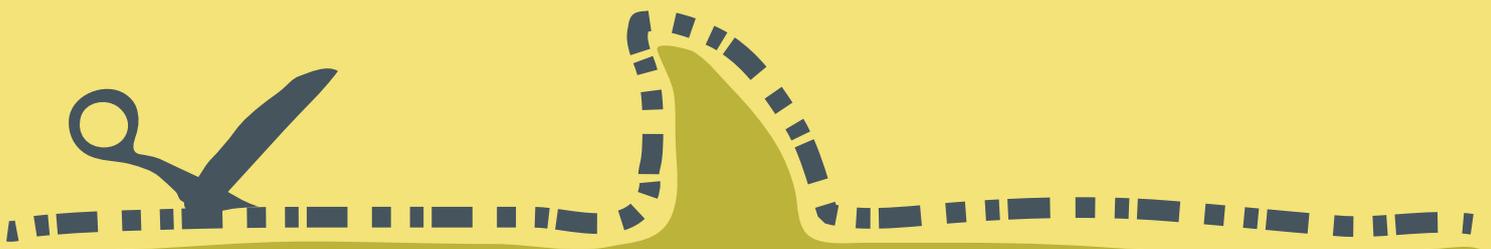


Tailored for Sharks

How rules are tailored and public interest surrendered
to suit corporate interests in the WTO, FTAs and BITs
trade and investment regime

By Mary Louise Malig



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Published 2013 by Transnational Institute (TNI) and Serikat Petani Indonesia (SPI)

The Report is researched and written by Mary Louise Malig

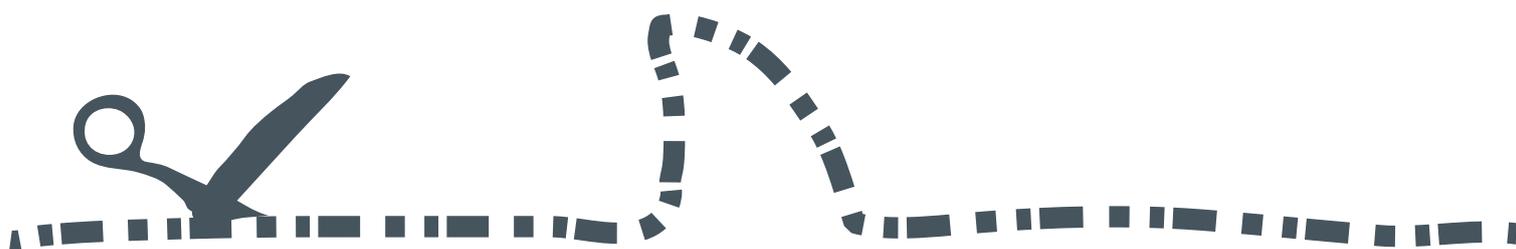
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Contents

Introduction	7
Part 1	
How the WTO got its teeth	8
The Illusion of the Sovereign State	
A Sea of Sharks and Sardines	
The World TNC Organization: The real beneficiaries of the global trade rules	
Part 2	
WTO rules and the free trade regime provide more favorable treatment for sharks than sardines	10
Most-Favored-Nation (MFN) Privilege	
Transnational 'National Treatment'	
Trade-Related Investment Measures (TRIMS)	
Part 3	
How does the Dispute Settlement Mechanism (DSM) work?	12
In the WTO	
In the FTAs and BITs	
Part 4	
Cases of dismantling Public Policy to favor Transnational Corporations	15
In the WTO	
In the FTAs and BITs	
The WTO and FTAs - Partners in Crime	
Part 5	
Trade Disputes in numbers	18
In the WTO	
In the FTAs and BITs	
Conclusions	21



Introduction

The discourse of rules and fairness usually brings up ideas of equality, justice and upholding of rights. Therefore, when the World Trade Organization (WTO) describes itself as a “rules-based” system that treats all member countries fairly based on the principle of “non-discrimination”, it could be concluded that the WTO multilateral trading system is just and equitable. But if the WTO system were indeed equitable, then why has global trade become concentrated in the hands of a few corporations, indicating that only a few big corporate players benefit from the global trading system. Why is it that 80% of US exports are handled by only 1% of the largest exporters and 85% of EU exports are in the hands of only 10% of the big exporters? If the WTO rules based system were really non-discriminatory, equitable and just, then shouldn't there be an equal distribution of economic benefits to all 159 Members countries?

This Report contests some key assumptions about the rules based global trade and investment system. It addresses such questions as: Who are the real beneficiaries of the legally binding and enforceable agreements and rules of the WTO that ensures the smooth, predictable and free movement of trade flows? Who are the key players in global trade that would benefit from the breaking down of all trade barriers? And ultimately, whose trade organization is the WTO really and how is it related to the regime of Free Trade Agreements (FTAs) and International Investment Agreements (IIAs)? How is this elaboration of rules designed to privilege the unilateral operations of transnational corporations (TNCs) which maintains a sea of sharks and sardines? How does the Dispute Settlement Mechanism (DSM) work? Are all these rules designed as part of the neoliberal architecture of impunity protecting the privileges of these corporations? And in this environment, how is the public interest and national sovereignty surrendered?

