including in Group Presentations).

Course Timetable and Overview (proposed time slots, TBC)

Class	Date	Day	Time	Lecturer	Topic
1	22 June	Monday	10:00 12:00 14:00 16:00	Arthur Appleton (Christian Häberli)	GATT 1994 and TBT Quiz
2	23 June	Tuesday	10:00 12:00 14:00 16:00	Arthur Appleton (Christian Häberli)	TBT and Case Studies
3	24 June	Wednesday	10:00 12:00 14:00 16:00	Christian Häberli (Arthur Appleton)	SPS
4	25 June	Thursday	10:00 12:00 14:00 16:00	Christian Häberli (Arthur Appleton)	SPS and Case Studies
5	26 June	Friday	10:00 12:00 14:00 16:00	Christian Häberli Arthur Appleton	Group Presentations and Debate
6	27 June	Saturday			Take Home Exam

Schedule

Monday, 22 June 2020 (Arthur Appleton)

- Introduction (with Christian Häberli)
- Basic TBT and SPS Knowledge Quiz (multiple choice, based on the week's readings). The purpose of this quiz is to ensure that participants do the readings in advance of class.
- Review of GATT Articles I, III, and XX and related jurisprudence: Implications for national policy space
- Introduction to the TBT Agreement: Implications for national policy space

Tuesday, 23 June 2020 (Arthur Appleton)

- The TBT Agreement continued: Relevant jurisprudence
- Group work: Case studies
- Introduction to cross-cutting issues: Public international law, sustainable development goals and the Vienna Convention on the Law of Treaties (with Christian Häberli)

Wednesday, 24 June 2020 (Christian Häberli)

- Introduction to the SPS Agreement
- Group study and topic allocation for group presentations (SPS)

Thursday, 25 June 2020 (Christian Häberli)

- The SPS Agreement continued: Relevant jurisprudence
- Cross-cutting issues continued (with Arthur Appleton)

Friday, 26 June 2020 (Christian Häberli and Arthur Appleton)

- Group presentations and final debate (Häberli and Appleton)

Saturday, 27 June 2020

- Take-home Assessment

Reading Material

Compulsory (for Monday)

The following reading must be completed before the first class (for Monday). It includes TBT and SPS materials¹

- Review Articles I, III and XX of GATT 1994
- Study the TBT Agreement and Annexes carefully provision-by-provision, with a focus on the preamble and Article 2:
http://www.wto.org/english/docs_e/legal_e/17-tbt.pdf
- Pages 883 - 934 on the **TBT Agreement** in Peter VAN DEN BOSSCHE and WERNER ZDOUC, *The Law and Policy of the World Trade Organization*, Cambridge University Press, (Cambridge University Press, Fourth Edition 2017)
- Study the SPS Agreement and Annexes provision-by-provision:
http://www.wto.org/english/docs_e/legal_e/15-sps.pdf
- Read Pages 935 - 992 on the **SPS Agreement** in Peter VAN DEN BOSSCHE and WERNER ZDOUC, *The Law and Policy of the World Trade Organization*, Cambridge University Press, (Cambridge University Press, Fourth Edition 2017).

Recommended (for Monday and Tuesday)

The relationship between GATT and TBT

- Appellate Body Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400, 401/AB/R, (22 May 2014) at ¶¶ 5.169, 5.200-5.201, 5.214-5.215, 5.261, 5.276-5.280, 5.291-5.292, 5.296-5.306, 5.310-5.313, 5.317-5.339, available at:
[http://www.worldtradelaw.net/reports/wtoab/ec-sealproducts\(ab\).pdf](http://www.worldtradelaw.net/reports/wtoab/ec-sealproducts(ab).pdf)
- Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R (24 April 2012) at ¶¶ 96, 176-182, available at: [http://www.worldtradelaw.net/reports/wtoab/us-clovecigarettes\(ab\).pdf](http://www.worldtradelaw.net/reports/wtoab/us-clovecigarettes(ab).pdf)
- Appellate Body Report, *United States – Measures Concerning The Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R (13 June 2012) at ¶ 405, available at: [http://www.worldtradelaw.net/reports/wtoab/us-tunamexico\(ab\).pdf](http://www.worldtradelaw.net/reports/wtoab/us-tunamexico(ab).pdf)
- *United States – Measures Affecting the Production and Sale of Clove*

¹ For an introduction on standards and safety, information on terminology, and an overview of relevant TBT and SPS issues, see the following WTO websites

www.wto.org/english/thewto_e/whatis_e/tif_e/agrm4_e.htm,

www.wto.org/english/tratop_e/tbt_e/tbt_e.htm and www.wto.org/english/tratop_e/sps_e/sps_e.htm.

