

Big Corporations, the Bali Package and Beyond

Deepening TNCs gains from the WTO

By Mary Louise F. Malig



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This Report is the second of a series commissioned as part of the Economic Justice and Corporate Power & Alternatives programme of Transnational Institute, exposing the corporate architecture of the supranational regulatory institutions of the World Trade Organization (WTO), Free Trade Agreements (FTAs) and Bilateral Investment Treaties (BITs) that favors corporate interests. This series focuses in particular on the role of the World Trade Organization in that corporate architecture. The first in this series was the publication, "Tailored for Sharks: How rules are tailored and public interest surrendered to suit corporate interests in the WTO, FTAs and BITs trade and investment regime" published by TNI and SPI last 2013.

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Executive Summary

This report, a sequel to the “Tailored for Sharks” published in 2013, delves deeper into the role the World Trade Organization (WTO) and its legal system play in the corporate architecture that benefits and protects interests of Transnational Corporations (TNCs); details concrete examples of TNCs behind trade disputes; and presents the post-Bali corporate roadmap.

The “historic” first agreement of the WTO at the December 2013 Bali Ministerial, after years of stalemate in multilateral trade negotiations, is a prime example of how WTO trade rules favor TNCs. The Bali Package has several elements but the centerpiece is the legally binding agreement: the Agreement on Trade Facilitation. The deal on agriculture is a weak and watered down peace clause – a temporary measure – that grants a short-term reprieve for developing country governments to provide support to their poor farmers and constituents without getting sued under the WTO Dispute Settlement Mechanism (DSM). The entire section on special and differential treatment and concerns of Least Developed Countries (LDCs) are all declarations and promises for future action. The Agreement on Trade Facilitation, however, in stark contrast, is legally binding and once it hurdles the current stalemate in Geneva will be legally adopted, ratified and included as an Annex into the “Marrakesh Agreement Establishing the WTO,” and thus will be legally enforced and guaranteed by the all-powerful WTO DSM. It is unclear how long India and other developing countries will hold their stand to not sign off on the adoption of the Trade Facilitation Agreement in exchange for the speeding up of the process for a permanent solution in Agriculture.

The clear winners of the Bali Package are transnational corporations (TNCs). TNCs, who control the global supply chains across the world, will gain the most from an Agreement that slashes costs and relaxes customs procedures, easing the flow of imports and exports. The 2010 UNCTAD report details that, “by 2009, it was estimated that there were 82,000 multinationals in operation, controlling more than 810,000 subsidiaries worldwide. Upwards of two-thirds of world trade now takes place within multinational companies or their suppliers – underlining the growing importance of global supply

chains.”¹ The world’s largest business organization, the International Chamber of Commerce (ICC), with past and present leaders from corporate financial giants such as Rothschild Europe, McGraw Hill Financial and others, was first to congratulate WTO Director General Azevedo and the WTO Members on the deal, Chairman Harold McGraw stated after the Bali Ministerial, “Our efforts to push governments to show the political will needed to conclude a deal here have paid off.”² Their commissioned study touts 1 trillion US dollars in gains for the world GDP, a calculation that other economists have questioned. Questions have also been raised on the quality of work that developing countries gain from being employed in the low-value capture ends of these global value chains (GVCs).³

This report concludes that the Bali deal is testament to the tenacity of TNCs to push their corporate agenda. The Trade Facilitation Agreement was soundly rejected in 2003. Yet today it is the first ever agreement of the WTO since its establishment in 1995. The 18-year negotiating stalemate of the WTO had done nothing to dampen the determination of TNCs to get this deal. While many had written the WTO off or lost interest because of its numerous collapses and stalemates, TNCs had never lost confidence in the WTO and particularly, the WTO legal system. For while the WTO negotiating branch was trapped in a quagmire, the adjudication branch was fully functional. The WTO DSM, for the past 18 years, and continuing today, enforces WTO trade rules, compelling sovereign states to withdraw public policies that run counter to WTO agreements.

This report analyses the WTO DSM in depth, the “crown jewel” of the WTO, and concludes that, while technically, disputes under the WTO DSM are between Member governments, the reality is that almost no government goes into the DSM without the pressure of their corporations. World trade is in reality between corporations, in fact, as the 2013 World Trade Report points out this trade is concentrated in the hands of a few corporations only. “The findings suggest that current trade is mainly driven by a few big trading firms across countries.”⁴ It is thus obvious that trade disputes filed under the world’s only multilateral trading organization are invariably filed at the impetus of their corporations.

Furthermore, this report provides several dispute cases as examples, focusing in particular on the cases around renewable energy. It details the TNCs involved in both sides of the disputes, filed on their behalf by their governments. It also reviews cases involving India, China, the US, Canada, Japan, and the EU, noting the corporations involved and the profits at stake. The first ever ruling of the WTO DSM on a case around renewable energy provides a negative precedent of favoring trade rules over efforts to fight climate change. The WTO DSM though with its confidential panel deliberations is not the only problem, the rules per se of the WTO are *biased* towards TNCs interests. The “non-discriminatory” rules of *National Treatment* and *Most Favored Nation* are just some of the examples of how trade rules claim to level the playing field and yet end up providing an “equal” competition between highly unequal players.

TNCs however are not fully satisfied with the current workings of the WTO DSM. This report details the soft and hard corporate agenda for change to the DSM. As the study commissioned by the ICC details, there are “two overriding problems facing the dispute settlement system: time and money. Both problems result from the fact that the system was designed by governments largely to protect themselves from litigation, rather than to rigorously enforce the rulebook.”⁵ Their vision is of a DSM that provides direct compensation for litigation costs incurred by the corporations involved in WTO disputes, awards damages to the injured corporation, and monetary compensations for excessive delays.

This report also raises the alarm bells related to the coming post-Bali corporate roadmap. TNCs have already made clear in their World Trade Agenda that they are looking to enter new areas for profit expansion. Hence the determined impetus to conclude the Bali deal at a time when world trade was slowing to a crawl of only 2.5 percent. There is still a brave new world for big business to conquer through the WTO. That agenda includes: (1) an international trade agreement on services – wider and more expansive than the current General Agreement on Trade in Services (GATS), (2) a multilateral framework agreement on investment, (3) an agreement on environmental goods and services and (4) bringing the “gains” made by TNCs in Regional Trade Agreements under the multilateral framework of the WTO. Advances in the Trans-Pacific Partnership Agreement and the Transatlantic Trade and Investment Partnership are also encouraged and welcomed by the ICC, but notes that these developments should reinforce further trade liberalization under a multilateral framework.

This is a dangerous moment for all social movements and people who are struggling for economic justice. The tremendous political momentum gained by the conclusion of the Bali Package at the 2013 Bali Ministerial and the confidence earned by WTO Director General Azevedo from Member governments, could combine to open the door not only to further negotiations around the Doha Development Round but also to entirely new areas.

The challenge is great and urgent.

Introduction

The establishment of the World Trade Organization (WTO) in 1995 had been part of an explicit design of the 20th century vision of a new system of multilateral financial and economic cooperation with the goal of deepening trade liberalization, referred to as the “Washington consensus”. The Bretton Woods institutions as they would be collectively known – the International Monetary Fund (IMF), the World Bank (WB) and the General Agreement on Tariffs and Trade (GATT) which subsequently mutated into the WTO, were all part of the grand scheme of the second age, or post-war, globalization. These multilateral institutions were to establish global trading rules and its accompanying legal system that would enforce and compel governments to comply. The IMF was tasked with re-establishing the gold standard exchange rate stability and imposition of international financial rules, the World Bank had the role of providing loans that by the 1980s came with expansive strings attached, or what was called Structural Adjustment Programs, and the GATT-WTO was tasked with removing barriers to trade and guaranteeing that “trade flows as smoothly, predictably and freely as possible.”⁶

The WTO though was the grand prize for business elites, considered the pinnacle of globalization and free trade. It was the first multilateral trading organization that was empowered with a legal system that could compel sovereign member states into complying with its trade rules. Shortly after its launch in 1995 however, the bastion of free trade fell into a quagmire, which it was unable to get out of for nearly two decades. This was due to several factors, some of which were – the sheer audacity of its ambition (*the Doha Development Round is more massive in terms of areas covered, than the Uruguay Round which established the WTO*), the arrogant intransigence of those who wanted trade to remain grossly unequal, and the powerful resistance of social movements and progressive governments.

The 18-year quagmire however, had only prevented the negotiating arm of the WTO from progressing. The adjudication arm though, with its Dispute Settlement Mechanism (DSM), was fully functional, providing corporations a means to defend their interests. The 60+ agreements under the WTO were being fully implemented and any transgressions reported to the DSM were then dealt with, bringing the total number of disputes to 482 as of August 2014.

The WTO, after all, was and continues to be part and parcel of what some commentators call the global “architecture of impunity”⁷ designed to benefit TNCs and place corporate profit above and beyond people’s interests.

Big Corporations Never Let Go of the Prize

This was one of the main reasons why big business – TNCs led by the International Chamber of Commerce (ICC) (the world’s largest business organization with past and present leaders from Rothschild Europe, Goldman Sachs, McGraw Hill Financial – a financial giant with brands including Standard and Poor’s Rating Services, Platts, JD Power and Associates, S&P Dow Jones Indices and S&P Capital IQ (further discussed in Part 1) – never gave up on the WTO. As many lost interest in the WTO with its stalemated negotiations and collapsed Ministerials, TNCs kept their eye on the prize. They launched the World Business Trade Agenda, sent high-level lobby delegations to the WTO events including the recently concluded Bali Ministerial, and even commissioned a study (*The Report to the ICC Research Foundation: Payoff from the World Trade Agenda 2013*) to show the benefits of concluding WTO agreements, number one of which was Trade Facilitation.

TNCs were first to celebrate and congratulate WTO Director General Roberto Azevedo on the Bali Package. It is probably an understatement to say big business was happy. Trade Facilitation after all, was going to give them a windfall of 10-15 percent as cross-border costs are greatly reduced. TNCs, who control the global supply chains across the world, are first and foremost the beneficiaries of an Agreement that slashes costs and relaxes customs procedures, easing the flow of imports and exports. The 2010 UNCTAD report details that, “by 2009, it was estimated that there were 82,000 multi-nationals in operation, controlling more than 810,000 subsidiaries worldwide. Upwards of two-thirds of world trade now takes place within multinational companies or their suppliers – underlining the growing importance of global supply chains.”⁸

As International Chamber of Commerce Chairman Harold McGraw stated after the Bali Ministerial, “Our efforts to push governments to show the political will needed to conclude a deal here have paid off.”⁹

McGraw's comments were perhaps a little premature as the WTO missed the July 2014 deadline to adopt the Protocol of Amendment for the Trade Facilitation Agreement, which would allow for its legal entry into the "Marrakesh Agreement" and eventual ratification by capitals. As a result, the ICC has launched a Save the TFA campaign to pressure governments into adopting the Protocol as soon as possible. Their pressure seems likely to succeed.

Big Corporations and "WTO Justice"

Certainly big business has no intention of letting go of their prize. For the past 19 years, they have been the main beneficiary of WTO trade rules and its legal system. Disputes under the WTO DSM, although technically between Member governments, are in reality between TNCs. Governments rarely launch disputes without the impetus of their corporations. As the ICC commissioned study itself says, "since almost no government is willing to bring a case without private sector pressure."¹⁰

The WTO DSM provides security that trade rules will be followed - assuring that the rules based system is "non-discriminatory." The problem however is that the WTO rules based system does discriminate - so-called 'equal' rules between unequal players invariably *favor* the bigger, the richer, the more established over the smaller, poorer, and less established. In this competition, the WTO DSM is the instrument by which the sharks beat out other sharks and swallow up the smaller sardines who get in the way of their corporate profits.

World trade is controlled by a few large TNCs and their subsidiaries. The 2013 World Trade Report states this clearly, "current trade is mainly driven by a few big trading firms across countries."¹¹ It therefore follows that the trade disputes under the world's only multilateral trading organization would be between the main players of world trade - TNCs. All this competition, however, - trade wars as they should be properly labeled - is only in the interest of corporate profit and often at the expense of the people and the planet. Public policy is sacrificed in the name of free trade rules.

Big Corporations Want More and More...

Free trade, as the economist analogy goes, is like a bicycle: it needs to keep moving forward to prevent it from falling over. Capital as well, without new areas to expand into, will stop profiting. Hence the near-desperation of free trade supporters and the WTO in their attempts at reviving the stalled negotiations. World trade had slowed down to a crawl the past few years, and in 2013 was only at 2.5 percent. Protectionism and macro-economic shocks, were to blame,

according to the WTO. WTO Director General Azevedo was quick to point out the urgency of the task at hand - "There is a message for the WTO in this. The past two years of sluggish trade growth reinforce the need to make progress in the multilateral negotiations."¹²

The post Bali dust had yet to settle but the ICC was already outlining the next steps. There is a brave new world for big business to conquer through the WTO. "Now, let's talk about tomorrow. This positive result in Bali breathes new life in the World Trade Organization and strengthens the plurilateral trading system going forward. We, in the international business community, must now work together, to help set that agenda."¹³ There are a number of things on that agenda - (1) an international trade agreement on services - wider and more expansive than the current General Agreement on Trade in Services (GATS), (2) a multilateral framework agreement on investment, (3) an agreement on environmental goods and services and (4) bringing the "gains" made by TNCs in Regional Trade Agreements under the multilateral framework of the WTO.

This Report is divided into two main parts:

Part 1: Big Business and the Bali Package

The first part goes into detail on how the Bali Package benefits TNCs:

- a) Trade Facilitation: the new legally binding agreement that relaxes customs procedures for faster trade flows and why it carries tremendous significance for TNCs and their global supply chains;
- b) Agriculture: the historically most contentious agreement in the WTO and how the new rules agreed in Bali jeopardize the future ability of developing countries to guarantee food security for their people and how the old rules continue to favor agribusiness;

The second part delves into the proposed ways to advance corporate interests through the WTO and the "WTO Justice" system.

- a) Dispute Settlement Mechanism: the crown jewel of the WTO is the legal system that enables corporations to compel sovereign governments to withdraw certain public policies that run counter to the global trading rules
- b) Corporations' ideas for "improving" the WTO DSM for its own benefit
- c) Corporations' proposed future agreements under the WTO - including investment, environmental goods and services, trade in services and bringing TNC "gains" in Regional Trade Agreements under the framework of the WTO.