Part 1

How the WTO got its teeth

The most crucial addition in the structural change from the General Agreement on Tariffs and Trade (GATT) to the WTO, was the creation of the Dispute Settlement Mechanism (DSM). It effectively makes the WTO one of the most powerful multilateral agreements in the world, because it is legally enforceable, authorizes the use of sanctions and can force sovereign states into changing domestic and national laws to comply with global free trade rules.

In its own words, the WTO calls this its unique contribution to the world: *“Dispute settlement is the central pillar of the multilateral trading system, and the WTO’s unique contribution to the stability of the global economy.”* It is indeed unique, as the WTO remains to date, to be the only multilateral agreement that has its own enforceable DSM which gives it the ability to issue legally binding compliance rulings that can involve imposing trade sanctions on governments found to have not complied with the WTO rules.

The 60+ agreements that make up the WTO and its rules were all written to support the main goal of the WTO, which is to “ensure that trade flows as smoothly, predictably and freely as possible.” This neoliberal and corporate goal of breaking down all trade barriers to allow the free reign of the markets is essentially at the heart of the WTO and its agreements and rules. It is the DSM that ensures that these rules are strictly implemented. As the WTO so proudly pronounces, this dispute settlement procedure “makes the trading system more secure and predictable” since it is “based on clearly defined rules”. However, for whom were those clearly defined rules written in the first place? Because to put it simply, can prejudiced rules ever produce equitable results?

The Illusion of the Sovereign State

It is increasingly questioned if indeed global trade is carried out between sovereign states. Legally, the Members of the WTO are states. Governments sign and ratify the agreement and become official Members of the WTO system. This signifies that global trade happens between states and the WTO rules are there to ensure that this

all progresses in a predictable and smooth manner. However, in reality, the actual key players of global trade are the transnational corporations. According to the 2013 World Investment Report by the UNCTAD, “Transnational Corporations coordinated Global Value Chains account for some 80% of global trade.”

What is seen here is that, although the states are the official Members of the WTO, most of them, act in coordination with their Transnational Corporations (TNCs). The corporate lobby and corporate capture of governments decision making function in the trade and other global policy negotiations have been well documented by several watchdog organizations e.g International Forum on Globalisation (IFG), Friends of the Earth International (FOEI), Observatory of Debt and Globalisation (ODG), and Corporate Europe Observatory (CEO) among others.

Dispute settlement is the central pillar of the multilateral trading system, and the WTO’s unique contribution to the stability of the global economy.

A Sea of Sharks and Sardines

But are the states and TNCs really on a level playing field as the WTO “rules based” system boasts? Is there really equitable treatment as the WTO claims?

For rules to be equitable on a level playing field, this first assumes that the players are on equal standing. This assumption could not be more wrong. There is a crucial disparity amongst the Members of the WTO multilateral trading system: On the one hand, there are the big, industrialized, rich nations with powerhouse economies; on the other hand, there are developing countries, some who have grown enough to be important global players but not so much that they would be on the same footing as the rich and powerful; and then there are developing countries who are still struggling to build their domestic industries, provide

food security to their people, provide essential services such as education, health, and transportation; and finally there are the least developed countries who are struggling just to survive, their economies quite marginal in the global economy and many dependent on foreign aid. That crucial disparity is as stark as it is simple - some are big, strong sharks and the rest are small or tiny sardines.

Then when the TNCs are added to this supposedly level global space the biggest players make their entrance. These are the biggest TNCs backed by the rich and powerful states who are clearly the bigger sharks. 41 of the world's 100 largest economies are Corporations, headed up by Walmart (Source: State of Corporate Power 2012-Planet Earth a Corporate World). Then there are other TNCs from the emerging economies who are smaller, but sharks nonetheless. Finally, the fledgling domestic industries,

enterprises and cooperatives make their entrance as the small sardines.

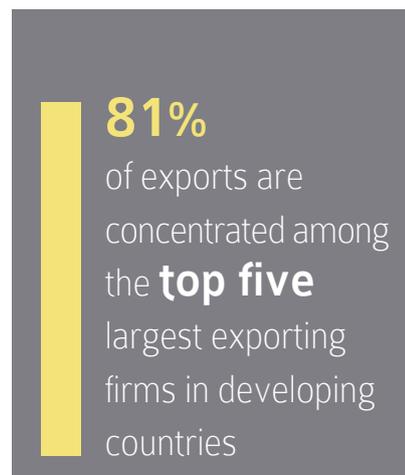
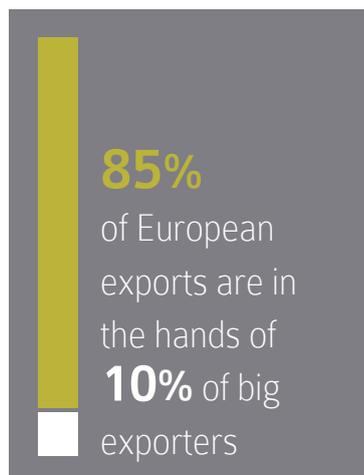
The WTO brings together all these sharks and sardines under a "rules based" system that claims to provide equal competitive opportunity. Even with special and differential treatment towards the tiny sardines, in a competition between sharks and sardines, it is relatively easy to predict the winner.

The World TNC Organization: The real beneficiaries of the global trade rules

After 18 years of the WTO's global trade rules, some very clear winners have emerged. And as the new Director General of the WTO states it so aptly, those winners just love the WTO.