Cigarettes, WT/DS406/AB/R (24 April 2012) at ¶¶ 88-96 (preamble), ¶ 100 (interpreting Article 2.1 ¶¶ 108-117, 120, 137-145 and 156 (likeness), ¶¶ 171-182, 190-200, 234-236 (discrimination), available at:

[http://www.worldtradelaw.net/reports/wtoab/us-clovecigarettes\(ab\).pdf](http://www.worldtradelaw.net/reports/wtoab/us-clovecigarettes(ab).pdf)

- *United States – Measures Concerning The Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R (13 June 2012) at ¶¶ 12- 18, 138, 154-155, 188-199 (technical regulation), ¶¶ 212-215 225-240,241, 244, 248-251, 266-270, 284-299 (discrimination), ¶¶ 315-322 (legitimate objective/necessity), ¶¶ 343-364, 368-378, 401 (international standards) available at:
[http://www.worldtradelaw.net/reports/wtoab/us-tunamexico\(ab\).pdf](http://www.worldtradelaw.net/reports/wtoab/us-tunamexico(ab).pdf)
- *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R, WT/DS386/AB/R (23 July 2012) at ¶¶ 265-292, 341-349 (discrimination – treatment less favourable), ¶¶ 373-379, and 461- 469 (legitimate objective), ¶¶ 470-491 (necessity) available at:
[http://www.worldtradelaw.net/reports/wtoab/us-cool\(ab\).pdf](http://www.worldtradelaw.net/reports/wtoab/us-cool(ab).pdf)
- *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R (18 June 2014), ¶¶ 5.8-5.60 (technical regulations), available at: [http://www.worldtradelaw.net/reports/wtoab/ec-sealproducts\(ab\).pdf](http://www.worldtradelaw.net/reports/wtoab/ec-sealproducts(ab).pdf)

Optional: TBT Agreement (for Monday and Tuesday)

- *Business Guide to Trade and Investment*, Volume 1 – International Trade (Arthur Appleton and Patrick Macrory, ICC, 2017), pages 87-116 (covers both TBT and SPS).
- *EC – Measures Affecting Asbestos and Asbestos-Containing Products*, (WT/DS135/R), (5 April 2001), ¶¶ 8.28-8.33 (criteria for application of the TBT Agreement), available at:
[http://www.worldtradelaw.net/reports/wtopanels/ec-asbestos\(panel\).pdf](http://www.worldtradelaw.net/reports/wtopanels/ec-asbestos(panel).pdf)
- *European Communities - Trade Description of Sardines*, DS/231/AB/R (23 October 2002), ¶¶ 171-291 (**skim only**) (characterization of the measure as a technical regulation, temporal scope, Codex as a relevant international standard, Codex "as a basis", ineffective or inappropriate"), available at:
[http://www.worldtradelaw.net/reports/wtoab/ec-sardines\(ab\).pdf](http://www.worldtradelaw.net/reports/wtoab/ec-sardines(ab).pdf)
- *Certain Country of Origin Labelling (COOL Requirements, Recourse to Article 21.5 of the DSU by Canada and Mexico*, WT/DS384,386/AB/RW (29 May 2015), ¶¶ 5.341-5.357 (GATT Article IX Marks of Origin), available at:
[http://www.worldtradelaw.net/reports/wtoab/us-cool\(ab\)\(21.5\).pdf](http://www.worldtradelaw.net/reports/wtoab/us-cool(ab)(21.5).pdf)
- Appellate Body Report, *United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, Recourse to Article 21.5 of the DSU by Mexico*, (WT/DS381/AB/RW) (3 Dec. 2015), **skim only** ¶¶ 7.22-7.266 available at: <http://worldtradelaw.net/document.php?id=reports/wtoab/us->

[tunamexico\(ab\)\(21.5\).pdf](#)

Optional Readings on the Vienna Convention and Societal Concerns

- Häberli, Christian. Seals and the Need for more Deference to Vienna by WTO Adjudicators. Fourth Biennial Global Conference of the Society of International Economic Law (SIEL) Working Paper No 22 (8 July 2014); electronic copy available at:
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2563474
- For Christian Häberli's publications on various societal concerns and policy space, see a listing at SSRN: <http://ssrn.com/author=1380616>

Recommended: (for Wednesday and Thursday)

- Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, 20 October 1998, ¶¶ 120-137 (risk assessment), available at: [http://www.worldtradelaw.net/document.php?id=reports/wtoab/australia-salmon\(ab\).pdf](http://www.worldtradelaw.net/document.php?id=reports/wtoab/australia-salmon(ab).pdf)
- Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R and WT/DS48/AB/R, 16 January 1998, ¶¶ 120-125 (precaution); ¶¶ 126-128 (retroactivity of SPS Agreement); ¶¶ 161-166 (based on); ¶¶ 178-193, 208-209 (risk assessment/rational relationship), available at: [http://www.worldtradelaw.net/reports/wtoab/ec-hormones\(ab\).pdf](http://www.worldtradelaw.net/reports/wtoab/ec-hormones(ab).pdf)
- Appellate Body Report, *Japan – Measures Affecting Agricultural Products (Japan – Varietals/ coddling moth)*, WT/DS76/AB/R, 22 March 1999, ¶¶ 72-85 (sufficient scientific evidence); 86-94 (precaution) available at: [http://www.worldtradelaw.net/reports/wtoab/japan-agproducts\(ab\).pdf](http://www.worldtradelaw.net/reports/wtoab/japan-agproducts(ab).pdf)
- Appellate Body Report, *Japan – Measures Affecting the Importation of Apples (fire blight)* WT/DS245/AB/R, 26 November 2003, ¶¶ 8-16 (SPS measures); ¶¶ 166-167 (sufficient scientific evidence – rejecting grant of discretion to implementing party's approach); ¶¶ 169–187 (precaution/provisional measure), available at: [http://www.worldtradelaw.net/reports/wtoab/japan-apples\(ab\).pdf](http://www.worldtradelaw.net/reports/wtoab/japan-apples(ab).pdf)
- Reports of the Panel, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, and WT/DS293/R, 26 September 2006, ¶¶ 7.167 and 7.3412 (measures containing both SPS and TBT provisions); ¶ 7.68 including footnote 242 (interpretation of “all the parties” in Article 31(3)(c) of the Vienna Convention), 7.1466-7.1491, 7.1569-7.1570 (undue delay) Available at: [http://www.worldtradelaw.net/reports/wtopanels/ec-biotech\(panel\).pdf](http://www.worldtradelaw.net/reports/wtopanels/ec-biotech(panel).pdf)

- Appellate Body Report, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS321/AB/R, 16 October 2008, ¶¶ 537-555 (risk assessment / risk management); ¶¶ 587-598, 616 (standard of review / minority scientific views / objective assessment of the facts); ¶¶ 688-734 (precaution / international standards), available at:
[http://www.worldtradelaw.net/reports/wtoab/canada-hormonessuspension\(ab\).pdf](http://www.worldtradelaw.net/reports/wtoab/canada-hormonessuspension(ab).pdf)

Optional: SPS Agreement (for Wednesday and Thursday)

- *Australia – Measures Affecting the Importation of Apples from New Zealand*, (fire blight, European canker, apple leaf-curling midge) (16 SPS measures at issue), ¶¶ 206-315, (standard of review / risk assessment / objective assessment of the facts), WT/DS367/AB/R, 17 Dec. 2010, available at:
[http://www.worldtradelaw.net/reports/wtoab/australia-apples\(ab\).pdf](http://www.worldtradelaw.net/reports/wtoab/australia-apples(ab).pdf)
- Panel Report, *United States - Certain Measures Affecting Imports of Poultry from China*, WT/DS392/R 25 Oct. 2010, ¶¶ 7.162-7.192 (risk assessment), available at: [http://www.worldtradelaw.net/reports/wtopanelsfull/us-poultrychina\(panel\)\(full\).pdf](http://www.worldtradelaw.net/reports/wtopanelsfull/us-poultrychina(panel)(full).pdf)
- Appellate Body Report, *India – Measures Concerning the Importation of Certain Agricultural Products*, WT/DS430/AB/R, (19 June 2015). ¶¶ 5.11-5.40 (relationship between Articles 2.2, 5.1 and 5.2, and presumption of inconsistency under Article 2.2 if violation of Article 5.1 and 5.2).
[http://www.worldtradelaw.net/reports/wtoab/india-agriculturalproducts\(ab\).pdf](http://www.worldtradelaw.net/reports/wtoab/india-agriculturalproducts(ab).pdf)
- Panel Report, *United States – Measures Affecting the Importation of Animals, Meat and Other Animal Products from Argentina*, WT/DS447/R (31 August 2015), ¶¶ 7.197-252 (compliance with OIE's Terrestrial Code), available at:
[http://www.worldtradelaw.net/reports/wtopanelsfull/us-animals\(panel\)\(full\).pdf](http://www.worldtradelaw.net/reports/wtopanelsfull/us-animals(panel)(full).pdf)
- *Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union*, WT/DS475/AB/R (22 March 2017), ¶ 6.2 on adaptation to regional characteristics), available at:
[http://worldtradelaw.net/document.php?id=reports/wtopanelsfull/russia-pigseu\(panel\)\(full\).pdf](http://worldtradelaw.net/document.php?id=reports/wtopanelsfull/russia-pigseu(panel)(full).pdf)