Part 1

The Bali Package and Big Business

A. Facilitating Trade for Transnational Corporations

The centerpiece of the Bali Package is a comprehensive, legally binding agreement on Trade Facilitation. It is the first agreement to be successfully adopted by WTO members since the establishment of the WTO in 1995. Corporations were quick to hail this as a resounding success of their lobby efforts towards governments and have claimed this as a victory for all. As Victor Fung, former Chairman of the International Chamber of Commerce (ICC) and present Chairman of the ICC World Trade Agenda and Chairman of Fung Group, the Hong Kong based supply chain group, stated, “We are very pleased with this outcome which re-establishes the centrality of the multilateral trading system. This is good for business worldwide, especially for small and medium sized enterprises and developing countries.”¹⁴

There is more to this statement of victory however, than meets the eye. In the present era of global supply chains or what is also called global value chains (GVCs), it is the TNCs and their subsidiaries whose businesses are based in developing countries, where labor is cheaper, that truly benefit from this agreement. In the UNCTAD 2013 World Investment Report: *Global Value Chains: Investment and Trade for Development*, it states that, “GVCs are typically coordinated by TNCs, with cross-border trade of inputs and outputs taking place within their networks of affiliates, contractual partners and arm’s-length suppliers. TNC coordinated GVCs account for some 80 percent of global trade.”¹⁵

The Relentless Pursuit of Trade Facilitation

Big business has long wanted this agreement. According to a report by the International Trade Centre, talks around the inclusion of trade facilitation in the WTO arose as early as 1993, after the conclusion of the Uruguay Round. It was one of the four “new issues” proposed at the 1996 Singapore Ministerial. The collapse of the 1999 Seattle Ministerial however, had put the issues on the back burner. TNCs, though, kept their eye on the prize. “In 2003, the International Chamber of Commerce, which represented (*at that time*)

8,000 businesses around the world stated that a “trade facilitation agreement is fundamental to the establishment of an improved and more efficient management process for international trade in goods on a global basis. Binding commitments are essential because only WTO can ensure the political support required for durable improvements in global trade.”¹⁶

What is not stated though is the real reason why the ICC and corporations prefer the WTO over Regional Trade Agreements (RTAs) or any other preferential or bilateral trade agreements, which is that the WTO has the all powerful Dispute Settlement Mechanism (DSM) that enables the WTO to legally compel sovereign governments to bring their national laws into conformity with WTO trade rules. This was the motivation for determinedly pushing this deal under the WTO despite all the stumbling blocks and despite having other avenues such as Regional Trade Agreements (RTAs) and Bilateral Investment Treaties (BITs).

The “new issues” of trade facilitation, competition, investment and government procurement had been a defining feature of the 2003 Cancún Ministerial and it was the resounding rejection by the G90 countries of the inclusion of these four issues that had contributed to the collapse of the Ministerial. However, TNCs persistence and recent successes show that if there is *political* will, there is a way. For despite the clear rejection in 2003, trade facilitation was officially included in the negotiating agenda of the WTO, the following year, in the 2004 July Package.

“TNC coordinated GVCs account for some 80 percent of global trade”

UNCTAD 2013 World Investment Report: *Global Value Chains: Investment and Trade for Development*

“Binding commitments are essential because only WTO can ensure the political support required for durable improvements in global trade.”

International Chamber of Commerce, 2003

What is the International Chamber of Commerce?

Founded in 1919, the ICC is the largest business organization in the world, which as of 2013, had a global network comprising 6.5 million companies, chambers of commerce and business associations in more than 130 countries. Calling themselves “merchants of peace,” they emphasize three main activities: rule setting, dispute resolution and policy advocacy. In terms of rule setting, the ICC develops rules, codes and standards for its members that help business in their day to day international trade transactions. In terms of dispute resolution, the ICC boasts of having the biggest international court of arbitration in the world, handling about 2,000 cases every year. The ICC International Court of Arbitration has registered over 20,000 cases since its founding in 1923. In terms of policy advocacy, the ICC aims to try and influence decisions made by intergovernmental organizations that affects business capacity to trade and invest across borders. The ICC is particularly interested in the World Trade Organization (WTO), the United Nations and more recently, the G20. The ICC was the first organization to be granted general consultative status with the United Nations Economic and Social Council (UN-ECOSOC). The ICC takes pride in its lobbying influence at the WTO, citing the Bali Package as part of its achievements. According to Stefano Bertasi, Executive Director, ICC Policy and Business Practices, “The most recent and most significant achievement that we can be proud of is the agreement reached by the World Trade Organization which includes a series of agreements including an agreement on Trade Facilitation.”¹⁷

The TNCs in the Leadership of the ICC

Although the list of ICC members is not readily available to the general public, a look at their Executive Board and their previous Chairmen give an indication of the TNCs involved in the ICC leadership.

The Current ICC Executive Board:

Chairman: Harold McGraw III – McGraw is Chairman of McGraw Hill Financial – a financial giant with brands including Standard and Poor’s Rating Services, Platts, JD Power and Associates, S&P Dow Jones Indices and S&P Capital IQ.

Vice-Chairman: Sunil Bharti Mittal – Mittal is Founder, Chairman and Group CEO of Bharti Enterprises and the Chairman of Bharti Airtel. Bharti Enterprises is a business conglomerate that operates in 20 countries across Asia and Africa owning various businesses including telecommunications, retail, financial services and manufacturing.

Honorary Chairman: Gerard Worms – Previous Chairman of the ICC, Worms is also Chairman of ICC France, Vice-Chairman of the investment bank Rothschild Europe part of the Rothschild Group. Rothschild is one of the world’s largest financial advisory groups. The Rothschild Family is said to have possessed, at one point, the world’s largest private fortunes.

Secretary General: Jean-Guy Carrier – Carrier has held senior positions in business and international organizations, particularly the World Trade Organization. From 1996 to 2008, he led various research-based publishing and public information programs for the WTO as Publisher and Chief Editor. He also set up the WTO Reference Centre program. This “insider” knowledge of the WTO has most likely been of particular use for the ICC’s lobbying at the WTO.

Previous Chairmen of the ICC in recent years:

2010 – 2011: Rajat Gupta – Gupta was the Managing Director of McKinsey and Company, a global management consulting firm, and was on the board of a number of corporations including Goldman and Sachs, Procter and Gamble and American Airlines. Gupta, who had also served as a member of the Foundation Board for the World Economic Forum, was, in June 2012, convicted on insider trading charges of four criminal felony counts of conspiracy and securities fraud. In March 2014, The New York Times reported that a court upheld the conviction and rejected Gupta’s appeal. “In a unanimous ruling, a federal appeals court rejected Mr. Gupta’s bid for a new trial, upholding a 2012 conviction that was a milestone in the government’s sweeping investigation into insider trading on Wall Street.”¹⁸

2008 – 2010: Victor K. Fung – Fung is the Group Chairman of Li & Fung group of companies. The Fung Group, as it is also referred to, is a Hong Kong-based supply chain group that supplies and manages high-volume, time-sensitive consumer goods (garments, home products, toys, sporting goods, etc) from an extensive global network of suppliers and distributors. The Fung Global Institute, of which Fung is also Chairman, has just recently co-published together with the WTO two publications on Global Value Chains (GVCs). Fung is also Chairman of the ICC World Trade Agenda Initiative. Fung was part of the ICC delegation to Bali.

2005 – 2008: Marcus Wallenberg – Wallenberg of the prominent Wallenberg family, one of the richest families in Sweden, founder and owner of the Swedish investment company Investor AB, is an investment banker and industrialist. Wallenberg was the CEO of Investor AB and a Board Member of several corporations including AstraZeneca, Ericsson, Electrolux and Saab – the global defense and security contractor.

Some of the TNC members of the International Chamber of Commerce

(Updated as of May 20, 2014)

AstraZeneca	Embraer	Mitsubishi Corporation
Attar Group	Eskom	Nokia Corporation
Bennett Jones	Etonic Worldwide	Oscar Carre Fonds Deltares
Bharti Enterprises	Evercore Partners	Protego
BHP Billiton	EVRAZ Group	Rothschild Europe
Confindustria	GITI Group	Smith and Nephew
Corporación América	Great Eastern Energy Corporation	Stonefly
Daesung Industrial	ING	Transcom Worldwide
Deutsche Borse	LM Ericsson	United Insurance Company
Doha Insurance Company	Lotto Sport Italia,	Vodafone
Dynasty Foundation	McGraw Hill Financial	YKM Holdings
East Capital	Melia Hotels International	Zurich Financial Services

Negotiations in the WTO however soon came to an impasse, only able to produce declarations at intervals. By 2011, former WTO Director General Pascal Lamy was left calling the 2011 Geneva Ministerial a “housekeeping exercise.” Corporations, however, were not ready to give up. In March 2012, at a trade policy conference at the WTO with then WTO DG Lamy in attendance, business representatives presented the International Chamber of Commerce (ICC) Business World Trade Agenda. This was followed in 2013 by the ICC World Trade Agenda Summit in which¹⁹ their number one priority on the list of desired outcomes was concluding an agreement on Trade Facilitation.

The final business recommendations were then submitted to governments ahead of the G20 Summit in Russia in September 2013 and the Bali Ministerial in December 2013. The recommendations were also used to “mobilize CEOs around the world to make the case to national governments for this new trade agenda.”²⁰ The ICC then sent a high-level delegation including members of the ICC Executive Board and the ICC World Trade Agenda Initiative to the Bali Ministerial to push the big business lobby for trade facilitation. In a video on the ICC website, ICC Chairman of McGraw Hill Financial congratulated ICC members on a job well done and the great success of the Bali Ministerial. “With *our help*, 159 countries came together to reach a Trade Facilitation Agreement that would boost the world economy by almost 1 trillion USD and lead to the creation of 21 million jobs... What an accomplishment... We have a lot to be excited about. We just witnessed the power of the International Chamber of Commerce global business platform acting as one united voice.”²¹

Trade Facilitation, Global Value Chains and the Corporate Beneficiaries

“Patterns of value added trade in GVCs are shaped to a significant effect by the investment decisions of TNCs.”

UNCTAD World Investment Report 2013

The WTO defines trade facilitation as “the simplification and harmonization of international trade procedures, with trade procedures being the activities, practices and formalities involved in collecting, presenting, communications and processing data required for the movement of goods in international trade.”²² Simply put, it is the relaxing and speeding up of customs procedures to cut the time it takes for goods to cross borders, facilitating faster trade flows. As Victor Fung, Chairman of the ICC World Trade Agenda and the Fung Group, a supply chain management conglomerate attests, “The trade facilitation deal under discussion at the WTO is basically about cutting red tape at borders and in customs for trade in goods. It means, for instance, harmonizing forms, administrative procedures and standards, and fees. These are a significant cost to business, particularly SMEs and companies in developing countries, often as high as 5-15% of the value of the goods involved.”²³ This is highly relevant to TNCs as one of the defining features of today’s global economy is GVCs. “A large share of 21st century trade requires integrated global supply chains that move intermediate

A Breakdown of the Trade Facilitation Agreement

The Trade Facilitation Agreement agreed in Bali is a comprehensive deal that covers a wide range of issues in relation to customs procedures. Its original negotiating mandate was to expand on three GATT Articles related to movement across borders of goods:

- Article V: Freedom of Transit: assures hassle-free movement of goods in transit through the territories of other Members
- Article VIII: Fees and Formalities connected with Importation and Exportation: aims to rationalize border procedures, fees and formalities
- Article X: Publication and Administration of Trade Regulations: requires Members to publish promptly their trade laws, regulations and administrative rulings

It has three sections and an annex:

- Section I: Articles 1-12: covers all the binding obligations and measures to be undertaken by Members
- Section II: Article 13-22: provides for special and differential treatment measures for developing country and Least Developed Country (LDCs) Members
- Section III: Article 23-24: establishes institutional arrangements for the implementation of Trade Facilitation under the WTO
- Annex 1: Notifications of Category A commitments

Articles 1-5 essentially cover transparency issues, expanding on the provisions of GATT Article X, while Articles 6-12 expand on provisions of GATT Articles V and VIII, covering issues of fees and formalities and freedom of transit. These are all legally binding obligations. Annex 1 includes individual schedules of Members for implementing Category A commitments. These commitments will form part of the Agreement.

Articles 13-22 provide for special and differential treatment for developing and LDCs, allowing for these countries to self-designate their notifications of commitments per Category:

- Category A: commitments that will be implemented upon entry into force of the Agreement; these are provisions of the Agreement that Members consider relatively easy enough to implement or are already implementing; LDCs are given an additional grace period of 1 year
- Category B: commitments that will be implemented after a transitional period; these are provisions of the Agreement that Members self-designate to be moderately more difficult to implement and therefore will need more time
- Category C: commitments that will be implemented only after receiving technical assistance and capacity building support; these are provisions of the Agreement that Members consider unable to implement without financial and technical support

There is an early warning system wherein developing countries or LDCs can notify the Trade Facilitation Committee of their inability to implement Category B & C commitments before the agreed deadlines and can get extensions, in all instances, LDCs get more consideration than developing countries, taking into account their economic status. At the end however, all the commitments are legally binding and developing and LDC Members will be obliged to implement these measures, or face challenges under the WTO Dispute Settlement Mechanism.

Developed countries do not have such Categories for their commitments as it is assumed that they have the ability to implement all the legally binding obligations upon entry into force of the Agreement, if they were not already implementing them.

The Trade Facilitation Agreement contains very real and concrete changes to regulation, legislation, institutions, administration and physical infrastructures of countries. The obligations under the Agreement include highly detailed and prescriptive provisions on how governments should change their customs related policies and institutions. For example, some of the legal obligations include:

- Article 3 requires that Members issue “advanced rulings” to traders who request it. Advanced rulings, which are already common practice in many developed countries, are a new area of obligation under the WTO. It is a binding decision for customs related classification of goods and facilitates release and clearance of goods.
- Article 6 details obligations on what fees Members can or cannot charge to traders and where there are any fees, limits them to the approximate cost of the services rendered.
- Article 7 orders numerous measures on the release and clearance of goods including the separation of release from final determination of customs duties, taxes, fees and charges. This obligation requires Members to establish a guarantee and risk system that allows for “low risk” or “authorized economic operators” to take the goods through customs BEFORE the payment of customs duties, taxes and fees to be determined by customs. The Article includes providing expedited processes, low data requirements, low rate of physical inspections, rapid release time and deferred payments of duties and taxes.
- Article 8 requires the establishment of coordination mechanisms between border control agencies and all other related agencies not only across the country but across borders. For example, for countries sharing a border, the Article obliges Members to align their working days and hours so that borders open and close at the same time, align their procedures and formalities, develop and share common facilities, create joint controls and establish one stop border post control.

Many of these obligations require amendments of national legislation and administrative regulations around customs and border controls. It also threatens government revenue from customs duties and taxes.

Article 2: “Opportunity to Comment, Information before entry into force, and Consultations”: on the other hand, includes a provision that each Member shall provide traders and “other interested parties” the opportunity to comment on proposed introduction or amendment of laws and regulations related to customs. “Interested parties” is a new term, that didn’t exist in GATT language. “Interested parties” do not necessarily have to be of the Members territory – meaning, any party (TNC exporter, importer, subsidiary) even from outside the country, has the right to comment on any possible future law or regulation that the government may want to amend or propose in relation to customs and movement of goods across its own borders. These provisions intrude on national policy space and impede on the sovereign role of the state in making customs related policy.