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



WTO, World Trade Report 2013

"Transnational Corporations - coordinated Global Value Chains account for some 80% of global trade"

UNCTAD, World Investment Report 2013

Part 2

WTO rules and the free trade regime provide more favorable treatment for sharks than sardines

The two core principles of the WTO, Most Favored Nation and National Treatment are underpinned by the goal of trade without discrimination. But the term non-discrimination here is a misnomer because in reality, leveling the playing field and providing equal opportunity to compete, between unequal players, only allows the bigger players to consistently win using these rules. And as evidenced in the data that shows global trade is indeed concentrated in the hands of a few, these rules have only been fair for the real big players in global trade, the transnational corporations.

Most-Favored-Nation (MFN) Privilege

The Most-Favored-Nation Treatment or MFN, is the very first Article in the GATT. It is one of the core principles of the global trading system. 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 favoured over the other except in cases of preferential access or treatment given to Least Developed Countries (LDCs) and some developing countries. As it states in paragraph 1 of Article I of the GATT:

“With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payment for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.”

The fundamental point of MFN according to the WTO, is equality of treatment to all signatories to the agreement, in this case, all the member states of the WTO. It is claimed that *trade without discrimination* means in the WTO that all are treated equally. Following the analogy mentioned earlier, this means that all the sharks and sardines are to be treated equally, regardless if one is a bigger shark, a shark or if one is a sardine. Of course,

there are some exceptions of preferential treatment given to a smaller sardine but that is the exception to the rule. The principle of MFN levels the playing field and in a competition between sharks and sardines, even when some preferential treatment is applied to the smaller sardines, is there any question as to who would come out the winner?

Transnational National Treatment

National Treatment is the other crucial core principle of the multilateral trading system. It is also a binding general obligation and can be found in Article III of the GATT and is best summarized in paragraph 4 of Article III:

“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. Again, following the WTO’s guiding principle of trade without discrimination, this obligation, requires governments to accord all privileges and exemptions it gives to its domestic

producers and service providers, to foreign producers and service providers. 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. Non-discrimination means that the giant foreign shark has to be treated equally with the tiny domestic sardine. The underlying principle here is that the WTO rules are providing equal competitive opportunity. But as cited earlier, this is exactly how big transnational corporations are able to grow exponentially and global trade is concentrated in fewer hands as smaller local producers are wiped out in their own markets.

In other words, small or domestic national sardines have to compete on equal terms with the big transnational sharks and no transnational shark should have benefits that the other transnational sharks don't have.

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.

An Agreement made for Transnationals: Trade Related Investment Measures (TRIMS) in the WTO

The WTO may not have a clear definition for investment but it has the Agreement on Trade Related Investment Measures or TRIMS. One of the Uruguay Round agreements, it targets the removal of restrictions attached as conditions to foreign investment as they are perceived as trade distorting. This is in relation to goods. **The TRIMS Agreement eliminates domestic industrial policy that supports domestic industries and allows foreign transnational corporations to conduct business without regard for the host domestic economy.**

In the pre-WTO era, as foreign direct investment increased, many national governments began imposing strict rules on foreign transnational corporations entering their borders. The restrictions were usually part of a national strategy on industrial policy, designed to boost and support domestic industries. These national regulations also acted as safeguards against the unrestricted outflow of foreign exchange reserves or that profits would leave the host country without contributing to the local economy. These regulations and national policies were implemented to ensure that domestic economies would benefit from these foreign investments. These regulations included:

- a) domestic content, requiring foreign transnational corporations to use a particular percentage of local content or products produced domestically;
- b) trade balancing requirements, requiring foreign transnational corporations to balance its use of imported products with the use of domestic products, in other words, requiring that foreign corporations not rely solely on imported foreign goods;
- c) foreign exchange restrictions, restricting a foreign corporation's access to foreign exchange to only the value related to foreign exchange inflows attributable to its industry;
- d) export restrictions, putting restrictions on exports by foreign corporations whether on particular products, volume or value in relation to its domestic production.

These regulations are now all banned under the WTO TRIMS Agreement. The rationale for banning these domestic industrial policy regulations is that these measures are seen as inconsistent with the principle of National Treatment and violate Article XI of the GATT, which stipulates the General Elimination of Quantitative Restrictions. In other words, TRIMS is the death of domestic industrial policy. It is simply an agreement designed to clearly benefit foreign transnational corporations because instead of contributing to the local market, it is able to operate without restriction and without regard on its impacts to the domestic industry or the national economy of the host country.

Part 3

How does the Dispute Settlement Mechanism work?

In the WTO

The Understanding on Rules and Procedures Governing the Settlement of Disputes, or simply known as the DSM, is one of the core Uruguay Round Agreements that constitute the WTO. It introduced one of the most significant changes in the structural transformation from the GATT to the WTO. **The WTO is the only multilateral body with a legally enforceable dispute settlement mechanism. This is the instrument by which the WTO is able to guarantee that its corporate rules are implemented and adhered to by all its members.** At what cost this is guaranteed, is evidenced in the dismantling of public policies on food, health, services, industry and environment in several countries. Paragraph 2 of Article III of the DSM affirms that the dispute settlement mechanism is a central element of the WTO.

“The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system.”

