

International Law

Academic year 2021 – 2022

International Trade Law DI064 – Autumn – 6 ECTS

Course Description

The global trading regime is in a period of great uncertainty. The traditional leadership role of the United States (US) in the World Trade Organization (WTO) appears to be a thing of the past. Although the Biden administration has softened the US rhetoric vis-à-vis the WTO and multilateralism, it has left numerous Trump-era unilateral trade measures and policies in place. The system continues to labour under the strain of the US – China “trade war”, a dysfunctional dispute settlement system, general globalization scepticism in international relations, and the COVID-19 pandemic. Many observers expect an era of greater trade restrictions, trade-distorting subsidization and industrial policy interventions. Meanwhile, rapid technological advances are changing economic life, trade flows, as well as trade and industrial policies as we know them. So what does the future hold for global trade governance, the WTO, and its legal system? Which elements of the existing system can and will survive, and which will have to change? Can the WTO, including its dispute settlement system, be reformed?

Against this complex backdrop, this course offers practical, in-depth knowledge of substantive WTO law and legal policy. We will cover the core disciplines of trade in goods and services as well as the specialized WTO agreements on, for example, health measures, technical standards, subsidies, anti-dumping measures, and intellectual property rights. We will learn how WTO law balances the need to limit protectionism with the need to preserve legitimate policy space at the national level. Students will also become acquainted with the WTO trade dispute settlement system, its procedures as well as its current crisis and the on-going reform efforts. We will also touch on other timely topics such as e-commerce, national security-based trade restrictions, the systemic challenges posed by state capitalism, and industrial policy. Knowledge of these nuts and bolts of international trade law is indispensable for understanding the existing system (including the many bilateral and regional trade agreements, which are modelled on the WTO framework) as well as for understanding and assessing the many reform ideas for the future.

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Syllabus

Classes and readings

Classes will take place on **Thursdays, 18:15 – 20:00**, starting Thursday 23 September.

We have to schedule one extra class, due to the timing of the final exam. This extra class will most likely take place on **Monday, 4 October 2021, from 18.15 – 20:00 (TBC)**.

All sessions will be recorded and the recordings will be made available. For the detailed time schedule and topics for each class, see the Course Schedule on pages 5 to 10 of this syllabus.

The **readings** for this course can be found, first, in the book entitled *International Trade Law* (3rd edition), co-authored by Prof. Andrew Guzman, Prof. Joost Pauwelyn and Prof. Jennifer Hillman (Wolters Kluwer, 2016). Second, for several class sessions, additional readings (mandatory or recommended) will be assigned and will be provided in electronic format. Students should also obtain a copy of the legal texts either from the WTO website or by purchasing the Documents Supplement to the *International Trade Law* textbook. Students may buy these books at a reduced price with the assistance of Chanya Punyakumpol. Please note that the IHEID library will have a certain number of copies of this book on reserve for this course and that no photocopié with the readings will be available at the Imprimerie Minute. All students are expected to have read the reading assignments prior to class and to engage in an informed discussion during class.

Basic Textbook:

- Joost Pauwelyn *et al.*, *International Trade Law* (3rd ed., Wolters Kluwer, 2016) – reserved copies are available in the IHEID library.

Additional Reading:

- Peter Van den Bossche & Werner Zdouc, *The Law and Policy of the World Trade Organization, Text, Cases and Materials* (4th ed., Cambridge University Press, 2017)
- Michael J. Trebilcock, *Advanced Introduction to Trade Law* (Edward Elgar Publishing, 2015)

Treaties & Legal Texts:

- WTO Secretariat, *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* (Cambridge University Press/WTO) – reserved copies are available in the IHEID library (also available at http://www.wto.org/english/docs_e/legal_e/legal_e.htm).

Optional additional resources:

- WTO dispute settlement cases: if you need background to any of the cases excerpted in the course book go to: <http://www.worldtradelaw.net/dsc/dscpage.htm> where you will find a summary of each and every WTO dispute.
- Other useful websites:
 - www.wto.org (official website of the World Trade Organization)
 - www.worldtradelaw.net (case summaries and research tool for WTO law)
 - www.tradelawguide.com (research tool for WTO law)

- www.ustr.gov (official US government trade website)
- http://www.europa.eu.int/comm/trade/index_en.htm (official trade site of the European Commission)
- www.insidetrade.com (insider information on trade developments)
- <http://www.tradelab.org> (online platform set up to broaden access to legal expertise in international trade and investment law)

Guest speakers:

In the second session, we will welcome as co-presenter Dr. Christian Hederer, Professor of International Economics and International Economic Policy at the Technical University of Applied Sciences Wildau.