Other provisions involve not only one-time costs but rather ongoing permanent costs for states, for example, Article I which requires the establishment and maintenance of information systems that are online and accessible to traders, requiring Members to have the information available in at least one of the WTO’s official languages, and to maintain enquiry points ready to answer any “reasonable” queries from traders or other “interested parties.” Some developing countries and LDCs do not even have the technology for the installation or management of such sophisticated information systems.

Other Agreement provisions require “hard infrastructure” such as ports, roads, buildings, offices and customs centers at borders, in order to facilitate faster, cost-free or cheaper, movement across borders. These are highly expensive costs that require ongoing budgetary costs for developing economy governments.

The issue of financing for developing countries to build this infrastructure and facilities to speed up trade continues to be a major point of contention, even after the Bali Deal has been agreed.

The Post-Bali Standoff and Other Developments in Trade Facilitation

Soon after Bali, the African Group raised concerns about the adoption of the Protocol of Amendment for the Trade Facilitation Agreement, citing the lack of concrete numbers to be committed by donor Members and other international organizations. However, WTO Director General Azevedo placated their concerns by launching a WTO Trade Facilitation Facility. The Facility was launched on July 22, 2014 to provide support to developing countries and LDCs in securing funds for the implementation of Trade Facilitation. Specifically, it has the following functions:

- Assessment of the needs of countries and matching those with funds from the appropriate donors
- Ensuring flow of information between countries and donors
- Disseminating best practices in measures of Trade Facilitation
- Providing support in identifying sources for implementation assistance, including specifically asking the WTO Director General to help secure those funds
- Providing grants for the preparation of projects for potential donors – these grants can be up to 30,000 USD to hire experts/consultants to help prepare the project proposal
- Providing grants for implementation of “soft infrastructure” projects (consultations for the modernization of customs regulations, workshops, trainings of officials, etc) – these grants can be up to 200,000 USD.

The WTO Trade Facilitation Facility includes the following international organizations: the International Trade Centre, the Organization for Economic Cooperation and Development (OECD), United Nations Conference on Trade and Development (UNCTAD), United Nations Economic Commission for Europe, Latin America and the Caribbean (ECE and ECLAC), United Nations Economic and Social Commission for Asia and the Pacific (ESCAP), United Nations Economic and Social Commission for Western Asia (ESCWA), the World Bank Group and the World Customs Organization (WCO). WTO donor Members will fund it on a voluntary basis. The Facility however, will only be operational upon adoption of the Protocol of Amendment for the Trade Facilitation Agreement to legally enter the WTO legal texts.

However, it was not only the African Group that needed to be placated, in order for the deal to be adopted. The government of India, along with a few other developing countries such as Bolivia, Venezuela and Cuba, also voiced concerns at the speed of the progress of Trade Facilitation and the apparent lack of movement on the other hand in the negotiations for a permanent solution for the food security question in Agriculture - a crucial issue that has held up the WTO July 31st deadline for sign-off on the final steps to the legalization of the Trade Facilitation Agreement.

Because although, the WTO had agreed to the Trade Facilitation Agreement in Bali, in reality, it needs to hurdle a few more steps before it can legally enter into force. Post-Bali, the steps are:

- (Done) The WTO Trade Facilitation Committee should do a legal review of the Trade Facilitation Agreement (As an aside, this begs the question: were Ministers in such a hurry in Bali to agree on this deal that they didn't actually ensure that what they were agreeing were all legally possible?)
- (Done) The WTO Trade Facilitation Committee prepares a Protocol of Amendment of the Trade Facilitation Agreement for adoption by the WTO General Council.
- (Deadline Passed (July 31, 2014)-Current Stalemate) The WTO General Council should have adopted the Protocol of Amendment. The adoption of this Protocol will allow for the legal amendment of the “Marrakesh Agreement Establishing the WTO” in order to include the Trade Facilitation Agreement in the WTO's legal texts.
- (Deadline for Ratification (July 31, 2015) – probable delay) Once the General Council adopts the Protocol of Amendment, the Trade Facilitation Agreement can then be sent to capitals for ratification. They are given 1 year to ratify. The WTO only needs 2/3rds of the Membership for the Agreement to enter into force. The Agreement will only enter into force for the remaining 1/3rd once they themselves ratify it.
- (Target date was 2015, probable delay) Entry into force of the Trade Facilitation Agreement. Upon entry into force, all Category A commitments should be implemented immediately. There is a grace period, but soon after, the Agreement can then be cited in disputes under the WTO Dispute Settlement Mechanism.

All the avid supporters of the Trade Facilitation Agreement, particularly the ICC, decried the blocking of the adoption of the Protocol of Amendment by India and others in Geneva last July 31, 2014. The ICC expressed “huge frustration” at the standoff.²⁶

India and a few others are digging in, however, demanding that more tangible and concrete progress be made in the food security permanent solution, before they give consensus to the adoption of the Protocol. It is not clear how long this stalemate will last.

and finished goods around the world. Intermediate goods account for 60 percent of global commerce, and about 30 percent of total trade is conducted between affiliates of the same multinational corporation.²⁴ Less time at borders dealing with customs procedures therefore translate to faster flows between GVCs. Former WTO Director General Lamy acknowledged the significance of this agreement to TNCs and their GVCs, “Multilateral trade negotiations can sometimes be difficult to relate to day to day work of doing business. Not so for trade facilitation... With the growing prevalence of regional and global supply chains, effective and predictable trade facilitation is an essential ingredient in making supply chains work for developing countries.”²⁵

TNCs and the WTO are quick to trump the supposed benefits of an agreement on trade facilitation for developing countries, employment and global GDP. At best however, these supposed benefits are half-truths or at worst, calculations that do not factor in the real costs.

1) *Developing countries are supposedly the big beneficiaries because they are participants to regional or global GVCs:* While it is true that many developing countries are participants in many GVCs, the UNCTAD points out that it cannot be automatically assumed that

potential long-term development benefits will be felt by developing countries. This is because developing countries participation can be limited to the “low-value” end of the value chain while developed countries have the “high-value” end of the value chain. As the UNCTAD World Investment Report in 2013 stated, “GVC participation can cause a degree of dependency on a narrow technology base and on access to TNC-coordinated value chains for limited value added activities.”²⁷ The report further details, “The value added contribution of GVCs can be relatively small where imported contents of exports are high and where GVC participation is limited to lower-value parts of the chain. Also, a large part of GVC value added in developing economies is generated by affiliates of TNCs, which can lead to relatively low “value capture”, e.g. as a result of transfer pricing or income repatriation.”²⁸ “Low value capture”, simply put, denotes that the task completed does not reap much economically or financially. This usually refers to the unskilled labor of poor developing countries that complete unskilled labor-intensive tasks and/or work on resource extraction – tasks not valued highly by the market. As opposed to “high value capture” where skilled and capital intensive tasks are undertaken and therefore have higher monetary

What are Global Value Chains?

Global Value Chains (GVCs) (*also referred to as Global Supply Chains or international production networks*) refer to the full range of activities that a product goes through from start to finish – from initial concept until end use. These activities can take place in different countries, usually at the most cost-efficient locations for that particular activity.

In recent decades as transportation and communication costs rapidly fell, production was increasingly unbundled and offshored. TNCs discovered that it would cost them less to offshore certain tasks (*usually unskilled tasks*) to factories (*usually in developing countries*). This gave them “comparative advantage.” Developed country TNCs were offshoring the labor-intensive and unskilled production tasks to factories in the global south where these TNCs could pay for cheaper wages for the unskilled laborers. This was cheaper than paying legally required decent wages to employees in the global north.

This fragmentation of production, the management of global factories, and the end of the need to perform manufacturing stages close to one another are all key components of today’s global value chains (GVCs). This phenomenon began in the 1980s but has now become the definitive system of world trade. The world economy is now defined by GVCs. *The Business Guide to the World Trading System*, published by the International Trade Centre (ITC) and the Commonwealth Secretariat in 1999, says “virtually all manufactured products available in markets today are produced in more than one country”.²⁹

However, not everyone earns the same benefits across the chain. As the UNCTAD World Investment Report 2013, points out, GVCs can perpetuate cheap wages, precarious work and trap developing countries in the low value end of the chain, never rising above the unskilled labor-intensive tasks.

gains. Clear examples would be poor developing countries packaging raw materials for export, this is low value capture, then richer developed countries processing those raw materials into higher quality products that are then sold at much higher prices in the global markets, this is the high value capture. Furthermore, decisions on what end of the value chain countries participate in, do not rest with developing countries. As detailed by the UNCTAD, TNCs decide where to invest based on locational determinants. Resource-rich developing countries are then limited to resource-based exports, which are the lowest value ends of the GVCs, while the technologically more advanced developed countries capture the high value end of the chains, due to their pools of skilled labor and technological capital.

2) *An agreement on trade facilitation will supposedly generate 1 trillion USD in global GDP growth and 21 million jobs: A report commissioned by the International Chamber of Commerce, "Payoff from the World Trade Agenda 2013," and produced by the Peterson Institute for International Economics, calculated that an agreement on trade facilitation would deliver 1 trillion USD in global GDP and support 21 million jobs. The report claims, "we estimate significant improvements in trade facilitation could increase exports of developing countries by approximately 570 billion USD and exports of developed countries by 475 billion USD. Taken together, this would translate into more than 1 trillion USD world export gains."³⁰ Furthermore, it claims, "in total, trade facilitation improvements would translate to global gains of 21 million jobs."³¹*

The Global Development and Environment Institute at Tufts University (GDAE), an established center of expertise in economics, policy, science and technology, however, published policy briefs and an opinion editorial in the Financial Times, to refute the claims of the commissioned study. It states that the conclusions reached were based on too many unjustifiable assumptions. "Inaccuracy accumulates in several stages of the estimation process: in estimating the gains from trade facilitation for a sample of countries, in scaling up the gains to the global level and in estimating the employment gains. The resulting figures are too uncertain to underpin any policy decisions."³²

These "gains", grossly exaggerated and empirically lacking, cannot be the basis for political or policy decisions. Furthermore, these "gains" do not take into account the actual costs that developing countries and LDCs would have to shoulder in order to implement the Agreement both in terms of "soft" and "hard" infrastructure. Yet, the

numbers are stated as fact by the ICC representatives and quoted in mainstream media, helping promote corporations' advocacy for the Trade Facilitation Agreement.

The UNCTAD report has also cautioned against unrealistic estimates of employment gains from GVCs. "As to employment gains, pressures on costs from global buyers often mean that GVC-related employment can be insecure and involve poor working conditions, with occupational safety and health a particular concern. Also, stability of employment in GVCs can be low as oscillations in demand are reinforced along value chains and GVC operations of TNCs can be footloose."³³ The GDAE working paper *"Trade Hallucination: Risks of Trade Facilitation and Suggestions for Implementation"* argues that the ICC estimates of job "gains" do not count the number of jobs destroyed in the process. "As experience has shown, rapid trade expansion leads to both job creation and job destruction with an often unclear balance."³⁴ The paper cites the example of the impact of the North American Free Trade Agreement (NAFTA), "In a testimony to the US Congress, Polaski (2006) noted that, twelve years after the agreement's signing, Mexico had gained 700,000 jobs in manufacturing and lost 2 million jobs in agriculture, a ratio of 1 to 2.86. Therefore if we assume a "post-NAFTA" scenario for developing countries and adopt the ICC's constant coefficient approach, we should expect that trade facilitation will destroy 2.86 jobs for every job it will create."³⁵

Despite the problematic inaccuracies, the WTO itself cites the figures as fact, issuing in its news item immediately following the Bali Ministerial that, "The benefits to the world economy are calculated to be between \$400 billion and \$1 trillion by reducing costs of trade."³⁶

Resource-rich developing countries are then limited to resource-based exports, which are the lowest value ends of the GVCs, while the technologically more advanced developed countries capture the high value end of the chains, due to their pools of skilled labor and technological capital.

TABLE 1 Costs vs Benefits of Trade Facilitation for Developing Countries

Estimated "Gains"	Promised Assistance	Estimated Costs and other Implications
1 trillion USD gains in global GDP (based on calculations questioned by other economists)	2 kinds of grants from WTO Trade Facilitation Facility: a) project proposal grants (up to 30k USD only)	Financial burden from both "soft" and "hard" infrastructure (from modernization of regulations, administration, information systems, training of officials to construction of building and rehabilitation of ports, border offices, roads)
21 million jobs (does not factor in job destruction)	b)"soft" infrastructure implementation grants (up to 200k USD only)	Maintenance costs of implementation
10-15 percent reduction in trade costs	Pledges of support from donor Members (no concrete amounts yet)	Potential loss of government revenue from limiting of fees that can be collected at borders
		Potential cutting of other government public programs (such as healthcare, education, poverty alleviation) as government funds are diverted in order to finance implementation costs of trade facilitation
		Debt creation as governments may take loans to finance implementation costs
		Potential job destruction in other areas
		Loss of national policy space

*Data collated by the author

3) *There are real costs for developing countries to implement the trade facilitation agreement:* In the run up to the Bali Ministerial, developing countries had long raised the issue of implementation costs. A clear demand was financial support from developed countries. Promises had been made for donors and developed countries to provide financing but until recently, there have been no concrete figures given. Soon after the Bali Ministerial, the International Trade Centre published a guide for business: *"WTO Trade Facilitation Agreement: A Business Guide for Developing Countries."* It states, "This simple guide aims at helping business understand the obligations that developing countries have accepted - or will in due course accept, so that they can work in partnership with governments to arrive at outcomes that will benefit governments and traders alike."³⁷ However, the high costs of implementation were left aside despite developing countries worries that they would need to divert scarce resources. As the GDAE policy brief explains, "implementing trade facilitation reforms is a

costly process, likely requiring teams of specialized personnel, and in many countries, large international consultancy fees. This requires diverting resources from other services such as healthcare and education."³⁸ Implementation costs will be significant as it will include "soft" infrastructure and "hard" infrastructure across the nation as obligations are expected to be implemented across the board in the Members' territories. The foreseen costs far outweigh the estimated "gains" of the Agreement.

In reality, the expected windfall of profit from the relaxing of borders and customs procedures, is for the TNCs who already control the GVCs. "Congratulating ministers and WTO Director-General Roberto Azevedo for their tireless efforts to reach consensus, ICC said that the agreement reached on trade facilitation was expected to reduce cross-border transaction costs for companies by 10-15% and was significant for businesses in all sectors and of all sizes around the world."³⁹

B. Starving small farmers, Feeding agribusiness

Agriculture has always been at the center of controversy in WTO negotiations. In 2008, for example, the stumbling block in the negotiations was agriculture. It was also one of the main points of contention at the Bali Ministerial. In particular, the debate centered on the issue of a “peace clause” - a temporary measure, that provides reprieve from being sued under the WTO Dispute Settlement Mechanism (DSM) because of food security programs for small farmers and poor constituents. At stake was the right to food and how the WTO was going to tie the hands of governments in their ability to guarantee food security to its people.

