

WTO Law on Technical Barriers to Trade (TBT) & Sanitary and Phytosanitary Measures (SPS)

Semester: Spring semester - FS 2022

ECTS: 3

Lecturers: Arthur Appleton & Christian Häberli

Dates: 27 June - 1 July 2022 (hybrid sessions)

Room: Anna Nussbaum, World Trade Institute, Hallerstrasse 6, Bern

Participants:

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

Course Description

WTO rules define Members' rights to regulate without restricting market access commitments unduly. This module will help participants determine where the line is between licit and illicit trade measures. Readings, lectures, class discussions, and group presentations will build on participants' basic knowledge regarding GATT obligations and apply this knowledge to trade-related regulatory issues that affect operators along the value chain and are of interest to civil society. We will first review Articles I, III, XI, XVIII-XXI of the GATT 1994. Then we 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 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, pandemic and public health policies, food safety, consumer protection, child and forced labour, public morals, the protection of the environment, and wartime trade barriers where TBT or SPS provisions might apply. Particular attention will also be given to the needs of the business community based on the realisation that businesses thrive when government regulations are legitimate, transparent, and stable.

Learning Objectives

Participants will build on their understanding of fundamental GATT provisions and gain a solid understanding of the operation of the TBT and SPS Agreements, the relevant WTO and RTA “case law” applying these agreements, and how WTO Members may use taxation schemes, technical regulations, standards, health-related import prohibitions, and testing, certification and labelling programmes to further their objectives.

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

- 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”,
- Understand the scope, legal operation and limitations imposed on WTO Members – in particular the non-discrimination principle as applied in the regulatory context,
- 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 a particular trade measure
- Demonstrate familiarity with the core legal principles and obligations in the TBT and SPS Agreements and relevant DSB decisions,
- Discuss the relevance and adequacy of the WTO rules in the light of today’s governance challenges, as well as of public international law, the Sustainable Development Goals, the Paris Agreement, and the Vienna Convention on the Law of Treaties,
- Appreciate the importance of international standards and operator guidelines, the difference between the US and EU approaches to standardization, including in some RTAs, and the benefits for WTO Members inherent in the TBT Code of Good Practice (Annex 3), and

- Explain the special challenges faced by developing countries seeking to meet the obligations of the TBT and SPS Agreements in their trade relations.

Lecturers

Arthur E. Appleton, JD, PhD

Adjunct Professor, Johns Hopkins University (SAIS – Europe) and IE University (Madrid)
Partner, 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, and an Adjunct Professor at IE University (Madrid) where he teaches a course on trade governance. He is also on the visiting faculty and the Advisory Board of the World Trade Institute (University of Bern) and occasionally teaches Executive Education courses at the Graduate Institute of International Studies and Development in Geneva. He has published widely in the field of international trade law and international arbitration (4 books and more than 50 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](#), an international law firm with offices worldwide. He has more than 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 organizations including the World Bank, the IFC, 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.

Christian Häberli, PhD

Fellow of the World Trade Institute since 2007 and a consultant for scientific research and outreach activities in Europe, Asia, Africa, and in the Americas. He has produced over 70 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 (<https://www.wti.org/research/publications/?author=44>).



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. Dr 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 twenty stages of five dispute settlement cases (bananas, apples, biotech, audio-visuals, and country of origin labelling). Chairperson of the Arbitration Panel initiated by the EU on restrictions applied by Ukraine on exports of certain wood products (2020). He also served as Chair (every other year) of the Joint Committee of the Agriculture Agreement Switzerland–EU (2002 to 2007).

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Course Schedule

Date	Day	Time	Lecturer/s	Topic
27 June	Monday	09:00-12:00	Arthur Appleton	Refresher GATT 1994 and TBT and SPS Quiz
		14:00-16:00	“	The TBT Agreement
28 June	Tuesday	09:00-12:00	Arthur Appleton	The TBT Agreement and cross-cutting issues
		14:00-16:00	“	Group exercises
29 June	Wednesday	09:00-12:00	Christian Häberli	SPS
		14:00-16:00	“	Group exercises
30 June	Thursday	09:00-12:00	Christian Häberli	SPS and TBT Trade Concerns, and Cross-cutting issues
		14:00-16:00	“	Cross-cutting Issues and Summing Up
1 July	Friday			Take-home assessment

Monday, 27 June 2022 (Arthur Appleton)**(09:00-12:00)**

- Review of GATT Articles I, III, and XX and related jurisprudence: Implications for national policy space
- TBT and SPS Quiz: The purpose of this quiz is to ensure that participants do the TBT and SPS readings in advance of class.
- Introduction to the TBT Agreement

(14:00-16:00 pm)

- **The TBT Agreement (cont'd)**

Tuesday, 28 June 2022 (Arthur Appleton)**(09:00-12:00)**

- The TBT Agreement continued: Cross-cutting issues and relevant jurisprudence
 - Environment, human rights, labour rights, public international law, sustainable development and the Vienna Convention on the Law of Treaties
- Discussion

(14:00-16:00)

- Group exercises
- Q&A, discussion

Wednesday, 29 June 2022 (Christian Häberli)**(09:00-12:00)****(14:00-16:00)**

- Introduction to the SPS Agreement
- Group exercises

Thursday, 30 June 2022 (Christian Häberli)**(09:00-12:00)****(14:00-16:00)**

- The SPS Agreement continued: Relevant jurisprudence

- Cross-cutting issues
- Cross-cutting issues (cont'd) + final questions SPS+TBT

Friday, 1 July 2022

- **Open book take-home assessment with one TBT and one SPS question**

Tests and Grading

- One Basic Knowledge quiz on Monday and a grade for active participation– worth 20% and 20%, respectively, of your final grade.
- Take Home Assessment (24 hours starting Thursday after class): 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).

