



WTO Law

Class 3: Institutions, Dispute Settlement

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WTO

- Public International Law
- Functions:
 - forum for negotiations
 - facilitate implementation trade agreements
 - administer dispute settlement system
- Member-driven organization
- decision-making by consensus
- 164 Members, largest non-WTO trading nation: Iran
 - Member: Art. XII:1 WTO Agreement, EU: XI:1 (EU speaks)
 - Procedure: Art. XI / Art. XII
 - 3/4 are developing countries, no definition, self-selection; 36 are LDCs, designated by UN -> special and differential treatment
 - Coalitions: e.g. ASEAN, Cairns (19 agricultural exporters), Quad (EU, US, Japan, Canada) -> now G5 (EU, US, India, Brazil, China)
 - Observers

Structure of WTO Law

*Marrakesh Agreement Establishing the World Trade Organization
(in force since 1 January 1995); SINGLE UNDERTAKING*

Annex 1

Annex 1A Multilateral Agreements on Trade in Goods

General Interpretative note to Annex 1A

GATT 1994 -> GATT 1947, including notes in Annex I

Understandings

Agreement on Agriculture

SPS Agreement

TBT Agreement

...

Annex 1B General Agreement on Trade in Services

Annex 1C TRIPS Agreement

Annex 2

DSU

Annex 3

Trade Policy Review Mechanism

Annex 4

Plurilateral Trade Agreements

Structure of WTO Law

- Outside of these
 - 36 protocols of accession (integral part of the WTO Agreement)
 - 27 Ministerial Decisions and Declarations as part of the Final Act adopted in Marrakesh (no enforceable provisions)
 - Dispute settlement reports, acts of WTO bodies, agreements concluded in WTO context, CIL, general principles, practice etc.
- Art. XVI:3 WTO Agreement;
interpretative note to Annex 1A

Goals of the WTO

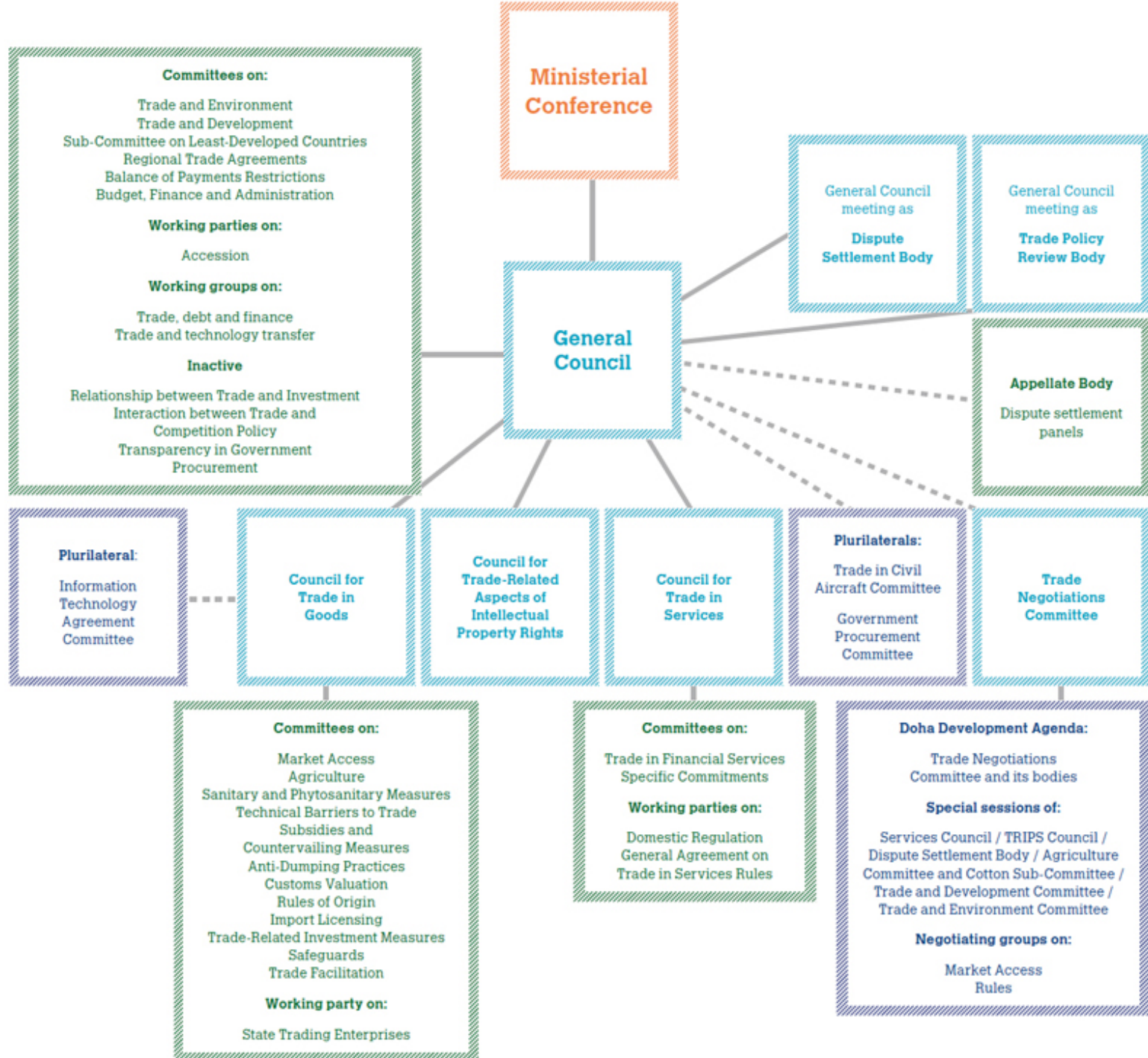
Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to **raising standards of living**, ensuring full employment and a large and steadily growing volume of real income and effective demand, and **expanding the production of and trade in goods and services**, while allowing for the **optimal use of the world's resources in accordance with the objective of sustainable development**, seeking both to **protect and preserve the environment** and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development,

Recognizing further that there is need for positive efforts designed to ensure that **developing countries**, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development . . .

