

**u<sup>b</sup>**  
UNIVERSITÄT  
DUISBURG  
ESSEN

nccr trade regulation  
national centre of competence in research

**international law of contemporary  
media**

**session 6: the law of the world trade  
organization**

mira burri, dr.iur.,  
fall term 2009/2010, 20 october 2009

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**the goals of the day**

- globalisation: dimensions, essence, effects
- free trade
- the World Trade Organization (WTO)
- origins and development
- characteristics of the WTO as a unique international regime
- main WTO objectives / functions
- main WTO principles
- (to be continued in session 7).

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**what is globalisation?**

**“... 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”.**

(Joseph Stiglitz, former Chief Economist, World Bank and Nobel Prize winner 2001, *Globalization and its Discontents*, 2002, at 9)

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## globalisation: dimensions

- **technological:** new means of transportation and communication overcoming natural barriers of time and space
- **economic** (as a consequence of reduced costs of transport and communication): enhanced worldwide trade in goods, services and capital (associated also with increased role of transnational corporations, TNCs)
- **social and cultural:** the “global village”; economic values superposed over any other social and cultural values?; globalisation and its discontents.

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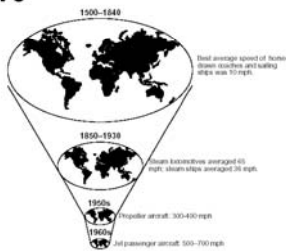
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## globalisation: driving forces

The shrinking world: The impact of transportation technology on effective distance



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## globalisation

- international trade is **not evenly distributed**
- global trade flows are dominated by exchanges within and between the 3 major regions of the global economy (the so-called triad): Europe, North America and East Asia; trade flows involving other parts of the globe relatively small (approx. 15% of world trade); intra-EU and intra-North America trade accounts for 52% of industrial trade
- all 48 least-developed countries together account for approx. only 0.5% of world trade (compare to 1.7% in 1970)
- economic globalisation: **a blessing or a curse?**

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**Map of the 50 Least Developed Countries**

int'l trade potential: the World Bank e.g. 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**; however we do not see that happening yet...

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**free trade: economic rationale**

- the **theory of comparative advantage**
- building upon Adam Smith (1776): the “invisible hand”: countries can benefit from division of labour and international trade
- developed by David Ricardo (1817): a **country does not have to be best at anything to gain from trade**; it should invest in what it does best and export that product
- not to be confused with absolute advantage.

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**protectionist policy rationales**

- protecting interests of constituencies with strong lobbies
- infant industry protection
- optimal tariff
- strategic trade policy
- national security or self-sufficiency
- pursuit of non-economic goals (legitimate **but** beware of disguised protectionism).

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### rationales for trade rules

- reacting against protectionism: “tying hands to the mast”
- security and predictability
- need for global governance; nation states cannot cope with the challenges of globalisation (e.g. clean environment, consumer safety, minimum labour standards)
- promoting justice on a global level
- rule-oriented system instead of power-oriented system.

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### international economic law

- relatively new branch of int'l law
- not only the law of the WTO
- encompasses also regional and bilateral trade agreements
  - regional (preferential) trade agreements (e.g. NAFTA: US, Canada and Mexico; MERCOSUR: Argentina; Paraguay, Uruguay and Venezuela)
  - a growing number of bilateral trade agreements (e.g. CH-Japan in force since 1 September 2009)
- multilateral trade agreements: the WTO – the most ambitious effort to regulate int'l trade. <sup>11</sup>

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### history of the WTO (1): GATT 1947

- post-WWII: Bretton Woods 1944
- awareness of need to complement the Int'l Monetary Fund and the World Bank with a comparable institution for int'l trade
- meetings 1946-1947 to work out a charter of an international organisation for trade (ITO) in 3 parts: (i) charter of the ITO; (ii) multilateral agreement to reduce tariffs reciprocally; (iii) general clauses relating to tariff obligations
- negotiations on parts 2&3 in the framework of General Agreement on Tariffs and Trade (GATT);
- agreement reached in October 1947 to apply GATT provisionally; GATT in force since 1 January 1948. <sup>12</sup>

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## history of the WTO (2)

- GATT 1947: a *de facto* international organisation
- 8 negotiation rounds from 1947 to 1994
- level of tariffs of developed countries in industrial products reduced from 40% to less than 4%
- need for a change as trade barriers increasingly of non-tariff nature; complexity of issues
- Punta del Este, Uruguay, 1986: a new negotiation round started with a broad agenda incl. trade in services
- 1994: the Marrakesh Agreement Establishing the WTO signed
- the WTO active as of 1 January 1995.