Jeopardizing the Right to Food

In the run up to the Bali Ministerial, India and the G33 group of developing countries tabled a demand to amend the Agreement on Agriculture (AoA) to allow for developing countries to use price support to implement public stockholding for food security and domestic food aid. Simply put, the G33 countries were asking for permission from the WTO, to provide subsidies to poor farmers. The proposal was to amend the AoA, specifically its domestic support rules. (See the box below: *Why the Agreement on Agriculture needs to be amended for the G33 proposal to work on a long term basis.*) Under the current rules, countries cannot go beyond the set AoA domestic support limits – 5 percent for developed countries and 10 percent for developing countries. India, for example, which approved the National Food Security Bill in September 2013, to provide subsidized food grains to poor members of its population, an estimated two-thirds of its 1.2 billion population, would definitely go over the 10 percent limit. Without the amendment, India could be taken to the WTO DSM, for violation of the AoA rules.

Developed countries however declared the proposal to amend the AoA as “too big an issue for Bali.” Instead, the compromise reached in Bali was a very weak peace clause that has so many loopholes that developing countries are likely to find it very difficult to use. For example, it has several restrictive conditions on what crops can be included or not included - the decision is seen to apply only to “primary agricultural products that are predominant staples in the traditional diet of a developing Member” – this is problematic as agricultural products related to food security are not all necessarily considered as staple crops. Then there are the extensive, onerous and intrusive information requirements per crop. Trade observers have pointed

to the dangers of India and other developing countries sharing too much information as required by this peace clause – i.e. opening balance of stocks, annual purchases – value, quantity, purchase prices, release prices, etc – because these are food security sensitive information and can be used against that country in future trade disputes around agriculture. Furthermore, it does not address the Agreement on Subsidies and Countervailing Measures (ASCM) and therefore still provides technical avenues for countries to be sued under the WTO DSM.

Also, the peace clause states, that it only applies “...in pursuance of public stockholding programmes for food security purposes existing as of the date of this Decision” which many have pointed out as highly problematic. “An important question is whether the decision introduces a “standstill” clause for any expansion of these public programs because the decision applies to programs “existing as of the date of this Decision.” If so, this would have an impact on developing countries who currently do not have such programs as well as for the expansion of India’s program.”⁴¹ This future illegality of food security programs jeopardizes the right to food and the responsibility of governments to guarantee, through all available means, their peoples’ food security.

Most importantly, in order to use the peace clause, countries need to – notify the WTO that they are breaching the limits of the domestic support rules of the AoA, tantamount to admitting ‘guilt’. All these admissions of guilt will not be good for that Member country after the peace clause time period lapses, as other Member countries will be able to use that against them at a future date.

Furthermore, the peace clause is not a permanent solution and doesn’t measure up to the original demands of amending the AoA. Worse, the promise of a long-term solution is unclear and subject to further negotiations.

The peace clause also highlights the deep hypocrisy embedded within the WTO. While India and other developing countries have to beg for permission to provide food subsidies to their poor constituents, “the US and EU, through various loopholes are able to circumvent their 5 percent limit under the AoA and provide billions of dollars in domestic support to their agricultural producers – the US with 130 billion USD in 2010 and the EU with 79 billion Euros in 2009.”⁴²

The big question is why do governments even need the WTO to decide whether they can guarantee the right to food to their people? The right to food is a universal human right that should not be subject to trade rules. This brings

Why the Agreement on Agriculture needs to be amended to accommodate the G33 proposal and its implementation on a long-term basis.

Under the rules of the AoA, domestic support, which includes measures to support prices, administered prices (*prices set by the government*) or subsidies directly related to production quantities, fall under the Amber box and are subject to limits. The limits are 5 percent of agricultural production for developed countries and 10 percent of agricultural production for developing countries. At the beginning of the WTO, WTO members that had subsidies higher than these “de minimis” levels were required to commit to reduce them. These reductions are referred to as the Total Aggregate Measurement of Support. The formula for calculating Total AMS is:

Volume of eligible production

X

Difference between the external reference price (world market price) and the administered price

=

Value of farm subsidy provided

The G33 countries have proposed changes to allow countries to provide subsidies in order to guarantee food security without exceeding the limits or facing legal challenges under the WTO dispute settlement mechanism. One of these four rules of the AoA needs to be amended for the G33 proposal to work:

- 1) Raise the “de minimis” support ceiling for developing countries from 10% to 15%
- 2) Review the 1986-88 external reference prices and use instead a more current reference price year
- 3) Review the volume of eligible production
- 4) Negotiate the administered price (however the G33 is not open to reducing further this fourth variable as this is the support that they want to give to their farmers.)⁴⁰

SOURCE: Malig, Mary Louise (2013) “The Return of the WTO: Why the 9th Ministerial and the Bali Package threaten the people and the planet.”

us to the long-standing demand of social movements, in particular of the global peasants movement La Via Campesina who rightly argue that agriculture should never have been included in the WTO negotiations and should not have been made subject to its rules.

Subsidizing Agribusiness

“Of agricultural subsidies, only half reaches farmers, and most goes to the richest.”

The World Bank “Global Economic Prospects”

While the US and EU are spending billions of dollars in subsidies, studies have shown that most of these go to those who do not need it – rich, large corporations or agribusiness. According to the World Bank, “The largest farm operations, which generally are also the most profitable and the wealthiest, receive most of the benefits of support systems. In the United States, the largest 25

percent of farms have average gross farm receipts of more than 275,000 USD and average farm net worth of more than 780,000 USD. They receive 89 percent of all support.”⁴³ The small family farms or cash-strapped growers receive very little support as they share the remaining 10 percent that has not gone to subsidizing large agribusiness. In the EU, the support goes to those who do not need it as well: “the largest 25 percent of farms have average gross farm receipts of more than 180,000 euros and average farm net worth of almost 500,000 euros. They produce 73 percent of farm output and receive 70 percent of support.”⁴⁴ This is similar in Japan and Canada as “the largest 25 percent of farms receive 68 percent and 70 percent of support payments, respectively.”⁴⁵

This means that small farmers, even in the heavily subsidized northern countries, do not receive much-needed substantial support from their governments. Many of them have been forced out of their lands. “Hundreds of thousands of farmers have left the land in Europe (200,000 farmers and 60,000 beef producers in 1999) and the US (235,000 farms failed during the mid-1980s farm crisis).”⁴⁶ As the recent TNI report on the *State of Land in Europe* details,

Revolving Door: Corporate Agribusiness, the US Government, and the WTO

*Mickey Kantor, US Trade Representative for much of the Uruguay Round of the GATT trade talks, is now a board member of Monsanto

*Claydon K. Yeutter, former Secretary of USDA, former US Trade Representative who led the US team in negotiating the North American Free Trade Agreement (NAFTA) and helped launch the Uruguay Round of the GATT negotiations, was as of February 1999 a member of the Board of Directors of Mycogen Corporation, whose majority owner is Dow AgroSciences, a wholly owned subsidiary of the Dow Chemical Company.

*The US Intellectual Property Committee is made up of 13 major US corporations including DuPont, Monsanto and General Motors. These corporations were instrumental in developing the Trade Related Intellectual Property Rights (TRIPS) agreement which was included in the Uruguay Round of the GATT (1985-1994)

*When Robert Shapiro was chair of Monsanto, he was also the chair of the US President's Advisory Committee for Trade Policy and Negotiations.

SOURCE: Paul, Helena and Steinbrecher, Ricarda (2003) "Hungry Corporations" Zed Books. London, UK and New York, USA.

Agribusiness Control of Food

83.5% of beef packing in the U.S. is controlled by four firms

48% of U.S. food retailing is controlled by five firms

71% of soybeans in the world go through three soybean crushing firms

66% of all pork is packed by four firms

90% of the global trade in grains is controlled by three firms

60% of U.S. corn seed market is controlled by two firms

SOURCE: Holt-Gimenez, Eric and Patel, Raj. (2012) "Food Rebellions: Crisis and the Hunger for Justice" Food First Books

"From 2007-2010, small farmers owning less than 10 hectares lost control over 17% of European farmland, an area bigger than Switzerland (4,320,000 hectares) while farmers owning more than 50 hectares gained almost 7 million hectares, more than twice the size of Belgium or the size of Ireland."⁴⁷

The 10 percent of the wealthiest farmers that receive two-thirds of subsidies in the US include lawmakers, Fortune 500 companies, and even celebrities such as Ted Turner and David Rockefeller.⁴⁸ Subsidizing large agribusiness "has earned farm subsidies the title "America's largest corporate welfare program."⁴⁹

The AoA, which was supposed to eliminate unfair and trade-distorting subsidies to foster "fair" competition, has instead, allowed the US, EU and other developed countries, to heavily subsidize their food and agribusiness TNCs. These TNCs now dominate the global markets and operate virtual monopolies. "Fewer than 5 companies (*these companies are: Syngenta, AstraZeneca, Aventis, DuPont and Monsanto.*)⁵⁰ control 90 percent of the export market for each of wheat, corn, coffee, tea, pineapple, cotton, tobacco, jute and forest products. This kind of consolidation is especially evident in the field of genetic engineering, where, even by 2000, just five companies controlled nearly 100 percent of GM seeds."⁵¹

TNCs have embedded themselves in the processes of the WTO with high-level delegations of CEOs lobbying trade representatives and attending various WTO meetings and events. In the WTO Ministerials alone, there are up to 500 corporate delegates⁵². Some of them are part of government delegations or come as business delegations to lobby governments.

Agriculture out of the WTO

The AoA is one of the Uruguay Round agreements and it is the first comprehensive multilateral trade agreement that covers agriculture as a whole sector. Although agriculture was included in the GATT 1947, in practice, it remained outside the agreement. This is why the AoA was originally hailed as one of the key achievements of the Uruguay Round for its promise to bring discipline to the entire sector by ending trade distorting subsidies of the developed countries and bringing an end to dumping, a practice of exporting heavily subsidized agricultural products into markets where they are sold at prices below the

cost of production, in which local farmers can not compete. The evidence (as presented here), however shows that after 18 years, the AoA has instead entrenched an unfair system of large subsidies to agribusiness and undermined the lives and livelihoods of small farmers and peasants around the world.

The AoA was supposed to reform trade in the sector, promising disciplines on subsidies. It even included a commitment to carry the reform forward through new negotiations to be launched in the year 2000. A good part of the Preamble of the AoA is dedicated to this promise of reform, discipline, and correcting distortions in world agricultural markets, but it also states that the long-term objective *“is to establish a fair and market-oriented agricultural trading system.”*⁵³

In reality, the AoA was a major coup for the developed countries, because it bound the developing countries agriculture policies to a market-oriented approach, opening their markets and limiting their capacity to support their own small farmers. At the same time, developed countries were able to find loopholes and ways to work the system in order for them to not only continue but increase exponentially their subsidies to agribusiness.

The Bali Package is testament to this continuing double standard. The long-standing demand of developing countries for the US and EU to eliminate their export subsidies in agriculture remains a dream. “The Bali package refers to these export subsidies, and acknowledges that it has missed the 2013 deadline, “We regret that it has not been possible to achieve this objective in 2013 as envisaged in that Declaration.” But it then commits to nothing except “dedicated discussions” for the coming years.”⁵⁴

These promises of ending export subsidies, amending the AoA, peace clauses and the hypocrisy of billions of dollars in continued subsidies to agribusiness, are all taking place in the bigger global context of small farmers losing more and more of their land to agribusiness, to droughts, typhoons, and floods – exacerbated by a growing climate crisis. The WTO AoA is just one of the instruments of agribusiness to further displace small farmers and peasants.

The global peasants movement La Via Campesina with 200 million members around the world, have long called for the removal of Agriculture from the realm of the WTO. Food and agriculture are not mere commodities that can be priced and traded. The right to food is an inalienable right that should not be subject to WTO rules.

WTO kills farmers!

“Food and agriculture are central to our lives as peasants and small farmers. Agriculture is not only our livelihood ; it is our life, our culture and our way of relating to Mother Nature. The logic of free trade runs counter to this, as it makes food a commodity ; a mere product to be bought and sold. This principle of free trade is embodied and pushed forward by the World Trade Organization (WTO). The WTO’s Agreement on Agriculture aims to make agricultural policies the world over more market oriented in order to facilitate greater trade flows. This is why we in La Via Campesina have been at the forefront of the struggle against the WTO since its launch in 1995. Since the beginning, we have consistently called for “WTO out of agriculture”. We were in the streets of Seattle, Cancun, Hong Kong, Geneva and this year in Bali. The commodification of food and agriculture through the WTO has caused the death of farmers – farmers’ livelihoods have been wiped out by cheap agricultural products being dumped in their markets below their costs of production. Korean farmer Lee Kyung Hae killed himself on the fences of the WTO Cancun Ministerial wearing a sign that said “WTO Kills Farmers”. That still carries true today as hunger grows, lands are grabbed by transnational corporations, peasants go into vicious debt cycles as they are unable to sell their produce, family farmers are wiped out by large agribusiness and food is poisoned by genetically modified organisms. We in La Via Campesina believe that the only way forward is to fight for Food Sovereignty. All peoples should have the right to culturally appropriate, nutritious and healthy food, and their food and agricultural systems should not be determined by the whims of the free market.”

Henry Saragih, Chairperson of Serikat Petani Indonesia
Editorial, Nyeleni Newsletter no 16: Peoples Struggle Against the WTO. December 2013

Part 2

Big Corporate Plans Beyond Bali

A. Polishing the Crown Jewel of “WTO Justice” for TNCs

“The WTO dispute settlement system is lauded as one of the most active and fastest adjudicative systems in the world. It is preferred to the many dispute settlement mechanisms contained in the hundreds of regional trade agreements the world over.

It is important to invest in its future.”

World Trade Organization Annual Report 2014

The DSM was created by the Dispute Settlement Understanding (DSU), or what is known in WTO legal parlance as “The Understanding on Rules and Procedures Governing the Settlement of Disputes,” one of the Uruguay Round agreements that formed the WTO. It is the single most important change from the GATT to the WTO as it empowers the WTO to legally enforce global trade rules. It is, as many say, the “crown jewel” of the WTO.

Shortly after the GATT was established in 1947, several multilateral rounds of negotiations took place. It was however the 1994 Uruguay Round of Multilateral Trade Negotiations that made significant amendments to the

GATT and established the WTO, which now included not only trade in goods but also services, intellectual property rights and agriculture. Most significantly, it was now a legal organization – the GATT had acted like an organization but it had only ever legally been an agreement.

The WTO brought together an amended GATT (*formerly GATT 1947 now GATT 1994*), additional sectors under trade in goods, new rules in trade in services, trade related intellectual property rights, a trade policy review and a dispute settlement mechanism. Annexed to these agreements are the specific schedules or binding commitments made by member countries allowing specific foreign goods or service providers into their markets. These 60+ agreements are all enforceable and legally binding assured by a powerful dispute settlement mechanism that has the ability to compel sovereign nation states to change their laws to conform to WTO trade rules and to impose trade sanctions (*suspension of concessions or benefits*) on erring member countries.

