

GLOBAL INSTITUTIONS



The World Trade Organization

Law, economics, and politics

Second edition

**Bernard M. Hoekman and
Petros C. Mavroidis**

ROUTLEDGE



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World Trade Organization

The World Trade Organization (WTO) is one of the most important international organizations in existence today. It embodies a set of disciplines that affect the ability of governments to impose trade restrictions, and has helped to support the steady expansion of international trade since the 1950s. The WTO has been the focus of vociferous protests by anti-globalization activists and has experienced great difficulties in agreeing to new trade rules since its establishment. At the same time it has become the premier global forum for the settlement of trade disputes and has proven to provide a robust framework for international cooperation in the trade area. This book separates the facts from the propaganda and provides an accessible overview of the WTO's history, structure, and policies as well as a discussion of the future of the organization. It also confronts the criticisms of the WTO and assesses their validity.

New to the second edition:

- Discussion of legislative amendments to the WTO Agreement, in particular Aid for Trade, the Agreement on Trade Facilitation and the Bali Package.
- Evaluation of case law developments and major disputes since 2007, including analysis of the WTO and the financial crisis—in particular the trade policy responses of WTO members.
- Reflection on recent shifts to mega-regional agreements (TPP, TiSA, TTIP) and their implications.
- What next post Bali?

Fully updated throughout, this book continues to be essential reading for students of international trade, international political economy, commercial law and international organizations as well as activists and others interested in a balanced account of a key global institution.

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About the series

The “Global Institutions Series” provides cutting-edge books about many aspects of what we know as “global governance.” It emerges from our shared frustrations with the state of available knowledge—electronic and print-wise, for research and teaching—in the area. The series is designed as a resource for those interested in exploring issues of international organization and global governance. And since the first volumes appeared in 2005, we have taken significant strides toward filling conceptual gaps.

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List of illustrations

Figures

2.1 The structure of the WTO	25
4.1 Average services trade restrictiveness index, 2010	76
6.1 Aid for trade by category, 2001–12, US\$ million	125

Tables

1.1 GATT/WTO negotiating rounds and membership	11
1.2 From GATT to WTO: a chronology	13
3.1 Top 10 targets and users of AD: initiations, 1995–2014 (June)	49
4.1 Modes of supply for services	69
4.2 Structure and example of a GATS schedule of specific commitments	72

Boxes

1.1 Director-Generals of the WTO	4
3.1 Summary of the main GATT articles	33
4.1 Major provisions of the GATS	67

List of abbreviations

AB	Appellate Body
ACP	African, Caribbean and Pacific
AD	antidumping
AFT	Aid for Trade initiative
AGOA	African Growth and Opportunity Act (US)
ALI	American Law Institute
ASEAN	Association of South-East Asian Nations
ATC	Agreement on Textiles and Clothing (WTO)
CBI	Caribbean Basin Initiative
CCT	Common Customs Tariff
CMA	critical mass agreement
COMESA	Common Market of Eastern and Southern Africa
CPC	Central Product Classification (UN)
CRN	Central Registry of Notifications
CRTA	Committee on Regional Trade Agreements (WTO)
CTD	Committee on Trade and Development (WTO)
CTS	Council for Trade in Services
CVD	countervailing duty
DG	Director-General
DDA	Doha Development Agenda
DDAGTF	Doha Development Agenda Global Trust Fund
DFQF	duty-free, quota-free
DSB	Dispute Settlement Body (WTO)
DSU	dispute settlement understanding (WTO)
EAC	East African Community
EBA	Everything But Arms (EU initiative)
EEC	European Economic Community
EC	European Community
EIF	Enhanced Integrated Framework (for trade-related technical assistance)

EPA	Economic Partnership Agreement (EU-ACP)
EU	European Union
FDI	foreign direct investment
FOG	Functioning of the GATT
FTA	free trade agreement
FTAAP	free trade area for the Asia-Pacific
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	gross domestic product
GPA	Government Procurement Agreement (WTO)
GSP	Generalized System of Preferences
HS	Harmonized System
IDB	Integrated Database
IGBA	Illegal Gambling Business Act
IMF	International Monetary Fund
INR	initial negotiating right
IPR	intellectual property right
ISDS	investor-State dispute settlement
ITA	Information Technology Agreement (WTO)
ITC	International Trade Centre (UNCTAD and WTO)
I-TIP	Integrated Trade Intelligence Portal
ITO	International Trade Organization
ITTC	Institute for Training and Technical Cooperation (WTO)
LDC	least-developed country
MAI	Multilateral Agreement on Investment (OECD)
MFA	Multifibre Arrangement
MFN	most-favored-nation
NAFTA	North American Free Trade Agreement
NGO	non-governmental organization
NTB	non-tariff barrier
NTM	non-tariff measure
OECD	Organization for Economic Cooperation and Development
PA	plurilateral agreement (WTO)
PRC	People's Republic of China
PSI	Pre-shipment Inspection
PTA	preferential trade agreement
QR	quantitative restriction
RCEP	Regional Comprehensive Economic Partnership
RPT	reasonable period of time
SADC	Southern African Development Community