Grading:

Exam: The final grade is based on a **take-home final exam** that can be completed in approximately 8 hours. Students will be given several days to complete the exam flexibly in the light of their end-of-semester schedule. The exam accounts in principle for 100% of the course grade. The exam will consist of a mix of short questions and hypothetical cases. Further instructions concerning the exam will be provided throughout the course and together with the exam. The precise timing of the exam will be determined in the early weeks of the semester.

Class participation: Oral class participation is mandatory. Because of the expected high number of students, we will designate a "panel" of selected students for each class session; these students will get priority for class participation in that particular class session.

Please note that, for any student on the "panel", active participation and correct answers based on the assigned readings are expected and are normally not rewarded with any points that would increase the grade. (Please also note that all students are expected to be prepared for class at all times, and the class instructor can call on any student at any time, including on students not assigned to the "panel".) In exceptional cases, particularly high-quality participation may be rewarded by up to 0.5 bonus points; in contrast, poor participation and lack of preparation may be sanctioned by up to 0.5 points. Both bonus and deduction are at the sole discretion of the professor.

Class attendance: Class attendance is mandatory. Absence from any class session without prior dispensation granted by the TA or course instructor (except in urgent cases) may be sanctioned by a point deduction from the final grade. This point deduction may be doubled for any missed class session in which the student is assigned to the class participation "panel". Students may nonetheless request permission to miss class for legitimate reasons, such as mandatory activities from other academic courses scheduled for the same time slot, as well as health or family-related matters. Unexcused absence from more than 5 sessions will lead to a failing grade, regardless of performance on the final exam.

This is a legal course. Nevertheless, we very much encourage non-lawyers to sign up. The greatest benefit for non-lawyers from taking this course is that you will learn how to think and how to analyse legal problems like an international (trade) lawyer. This is not only a useful and rewarding intellectual journey in and of itself. Many non-lawyers in the Graduate Institute student body will end up interacting professionally with (international) lawyers in some manner throughout their careers, or will deal with subject matters that have a legal dimension. Non-lawyers who challenged themselves during their university education and who became acquainted and comfortable with legal reasoning will tend to do much better in these professional contexts. (The reverse is obviously also true for lawyers.) While non-lawyers may have a steeper learning curve in the early parts of the course, they traditionally do very

well in this course. In past years, some non-lawyers were able to receive very high grades, including a 6.0. If you put in the time and effort, you will do very well.

Moreover, international trade law, by its nature, has multi-disciplinary dimensions. Therefore, class participation and contributions by students specializing in economics, political science, international relations or any other related field are an important and very welcome element of this course.

ELSA WTO Law Moot Court 2021/2022:

Students with a particularly strong interest in international trade law and WTO law may also wish to consider participating in the 2021/2022 edition of the “John H. Jackson WTO Law Moot Court Competition” (previously “EMC2”), organized by the European Law Students Association (ELSA). This global competition involves a simulated WTO dispute and requires student teams – drawn from over 100 universities world-wide, including the world’s highest-ranked law schools – to present formal written submissions as well as participate in oral pleadings before panels composed of WTO law and trade policy experts. The competition provides an excellent opportunity to build WTO legal expertise as well as litigation experience and to make valuable professional contacts within the Geneva-based and global trade community. The Graduate Institute team will be selected and supervised by a team of coaches that includes the course assistant. Historically, the Graduate Institute team has been among the elite teams and won the entire competition in 2011/2012 and 2017/2018. Enrolling in DI064 is not required for participating in the Moot Court Competition, but is highly recommended for students without previous exposure to international trade law. Further information regarding the WTO Moot Court, including information on this year’s coaching team, will be available at the beginning of the semester.

COURSE SCHEDULE

Class	Topics	Readings
Session 1: 23 Sept. (Thu.) 18:15 – 20:00	Introduction & Overview of the Course: <ul style="list-style-type: none"> ● Structure and content of the course: What is the course intended to convey? What are students expected to achieve? ● Functions of the WTO as an institution, as a negotiating forum and as a dispute settlement system ● Evolution and general structure of the WTO treaty system ● The WTO and the global trading system today and the key elements of its current crisis 	<ul style="list-style-type: none"> ● Chapter 4 ● Chapter 22, pp. 739 – 745 ● Inu Manak, <i>A Clear Agenda to Save the WTO</i>, 29 April 2021, Cato Commentary, https://www.cato.org/commentary/clear-agenda-save-wto ● Robert Lighthizer, <i>How to Set World Trade Straight</i>, THE WALL STREET JOURNAL, 20 August 2020
Session 2: 30 Sept. (Thu.) 18:15 – 20:00	Trade Theory and Economic Policy: <ul style="list-style-type: none"> ● Basics of economic trade theory: Why do countries trade? Why is trade considered to be welfare-enhancing? ● What are the benefits and risks of free trade? ● Who wins and who loses economically from trade liberalization? ● Theory of optimal intervention from economic, legal and political perspectives <p>Guest co-presenter: Prof. Dr. Christian Hederer. Please note that this session will exceptionally be held in fully virtual format.</p>	<ul style="list-style-type: none"> ● Chapter 1 <p><i>Optional Reading:</i> Chapter 2, pp. 35 - 46</p>
Session 3: 4 Oct. (Mo.) 18:15 – 20:00	WTO Rules on Border Measures: <ul style="list-style-type: none"> ● Customs, tariffs, tariff bindings and trade liberalization ● Prohibitions of quantitative restrictions and relevant exceptions <p>(Please note that this session is exceptionally not on a Thursday. The need for this irregularly-timed “extra” class session arises because the semester does not have enough weeks for our 14 class sessions.)</p>	<ul style="list-style-type: none"> ● Chapter 7, pp. 181 – 214 ● Chapter 8