Of all these changes however, the WTO itself is proud to point out that the DSM is of most significance. “Dispute settlement is the central pillar of the multilateral trading system, and the WTO’s unique contribution to the stability of the global economy. Without a means of settling disputes, the rules-based system would be less effective because the rules could not be enforced. The WTO’s procedure underscores the rule of law, and it makes the trading system more secure and predictable.”⁵⁵ The DSM is the method by which “WTO justice” is delivered. Whether or not the rules in this rules-based system are fair to both big and small is an entirely separate question.

TABLE 2 Basic Breakdown of Structure of WTO Agreements

Umbrella Agreement	AGREEMENT ESTABLISHING THE WTO		
	Goods	Services	Intellectual property
Basic Agreements for Each Area	GATT (General Agreement on Tariffs and Trade)	GATS (General Agreement on Trade in Services)	TRIPS (Trade Related Intellectual Property Rights)
Dispute Settlement Understanding	DISPUTE SETTLEMENT		
Transparency Mechanism	TRADE POLICY REVIEWS		

SOURCE: World Trade Organization

The DSM is the method by which “WTO justice” is delivered. Whether or not the rules in this rules-based system are fair to both big and small is an entirely separate question.

The Crown Jewel of the WTO

The WTO negotiating branch may have been in a quagmire for the past several years, with stalemated talks and collapses, but the adjudication branch has continued to function, maintaining the power of the WTO. It is after all, the only multilateral body with a legally enforceable system. As of 23 August 2014, there have been a total of 482 disputes brought to the DSM. 482 in 19 years is relatively high especially when compared to the number of disputes brought under the GATT of 300 in 48 years. In addition, according to the WTO, it has been used by 100 members, or 63 percent, of the membership. More cases according to the WTO, is not necessarily a bad thing: “(T) here are strong grounds for arguing that the increasing number of disputes is simply the result of expanding world trade and the stricter rules negotiated in the Uruguay Round; and that the fact that more are coming to the WTO reflects a growing faith in the system.”

It is noticeable, though, that the most active in the DSM are the developed countries and the big developing countries, who have the financial capacity to see through a dispute process which usually takes 2 to 3 years.

What the WTO does not say is that, although at face value, the DSM involves disputes between member states of the WTO; in reality, few governments file a

dispute without corporations telling them to do so as world trade is primarily carried out by corporations. A study commissioned by the International Chamber of Commerce states this as a matter of fact, “since almost no government is willing to bring a case without private sector pressure.”⁵⁶

The United States, the most active country in the DSM, as shown in the previous table, has for example, filed numerous cases with the interests of their firms in mind. One of the most recent cases involving the United States is a case that exemplifies how a government uses the WTO DSM to protect the interests of its corporations against other competing corporations. Trade wars, ostensibly between governments, in this case, the US versus China, are in reality on behalf of their large transnational corporations competing for coveted market share.

WTO Dispute DS440: China — Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States

Status as of May 2014: Panel report circulated on 23 May 2014 (Panel report has been circulated to Members. It has not yet been appealed or adopted.)

On July 5, 2012, the United States filed a request for consultation – the first step in the filing of a dispute under the WTO DSM. The complaint centers on China – particularly its Ministry of Commerce to the Peoples Republic of China (MOFCOM) imposing anti-dumping and countervailing duties on certain automobiles from the US. The agreements cited in the complaint were: Articles 1, 3.1, 3.2, 3.4, 3.5, 4.1, 5.3, 5.4, 6.2, 6.5.1, 6.8 (including Annex II, paragraph 1), 6.9, 12.2 and 12.2.2 of the

TABLE 3 WTO Members Most Involved in Disputes 1995-2013

Member	As Complainant	As Respondent
United States	106	121
European Union	90	77
Canada	33	17
Brazil	26	15
Mexico	23	14
India	21	22
Argentina	20	22
Japan	19	15
Korea	16	14
China	12	31

SOURCE: World Trade Organization Annual Report 2014

An Agreement for TNCs: Trade Related Investment Measures (TRIMs)

One of the Uruguay Round agreements, TRIMs targets the removal of restrictions attached to foreign investment in relation to goods. For example, if a government wants to implement domestic content requirements, foreign exchange restrictions or export restrictions – elements of industrial policy designed to bolster domestic industry and ensure that foreign direct investment benefits the local economy – these ‘trade related investment measures’ can be seen as trade-distorting and are therefore disallowed under TRIMs. The TRIMs Agreement severely limits governments’ ability to implement domestic industrial policy that supports domestic industries as these would be seen to be “unfair” to foreign TNCs.

Anti-Dumping Agreement; Articles 10, 11.3, 11.4, 12.4.1, 12.7, 12.8, 15.1, 15.2, 15.4, 15.5, 16.1, 22.3, 22.5 of the ASCM Agreement; and Article VI of the GATT 1994.

On May 23, 2014, the Panel report was circulated to the Members and the Panel had sided with the US and found China guilty of acting inconsistently with WTO rules. The Panel ruled that China should bring its policies to conformity with those in the cited agreements.

China’s Ministry, the MOFCOM, claimed that the US was “dumping” automobiles - selling them below the cost of production and therefore had begun in 2011 to impose anti-dumping taxes on US automobiles produced by General Motors Co. (GM) and Chrysler Group LLC brands. This claim, some trade observers say, was seen as a move by China to boost the competitive edge of its own automobile industry. In particular, China imposed duties of up to 21.5 percent – effectively, according to the Office of the United States Trade Representative (USTR), a tax of more than 20 percent on the American cars. The US stated in their complaint under the DSM that there was no justification for the accusation that the US was dumping cars in the China market, and the WTO Panel sided with them.

This was a significant case for the US with billions of US dollars of corporate profit at stake. As the USTR Michael Froman stated, “This is a significant victory. In 2013, the United States exported 64.9 billion dollars worth of autos,

and 8.5 billion of that went to China, which has become the second largest export market for U.S. autos. China’s unjustified duties affected an estimated 5.1 billion dollars of those exports, and applied to well-known models, like the Jeep Grand Cherokee, Jeep Wrangler, Buick Enclave, Cadillac Escalade, and others.”⁵⁷

The other most recent case involving the United States is a case against India in relation to solar cells and solar modules. This dispute exemplifies how a government like the US can use the WTO DSM and WTO rules, in this case, the Trade Related Investment Measures (TRIMs) and National Treatment, to contest the national policy of India and its efforts to foster its clean energy domestic industry, in the interest of protecting US transnational corporate profits.

WTO Dispute DS456: India — Certain Measures Relating to Solar Cells and Solar Modules

Status as of May 2014: Panel established, but not yet composed on 23 May 2014 (The WTO DSM has agreed to establish the Panel but the Panelists have not been chosen.)

On February 6, 2013, the United States filed a request for consultation. The complaint centers on India implementing certain measures around domestic content requirements for solar cells and solar modules under its national program Jawaharlal Nehru National Solar Mission (NSM). This was followed on February 10, 2014 by the United States filing a request for additional consultations with regard to Phase II of the NSM program. Japan has requested to join the consultations. Other Third Parties include Brazil, China, Canada, the European Union, Korea, Malaysia, Norway, Russia and Turkey. The agreements cited were: GATT 1994: Article III:4, Trade Related Investment Measures (TRIMs): Article 2.1, and the Subsidies and Countervailing Measures (ASCM): Articles 3.1b, 3.2, 5c, 6.3a, 6.3c, 25. The United States claims that India’s NSM measures “appear to nullify or impair the benefits accruing to the United States directly or indirectly under the cited agreements.”⁵⁸

To put it simply, the US’ complaint claims that India is in violation of a number of WTO Agreements by discriminating unfairly against foreign solar equipment manufacturers in order to favor domestic manufacturers. India’s program, the NSM, launched in 2010, has a goal of reaching 20,000 megawatts of grid-connected solar power capacity in India by 2022, which at current estimates would

provide energy for around 30 million Indian households. The NSM program has two phases and both have domestic content requirements – Phase I has required developers of photovoltaic projects using crystalline silicon technology to use solar cells and modules made domestically – at least 30 percent to be Indian-manufactured equipment. Phase II is expected to include thin film solar PV panels.

Domestic content requirements – or governments requiring corporations to source a certain percentage of materials from domestic producers – are an industrial policy measure which governments use to support domestic industries, especially fledgling and infant industries, in order to

foster their growth. In the pre-WTO era, this was fairly common. As foreign direct investment increased, many governments imposed strict rules as part a strategy to protect their smaller domestic industries from the bigger, much more developed TNCs that crossed into their borders. India, therefore, could be said to be implementing public policy in the interests of its fledgling solar industry. However, this is the era of the WTO, and India's support for its industries, no matter how small, is no longer allowed for it is "discriminatory" against foreign corporations. Under the WTO, everyone – big and small – are to be treated the same. This rule, "National Treatment" basically means that any privilege afforded to

The Principles of "Non-Discrimination" or Favoring the Sharks over the Sardines

The World Trade Organization (WTO) claims its mission is to ensure trade "without discrimination." This trade term of "non-discrimination" though is a misnomer and refers not to equality for all - irrespective of their physical attributes - but rather, refers to leveling the playing field, allowing for equal competition. In the case of the WTO however, where members can vary from developed to developing to least developed, the principles of "non-discrimination" create equal opportunity for very unequal players. Furthermore, the real players in world trade – the TNCs – are afforded – through these principles of "non-discrimination" – the same treatment given to much smaller, much poorer, local enterprises. To this end, the principles of "non-discrimination" then do the inverse – discriminating against the smaller players or the sardines, while favoring the much larger players or the sharks.

The two core rules of the WTO that embody this "non-discrimination" principle are "Most Favored Nation" and "National Treatment".

"Most Favored Nation" (MFN): The MFN is the core principle of the General Agreement on Tariffs and Trade (GATT) and of the WTO trading system. It is the first Article of the GATT. It is a binding general obligation that any treatment given to any WTO member will be given to all WTO members. One member cannot be favored over the other except in cases of preferential access or treatment given to Least Developed Countries (LDCs) and some developing countries. The principle of MFN supposedly levels the playing field for equal competition but between sharks and sardines, even when some preferential treatment is given to the smaller sardines, is there any question as to who would come out the winner?

"National Treatment": National Treatment is the other crucial core principle of the multilateral trading system. Like MFN, it is a binding obligation. It is the third Article of the GATT 1994 and is best summarized in Article III, paragraph 4, one of the most cited articles in disputes under the WTO DSM. "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product."

In essence, once a foreign product or service enters the market, it must be treated no less favorably than the local, domestic or national products or service providers. In other words, governments need to treat foreign and domestic products and services equally. It does not matter that the privileges a government gives to its domestic producers are to encourage its national industry to grow, it then has to give those privileges to a foreign transnational corporation that does not need any kind of support in growing because it is already a force to be reckoned with.

TABLE 4 WTO Agreements cited in complaints under the DSM from 1995-2013

Agreement	Number of times cited
General Agreement on Tariffs and Trade (GATT) 1994 <i>(The GATT 1994 includes Articles on Most Favored Nation and National Treatment amongst others)</i>	375
Anti-Dumping	102
Subsidies	101
Agriculture	71
Technical Barriers to Trade (TBT)	47
Sanitary and Phytosanitary Measures (SPS)	40
Safeguards	45
Import Licensing	41
Trade Related Intellectual Property Rights (TRIPs)	34
Trade Related Investment Measures (TRIMs)	39
Establishing the World Trade Organization (WTO)	40
Government Procurement Agreement (GPA)	4
Rules of Origin	7
General Agreement on Trade in Services (GATS)	22
Customs Valuation	16
Preshipment Inspection	2

SOURCE: *World Trade Organization Annual Report 2014*

*Complainants can cite one or numerous agreements and articles of the agreements in the same complaint.

The double-standard in applying “fair” and “non-discriminatory” rules: The case of Big Pharma against generic medicines

Article V: Freedom of Transit assures hassle-free movement of goods in transit through the territories of other Members. But from 2008 to 2009, numerous shipments of generic medicines from India on the way to Brazil, were held by European border officials in Germany, France and the Netherlands, and then returned to India. The generic medicines - to treat illnesses such as hypertension and HIV-AIDS - were produced in India by its pharmaceutical companies including Ranbaxy Laboratories Ltd and Dr Reddy's Laboratories Ltd. They were on the way to Brazil. The medicines were not protected by patent in either India or Brazil. The medicines however, which were protected by patent in Europe, were seized in transit in European ports and sent back to India, at the request of Big Pharma.

In May 2010, India and then followed by Brazil, filed a complaint under the WTO DSM against the European Union and its member state, the Netherlands, citing among others, the provisions of GATT Article V covering freedom of transit.

If Article V: Freedom of Transit is to be followed however, the European authorities should have had no authority to block the generic medicines, as the legal provision states, “There shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties.”

The cases interestingly, have remained in the early phase of the dispute process for the past four years, not moving from the consultations phase. *(There are some disputes that have languished in consultations phase for several years, not advancing to the Panel stages. The stages of the dispute process are further discussed later in this report.)* It is unclear as to why it has not advanced but the European Commission had stated early on in the process that it had preferred to settle the controversy without having to go through a WTO dispute process. “We are confident that a dispute on this issue will not be necessary.”⁶⁰

It begs the question though, do the “fair” and “non-discriminatory” rules of the WTO only apply when big corporate profits are not threatened?

a domestic producer by its own government, no matter if it is meant to support its development from infancy, should then be afforded as well to all foreign producers, even if they are ten times bigger than the domestic producer. National Treatment (*GATT 1994: Article III:4 - foreign products will be treated no less favorable than domestic products*) is exactly one of the articles cited by the United States in its complaint against India.

In India's case, the US is particularly interested because its corporation, First Solar, the world's largest thin film manufacturer, is poised to suffer a significant economic blow under the India NSM program. "First Solar thin film systems currently make up more than 20 percent of India's solar PV market. Conversely, solar projects in India accounted for eight percent of the thin film modules manufactured by First Solar in 2011, and the company continues to seek opportunities in the country. A DCR (*domestic content requirement*) provision for thin film solar projects in India could deal a significant blow to US solar manufacturers, in particular First Solar."⁵⁹

The ruling on this case will be significant in its implications for governments implementing public policies to foster domestic industries around clean energy and the support for the public shift to consumption of renewable energy.

Cases of Dismantling Public Policy to Favor TNCs

The WTO DSM provides an enforcement mechanism that trade rules will be followed at all times.

Below are key examples that are emblematic of this withdrawal of public policy in favor of WTO trade rules that benefit TNCs – whether from developed or developing countries. This section focuses on the disputes around renewable energy and how WTO rules and the WTO DSM are ruling against national public policies that promote green jobs and foster domestic industries around clean energy.