This security and predictability of the WTO multilateral trading system assures Members that the expected benefits from the agreements will be guaranteed at all times. But paragraph 3 of Article III indicates that Members cannot impose measures that impair any **direct** or **indirect** benefits that other Members can expect from the agreements. This gives an unimaginably wide coverage of complaints that can be brought to the dispute settlement mechanism as Members can claim loss of benefit either **directly** or **indirectly**.

*“The prompt settlement of situations in which a Member considers that **any benefits accruing to it directly or indirectly under the covered agreements are being impaired** by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.”*

And when such disputes arise, the clear aim is a positive resolution. However, as paragraph 7 of Article III details, in the absence of a mutually agreed solution, the first

objective is to secure the withdrawal or reversal of the national or domestic measure found to have been impairing benefits or been inconsistent with the WTO rules or provisions of any of the WTO agreements. **In simple terms, if a member state’s national law or policy measure is in conflict with a rule or provision of the WTO, the national law loses and has to be withdrawn and the DSM ensures that ultimately it is the WTO rule that will prevail.**

The DSM 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. (See *Figure 1: Flowchart of Dispute Settlement Process*) The first step is to enter into consultations because as the WTO states in its publicity materials, the priority is to settle disputes through consultations. Then the Panel is established, terms of reference are agreed, the Panel is composed and agreed then the Panel meets with the Parties – there are the Parties (WTO member countries) to the Dispute, the complainant and the respondent and then there are Third Parties (also WTO member countries) who have declared interest in the dispute as it impacts them as well.

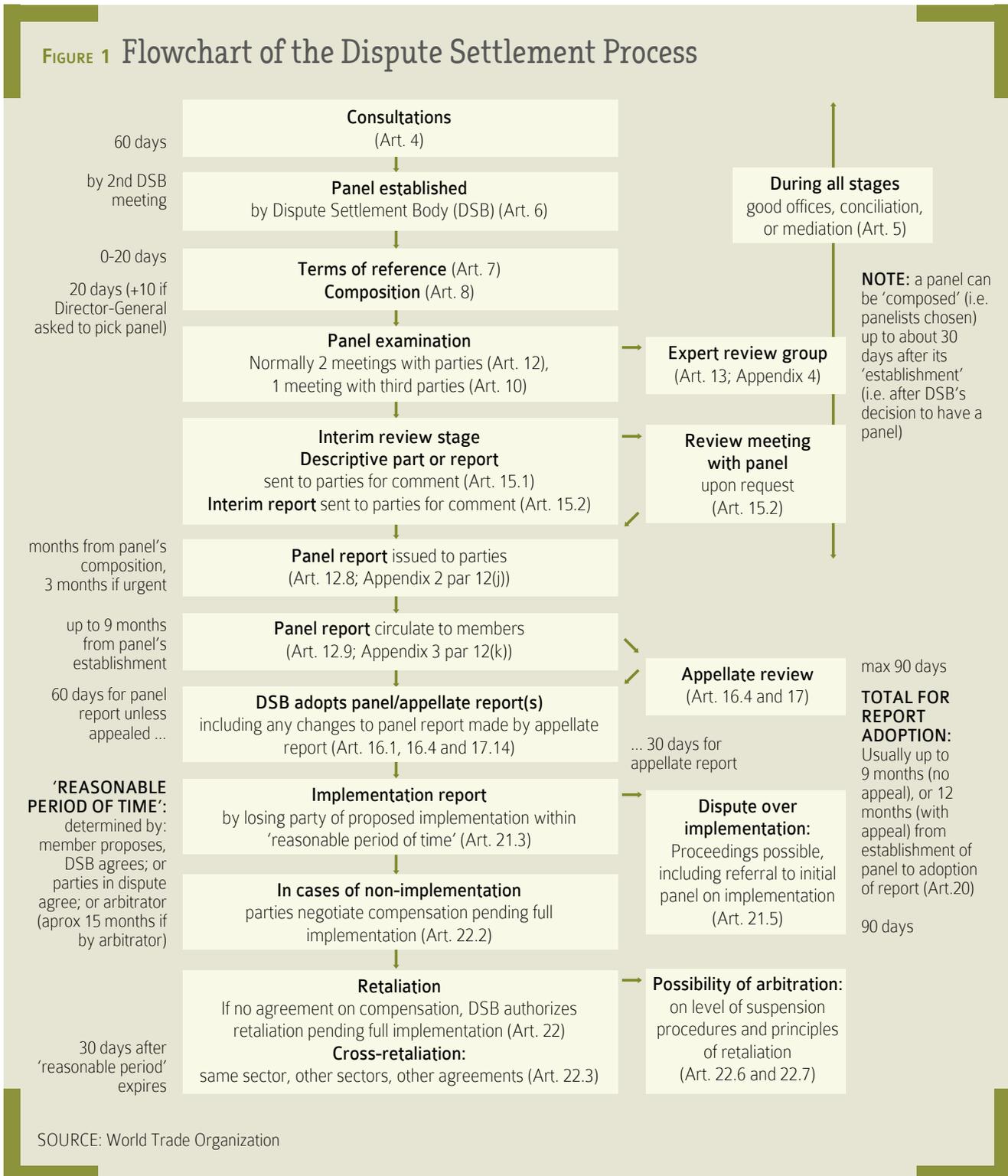
After the Panel hears all the Parties, an interim report is issued for comment by the Parties involved. After all comments are deliberated on, a final Panel Report is issued to the Parties and a final summary report is issued to all Members. The Parties (complainant and respondent) to a dispute though, may appeal a Panel Report at any time before the Dispute Settlement Body adopts it.