Preamble to *Agreement Establishing the WTO*

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Institutional Structure of the WTO



Institutional Structure

- Ministerial Conference: Art. IV:1, decision-making powers on all matters under any multilater agreement,
 - General Council: Art. IV:2, DSB IV:3, TPRB IV:4
 - Specialized councils: Art. IV:5
 - Others
 - Judicial bodies
 - WTO Secretariat (634 staff location: Geneva), headed by Director-General
- > no small executive

Decision-making

- Art. IX:1 WTO Agreement: rule by consensus (no Member explicitly objects, no voting), if not majority
- Exceptions: e.g.
 - DSB – by consensus or negative consensus;
 - authoritative interpretation: Art. IX:2;
 - accession: XII:2;
 - waiver: Art. IX:3
 - Amendments: Art. X
- Reality: voting rare, in practice: consensus

Dispute Settlement

- How are disputes settled in International Law?



Dispute Settlement

- How are disputes settled in International Law?



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International
Criminal
Court



Basic features of WTO dispute settlement (DS)

How long to settle a dispute?

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These approximate periods for each stage of a dispute settlement procedure are target figures – the agreement is flexible. In addition, the countries can settle their dispute themselves at any stage. Totals are also approximate.

60 days	Consultations, mediation, etc
45 days	Panel set up and panellists appointed
6 months	Final panel report to parties
3 weeks	Final panel report to WTO members
60 days	Dispute Settlement Body adopts report (if no appeal)
Total = 1 year	(without appeal)
60-90 days	Appeals report
30 days	Dispute Settlement Body adopts appeals report
Total = 1y 3m	(with appeal)

Basic features of WTO dispute settlement (DS)

- The Panel: Art. 6-8 DSU
- Adoption of the Panel Report: Art. 16
- Now v. GATT
- The Appellate Body: Art. 17
- Now v. GATT

Basic features of WTO dispute settlement (DS)

- Aim/function of DS (art. 3.2, 3.3, 3.7 DSU)
- Key procedural stages:
 - Consultation
 - Panels: composition and operation
 - Appellate Body: composition and operation
 - Implementation (incl. compliance and retaliation)

Implementation

- A recommendation to bring into conformity: binding? (Art 19.1 DSU)
- Implementation: only prospective? (Art 3.7)
- Reasonable period for implementation (Art 21.1) + Compliance review (Art. 21.5)
- Remedies in case of non-compliance:
 - voluntary compensation (add. trade benefits);
 - ‘suspension of concession’ (trade sanctions; retaliation)

Key procedural and systemic issues

- Complaint
- Standing
- Treaty interpretation
- Other procedural issues (burden of proof, objective assessment, standard of review, fact-finding, judicial economy, completing the analysis)
- Transparency
- Unilateral redress

Complaint

- Violation v non-violation
 - Nullification or impairment of a benefit
- Measure at issue
 - Identification
 - Mandatory/discretionary doctrine

Standing

- *EC Bananas*: US brings claims, although it does not produce bananas for export
- AB refers to Art 3.7: “exercise ...judgment ... whether ... fruitful”
- Effects of EC regime on US market
- Danger of abuse?

Hermeneutics

- Artt 31 and 32 VCLT
- Art 31: ordinary meaning, context, object & purpose
- Other rules of international law?
Practice? Precedents?

Procedural Issues

- Burden of proof (claim, exception/affirmative defense, fact)
- Objective assessment (art 11 DSU)
- Standard of review (art 11 DSU)
- Fact-finding (art 13 DSU)
- Judicial economy (art 3.7; 7.2 DSU)
- Completing the analysis (art 17 DSU)

Transparency issues

- Submissions confidential or public?
- Public hearings?
- Amicus curiae briefs:
 - AB opens the door, but does not allow anyone in
 - Majority of members are opposed
- Purely intergovernmental or stakeholders approach?

Unilateral redress

- Art 23 DSU: Members must have recourse to WTO dispute settlement, when seeking redress of a violation
- Security and predictability of the multilateral trading system
- Position of economic operators

Assessment of dispute settlement

- World Trade Court? How judicial is the system?
- Internal and external legitimacy (cf. political science: input and output legitimacy)
 - Developing countries
 - Economic operators
 - Civil society

The AB Crisis

■ Members:

- **Bhatia (India) 2n term 10 Dec 2019**
- **Graham (US) 2nd term 10 Dec 2019**
- **Ramírez-Hernández (MX) 2nd term 30
June 2017**
- **Chekitan Servansing (Mauritius) 30
Sept 2018**
- **Van den Bossche (Belgium) 2nd term 11
Dec 2017**
- **Zhao (China) 30 Nov. 2020**

Rule 15 Working Procedures

- A person who ceases to be a Member of the AB may, with the authorization of the AB and upon notification to the DSB, complete the disposition of any appeal to which that person was assigned while a Member...