WTO DSM Disputes around the Renewable Energy Industry

The fight against climate change has been intensifying over the past few years, with social movements and climate justice activists demanding their governments shift away from dirty energy (coal, fossil fuels, and other extractive industries) to clean and renewable energy (solar, wind,

water and other more sustainable forms of energy). Government policies to implement the shift from dirty to clean energy, and creating green jobs, have been welcomed as a step forward. However, TNCs who have found an edge in the domination of the renewable energy sector – in the production of solar panels, and other renewable energy materials and technologies – have been blocking the efforts of other TNCs and fledgling infant industries from eating into their markets. These TNCs through their governments have been using the WTO and its rules of "non-discrimination" to keep their market edge and expand corporate profits. In an urgent crisis of climate change, isn't it more vital for renewable energy, materials and technology to be shared and made more publicly accessible rather than for TNCs to engage governments in trade disputes over who gets which market?

In 2011, the United States, for example, was lobbied by SolarWorld AG – a German TNC with headquarters in Germany and the US – to take action against Chinese solar panel TNCs. SolarWorld AG, the largest solar panel maker in the US, on Oct. 19, the US subsequently filed anti-dumping and countervailing duty petitions against China's solar industry.⁶¹ China, whose TNCs – including Suntech Power Holdings Co. and Trina Solar Ltd – had long been on the rise in the renewable energy sector, had taken the world's top spot as leading photovoltaic producers, dethroning German TNCs. SolarWorld though had claimed in its petition to the US government that China had been illegally subsidizing Chinese TNCs exports and dumping in the US market. The United States Commerce Department sided with SolarWorld and had then imposed duties up to 250 percent on Chinese solar imports coming into the US. China has responded with an action of its own, filing a dispute under the WTO DSM against the US. The proceedings are ongoing.

In 2013, following the US action, EU ProSun – a joint initiative of the EU solar industry – lobbied the European Commission to take similar action against the Chinese TNCs. A year later, in May 2013, Europe joined the American chorus and "slapped punitive trade tariffs on China solar."⁶²

The first ever WTO DSM decision on a dispute around renewable energy has set a worrisome precedent. The WTO DSM ruled against Canada – whose program, "Ontario Green Energy Act", in its province of Ontario had been designed to not only encourage consumers to shift to renewable energy consumption but also to create new green jobs. In 2009, the Ontario's Feed-in Tariff program – created by the Ontario Green Energy Act – began paying

What is the Feed-in Tariff Program?

The Feed-in Tariff Program is a policy mechanism used by governments to promote, encourage, accelerate, or support investment in renewable energy technologies. Under these programs, governments offer long-term contracts, guarantees to purchase at cost or at times above market costs as well as preferential grid access to help finance the investments in renewable energy production and to encourage cost-reduction to promote easier access for local consumers.

The challenge should be to ensure that the support from the Feed-in Tariff Program actually goes to community based, local, small producers – encouraging growth of domestic producers, sourcing materials locally and creating employment opportunities for the community.

Feed-in Tariff Programs are not unique to Ontario nor to Canada. Several countries use the program to boost the production of renewable energy. However, with the recent WTO DSM ruling on the Ontario program, other countries' programs may now also be questioned under the WTO DSM.

above-market rates to renewable energy producers – as long as they used a certain percentage of domestic content and domestic labor – at least 25 percent of the content of all wind projects and 50 percent of the content of all solar projects to be produced by workers in Ontario. The province of Ontario also guaranteed a 20-year purchase price per kilowatt-hour for electricity produced from wind and solar generators for companies that had a certain percentage of costs originating from Ontario. This program generated 20,000 climate jobs in the first two years of implementation and was designed to help Ontario meet its goal of closing down all its coal-power generators by 2014.

There were of course certain concerns such as seven billion USD of the program going to a large TNC – Samsung. “Under the agreement with Samsung, Ontario will provide the company with subsidies to establish a massive solar and wind energy capacity in the province. The government will support the company by providing preferential grid access, financial assistance, and land. The deal has been a boon to Samsung, which is vying to position itself as a major renewable energy player. Samsung, as part of the deal, will also establish a wind turbine facility and solar power production facility in Ontario.”⁶³ However, despite the concern around Samsung and other concerns on implementation, in general, the program was seen by many, as a positive step forward in the fight against climate change – shifting power production and consumption from dirty energy to clean and renewable energy.

In September of 2010 however, Japan, filed a complaint or in WTO DSM legal parlance, a “request for consultation” on Ontario’s green energy program. A year later, the European Union would join Japan in the complaint. Both Japan and the EU had complained of Canada unfairly

discriminating against foreign TNCs, citing the GATT 1994 Articles of National Treatment and a number of Articles in the TRIMs agreement and the Agreement on Subsidies and Countervailing Measures (ASCM). (*Full list of articles cited in the complaint can be found in Table 4: WTO DSM Disputes around Renewable Energy*)

Trade observers though were quick to raise suspicions on the motives of Japan for leading this trade dispute as other provinces in Canada have had domestic content requirements in the past as part of the local government procurement plans. “Some observers have speculated that Japan is targeting Ontario in the wake of a \$7 billion contract given to Korean competitor Samsung by the Ontario government. Recently, Japanese companies - such as Sharp, Mitsubishi, and Kyocera - were on the losing end of a US\$20 billion nuclear power deal in the United Arab Emirates. The Ontario deal could therefore have been perceived by Japan as a sign of losing ground in the green energy arena, some experts say.”⁶⁴ The European Union also had corporate profits in mind in joining the dispute. Although the specific corporations affected are not named, the European Commission details that its losses would be significant. “EU exports to Canada in wind-power and photovoltaic power- generation equipment are “significant,” according to the Brussels-based European Commission, ranging from 300 million euros (*408 million USD*) to 600 million euros (*817 million USD*) between 2007 and 2009.”⁶⁵

On December 2012, the WTO DSM ruled against Canada, siding with Japan and the EU, and ruling that Canada had to bring its policies into conformity with WTO trade rules. Canada appealed the decision but was not successful. The Appellate Body upheld the WTO DSM Panel. “The Appellate Body recommended that the DSB request Canada to bring

its measures found in the Appellate Body Report, and in Panel Report as modified by the Appellate Body Report, to be inconsistent with the TRIMs Agreement and the GATT 1994 into conformity with its obligations under those Agreements.”⁶⁶ Canada, then announced that it would respect the decision and would work together with the province of Ontario in withdrawing the program.

The triumphant EU has hailed the decision: “The EU supports the promotion of renewable energy but considers this must be done in a manner consistent with international trade rules.”⁶⁷ stated EU Trade spokesman John Clancy.

The ruling of the WTO DSM against the Ontario green energy program is the first ruling on a dispute around renewable energy and it sets a negative precedent for all future disputes on this issue. It shows that WTO trade rules trumps efforts to fight climate change and achieve climate justice. The precedent set by this ruling is: the planet may be burning but efforts to address the climate crisis in a socially just manner will be blocked if they do not fall into line with WTO trade rules.

This is the significance of the WTO – that it provides a legally enforced mechanism that can compel sovereign states to withdraw national laws that run counter to the

The Urgency of Climate Change

2013 witnessed the biggest super typhoon in the history of the Philippines: Typhoon Haiyan, or Typhoon Yolanda as it is called in the Philippines, devastated millions of families, displaced an estimated 4 million people, and, left in its wake at least 6,100 dead, making it the deadliest typhoon to ever hit the country. Thousands remain missing and thousands more remain homeless and dependent on relief goods. Government experts have also estimated that the super typhoon had devastated around “600,000 hectares of agricultural lands, with an estimated 1.1 million metric tons of crops lost.”⁶⁸ The FAO reported preliminary estimates of 110 million USD worth of crop losses and twice that number for damage to the agricultural sector as a whole⁶⁹.

Typhoon Haiyan is one of the many faces of climate change and the horrors to come. There will be more extreme weathers, droughts, desertification, floods, hurricanes, typhoons and other disasters as the planet warms. These will all, like Typhoon Haiyan, have human costs, impacting most on those whose lives and livelihoods are most precarious.

Nature however, is not to blame for the rise in extreme weather, but rather mankind - as the Intergovernmental Panel on Climate Change (IPCC) stated in its 5th Assessment Report, “It is extremely likely that human influence has been the dominant cause of the observed warming since the mid-20th century.”⁷⁰ It further states, “Human influence on the climate system is clear. This is evident from the increasing greenhouse gas concentrations in the atmosphere, positive radiative forcing, observed warming, and understanding of the climate system.”⁷¹

Therefore, the urgency of real solutions to the climate crisis is real. Social movements have called on a change in the system – demanding an end to the dependency on dirty energy and transitioning to community based, just and sustainable forms of clean and renewable energy, allowing as well for the just transition of workers into green jobs.

Some demands listed by social movements who organized the Climate Space at the 2013 World Social Forum in Tunisia are listed here:

“System Change means:

Leave more than two thirds of fossil fuel reserves under the soil, as well as beneath the ocean floor, in order to prevent catastrophic levels of climate change.

Ban all new exploration and exploitation of oil, tar sands, oil shale, coal, uranium, and natural gas.

Support a just transition for workers and communities away from the extreme energy economy and into resilient local economies based on social, economic and environmental justice.

Decentralize the generation and ownership of energy under local community control using renewable sources of energy. Invest in community based, small-scale, local energy infrastructure.”⁷²

TABLE 5 WTO DSM Disputes around Renewable Energy

Dispute No.	Request for Consultation filed	Complainant	Respondent	Third Parties	Industry	WTO Articles Cited	Status (as of June 2, 2014)
DS412	13 September 2010	Japan	Canada	Australia; Brazil; China; El Salvador; European Union; Honduras; India; Saudi Arabia, Kingdom of; Korea, Republic of; Mexico; Norway; Chinese Taipei; United States	Renewable Energy Generation Sector	GATT 1994: Art. III:4, III:5, XXIII:1 Subsidies and Countervailing Measures: Art.1.1, 3.1(b), 3.2 Trade-Related Investment Measures (TRIMs): Art. 2.1	<i>(This was combined with DS426 – a similar complaint launched by the European Union against Canada-see below)</i>
DS426	11 August 2011	European Union	Canada	United States; Japan; Australia; China; Chinese Taipei; India; Saudi Arabia, Kingdom of; Brazil; Korea, Republic of; Mexico; Norway; Turkey; El Salvador	Feed-in Tariff Program (related to Renewable Energy Generation Sector)	GATT 1994: Art. III:4 Subsidies and Countervailing Measures: Art.1.1, 3.1(b), 3.2 Trade-Related Investment Measures (TRIMs): Art. 2.1	Panel Report was circulated on 19 December 2012. Appellate Body report circulated on 6 May 2013. <i>Canada's Feed in Tariff program and domestic content requirements around its renewable energy generation sector in Ontario were found to have been inconsistent with provisions under the GATT 1994 and TRIMs. Canada appealed the decision but failed.</i>
DS437	25 May 2012	China	United States	Australia; Brazil; Canada; European Union; India; Japan; Korea, Republic of; Norway; Russian Federation; Turkey; Viet Nam; Saudi Arabia, Kingdom of	Solar Panels	Subsidies and Countervailing Measures: Art.1.1, 1.1(a)(1), 1.1(b), 2, 10, 11, 11.1, 11.2, 11.3, 12.7, 14(d), 30, 32.1 GATT 1994: Art. VI, XXIII Protocol of Accession: Art. 15	Panel was composed on 26 November 2012. Proceedings ongoing. <i>The United States Commerce Department had imposed duties of up to 250 percent on Chinese solar imports including on Chinese TNCs such as Suntech Power Holdings Co. (STP) and Trina Solar Ltd (TSL) stating that China had been illegally subsidizing these exports to dump into US markets. In response, China filed this dispute under the WTO DSM.</i>
DS452	5 November 2012	China	European Union, Italy, Greece		Feed-in Tariff Program (related to Renewable Energy Generation Sector)	GATT 1994: Art. I, III:1, III:4, III:5 Subsidies and Countervailing Measures: Art. 1.1, 3.1(b), 3.2 Trade-Related Investment Measures (TRIMs): Art. 2.1, 2.2	In consultations, Panel has not yet been established. <i>China has filed a complaint against the European Union and member states Italy and Greece for its Green Energy –Feed in Tariff Program – that China claims violate National Treatment and the Most Favored Nation rule under the WTO. China claims this has been hurting Chinese TNC producers of photovoltaic products.</i>
DS456	6 February 2013	United States	India	Brazil; Canada; China; European Union; Japan; Korea, Republic of; Malaysia; Norway; Russian Federation; Turkey	Solar Cells and Solar Modules	GATT 1994: Art. III:4 Trade-Related Investment Measures (TRIMs): Art. 2.1 Subsidies and Countervailing Measures: Art.3.1(b), 3.2, 5(c), 6.3(a), 6.3(c), 25	Panel established but not yet composed as of 23 May 2014. <i>The United States' complaint claims that India is in violation of a number of WTO Agreements by discriminating unfairly against foreign solar equipment manufacturers to favor domestic manufacturers.</i>

*Data collated by the author from the World Trade Organization Dispute Settlement Gateway (all cases are discussed in detail in previous sections in this publication)

WTO's rules. These national laws or public policies have often been put in place to foster industrial growth or protect public interests. Under the WTO rules however of "fair" competition, these public policies are seen as "trade barriers" that impede the free flow of trade.

Soon, members will also be able to cite Trade Facilitation in their complaints upon the Agreement's entry into force.

It's Good but it can be Great

TNCs have other avenues for dispute resolution. The International Chamber of Commerce (ICC) for example has its own arbitration department, handling about 2,000 cases every year. There is also the International Center for Settlement of Disputes (ICSID) operated under the World Bank, where TNCs are able to directly sue States. The WTO DSM however, has a number of advantages for TNCs – 1) the WTO DSM is multilateral – covering 159 countries,

Breaking down the WTO DSM process

The legal text of the Understanding on Rules and Procedures Governing the Settlement of Disputes lists a detailed step-by-step process for the settlement of disputes, using this as assurance to Members that disputes will be resolved in a timely manner.

Step 1: A Member government of the WTO files a "request for consultation." This is the complaint – that another Member government has been discriminating against them or treating them unfairly. This first step in reality is preceded by a prior step – the TNCs going to their government and pressuring them to file the dispute. Disputes are officially between States but as can be seen with the numerous examples in this publication and the admission itself of the International Chamber of Commerce commissioned study, disputes more often than not, begin with a TNC complaining to its government.

Step 2: Consultations then take place between complainant and respondent. This is ideally done in the course of 60 days but some disputes stay in consultations phase for months if not years.

Step 3: If consultations do not work, then a Panel is established, terms of reference are agreed, the Panel is composed and agreed on then the Panel meets with the Parties (*Parties are the Complainant, Respondent and Third Parties – Member States who want to join the complaint because they feel their interests are also affected by the dispute*). (For more on what the Panel and who the Panelists are, see following box: *Who are the WTO DSM Panelists?*)

Step 4: The Panel hears the Parties, (*Usually two meetings with Complainant and Respondent, one meeting with Third Parties*), Panel deliberates, issues an interim report, sends to Parties for comments, holds a review meeting and then issues the final Panel report to Parties then to all WTO Members. (*Panel may or may not consult an advisory Expert Group whose advice they can choose to ignore.*)

Step 5: The Losing Party (*Third Parties cannot appeal*) can appeal the case then the Appellate Body reviews the case and can issue ruling to either uphold or disagree with Panel ruling. (*Opinions issued by Panelists are anonymous, deliberations are confidential and reports are drafted without the presence of the Parties.*)

Step 6: The Dispute Settlement Body (*The WTO General Council convenes itself as the Dispute Settlement Body*) then adopts the Panel or Appellate Body report. Losing Party is then given "reasonable period of time" to adopt the ruling (*meaning bring its offending policies into conformity with WTO trade rules*).