Following the results of the appeal, if the losing government party is found to have indeed implemented national policy measures in conflict with the WTO rules and agreements, it will then have to withdraw that national policy measure. The Dispute Settlement Body will oversee the implementation of this within a “reasonable period of time” and Parties can negotiate compensation pending full implementation of the withdrawal of said policy measure. In case, the losing party is still found to have not complied, the complainant Party can apply for permission to retaliate or cross-retaliate and the Dispute Settlement Body can grant that authorization.

When the losing Party does not comply, measures of retaliation are authorized against it. **This method of trade sanctions however, is only useful for a powerful country.** It is simply an ineffective tool in the hands of a small developing country or a Least Developed Country. How, is a small country going to effectively retaliate or cross-retaliate against a country whose economy is probably ten times bigger than its own.

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 become the central player of the process. Except for the appeals, which go to an Appellate Body, the moment the Panels are established in the process, they act almost as judge, jury and executioner.

FIGURE 1 Flowchart of the Dispute Settlement Process



In theory, Panels have the trust and confidence of the entire WTO membership because the potential panelists come from the Member states 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 qualifications of these potential panelists are outlined in paragraph 1 of Article 8 of the Rules and Procedures, but one criteria is highlighted - these individuals Panelists need to be trade experts.

In conclusion, the crucial issue to be raised is that a Panel composed of trade experts have the legal authority to meet in secret, deliberate in confidence, matters of public interest and importance, and issue decisions to render void national measures and public policies of sovereign states that cover areas of health, environment, public services, food security, and industrial policy, on the sole merit of whether that particular measure impaired a transnational corporation from directly or indirectly benefitting from a WTO rule or agreement.

Through the DSM, free trade corporate interests trump all. Sovereign states are required, under threat of retaliation and cross retaliation sanctions, to withdraw national policy measures that protect national policies and standards but run counter to global trade flows operating as smoothly, predictably and freely as possible.

They become complicit in accepting to be put on trial by corporate interests whether explicitly by specific TNCs in tribunals such as ICSID or in the WTO DSM mechanism where states are equally put on trial by the corporate interests that claim to be discriminated by a national policy or standard set in place by a sovereign state.

In FTAs and BITs

The Dispute Settlement Mechanism in the FTAs and BITs provides that TNCs can sue governments on a range of issues including for both actual and perceived loss of profits. This is the investor to state mechanism which is mediated through International Center for Settlement of Disputes (ICSID) and operated under the World Bank. The main characteristics of this are:

- It is between a private and a public entity (TNCs vs. States)
- One sided mechanism: only TNCs can sue governments
- The arbitration panel is private - its not like the International Court of Justice or the International Criminal Court where judges are elected by all countries for a period of years.
- Three persons compose the panel of arbitrators: one is appointed by the state, one is appointed by the investor, and the third one can be appointed by mutual agreement between investor and state. If the arbitration is done under the rules of the ICSID, that is part of the World Bank mechanism, the president of the World Bank is authorized to appoint the third arbitrator if there is no mutual agreement among the State and the TNC.
- Arbitrators are not like judges that only make judgments. Arbitrators are usually private lawyers that can be defendant lawyers in another case, consultants for a TNC, or arbitrators in yet another case.
- Hearings of the arbitration panel are held in secret and are not open to the public.
- Arbitrators interpret the clauses (they interpret what is the definition of investor, what is expropriation, what is fair and equitable treatment, etc.) as they wish.
- If a TNC wins in a case it receives compensation even for future loss of profits.
- If a member State wins, it doesn't receive compensation. The best scenario is that it will not be obliged to compensation, but the state still has to cover legal costs.
- Awards can be enforced in courts of other countries against assets of the losing State.
- Legal Costs estimates: are calculated on an average of 4-8 million US\$ for the State and 3,000 US\$ a day for arbitrators.

In both the system of the WTO DSM as well as in the dispute mechanism of the FTAs and BITs, States renounce their own sovereignty and national judicial system. They become complicit in accepting to be put on trial by corporate interests whether explicitly by specific TNCs in tribunals such as ICSID or in the WTO DSM mechanism where states are equally put on trial by the corporate interests that claim to be discriminated by a national policy or standard set in place by a sovereign state.

Part 4

Cases of dismantling Public Policy to favor Transnational Corporations

In the WTO

One of the most recent cases in the WTO that exemplifies how its rules favor TNCs over national policy measures that benefit the people, is the case of Ontario, Canada.

Japan and the EU vs. Ontario and renewable energy

The province of Ontario in Canada established a program to promote the development of renewable energy to mitigate climate change and also create jobs. It required 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. It 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 generated 20,000 climate jobs in its first two years of implementation. And although there were certain concerns on its implementation, it was generally seen as a positive step to transitioning from dirty energy to renewable energy.

In 2010 and 2011, Japan and the European Union filed complaints at the WTO DSM citing that Canada violated the rules under National Treatment and TRIMS because of the domestic content requirements and the guaranteed purchase price of the clean energy. The WTO Dispute Settlement Body ruled against Canada agreeing with Japan and the EU that Canada had violated provisions under National Treatment and TRIMS. In 2013, Canada informed the DSB that it would comply with the rulings and would withdraw the program within the agreed period of time set.