SCM	Subsidies and Countervailing Measures
SDT	special and differential treatment
SGA	Safeguards Agreement
SPS	Sanitary and Phytosanitary Measures Agreement
STC	specific trade concerns
STRI	services trade restrictiveness indicator
TBT	Technical Barriers to Trade Agreement
TFA	Trade Facilitation Agreement
TiSA	Trade in Services Agreement
TNC	Trade Negotiations Committee (WTO)
TPP	Trans-Pacific Partnership
TPRB	Trade Policies Review Body (WTO)
TPRM	Trade Policy Review Mechanism (WTO)
TRIPS	Trade-related Intellectual Property Rights
TRQ	tariff rate quota
TTIP	Transatlantic Trade and Investment Partnership
UNCTAD	United Nations Conference on Trade and Development
VER	voluntary export restraint
WCO	World Customs Organization
WTO	World Trade Organization

Contents

<i>List of illustrations</i>	viii
<i>List of abbreviations</i>	ix
Introduction	1
1 A very brief history of the trading system	9
2 The WTO in a nutshell	17
3 Trade in goods	32
4 Services, intellectual property, and plurilateral agreements	66
5 Dispute settlement and transparency	89
6 Developing countries and the multilateral trading system	109
7 Whither the trading system?	129
<i>Glossary</i>	144
<i>Select bibliography</i>	150
<i>Index</i>	153
<i>Routledge Global Institution Series</i>	161

Introduction

Established in 1995, the World Trade Organization (WTO) administers the trade agreements negotiated by its members, in particular the General Agreement on Tariffs and Trade (GATT), the General Agreement on Trade in Services (GATS), and the Agreement on Trade-related Intellectual Property Rights (TRIPS). The underlying philosophy of the WTO is that open markets and non-discrimination are conducive to the national welfare of all countries. The *raison d'être* of the WTO is to offer a mechanism to governments to reduce both their own trade barriers and those in foreign markets. Its primary functions are thus to provide a forum for the negotiation of binding agreements to reduce trade barriers, agree on disciplines for policies affecting international trade including transparency, and to provide a mechanism through which its members can enforce all negotiated commitments.

The organization is a stand-alone international institution. It is independent of the United Nations system (that is, it is not a UN specialized agency), in contrast to many other international organizations such as the World Intellectual Property Organization or the International Telecommunications Union. The WTO is located on the shore of Lake Geneva in a beautifully landscaped park. Its tranquil environment belies the turbulence that characterized the first 20 years of its operation. Few of the officials who were present at the 1994 Ministerial meeting in Marrakech that concluded the Uruguay Round (1986–1995) and created the WTO are likely to have foreseen how much controversy the organization would create among non-governmental organizations (NGOs), parliaments, industry, and farm and labor groups around the world. The WTO has become a focal point for many of those opposing the process of globalization of the world economy.

The visibility of the WTO increased significantly following its 1999 Ministerial meeting in Seattle, US. Intended to launch a new multi-lateral round of trade negotiations, the meeting collapsed in the midst

2 *Introduction*

of large-scale demonstrations by labor unions, environmental groups and other NGOs. Labor union representatives, for example, were in favor of introducing disciplines on labor standards into the WTO, so as to be able to use the WTO dispute settlement mechanism and the threat of trade sanctions to enforce norms in this area. Many developing countries opposed this, fearing that the real objective of proponents was not to improve working conditions in their countries but to increase their costs of production and make their goods less competitive. A statement by President Clinton at the meeting that he supported discussions on labor standards helped inflame the debate.

Other contentious issues included suggestions to negotiate disciplines on investment policies in the WTO. This had been on the agenda of the Organization for Economic Cooperation and Development (OECD) for some time, with the objective of negotiating a Multilateral Agreement on Investment (MAI). The draft texts of a MAI (1998) proposed by some OECD members had generated great concern among many NGOs, in particular provisions to allow for so-called investor-State dispute settlement (ISDS), a form of arbitration that permits foreign investors to sue host country governments for losses incurred as the result of measures that violate the provisions of the agreement, such as expropriation. NGOs argued that the MAI was mostly about defining and strengthening the rights of investors, and not about establishing obligations for them. The extent of opposition to the MAI became strong enough that the OECD negotiations broke down in 1998. The perception that much of the MAI agenda would be transferred to the WTO was opposed by many NGOs in Seattle, as well as by many developing countries that felt that capital-exporting nations would be imposing their preferred investment regimes. Seventeen years later ISDS was once again in the news as it became a flashpoint for opposition to a proposed Transatlantic Trade and Investment Partnership (TTIP) between the EU and the United States (TTIP negotiations started in 2011, and are still on-going).