Step 7: If the losing Party does not comply within the agreed "reasonable period of time," the winning Party can complain and bring it back to the Panel to negotiate possible compensation while waiting for full implementation of the ruling.

Step 8: If the losing Party still refuses to comply, the Panel can then authorize the winning Party to retaliate. (*Retaliation or Cross-Retaliation is the winning Party suspending concessions to the losing Party in that sector, related sector, other sectors or under other agreements.*)

This whole process is supposed to take around 15 months but can take much longer.

Who are the WTO DSM Panelists?

Who exactly are the members of the powerful Panels that get to issue decisions on disputes between sovereign states? As seen in the previous section, the Panels play a very important role in the whole dispute settlement process. Once the Panels are established, usually of three panelists but can also be of five panelists, they are the central player of the process.

In theory, Panels have the trust and confidence of the entire WTO membership because the potential panelists come from the Members themselves. Paragraph 4 of Article 8 of the Understanding on Rules and Procedures Governing the Settlement of Disputes provides for the creation of an indicative list of individuals, submitted by Members, who could serve as panelists. (*The Indicative List of Panelists for 2014 can be found in WTO document number WT/DSB/44/Rev.28*)

To qualify as a Panelist, he/she simply needs to be a trade expert. They have no other required qualifications except to have served, taught, published or practiced in the area of trade. And yet, they decide on issues beyond their area of expertise because the coverage of the agreements of the WTO go well beyond trade – from public health to renewable energy. This is highly problematic as decisions are then made solely on the merits of the trade rules and agreements. National measures that are put in place by sovereign states to create employment, provide public services, ensure food security, guarantee public health and protect the environment are then judged solely on the basis of whether or not that measure negatively impaired the expected direct or indirect benefit from a WTO rule or agreement.

Because Panelists opinions in Panel rulings are anonymous, it is difficult to know which Panelist voted in favor or against a dispute.

2) the WTO is already a legally binding Agreement and therefore has pre-existing consent 3) DSM rulings are legally enforceable and if not followed within the allotted time period, can come with retaliation measures.

The ICC arbitration and ICSID involve bilateral agreements not multilateral. Under the ICC or the ICSID, governments and TNCs need to *consent* to use the ICC or ICSID dispute settlement mechanism, by including a clause in their contracts explicitly agreeing to this method of arbitration. Rulings are also punitive but can be contested. Furthermore, a number of governments have begun to question and withdraw from the ICSID, throwing doubts on its legitimacy.

The WTO therefore, is still the crown jewel of dispute settlement for TNCs. TNCs, through their governments, are able to ensure the “fair” and “non-discriminating” global trade rules are enforced in their *favor*. However, despite all the benefits TNCs already enjoy from the system of WTO justice, TNCs still have more proposals on how to make it even better.

The Soft Agenda for DSM Change

The ICC Business World Trade Agenda cites the DSU as a cornerstone of the WTO in the way it provides assurance

that member states will respect their commitments. However it is keen to improve to work more efficiently for their interest, suggesting a “number of practical modifications to the DSU”:

“These modifications should result in more rapid decisions, greater possibility to settle without going to final judgment, and more transparency of hearings and submissions by parties. Proposals for significant change include among other things:

- introduction of remand, allowing the Appellate Body the ability to remand the case back to the Panel for factual findings
- “sequencing” issue and other problems concerning the suspension of concessions or other obligations, thus clarifying ambiguous language in the DSU
- enhancement of compensation as a temporary remedy for breach of WTO law...⁷³

These recommendations are considered practical and technical modifications to the DSU that are moderately easy to achieve and are recommended by business for adoption at the next WTO Ministerial.

The Hard and Ambitious Agenda for DSM Change

However, the Peterson Institute study commissioned by the ICC argues these proposed technical reforms do not go far enough: “More ambitious reforms ought to be considered with an eye on the two overriding problems facing the dispute settlement system: time and money. Both problems result from the fact that the system was designed by governments largely to protect themselves from litigation, rather than to rigorously enforce the rulebook.”⁷⁴ The study details:

1) *Lost time for TNCs*: The study rues that everything takes too long in the current DSM process: “As general advice, once a company decides to pursue a case through its government, it can easily take three years to secure both a panel report and an Appellate Body decision. If the losing government does not comply, it may take another two years for the “suspension of concessions” to be authorized and force a satisfactory resolution.”⁷⁵ It further details, “All in all, the average time line from a company decision to launch a case and final resolution can easily reach 980 days, almost three years. This is the average; and, when the losing country refuses to comply, the retaliation process will take another two years.”⁷⁶ (*This quote also clearly underlines that cases start with the corporations.*) The reasons for the excessive delay cited are the time it takes to form a panel, the panelists schedules, translation delays, and that overall, the whole process works too slowly. Following this, the study recommends the following ambitious reforms for the DSM:

“At a national level, each business community should press its government to establish and adhere to short timelines for the decision whether or not to bring a case to the WTO. To accelerate the WTO’s own consultation and panel process, and to ensure impartiality, several changes are necessary:

- Sitting government officials should not serve as panelists, and the bar against nationals of a contesting party serving on panels should be dropped.
- All panel and Appellate body hearings should be simultaneously webcast.
- The mandatory 60-day consultation period before setting up a panel should be eliminated.
- If contesting parties cannot agree on a panel within 30 days, the director General should select panelists from a standing roster within the next 15 days.

- As with other WTO documents, panel rulings should be circulated first in English so that Appellate Body review can proceed while translations are done.”⁷⁷

These are all recommendations that the ICC hopes would result in more rapid decisions in disputes.

2) *Lost money for TNCs*: The second, but no less important, complaint raised by the study is the lost money for big business. “For the private sector, delays in WTO justice are exacerbated by the fact that there is no compensation for litigation costs or retrospective damages, even when the complaint prevails hands down.”⁷⁸ In the business of making money, losing money is a seriously grave matter. The study recommends the following ambitious reforms for the DSM:

“The Geneva mindset has so far rejected every proposal for retroactive remedies and monetary damages, arguing such suggestions are “dangerous,” even though retaliation by raising tariffs sideswipes innocent buyers, both households and business firms. Needed are remedies that make the aggrieved private parties whole, along with escalating penalties when losing members are slow to comply. Specific recommendations include:

- Losing members should pay the litigation costs of prevailing members, capped at a reasonable figure such as \$5 million. The arbitrator should determine the level of costs and the financial obligation of each party. WTO members should be encouraged to compensate the litigation costs incurred by private firms before compensating their own costs; moreover private firms that stand behind WTO cases should be obligated to pay the litigation costs of the WTO opposing member in the event of an adverse decision.

These proposed recommendations introduce a completely new dimension to the WTO DSM – one of direct compensation to the transnational corporations involved in the disputes. Not only is this clear admission from big business that they are behind the disputes filed by their governments, but it is also a demand for more money towards private profits.

- Panelists should have the power, at their discretion, to award retrospective money damages to the prevailing member, from the time a complaint is filed until the time the panel report is circulated. Any damages so awarded should be paid over by the prevailing member to the injured private parties.
- If the losing member takes more than a “reasonable period of time” to correct its WTO violation, then the compliance panel should have the power to assess money damages to compensate the prevailing member (and its private firms) for the excessive delay. Moreover, the compliance panel should have the power to levy progressive penalty damages the longer the losing member drags its feet.”⁷⁹

These proposed recommendations introduce a completely new dimension to the WTO DSM – one of direct compensation to the transnational corporations involved in the disputes. Not only is this clear admission from big business that they are behind the disputes filed by their governments, but it is also a demand for more money towards private profits.

“More ambitious reforms ought to be considered with an eye on the two overriding problems facing the dispute settlement system: time and money. Both problems result from the fact that the system was designed by governments largely to protect themselves from litigation, rather than to rigorously enforce the rulebook.”⁷⁴

3) Extension of the DSU to RTAs (Regional Trade Agreements): The study concludes with a third suggested ambitious change for the WTO DSM. “We also suggest for consideration – not necessarily for an agreement in 2013 – an optional extension of the DSU for resolving disputes between RTA partners.”⁸⁰ TNCs clearly prefer their crown jewel in contrast to most RTAs, which have weak or non-existent dispute settlement systems. The study claims that this reflects the preference of RTA members – they want prescriptive not binding rules, and they want differences to be resolved by diplomats, not jurists. The study however continues by saying that the tried and tested WTO DSM is much more preferable for them. “If it was available, these RTAs might want the tested system of Geneva jurisprudence (*referring to the WTO DSM which is based in Geneva*).”⁸¹

The abovementioned proposal will extend the jurisdiction of the WTO DSM to the web of regional trade agreements that have emerged in recent years. The upcoming Trans-Pacific Partnership Agreement and the Trans Atlantic Trade and Investment Partnership between the EU and US are all examples of RTAs. The negotiations of these two large RTAs both include agreements that go beyond WTO agreements. Bringing the WTO “plus” advances back into the multilateral framework, at least under the jurisdiction of the DSM, deepens and expands the power of the WTO.

In conclusion, TNCs clearly value the DSM and see its potential to do even more to advance their corporate interests. Furthermore, it shows more clearly than ever before that global trading rules of the WTO are written primarily for TNCs.

B. The Corporate Roadmap

The significance of the Bali Package is the change in momentum in the WTO negotiations. For the first time, in almost 20 years, the WTO has an agreement. After being at stalemate for so long, the WTO's legitimacy was at stake. Although its role of adjudicating disputes and enforcing its rules, functions efficiently, its task of negotiating new agreements had all but failed.

The Real Significance of the Bali Momentum

The incredible pressure on all members combined with the changed political and economic landscape and the political ethos of the new Director General from Brazil, all came together to deliver the Bali Package in the last hours of the Ministerial. This, in turn, brings a whole new dimension to the WTO and the future of free trade. The bicycle of free trade is now upright and moving forward again. Fresh with new momentum, WTO Director General Azevedo has already been calling for ways to move forward post-Bali. "Bali represents not just a huge achievement for all of us—but also a huge opportunity. There is real political momentum and we must build on it." The ICC has issued their Business Priorities for world trade and made clear what they will be pushing for in their post-Bali roadmap. Especially given that the new Director General is more than friendly to TNCs. "I believe TNCs love the WTO and they really want the WTO to be able to lower barriers to trade, because they won't be able to do it alone. They really won't! They need that these negotiations take place in the WTO, for example trade facilitation. What we are negotiating in Bali now is of great interest for TNCs. I know this also because in my former position as Brazilian Ambassador in Geneva I received visits from CEOs, from important people representing TNCs that want to facilitate trade."⁸²

The other crucial significance of the Bali Package was that it showed the WTO how to overcome the deadweight that the Doha Development Round had become. Seemingly abandoning the single undertaking principle, where nothing is agreed until everything is agreed, the WTO had opted to carve out a smaller set of issues to be discussed and agreed for the Bali Ministerial, calling this an "early harvest" of the Doha Round. Through this strategy, they were able to achieve the Bali Package. It can therefore be envisioned that the next step would be to carve out a next set of issues, discussing and agreeing things in smaller packages. There are many questions to be raised though with this process, in particular - which issues get prioritized and which get left behind and what happens to the single

undertaking principle. The precedent at Bali, where Trade Facilitation, a developed country and big business priority, is poised to be legalized while the developmental issues of Least Developed Countries (LDCs) which had been on the table for several years, remains a mere declaration speaks volumes as to the likely winners in future negotiations.

Big Corporations Priorities

Furthermore, the Bali Package has opened the door for other controversial issues to be discussed. Corporations have already listed priority issues for "Beyond Doha." Here are some of those business priorities:

1) *Multilateral framework on Investment*: Investment was one of the four "new issues" rejected in previous years but as with Trade Facilitation, is finding its way back on the negotiating table. According to the UNCTAD, there are over 3,000 international investment agreements that cover two-thirds of global foreign direct investment but that a further 14,000 bilateral treaties would be needed to fully cover international investment. However, corporations feel this is too unwieldy: "This complex network of treaties is too large and complex for investors to handle."⁸³ It continues, "Business needs a stable and predictable investment environment... Therefore, broad discussion should be encouraged on investment issues, such as dispute settlement in international investment agreements, the rising importance of international investments by state-owned enterprises, and how public-private partnerships – including co-investment by host states and private investors – can contribute to break down barriers to investment."⁸⁴

2) *Bring in regional and preferential trade liberalization under the WTO framework*: Corporations are concerned that the proliferation of regional trade agreements (RTAs) and preferential trade agreements (PTAs) is increasing the difficulty for doing business. "Business is concerned that regulatory fragmentation may increase with the continued proliferation of RTAs and PTAs, thus increasing the cost of doing business, especially in a world where trade increasingly takes place through global value chains."⁸⁵ It therefore recommends that the advances made through these RTAs and PTAs be brought under the WTO framework and be multilateralized. "Integrating the advances of RTA/PTAs into WTO rules helps create a level playing field for all companies in every region of the world. Business, therefore, strongly supports increasing the capacity of the WTO to foster convergence between RTAs/PTAs and WTO rules."⁸⁶

Priorities number 1 and 2 reveal the goal to bring everything under one multilateral framework, or the

consolidation of the corporate trade and investment empire. BITs, FTAs, RTAs and PTAs may have been attractive at some point because of the stalemate in WTO negotiations, but the growing number today has become unwieldy. As the UNCTAD had pointed out, to cover all of global FDI, a staggering number of 14,000 additional BITs are needed. Furthermore, some countries are choosing not to renew some BITs. The WTO, in contrast, is a whole package of legally binding agreements and countries cannot pick and choose which agreements to implement or not.

The ICC still welcomes the potential of further trade liberalization with the new agreements being negotiated regionally: the Trans-Pacific Partnership Agreement and the Transatlantic Trade and Investment Partnership – but argues that these efforts should complement and reinforce the multilateral trading system.

3) *Liberalization of environmental goods and services:* Corporations are advocating for “greener” economic activity through trade, but this greening has nothing to do with saving the planet, but rather, finding new areas for making profit. Climate change and the so-called “green economy” of commodifying and pricing nature, also brings in the potential of corporations making profits out of the goods and services that come with those “green” activities that include a broad range of technologies and sectors. Bringing that under the WTO ensures that trade rules will be enforced and will most likely trump genuine environmental concerns.