Class	Topics	Readings
Session 4: 7 Oct. (Thu.) 18:15 – 20:00	WTO Non-Discrimination I: <ul style="list-style-type: none"> ● Overview. Most-favoured nation vs. national treatment ● National treatment in internal taxation. Core case law on tax discrimination under Article III:2 of the GATT 1994 	<ul style="list-style-type: none"> ● Chapter 9
Session 5: 14 Oct. (Tue.) 18:15 – 20:00	WTO Non-Discrimination II <ul style="list-style-type: none"> ● National Treatment in internal (non-fiscal) regulation ● Core case law under Article III:4 of the GATT 1994 and other relevant WTO provisions 	<ul style="list-style-type: none"> ● Chapter 10
Session 6: 21 Oct. (Thu.) 18:15 – 20:00	WTO Non-Discrimination III: <ul style="list-style-type: none"> ● Key elements of the most-favoured nation (MFN) principle and core case law ● The Enabling Clause and discrimination in favour of developing countries ● Introduction to Article XXIV of the GATT 1994 and regional trade agreements 	<ul style="list-style-type: none"> ● Chapter 11, pp. 323 - 334, 339 – 350 ● Chapter 22, pp. 751 – 768 ● Chapter 12, 353 - 360
Session 7: 28 Oct. (Thu.) 18:15 – 20:00	Exceptions from GATT/GATS free-trade rules <ul style="list-style-type: none"> ● Squaring free trade and the right to pursue legitimate policy objectives such as protection of the environment, public health, public morals, or labour standards ● Article XX of the GATT 1994 and Article XIV of the GATS: Elements and core case law. ● The national security exception under Article XXI of the GATT 1994 (XIVbis of the GATS and Article 73 of the TRIPS Agreement) 	<ul style="list-style-type: none"> ● Chapter 13 ● Chapter 14, pp. 419 – 440 ● Panel Report, <i>Russia – Traffic in Transit</i> (WT/DS512/R), paras. 1.1 – 3.2, Sections 7.3 and 7.4, 7.5.1, and paras. 7.53 – 7.82 ● www.worldtradelaw.net Dispute Settlement Commentary on <i>Saudi Arabia - Measures Concerning the Protection of Intellectual Property Rights (DS567)</i>, pp. 2 – 5, 17 - 21
Session 8: 4 Nov. (Thu.)	“Fair trade” and trade remedies I: <ul style="list-style-type: none"> ● Overview of main features, commonalities of and differences between the WTO agreements on anti-dumping, subsidies and safeguards 	<ul style="list-style-type: none"> ● Chapter 15, pp. 457 - 493 ● Chapter 16, pp. 503 - 504 ● Chapter 17, pp. 551 – 552

Class	Topics	Readings
<p>18:15 – 20:00</p>	<ul style="list-style-type: none"> ● Detailed discussion of dumping. Key concepts: dumping; injury and causation. ● Discussion of salient case law on dumping 	<ul style="list-style-type: none"> ● Christian Tietje and Vinzenz Sacher, <i>The New Anti-Dumping Methodology of the European Union – A Breach of WTO Law?</i> BEITRAEGE ZUM TRANSNATIONALEN WIRTSCHAFTSRECHT (May 2018) http://telc.jura.uni-halle.de/sites/default/files/BeitraegeTWR/Heft%20153.pdf
<p>Session 9: 11 Nov. (Thu.) 18:15 – 20:00</p>	<p>“Fair trade” and trade remedies II:</p> <ul style="list-style-type: none"> ● Details of subsidies disciplines: Key concepts: financial contribution, benefit and specificity ● Anti-subsidy remedy at the domestic level: Imposition of countervailing duties ● Multilateral anti-subsidy remedies: Prohibited and actionable subsidies before the WTO. ● Determining adverse effects/special prejudice ● Salient case law 	<ul style="list-style-type: none"> ● Chapter 16 ● Chapter 17
<p>Session 10: 18 Nov. (Thu.) 18:15 – 20:00</p>	<p>WTO Dispute Settlement Process and Practice:</p> <ul style="list-style-type: none"> ● Evolution and main features of the WTO dispute settlement mechanism. Key players in a WTO dispute ● From consultations to implementation: Key segments of a WTO dispute ● Remedies, implementation, compliance review ● The current crisis of the WTO dispute settlement system, including the demise of the Appellate Body. Reform proposals and other initiatives, including the so-called MPIA (Multi-party interim appeal arbitration arrangement) 	<ul style="list-style-type: none"> ● Chapter 5 ● The United States President’s 2018 Trade Policy Agenda, <i>US Concerns with WTO Dispute Settlement</i>, pp. 22 - 29 https://ustr.gov/sites/default/files/files/Press/Reports/2018/AR/2018%20Annual%20Report%20I.pdf ● Multi-Party Interim Appeal Arrangement Pursuant to Article 25 of the DSU, https://trade.ec.europa.eu/doclib/docs/2020/march/tradoc_158685.pdf