The investment example illustrates one of the major challenges confronting the trading system: moving beyond disciplining the use of import tariffs and similar policies that are designed explicitly to protect domestic industries. As tariffs have fallen, the trade agenda increasingly revolves around so-called behind-the-border policies that may have effects on international trade and investment but are not designed to discriminate against foreign products and foreign companies. Policies pertaining to labor standards, the environment or investment involve domestic regulatory instruments. Their primary purpose is to achieve non-trade objectives: guaranteeing specific worker rights; internalizing environmental spillovers; and creating a business environment that is

conducive to employment creation and innovation. How governments decide to regulate economic activity will vary across countries, reflecting social preferences, national development strategies, endowments and so forth. While regulation may affect foreign firms negatively, that is not necessarily a good reason for seeking to constrain the ability of governments to intervene.

However, that is the core function of the WTO: it is an instrument through which governments negotiate common policy disciplines. They do so in order to reduce the negative spillover effects of national policies or as a means to change domestic political economy dynamics in a way to allow the pursuit of what are considered to be welfare-enhancing policy reforms. In the case of the WTO's traditional core agenda (trade policies—tariffs, quotas), agreements to lower trade barriers will be beneficial for the world as a whole. At the level of a country, some groups that benefited from protectionist policies will be adversely affected by liberalization, but overall the aggregate gains from liberalization outweigh the costs. In principle, therefore, there is a surplus that can be used to compensate those that lose if society (government) decides to do so.¹ In the case of behind-the-border regulatory policies, however, it makes no sense to change existing norms if these are considered to be appropriate by a society—they have been put in place to achieve a specific objective and changing them at the behest of another government may lower welfare. Addressing the international externalities that are created by domestic regulation is a much more difficult task than reciprocally bargaining down trade barriers.

Determining where international cooperation on regulatory norms is beneficial for all members is one of the major challenges confronting the WTO. The active participation of civil society groups in the debates that inform such determinations is a positive development. For the WTO to function effectively it must have the support of members, which in turn requires that there are (large) constituencies in these members that regard the rules of the game as being beneficial to them. The more the WTO is used to discipline regulatory policies, the greater the number of stakeholders that will need to be involved in both negotiating and implementing agreements. That in turn has implications for the governance of the WTO.

The WTO is an inter-governmental organization: only governments have legal standing in the organization. GATT practice used to be that deliberations were confidential—little effort was made at what is now called outreach. That has changed, especially in the post-Seattle period. Information on what is happening and what issues are on the negotiating table is now much easier to obtain, and the extent of

4 Introduction

interaction between WTO members, the WTO secretariat and interested civil society groups has increased. A number of the latter have established offices in Geneva, some of which are larger than those maintained by many developing countries—some of which cannot afford to be present in Geneva at all.

The WTO as an organization is relatively small compared to other international organizations: some 650 staff (professional and auxiliary), many of whom are translators. It has limited responsibilities—essentially to manage meetings and prepare documentation at the request of members, support dispute settlement proceedings and undertake periodic reviews of the trade policies of members (Box I.1). Whatever their background, all WTO Director-Generals (DGs) have precious little formal authority to take decisions. As is often stressed by delegations in Geneva, the WTO is a *member-driven organization*, where each signatory has a voice.² Even the smallest player can make its voice heard because decision-making is mostly on the basis of consensus. Thus, small countries can, and do, express their views and may block proposals that they do not support. Moreover, because the WTO is a rules-based system where disciplines are enforceable through an effective dispute settlement mechanism, the smallest member may take on the most powerful country in the world. If a WTO “panel,” that is, the WTO first instance “court,” decides that the United States or the EU has violated a commitment, these large players must bring their measures into compliance with their obligations. The experience suggests that in the majority of cases they do so.

Box I.1 Director-Generals of the WTO

The first five heads of the organization were drawn from the ranks of senior political figures from member states: Peter Sutherland, a former European Community (EC) Commissioner for Competition (1993–1995); Renato Ruggiero, a former trade minister from Italy (1995–1999); Michael Moore, former prime minister of New Zealand (1999–2002); Supachai Panitchpakdi, former trade and deputy prime minister of Thailand (2002–2005); and Pascal Lamy, former Commissioner for Trade for the EU (2005–2013). This contrasted with the GATT years, where the DG was consistently a senior civil servant, not a politician or an ex-Minister. With the appointment of Roberto Azevedo, a former Brazilian Ambassador to the WTO, to the top job in 2013, the WTO moved back toward a more technical, civil servant profile—a deliberate choice by the membership given that several (former) Ministers competed for the job.