Last July 8, 2014, 14 WTO Members (Australia, Canada, China, Chinese Taipei, Costa Rica, the European Union, Hong Kong China, Japan, New Zealand, Norway, Singapore, the Republic of Korea, Switzerland, and the United States), which make up 86 percent of global environmental goods trade, launched plurilateral negotiations for an Environmental Goods Agreement. Participants of the group have stated that once they reach “critical mass” (estimated to be at 90 percent of market share), they would extend the benefits of the agreement to the rest of the WTO Membership on an MFN

The precedent at Bali, where Trade Facilitation, a developed country and big business priority, is poised to be legalized while the developmental issues of Least Developed Countries (LDCs) which had been on the table for several years, remains a mere declaration speaks volumes as to the likely winners in future negotiations.

(Most Favored Nation) basis. Meaning, all Members would benefit from the tariff reductions even if they are not part of the plurilateral negotiations. It is also possible that with enough Members joining the talks, that it graduates from plurilateral to multilateral, or that it is negotiated plurilaterally and then multilateralized once agreed upon. These are all still up for discussion and negotiation.

The plurilateral negotiations, welcomed by the Director General Azevedo as a positive development, aims to reduce import tariffs to 5 percent or less by the end of 2015.⁸⁷ (*Tariffs today can be as high as 35 percent.*) The negotiations will take off from the list of 54 environmental goods agreed by the Asia Pacific Economic Cooperation (APEC) – which includes renewable and clean energy generation such as solar panels and wind turbines, wastewater treatment, air pollution control, solid waste treatment and others.

There will be two phases to the negotiations:

- Elimination of tariffs or customs duties – aiming to reduce tariffs by 5 percent or less by the end of 2015
- Elimination of non-tariff barriers and the discussion of environmental services

“I believe TNCs love the WTO and they really want the WTO to be able to lower barriers to trade, because they won’t be able to do it alone. They really won’t! They need that these negotiations take place in the WTO, for example trade facilitation. What we are negotiating in Bali now is of great interest for TNCs. I know this also because in my former position as Brazilian Ambassador in Geneva I received visits from CEOs, from important people representing TNCs that want to facilitate trade.”

WTO Director General Roberto Azevedo in an interview on famous Brazilian TV show, 27/05/2013

This plurilateral approach to the negotiations of environmental goods and services is seen as one of the new and more flexible negotiating approaches being employed at the WTO to avoid the previous deadlocks in the Doha Round of negotiations. The ICC adds their own recommendation to these negotiations: eliminating unilateral environmental rules “that are trade-restrictive or create barriers to trade.”⁸⁸

4) *Liberalize trade in services*: According to corporations, the potential of the General Agreement on Trade in Services (GATS) has not been fully realized. There is so much more to liberalize in the area of services. The ICC Business Priorities report states, “It is estimated that removing barriers to global exports of tradable services could generate world trade gains of 1.0 trillion USD.”⁸⁹ The 2013 World Trade Report states the importance of services as well, “when looking at the value-added directly and indirectly traded, the services sector becomes the most important contributor to trade, well ahead of manufactured

goods.”⁹⁰ The concrete recommendation therefore of the International Chamber of Commerce states, “Make concrete progress on the liberalization of trade in services through alternative negotiating approaches, including plurilateral approaches and approaches focused on particular sectors, including the International Services Agreement. These approaches should be pragmatic, results-oriented, consensus-based, transparent, as inclusive as possible, and should lead to multilateral outcomes across all modes of supply.”⁹¹ (*The GATS has four modes of supply, which include cross-border supply, services consumed abroad, commercial presence in the territory, and movement of natural persons. Services can include a wide range from financial, communication, healthcare to education.*)

Clearly, big corporations envision new areas to be liberalized. Most importantly, they want it all to be under the jurisdiction of the WTO and its all-powerful DSM to guarantee that rules are enforced and that business interests are protected.

Conclusions

Although the WTO negotiating arm had been in an 18-year quagmire, weighted down by the sheer greed of the ambition of the main players of world trade – TNCs – to expand their area of profits, the WTO legal system had been fully functional, delivering “WTO Justice” for the protection of TNC interests. The Bali Package though, the “historic” first ever agreement of the WTO since its establishment in 1995, brings unparalleled momentum to the trading organization. Today, with a new Director General, from Brazil – a leading member of the BRICS countries and receiving tremendous support from developing countries, the WTO has found a new lease of life. Today, both arms of the WTO – one pushing free trade forward through the negotiation of new agreements and of the second guaranteeing free trade through the enforcement of its rules – are fully functional. This is a dangerous moment for social movements and people who struggle for economic justice.

The Bali Package is a Bad Deal

There are a number of critical issues around the Bali Package and why it represents a step backward rather than forward to a more sustainable just world:

First, the only legally binding agreement in the Bali Package is the Agreement on Trade Facilitation. After 18 years of negotiations – of promises to deliver “development” for the least developed, to address historic demands of special and differential treatment, to end the system of developed countries providing billions of dollars in trade-distorting subsidies to their agribusiness – after all those years – the first agreement that is sealed is an agreement that developing countries had rejected years ago. This was not a developing country concern, they did not even want it. Trade Facilitation was one of the “new issues” proposed in the 1996 Singapore Ministerial and was soundly rejected at the 2003 Cancun Ministerial. TNCs though, as proudly detailed by the International Chamber of Commerce (ICC), never gave up on this deal and pushed it finally to fruition at the 2013 Bali Ministerial.

All the other aspects of the Bali Package are mere *declarations*. They do not carry any weight legally. The entire section on special and differential treatment and issues of concerns for Least Developed Countries are just statements. There are no legal obligations to carry them out.

The deal on Agriculture is a weak and watered down compromise – the promises on ending export subsidies is again a mere *declaration*. The “peace clause” is an unsatisfactory temporary solution with several invasive information requirements and a caveat that it only applies to programs registered before the Bali Ministerial. All other future food security programs will be deemed illegal by the WTO.

The original demand of the G33 countries had been to amend the Agreement on Agriculture (AoA) in order to provide a more long-term solution for developing countries to guarantee food security for their populations. Legally amending the AoA however, was deemed too big an issue for Bali, by developed countries. The hypocrisy however is that today, post-Bali, the Protocol of Amendment for the Trade Facilitation Agreement and its eventual ratification is already on the table so that the WTO may *legally amend* the “Marrakesh Agreement Establishing the WTO” in order to include the Trade Facilitation Agreement in the WTO legal texts. Therefore – legally amending an article in the AoA to allow for food security measures was too hard and too big of an issue – and yet – legally amending the Marrakesh Agreement in order to include an entirely new agreement full of new legal obligations and articles that would allow faster trade flows for TNCs – is not too hard or too big at all.

Once the Marrakesh Agreement Establishing the WTO is legally amended to include the Trade Facilitation Agreement, the obligations and rules of the Trade Facilitation Agreement will then be legally enforced by the WTO and non-compliance can be brought under the WTO Dispute Settlement Mechanism (DSM).

Disputes are really between TNCs

The whole point of TNCs not giving up on the WTO and their Trade Facilitation dream was because of the ability of the WTO to legally enforce trade rules and to compel sovereign states into withdrawing legislation in order to comply. The WTO DSM after all, is the crown jewel of the TNCs – the real beneficiaries of WTO trade rules and its legal system.

The legal system that guarantees the rules based system of the WTO benefits only the biggest as the rules themselves *favor* the biggest. The “non-discriminatory” rules of

National Treatment and Most Favored Nation are just some of the examples of how trade rules level the playing field and provide an equal competition between unequal players. In that “fair” competition, it is obviously the sharks who win over the sardines.

Disputes under the WTO DSM although ostensibly between Member governments, are as detailed in this publication, in reality done by governments on behalf of their TNCs. These now include some of the bigger developing countries who also now have their own TNCs whose profits and market shares they are defending. The losers, however, whether in developed or developing countries remain the same – small-scale farmers, fledgling enterprises, fishermen, artisans and workers.

Already, TNCs, have presented proposals for restructuring the DSM in order for them to further benefit. Proposals include direct compensation and speeding up of timetables, as they lose too much time and money under the current process. The “architecture of impunity”⁹², in other words, the framework of trade and investment rules that support corporate interests and prevent accountability for corporate violations of human rights, can apparently be even further improved for the benefit of TNCs.

The post-Bali future does not bode well for Economic Justice

The tremendous political momentum gained by the conclusion of the Bali Package at the 2013 Bali Ministerial and the confidence earned by WTO Director General Azevedo from Member governments, will combine to open the door not only to further negotiations around the Doha Development Round but also to entirely new areas – already outlined by big business in their World Trade Agenda.

The Doha Development Round will be dealt with in little packages – The Doha Development Round was not only ambitious in its scope and coverage but also in its single undertaking rule – where nothing is agreed until everything is agreed. The Doha Development Round, launched in 2001, proved to be too big and too controversial to agree all in one go. The strategy now will be to take elements of the Doha Development Round and “harvest” them into little packages, agreeing on them in more manageable sizes. Although some smaller developing countries are now trying to question this modification of the single undertaking rule – questioning why the Trade Facilitation Agreement will already be legalized while the rest of the Doha Round is still unsettled, Director General Azevedo is generally

seen as moving forward, full steam ahead. He has already made numerous trips post-Bali, meeting several Member governments bilaterally, accelerating the push forward on the post-Bali agenda.

The door is now open to new issues - Now that the bicycle of free trade is upright and moving forward with its Bali Package momentum, there will be a wide open door for new areas for deeper and further liberalization. Capital, after all, cannot remain stagnant, it will only remain profitable as it enters new areas and markets to profit from. The ICC has already listed their top priority areas for new WTO agreements:

- A multilateral framework on investment to consolidate the existing international investment agreements;
- Liberalization of environmental goods and services to tap into the potential wealth of the green economy;
- To bring into the jurisdiction of the WTO the existing liberalization made under RTAs, PTAs, BITs and FTAs, many of which go beyond existing WTO agreements. Bringing these in will expand WTO expanse into other areas and more importantly, bring all under the guarantee of enforcement under the DSM;
- Liberalize trade in services to achieve the full potential of profits in this area, seeing that services have now become a more important contributor to trade than manufactured goods.

These are all areas of either deep contention or completely new areas that should not even be covered by rules of free trade. The multilateral framework on investment, for example, is an issue long opposed and until now defeated by social movements and progressive governments, however TNCs are relentless in their determination to push for a corporate deal on investment. Trade Facilitation was rejected and yet today, it is the first legally binding agreement produced by the WTO after 18 years. The lesson here is that there is no underestimating the power of TNCs.

Now is the time to fight even harder for Economic Justice

The “architecture of impunity”⁹³ for TNCs is currently guaranteed by the WTO legal system as well as by key elements of the trade and investment regimes (FTAs/TTIP & TPP, BITs and other International Investments Agreements (IIAs)). The fact that the disastrous Bali Package deepens

these tremendous corporate gains and opens up new areas of further liberalization and WTO coverage – all pose a grim future for the rights of people and the planet. The fight for economic justice - however formidable with the present odds - is ever more urgent and necessary. In fact, more and more people are joining in the struggle with concrete proposals on dismantling corporate power.

Last June 2014, “the United Nations Human Rights Council (UNHRC) adopted a resolution establishing an intergovernmental working group with the mandate of drafting a legally binding instrument to enforce human rights obligations on Transnational Corporations. After intense debate, a majority of twenty member states of the UNHRC, representing a population of 3.8 billion people, voted in favour of this historic resolution. Human rights defenders and communities affected by TNCs along with social movements and campaign networks played a key role in achieving this important historic victory.”⁹⁴

In Bali itself, the powerful and inspiring EndWTO Week of Action was organized parallel to the 2013 Bali Ministerial, by Gerak Lawan (Indonesian Peoples Movement Against Neocolonialism and Imperialism), the Social Movements for an Alternative Asia (SMAA), La Via Campesina and supported by numerous other social movements and organizations around the world including Grassroots Global Justice Alliance, Transnational Institute and The Global Campaign to Dismantle Corporate Power and End TNCs Impunity. The Week of Action included a popular

International Tribunal on the WTO – underlining with evidence-based case studies the devastating impacts of pro-TNC trade agreements on people’s lives, livelihoods and food security. In addition, one of the key outcomes of that Week of Action was a living document outlining the concrete alternatives and proposals put forward by social movements – “Economy for Life in Our Earth Community.”

As it states in its vision, “the *Economy for Life* is an economy where the fundamental needs of every being and Mother Earth are guaranteed to promote the creativity, humanity and happiness of life. Where solidarity, complementarity, diversity, peace and the well-being of the Earth community as a whole have replaced the greed, ambition, competition, individualism, discrimination, violence and destruction of our Mother Earth generated by the logic of capital.”⁹⁵

The challenge is great but urgent. Humanity and the planet are at stake and there is no time to lose. Social movements and all those who believe in building an economy for life, need to end the WTO – its architecture of impunity for TNCs and its march towards further liberalization and limitless growth on a planet that has already reached its limits.

As this report has shown, the TNCs have clearly demonstrated their tenacity for achieving their goals. Social movements need to rise to that challenge and show an even greater determination to achieve the vision of an economy for life. There is power in our hope.

Endnotes

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The International Chamber of Commerce (ICC) - one of the biggest and heavily concentrated organisations of Transnational Corporations was at the forefront of shaping the WTO Bali Agenda and the ICC Chairman Harold McGraw commented immediately after the Bali Ministerial, “Our efforts to push governments to show the political will needed to conclude a deal here have paid off.”

The ICC commissioned study (*“Report to the ICC Research Foundation: Payoff from the World Trade Agenda 2013”* Peterson Institute for International Economics) also details the corporate road map on future re-structuring of the WTO Dispute Settlement Mechanism (DSM) and details that there are “two overriding problems facing the WTO DSM: time and money. Both problems result from the fact that the system was designed by governments largely to protect themselves from litigation, rather than to rigorously enforce the rulebook.”

This report is commissioned as part of the Economic Justice and Corporate Power & Alternatives programme of Transnational Institute, exposing the corporate architecture of the supranational regulatory institutions of the World Trade Organization (WTO), Free Trade Agreements (FTAs) and Bilateral Investment Treaties (BITs). The report is also envisioned as a contribution to the discourse of the international movements calling for an End to the WTO and corporate led globalization, led by the Social Movements for an Alternative Asia (SMAA) and Gerak Lawan. It is jointly published by the Transnational Institute and the Serikat Petani Indonesia (SPI).



Serikat Petani Indonesia (Indonesian Peasants Union), is a national movement organization for landless people, peasants, small farmers, farm workers, plantation workers, and peasants-based indigenous community. At the national level, SPI exists in 14 provinces and 33 districts with thousands of individual members at the village level. At the international level, SPI is a member of La Via Campesina – International Peasants Movement, whose International Operational Secretariat was based in SPI - Indonesia from 2004 to 2013. It is also one of the founding members of Gerak Lawan and one of the founding convenors of the Social Movements for an Alternative Asia.

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The Transnational Institute was founded in 1974. It is an international network of activist-scholars committed to critical analyses of the global problems of today and tomorrow. TNI seeks to provide intellectual support to those movements concerned to steer the world in a democratic, equitable and environmentally sustainable direction.

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