In FTAs and BITs

CMS Energy vs. Argentina

Argentina is the most sued country in the world by foreign investors. It has 52 known disputes. Many of

these disputes arose because of the economic crisis of Argentina in 1999. During the 90's Argentina went through a very deep process of privatization following the recommendations of the World Bank. During that time, contracts were signed with TNCs assuring them tariffs in dollars, adjusted for inflation in the United States and converted to pesos at the market exchange rate. When the economic crisis came, the government had to freeze the tariffs in pesos and the investors presented dozens of demands against the state of Argentina arguing that the measures taken by the government were equivalent to an expropriation or an indirect expropriation of their future profits.

One of those companies that won against Argentina using the provisions is CMS Energy, an American natural-gas company that used the BIT between the United States and Argentina to sue the Argentinian government. Using the ICSID, CMS Energy sued Argentina. After 6 years, the award of the arbitration tribunal favored CMS Energy with a compensation of US\$133.2 million plus interest.

A subsidiary of the Bank of America that bought CMS Energy's claim requested that the United States revoke the trade preferences Argentina has with the US, and lobbied to block its access to World Bank loans. In 2013, Argentina announced that it was going to pay this and other penalties awarded against it, in other disputes, not only those under ICSID, totaling \$677 million.

Occidental Petroleum vs. Ecuador

Occidental Petroleum Corp. ("Oxy") based in the United States and Ecuador signed in 1999 a Participation Contract to explore and exploit hydrocarbons in Block 15 of the Ecuadorian Amazon region. One year later Oxy entered into a Farmount Agreement with the Canadian company Alberta Energy Corporation Ltd ("AEC") where AEC acquired a 40% economic interest in Block 15 in return for certain capital contributions. This transfer violated the Participation Contract and Ecuadorian Law because it required ministerial approval.

In 2006 the government of Ecuador terminated its relationship with Oxy because of these infringements. Oxy presented a dispute against Ecuador based on the BIT between the United States and Ecuador. The arbitration tribunal held that the Farmout Agreement effected an assignment in violation of Ecuadorian law, since it was not approved by the Ecuadorian government. However, the tribunal held that the termination of the Participation Contract was a disproportionate response to Oxy’s assignment of rights under the Farmout Agreement and therefore established a penalty by which Ecuador has to compensate Oxy with US\$1.77 billion (US\$2.3 billion with interest applied). **This is the biggest penalty awarded against a state until now.**

Ecuador has asked for the annulment of the penalty. The case is still pending a final decision.

The WTO and the FTAs: partners in crime

The WTO rules are the foundation for all FTAs. Where the WTO ends, the FTAs take off, the Trans-Pacific Partnership Agreement, Trans-Atlantic Partnership Agreement, European Union FTAs, Economic Partnership Agreements (EPAs) and others are an expansion of the WTO in terms of:

- New Issues (Investor State Dispute Settlement- ISDS, trade facilitation, Competition, State Own Enterprises, Government procurement, etc.)
- More ambitious, demanding provisions in all chapters (e.g. extension of patents life for more than 20 years, inclusions of more private and public services, elimination of tariffs in almost all products, etc.)

	WTO 159 countries	FTAs Bilateral or regional 2 or more countries E.g. TPPA 12 countries	BITs 2 countries
Industrial products	√ NAMA* – Non agriculture goods	√ NAMA +	
Agriculture products	√ AOA -Agriculture	√ Agriculture +	
Medicines and DNA	√ TRIPS – Intellectual Property	√ TRIPS +	
Schools, hospital, energy	√ GATS - Service	√ GATS +	
Investment	√ TRIMS - Investment	√ Investment + ISDS	√ Investment + ISDS
Borders		√ Custom Issues (Trade facilitation)	
Competition		√ Competition	
Industries		√ State Own Enterprises	
Government Procurement		√ Government Procurement	
Dispute Settlement Mechanism	√ Dispute Settlement Mechanism between states	√ Dispute Settlement Mechanism between states and TNCs	

* NAMA: Non-Agricultural Market Access; AOA: Agreement on Agriculture; TRIPS: Trade Related Intellectual Property Rights; GATS: General Agreement on Trade in Services; TRIMS: Trade Related Investment Measures.

However, the tribunal held that the termination of the Participation Contract was a disproportionate response to Oxy's assignment of rights under the Farmout Agreement and therefore established a penalty by which Ecuador has to compensate Oxy with US\$1.77 billion (US\$2.3 billion with interest applied). This is the biggest penalty awarded against a state until now.

The Bilateral Investment Treaties (BITs) on the other hand, have provisions on investment more developed than the WTO and include a mechanism to solve disputes between foreign private companies and States in private courts. ISDS is present in almost all FTAs and BITs negotiated during the last two decades.

Investment can be everything in FTAs & BITs: real, fiction, present, future

The definition of investment in the agreements reflects the extent and coverage of what a TNC can gain from that agreement, so it is exceedingly important. In the FTA between US and Peru, the definition of investment is all-encompassing and covers everything from the actual gain to the expected and assumed gain.