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## WTO membership

- 2 ways of becoming a WTO member:
- **original membership** (art. XI WTO Agreement): allowed the GATT 1947 contracting parties to join the WTO by accepting the WTO Agreement and the multilateral trade agreements and by making concessions and commitments for trade in goods and services; this procedure open only until March 1997; **123 original members**
- **accession** (art. XII WTO Agreement): always open; accession process; decision of the WTO Ministerial Conference
- **presently, 153 WTO members.**

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## objectives of the WTO

- the increase of standards of living
- the attainment of full employment
- the growth of real income and effective demand
- the expansion of production of, and trade in, goods and services
- **also:** in pursuing these objectives the WTO must take into account the **necessity for preservation of the environment** and **needs of developing countries**; the importance of **sustainable economic development** stressed.

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### functions of the WTO

- facilitate implementation, administration and operation of WTO agreements
- forum for negotiating new trade agreements (presently: **Doha Development Agenda**, 2001-?)
- settlement of trade disputes between its members
- review trade policies of its members
- cooperate with other international organisations
- give technical assistance to developing country members.

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### the WTO dispute settlement (1)

- Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)
- transformation from diplomatic under GATT 1947 to quasi-judicial system: the **“jewel in the crown”**
- main features:
  - compulsory; exclusive; contentious jurisdiction
  - strict timeframes
  - possibility of appellate review
  - real enforcement mechanisms (*ultimate remedy*: withdrawal of the measure - immediately or within a reasonable period of time; *temporary remedies*: compensation; suspension of concessions (retaliation)).

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### the WTO dispute settlement (2)

- objectives:
  - secure positive solution to a dispute
  - preservation and clarification of rights and obligations
  - not add to or diminish rights and obligations
  - mutually agreed solutions preferred (consultations or negotiations, art. 11 DSU; arbitration, art. 21.3(c), 22.6 and 25 DSU; good offices, conciliation and mediation, art. 5 DSU)
- access: wto members who assert to have suffered nullification or impairment of benefits; violation and non-violation complaints
- scope: the **“covered”** agreements (appendix 1 DSU)

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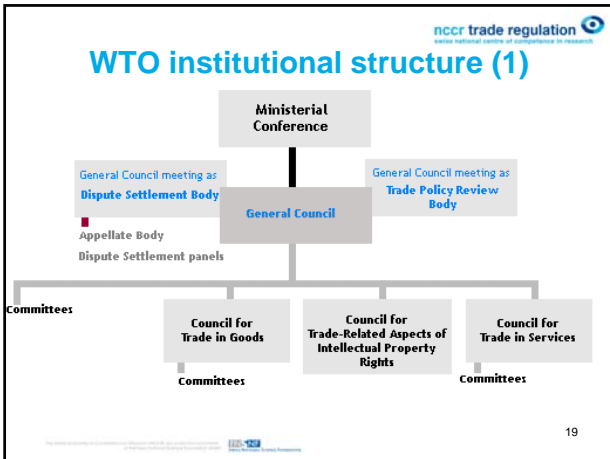
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- ## WTO institutional structure (2)
- at the *highest* level, the **Ministerial Conference**; in session only for a few days every 2 years;
  - at a *second* level, the **General Council**; exercises the powers of the Ministerial Conference between sessions; the **Dispute Settlement Body (DSB)** and the **Trade Policy Review Body (TPRB)** - both emanations (*alter ego*) of the General Council
  - at *lower* levels, specialised Councils and a manifold of committees and working parties
  - the **WTO secretariat** (relatively small); headed by a Director-General; no real executive or agenda-setting body: **WTO – “member-driven” organisation.**
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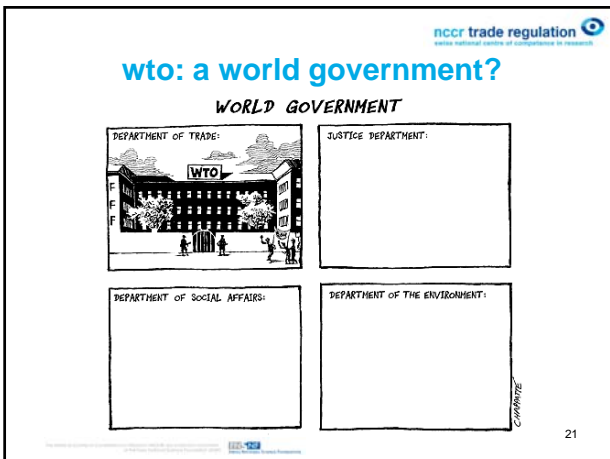
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## WTO decision-making