Compulsory Readings

- Read Pages 964 - 1017 on the **TBT Agreement** in Peter VAN DEN BOSSCHE and Werner ZDOUC, *The Law and Policy of the World Trade Organization*, (Cambridge University Press, Fifth Edition, 2022).
- Read Pages 1021 - 1078 on the **SPS Agreement** in Peter VAN DEN BOSSCHE and WERNER ZDOUC (same as above)
- Review Articles I, III and XX of GATT 1994 and study the TBT and SPS Agreements provision by provision. They are available at: https://www.wto.org/english/docs_e/legal_e/legal_e.htm

Recommended Reading

- *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).
- Häberli, Christian. Can Panels Save WTO? WTI Working Paper 5/2021 (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3787577)
- Note that WTO TBT and SPS Cases, Notifications, "Trade Concerns", trade and project data (UN, ITC) are available on the **ePing" SPS & TBT Platform** (<https://epingalert.org/>).
- Please also take a look at WTI's SPS/TBT course on [Google drive](#) or the

website **ILIAS** (https://ilias.unibe.ch/goto/ilias3_unibe_crs_2251820.html).
First time users please log in here: <http://www.ilias.unibe.ch>

The relationship between GATT and TBT/SPS

- *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:
[http://www.worldtradelaw.net/reports/wtoab/ec-sealproducts\(ab\).pdf](http://www.worldtradelaw.net/reports/wtoab/ec-sealproducts(ab).pdf)
- *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R (24 April 2012) at ¶¶ 96, 176-182:
[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 ¶ 405: [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 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):
[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):
[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):
[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):
[http://www.worldtradelaw.net/reports/wtoab/ec-sealproducts\(ab\).pdf](http://www.worldtradelaw.net/reports/wtoab/ec-sealproducts(ab).pdf)

TBT Agreement

- *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):
[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): [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): [http://www.worldtradelaw.net/reports/wtoab/us-cool\(ab\)\(21.5\).pdf](http://www.worldtradelaw.net/reports/wtoab/us-cool(ab)(21.5).pdf)
- *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: [http://worldtradelaw.net/document.php?id=reports/wtoab/us-tunamexico\(ab\)\(21.5\).pdf](http://worldtradelaw.net/document.php?id=reports/wtoab/us-tunamexico(ab)(21.5).pdf)

The Vienna Convention and Societal Concerns

- Häberli, Christian. Can Panels Save WTO? WTI Working Paper 5/2021 (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3787577)
- Häberli, Christian, “Seals and the Need for more Deference to Vienna by WTO Adjudicators”, (SIEL) Working Paper No 22 (8 July 2014: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2563474
- Arthur Appleton, “PIL and IEL: Will Seal Deaths Resurrect the Dream of International Legal Coherence?” (online journal) <http://www.qil-qdi.org/pil-iel-will-seal-deaths-resurrect-dream-international-legal-coherence/>, QIL - Questions of International Law, Zoom-in 9 (2014) 5-18, 24 November 2014.

SPS Agreement

- *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, 20 October 1998, ¶¶ 120-137 (risk assessment):
[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)
- *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):

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

- *Japan – Measures Affecting Agricultural Products (Japan – Varietals/coddling moth)*, WT/DS76/AB/R, 22 March 1999, ¶¶ 72-85 (sufficient scientific evidence); 86-94 (precaution):
[http://www.worldtradelaw.net/reports/wtoab/japan-agproducts\(ab\).pdf](http://www.worldtradelaw.net/reports/wtoab/japan-agproducts(ab).pdf)
- *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):
[http://www.worldtradelaw.net/reports/wtoab/japan-apples\(ab\).pdf](http://www.worldtradelaw.net/reports/wtoab/japan-apples(ab).pdf)
- *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):
[http://www.worldtradelaw.net/reports/wtopanels/ec-biotech\(panel\).pdf](http://www.worldtradelaw.net/reports/wtopanels/ec-biotech(panel).pdf)
- *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):
[http://www.worldtradelaw.net/reports/wtoab/canada-hormonessuspension\(ab\).pdf](http://www.worldtradelaw.net/reports/wtoab/canada-hormonessuspension(ab).pdf)
- *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: [http://www.worldtradelaw.net/reports/wtoab/australia-apples\(ab\).pdf](http://www.worldtradelaw.net/reports/wtoab/australia-apples(ab).pdf)
- *United States - Certain Measures Affecting Imports of Poultry from China*, WT/DS392/R 25 Oct. 2010, ¶¶ 7.162-7.192 (risk assessment):
[http://www.worldtradelaw.net/reports/wtopanelsfull/us-poultrychina\(panel\)\(full\).pdf](http://www.worldtradelaw.net/reports/wtopanelsfull/us-poultrychina(panel)(full).pdf)

- *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)
- *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):
[http://www.worldtradelaw.net/reports/wtopanelsfull/us-animals\(panel\)\(full\).pdf](http://www.worldtradelaw.net/reports/wtopanelsfull/us-animals(panel)(full).pdf)