Definition in FTA USA-Peru (2006)

Investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:

- (a) an enterprise;
- (b) shares, stock, and other forms of equity participation in an enterprise;
- (c) bonds, debentures, other debt instruments, and loans;
- (d) futures, options, and other derivatives;
- (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
- (f) intellectual property rights;
- (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; and
- (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges;

Investment is not only the money that foreign companies bring to a country but all these issues that go from expectations of profit, debt, patents, licenses, speculative mechanisms such as derivatives, pledges, mortgages, permits, and so on. In this case, it would be easier to ask what is not included as an investment according to this definition.

Part 5

Trade Disputes in Numbers

In the WTO

As of November 1, 2013, the total number of disputes brought to the WTO total 467 cases. 146 of those are still in consultations, Panels have already been established for 22 cases, recommendations were already made to withdraw national policy measures in conflict with WTO rules in 26 cases, while 5 cases have been granted authorization to retaliate. The table below shows the detailed status of the 467 cases that are currently filed with the WTO.

83 of the 467 dispute cases filed in the WTO cite the MFN Article and 72 disputes cases filed cite the general article of National Treatment while 84 cases cite Article III.4 under National Treatment. Some cases cite several Articles or several points under the same Article but it can be seen that the violation of the obligations under National Treatment are most often cited as a reason for the filing of a dispute.

TABLE 1 Status of Total Disputes Brought to the WTO

STATUS	NUMBER OF CASES
In consultations	146 cases
Panel established, but not yet composed	22 cases
Panel composed	18 cases
Panel report circulated	0 cases
Panel report under appeal	0 cases
Appellate Body Report circulated	0 cases
Report(s) adopted, no further action required	27 cases
Reports adopted, with recommendation to bring policy measure(s) into conformity	26 cases
Implementation noted by respondent	86 cases
Mutually acceptable solution on implementation notified	21 cases
Compliance proceedings ongoing	4 cases
Compliance proceedings completed without finding of non-compliance	2 cases
Compliance proceedings completed with findings of non-compliance	5 cases
Authorization to retaliate requested	4 cases
Authorization to retaliate granted	5 cases
Authority for panel lapsed	7 cases
Settled or terminated (withdrawn, mutually agreed solution)	94 cases
TOTAL NUMBER OF DISPUTES BROUGHT TO THE WTO	467 cases

* Data collated by the author from the World Trade Organization Dispute Settlement Gateway

* Status as of November 1, 2013

TABLE 2 Number of Dispute Cases that cited Most-Favored Nation and National Treatment

ARTICLE CITED	NUMBER OF DISPUTE CASES
Article I (Most-Favoured-Nation)	83 cases
Article I.1 (according the same customs duties to all)	47 cases
Article III (National Treatment)	72 cases
Article III.1 (internal taxes should not be applied to imported or domestic products so as to afford protection to domestic production)	11 cases
Article III.2 (equal internal taxes to imported and domestic products)	32 cases
Article III.4 (foreign products will be treated no less favorable than domestic products)	84 cases
Article III.5 (foreign products must not be required to use domestic content)	9 cases
Article III.7 (no domestic regulations on content or processing of foreign products)	1 case

* As of November 1, 2013, 467 disputes have been brought to the WTO

* Data collated by the author from the World Trade Organization Dispute Settlement Gateway

TABLE 3 Major Developed Countries as Complainant and as Respondent

COUNTRY	NUMBER of DISPUTE CASES as Complainant and Respondent
United States	106 cases as complainant 120 cases as respondent
European Union	89 cases as complainant 74 cases as respondent
Japan	18 cases as complainant 15 cases as respondent

* Data collated by the author from the World Trade Organization Dispute Settlement Gateway

TABLE 4 Major Developing Countries as Complainant and as Respondent

COUNTRY	NUMBER of DISPUTE CASES as Complainant and Respondent
Brazil	26 cases as complainant 14 cases as respondent
India	21 cases as complainant 22 cases as respondent
China	11 cases as complainant 31 cases as respondent

* Data collated by the author from the World Trade Organization Dispute Settlement Gateway

TABLE 5 Some Other Developing Countries as Complainant and as Respondent

COUNTRY	NUMBER of DISPUTE CASES as Complainant and Respondent
Indonesia	7 cases as complainant 7 cases as respondent
Philippines	5 cases as complainant 6 cases as respondent
Ecuador	3 cases as complainant 3 cases as respondent
Ghana	0 cases as complainant 0 cases as respondent
Bolivia	0 cases as complainant 0 cases as respondent
South Africa	0 cases as complainant 4 cases as respondent

* Data collated by the author from the World Trade Organization Dispute Settlement Gateway

And looking at the numbers of cases filed by developing countries and developed countries, the gap is clear. Those who can afford it and more importantly, have the capacity to implement it in the end, use it more. The United States and the European Union lead the pack with the US at 106 cases as complainant and the EU at 89 cases as complainant.