- **normal procedure (art. IX:1 WTO Agreement)**
  - **consensus (default): implications?**
  - majority voting
- **special procedures**
  - **dispute settlement: reverse consensus**
  - authoritative interpretations (IX:2 WTO Agreement)
  - waivers (art. IX:3-4 WTO Agreement)
  - amendments (art. X WTO Agreement)
- **WTO decision-making in practice**
- marginalisation of developing countries?
- decision-making with 153 members?
- **“green room”** meetings; multiple coalitions.

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## the WTO law

- **complex structure**  
[http://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm](http://www.wto.org/english/docs_e/legal_e/legal_e.htm)
- **Marrakesh Agreement Establishing the WTO**
- ANNEX 1A: Multilateral Agreements on Trade in Goods
- **General Agreement on Tariffs and Trade 1994 (GATT)**
- ANNEX 1B: **General Agreement on Trade in Services (GATS)**
- ANNEX 1C: **Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)**
- ANNEX 2: Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)
- ANNEX 3: Trade Policy Review Mechanism
- ANNEX 4: Plurilateral Trade Agreements

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## the WTO law: 3 main pillars

General Agreement on Tariffs and Trade  
**(GATT)**

General Agreement on Trade in Services  
**(GATS)**

Agreement on Trade-Related Aspects of Intellectual Property Rights  
**(TRIPs)**

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## basic principles of WTO law

- principles of non-discrimination
- rules on market access
- rules on unfair trade
- rules on conflicts between trade liberalisation interests and other societal interests
- rules on special and differential treatment for developing countries

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## non-discrimination obligations

- most-favoured-nation (MFN) treatment obligation:
  - prohibits a country from discriminating **between** other countries
- national treatment obligation
  - prohibits a country from discriminating **against** other countries

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## MFN

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### MFN treatment: GATT 1994

- article I:1 GATT 1994
- nature of the MFN obligation
- test of consistency
- measure confers a trade 'advantage'
- products are 'like' (physical properties of the product; products end use in a given market; consumers tastes and habits; tariff qualification)
- advantage is granted 'immediately and unconditionally'

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### MFN treatment : GATS

- article II:1 GATS
- nature of the obligation
- test of consistency
- measure covered by GATS
- services & service suppliers are 'like'
- no less favourable treatment
- exemptions

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### national treatment: GATT 1994

- article III GATT 1994
- nature of the obligation
  - purpose of Article III
  - internal measures *versus* border measures
  - structure of Article III
- UN Provisional Central Product Classification:
- <http://unstats.un.org/unsd/cr/registry/regcst.asp?Cl=9&Lq=1>

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**Switzerland, List of specific commitments  
GATS/SC/83**

Sector or Sub-sector	Limitations on Market Access	Limitations on National Treatment	Additional Commitments
<b>5. Educational Services</b>			
Private Educational Services:			
Compulsory education services (primary & secondary I)	1) Unbound 2) Unbound 3) None 4) Unbound	1) Unbound 2) Unbound 3) None 4) Unbound	
Non-compulsory secondary education services (secondary II)	1) None 2) None 3) None 4) Unbound except as indicated in Part I	1) None 2) None 3) None 4) Unbound except as indicated in Part I	
Higher Education Services (CPC 923)	1) None 2) None 3) None 4) Unbound except as indicated in Part I	1) None 2) None 3) None 4) Unbound except as indicated in Part I	
Adult Education Services (CPC 924)	1) None 2) None 3) None 4) Unbound except as indicated in Part I	1) None 2) None 3) None 4) Unbound except as indicated in Part I	<b>Modes of supply:</b> 1) Cross-border supply 2) Consumption abroad 3) Commercial presence 4) Presence of natural persons

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