Of course, the rules of the game reflect power relationships: Uganda does not have the same ability as the United States to determine the outcome of negotiations. But with the creation of the WTO in 1995 the trading system moved away from a regime where implementation of many rules was voluntary and dispute resolution relied heavily on diplomacy and “pragmatic flexibility,” toward one where all rules applied, in principle, to all members equally and dispute settlement is more legalistic and “binding.”³ This, in conjunction with a major expansion in the substantive coverage of multilateral disciplines—to also span intellectual property rights and trade in services—and efforts by interest groups of varying stripes to extend its reach, further helps explain why the WTO came to attract much more attention than its predecessor.

Another factor that has played an important role has been the steady increase in engagement and participation of developing countries in the WTO process. Thus, Seattle failed in part because of rejection by developing countries to consider the introduction of labor standards in the WTO—something that was strongly supported by many NGOs. The 2003 Cancun Ministerial meeting failed because many developing countries refused to accept the launch of negotiations on four so-called “*Singapore issues*”—competition, investment policy, transparency in government procurement and trade facilitation. The inability to conclude the Doha Development Agenda (DDA) negotiations that were launched in 2001, and are still on-going at the time of writing (summer 2015), is in significant part a reflection of the more active participation of developing countries in the pursuit of their trade objectives, as well as the increasing heterogeneity of the WTO membership. The term “developing countries” in the WTO refers to a “heterogeneous” set of countries, as it includes economies with annual per capita incomes of less than US\$500, but also economies with per capita incomes above US\$10,000 (e.g. Brazil with US\$11,700 in 2013). Managing this heterogeneity is a major challenge for the WTO membership.

At the end of 2013, WTO members demonstrated that they were capable of designing new disciplines that all governments around the table see to be in their interest. The Ministerial Conference held in Bali agreed to the first ever multilateral agreement negotiated under WTO auspices—the Agreement on Trade Facilitation (TFA). In addition, a number of other decisions were taken that reflected developing country concerns and interests, including on issues such as the ability to subsidize domestic farmers to maintain stocks for food security purposes, duty-free, quota-free (DFQF) access for exports of goods from least developed countries (LDCs), including action to simplify rules of origin; making progress on granting LDCs preferential access to services

markets; a cotton initiative; and a mechanism to monitor the implementation of special and differential treatment provisions for developing countries. Earlier achievements included the creation of the Aid for Trade initiative, an instrument to increase the flow of development assistance to enhance supply/trade capacity in poor countries, and the Enhanced Integrated Framework for trade-related technical assistance for LDCs, a new mechanism hosted by the WTO to assist the LDCs to identify trade priorities and coordinate assistance from donor countries.

It is important to bear in mind that the WTO is not just a negotiating forum. The WTO is also a venue for countries to monitor implementation of the existing rules of the game, which are quite extensive, and to settle disputes. The WTO plays an important role as a “transparency mechanism” as well as a forum in which governments can enforce the trade policy commitments that they have made to each other. The relevance of the WTO is illustrated by the fact that during its first 20 years over 30 new members acceded to the organization—which entails a very demanding process and substantial effort by the governments. At the same time, however, countries have been pursuing preferential trade agreements (PTAs) that exclude the majority of their WTO partners. We shall return to this paradox in the course of this book, as the ever stronger trend toward PTAs has important implications for the WTO.

The WTO is heading toward its tenth Ministerial Conference to be held in Nairobi, Kenya, in December 2015. At the moment of writing, it is anyone’s guess what the outcome will be. Following its first success since the advent of the Doha round (2001) with the signing of the Agreement on Trade Facilitation at the ninth Ministerial Conference in Bali in December 2013 (discussed below), the task of WTO members is to agree on a road map to salvage the on-going Doha Development Agenda trade negotiations. When WTO Ministers meet in Nairobi, the Doha round will be well into its 14th year, making it the longest multilateral trade negotiation ever. Governments have increasingly prioritized preferential trade agreements over the WTO, with the EU and the US focusing in particular on so-called mega-regional deals that include many of the major OECD member countries. Multilateral trade negotiations have hit the doldrums, although multilateral trade cooperation—the daily business of the WTO, including activities aimed at ensuring transparency of trade policy and settlement of disputes—continues to work well. It remains to be seen whether these dimensions of trade cooperation will continue to function well in the continued absence of a successful conclusion of the Doha Round.

To understand what the WTO does, it is necessary to delve into its rules (the law), as well as its operating mechanisms and procedures.