Even amongst the developing countries, there is a disparity. The bigger developing countries have a higher number of cases as complainant because it

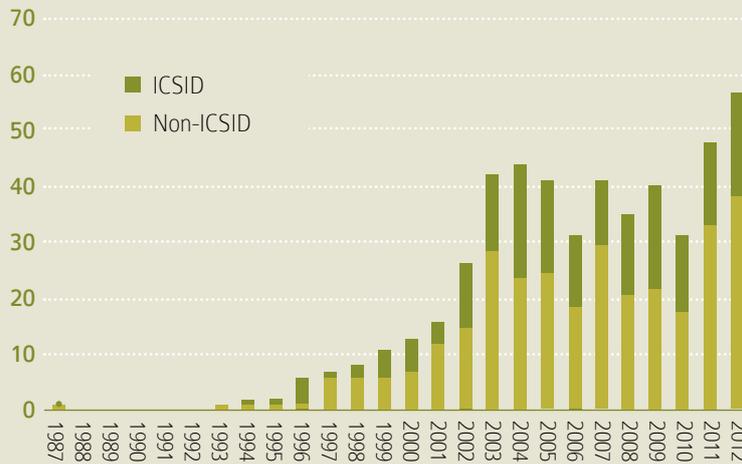
has the resources and is able to follow through on the implementation. Smaller economies like the Philippines and Ecuador have less than 10 cases each. While several countries like Ghana and Bolivia have none.

In the FTAs

The total number of known treaty-based cases reached 514 in 2012, and the total number of countries that have responded to one or more such case increased to 95.

FIGURE 2 Known ISDS cases

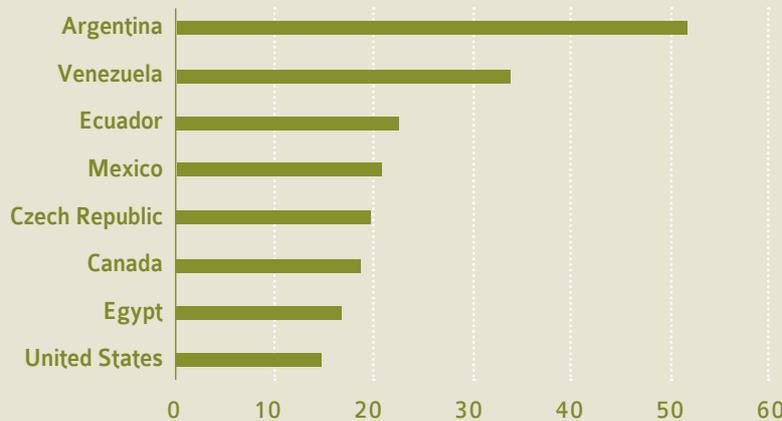
Annual number of cases



Source: UNCTAD, 2012

FIGURE 3 Most frequent respondents in ISDS cases

Total as of end 2012



Source: UNCTAD, 2012

Conclusions

From its beginnings, the WTO has been an essential institution to advance and accelerate the interests of Transnational Corporations (TNCs). In the guise of a multilateral trading system, it has established global, enforceable rules to assure free and smooth trade flows for TNCs. The core rules of the WTO - National Treatment, Most-Favored-Nation and Trade Related Investment Measures (TRIMS) - have created a trade and investment architecture of privilege for the corporate sharks. These are the real winners of the “free competition” among the sovereign state members of the WTO - with more benefit for the more powerful sharks and less for the less powerful sardines - a long way from equal treatment among sovereign states.

As the UNCTAD World Investment Report points out, the TNC coordinated Global Value Chains accounts for some 80% of global trade.

But the most important tool of the WTO in enforcing these unfair rules is the secretive WTO Dispute Settlement Mechanism (DSM) which ensures the enforcement of those rules, even when it means dismantling national and domestic policy measures in the Member countries. In addition, the dispute settlement procedures under FTAs and BITs go much further by deepening the WTO rules in areas such as investment, giving greater coverage for complaints and by allowing TNCs to directly sue states, using the International Center for the Settlement of International Disputes (ICSID) under the World Bank framework.

As more and more cases are filed, the governments have had to surrender substantive sovereignty every time they withdraw national public interest policy measures in favor of corporate interest global trade rules, re-enforcing the asymmetry of the most powerful sharks and the less powerful sardines.

The real losers in this pincers strategy (DSM and ICSID) are the people - as hard fought national and domestic

policy measures on issues of great concern to people such as health, food, environment and industry priorities, can all be reversed by a panel of trade experts deciding if those measures conflict with the rules of either the WTO or the FTAs and BITs.

In this global trade and investment regime, whether multilateral or bilateral, governments have not only failed to protect humanity and the planet from corporate abuse, they have aided and abetted corporate economic and ecological crime. Through trade and investment agreements, governments have been complicit in facilitating the expansion of corporate power and weakening the overall capacity and responsibility of states to regulate corporations in the public interest.

In this context of corporate capture of government responsibility to ensure the public interest, the architecture of both WTO rules and FTAs & BITs operates to enforce and ensure the complicity of governments with corporate interests. As states become weaker, TNCs grow stronger and operate with impunity and legitimacy provided by an unfair rules based system.

In the last decades of consolidation of the neoliberal doctrine of free trade, the state and its governing functions have increasingly become subordinated to the laws of the market. The WTO, the FTAs and the BITs regime has emerged as what Swampa (2013) calls the “new supranational regulatory institutions... that is, as a meta regulatory state.” This construction exclusively serves corporate interests and profits.

It is the Transnational Corporations then which emerge as the real beneficiaries of the rules based system of the WTO, FTAs and BITs trade and investment regime as indeed these were tailored for them, the biggest sharks in the sea.

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“ 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 a famous Brazilian TV show, 27/05/2013

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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