Class	Topics	Readings
<p>Session 11: 25 November (Thu.) 18:15 – 20:00</p>	<p>Trade in services:</p> <ul style="list-style-type: none"> ● Liberalization of trade in services: overview and key features of the GATS ● Key GATS concepts: commonalities and differences between GATT and GATS ● How to read a GATS schedule ● Salient case law 	<ul style="list-style-type: none"> ● Chapter 20
<p>Session 12: 2 Dec. (Thu.) 18:15 – 20:00</p>	<p>WTO law against abuse of regulatory freedom: Agreement on Technical Barriers to Trade (TBT) and the Agreement on Sanitary and Phytosanitary Measures (SPS):</p> <ul style="list-style-type: none"> ● How to define TBT and sanitary and phytosanitary (SPS) measures? What are the differences? ● Limits of the regulatory autonomy to pursue nontrade concerns under the TBT Agreement and the SPS Agreement ● How should an international organization like the WTO deal with scientific uncertainty and different risk attitudes and policies prevailing in different WTO Members? ● Disciplines against abuse of regulatory autonomy for protectionist purposes ● Key case law 	<ul style="list-style-type: none"> ● Chapter 18 and 19
<p>Session 13: 9 Dec. (Thu.) 18:15 – 20:00</p>	<p>WTO law against abuse of regulatory freedom: Agreement on Technical Barriers to Trade (TBT) and the Agreement on Sanitary and Phytosanitary Measures (SPS) (cont'd);</p> <ul style="list-style-type: none"> ● Approximately one half of this session will be a continuation of Session 132 <p>Regional/free-trade agreements: New trends in international trade regulation</p> <ul style="list-style-type: none"> ● How do existing regional/free trade agreements build on and expand existing international trade regulation? ● Examples of most recent FTAs, including the so-called “mega-regionals” ● Typical content of FTAs, including “new issues” such as e-commerce, regulation of 	<ul style="list-style-type: none"> ● Chapters 18 and 19 ● <i>Explanation of the Swiss Government of its/EFTA's policy concerning free trade agreements (FTA) policy and the content of those FTAs</i> <p>https://www.seco.admin.ch/seco/en/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbe</p>

Class	Topics	Readings
	state-owned enterprises, trade facilitation, competition policy, and small and medium-sized enterprises.	<p>ziehungungen/Freihandelsabkommen.html#-1699834606</p> <ul style="list-style-type: none"> • Please skim the text of the EFTA – Indonesia FTA <p>https://www.efta.int/free-trade/Free-Trade-Agreement/Indonesia</p> <p>https://www.efta.int/sites/default/files/documents/legal-texts/free-trade-relations/indonesia/efta-indonesia-main-agreement.pdf</p> <ul style="list-style-type: none"> • Please skim through all the chapters of the CPTPP <p>https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-text-and-resources/#chapters</p> <p><i>(It is sufficient to read through the headings in each chapter (1-30))</i></p>
<p>17 Dec. (Fri.) 14:15-16:00</p>	<p>Review Session With Chanya Punyakumpol</p>	
<p>Session 14: 16 Dec. (Thu.) 18:15 – 20:00</p>	<p>Regional/free-trade agreements: The new trends in international trade regulation (cont'd)</p> <ul style="list-style-type: none"> ● Approximately one half of this session will be a continuation of Session 13 <p>Current and “new” issues in the WTO</p> <ul style="list-style-type: none"> ● Some of the current trade policy issues, as well as “new issues” currently being explored in WTO negotiations, including the US – China “trade war”; controversial technology transfer policies; national security-motivated economic policies; online censorship; e-commerce; micro, small- and medium-sized enterprises; services domestic regulation; and investment facilitation. 	<p><u>TBD</u></p>

Class	Topics	Readings
Time TBC	<u>Final Take Home Exam, to be submitted on Moodle</u>	