Developing Economies and Newly Globalized Trade: New Rules to Fleece the South

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Abstract Neoliberal ideology forms the political backbone and background of present changes in economic and social systems. Trade policies in particular are often used to preach the advantages of globalization. This chapter shows that the new trade regime is heavily biased, tilting trade relations further against small countries and the South. Rather than being a rule-based system upholding the rule of law, and protecting the contractual rights of Southern or smaller countries in general, it is a pseudo-legal club to beat weaker countries with, even though bigger Southern Countries, such as India or China, are not always defenceless. Larger countries can choose whether to comply with dispute settlement findings or not. This chapter gives many examples. Recent attempts to change the dispute solution mechanism even more away from equal treatment before the law bode ill for weaker members. The much touted "Development Round" turned out not to have had much development effects, serving Northern interests instead. Furthermore, the WTO offers itself publicly as a means to outsmart parliaments and democracy. While the WTO has served to establish basic commitments, the North meanwhile prefer bilateral investment treaties in order to press WTO-plus obligations on the South, obligations that could not get through multilateral WTO negotiations. Present unilateral actions by the USA illustrate once again the weakness and limited usefulness of the WTO framework.

1 Introduction

Neoliberal ideology forms the political backbone and background of present changes in economic and social systems. Trade policies in particular are often used to preach the advantages of globalization. Trade is one of its very backbones. Allowing market forces to operate more freely, globalization and deregulation are claimed to benefit everyone ultimately. In any case, there seems to be no alternative. Renato Ruggiero, Director General of the World Trade Organization (WTO), for instance, expresses

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this view: "Only a free global market and a free global trading system can cope with the global challenges of our time" (WTO 1996b, p. 11). As the present trade system clearly shows, important global players do not want a level playing field, a real market or real liberalization, but trade agreements have been used to tilt trade rules further against the South, as well as to fight democracy.

Virtually always globalization has been referred to apparently exogenous factors, forces beyond democratic control forcing governments to adopt "sound" policies, comparable to the law of gravity forcing the high jumper back to the ground. However, like the cane in Victorian pedagogical theory, these forces work for the best interest of those who feel it, even if those feeling it might wrongly not think so. It was "forgotten" to mention that governments negotiated and signed agreements bringing about this situation.

The WTO (1998, p. 4) itself expresses its role quite clearly and much more honestly:

> Finally—and perhaps most importantly—the WTO can help provide the response to the central government challenge of our new global age: the fact that governments answer mainly to national constituencies, while increasingly the economic system must answer to global needs. The experience of the WTO, and the way it works via binding commitments reached by consensus, gives some guidance as to how these systemic gaps might be bridged.

In plain English, the WTO offers itself as a means to outsmart parliaments and democracy by signing "appropriate" international treaties that bind future governments. If these treaties were indeed in the best interest of all concerned, such trickery would not be needed. People would embrace them in their very own interest. The WTO is by far not the only example. The EU is another anti-democratic project. New bilateral investment agreements (BITs) rigorously aim at destroying democratic self-determination. Globalization is anti-democratic and interest-led political actions against the interest of the majority in the North and the South.

Regarding the WTO framework, one cannot but agree with the expert analysis of Pascal Lamy (2007), then the WTO's Director General, in a speech at ECOSOC:

> But today a number of the current substantive rules of the WTO do perpetuate some bias against developing countries. This is true for example with rules on subsidies in agriculture that allow for trade-distorting subsidies which tends to favour developed countries. This is also true when we look at the high tariffs that many developed counties apply on imports of agricultural and industrial products, in particular from developing countries. I often say that while the political decolonization took place more than 50 years ago, we have not yet completed economic decolonization.

In other words, the North was mostly able to shape the WTO system according to their interests. Therefore, Lamy continues, putting his hopes on something called a Development Round: "A fundamental aspect of the Doha Development Agenda is therefore to redress the remaining imbalances in the multilateral trading system and to provide developing countries with improved market opportunities". Vain hope—as the outcome of this "Development Round", a Blairite expression, proves.

This chapter is questioning interest-led official assertions, analysing the effects of trade on countries. It first discusses theoretical issues, showing that neoliberal globalization has no theoretical foundation in economics. This is necessary as

globalizers usually refer to this theoretic framework. Logic or veracity is of course of no concern to globalizers—economic theory is but a particularly often used subterfuge to veil very clearly discernible private interests.

After recurring to neoclassical theory to show that the usual argument that liberalizing more leads to improvements for all has no theoretical foundation, this chapter analyses real trade policy. Doing so one clearly sees that it is not even attempted to approach theory's perfect market. Quite on the contrary, powerful countries tilt trade rules further against the South under the cloak of unrealistic theories. What is officially propagated as freeing trade is actually harnessing trade in favour of Northern special interests—political truths all over.

2 Textbook Theory and Neoliberal Trade Policy

Neoliberal ideology claims to derive from neoclassical textbook theory and its optimization mechanisms making everyone better off. It can easily be shown that this is at severest odds with the truth.

One quick look at a microeconomics textbook shows that the results of the perfectly competitive market cannot be approximated by eliminating some but not all market imperfections. Reducing only the number of imperfections, liberalizing trade partially, might as well make things worse. Unless a global, perfectly competitive market can be established, good introductory textbooks warn (e.g. Nicholson 1992, p. 521), selective changes, such as liberalization, may deteriorate a country's economic position. Unsurprisingly, liberalization crashes prove economic theory and mathematics right. Furthermore, while trade models work quite well under two countries/two products/two factors assumptions, they cannot be generalized in a meaningful way.

The IBRD economist H.B. Chenery (1961, p. 23) concluded that the static concept of comparative advantages creates conflicts between trade theory and growth theory so that two important bodies of orthodoxy cannot be reconciled: "There are a number of contradictions between the implications of trade theory and growth theory. To make these theories consistent, it is necessary to discard" some assumptions, such as the crucial condition of constant returns. This means that there exists no logically consistent theory guaranteeing the outcome that anyone is better off, as claimed by neoliberals. While the theorem of comparative advantages, the main argument of those advising unconditional liberalization, is irrefutably correct *within* its assumptions, constant returns are necessary to guarantee an unequivocally positive outcome. If, ceteris paribus, this absolutely unrealistic restriction is dropped, trade may be to the disadvantage of a country specializing according to the theorem (Graham 1923). After attempts to disprove this so-called Graham's paradox had failed, textbooks simply stopped telling students about it—a prime example of academic honesty.

Raffer (1994) showed that Graham's case provides a theoretical corroboration of the Prebisch-Singer thesis of secularly falling terms of trade. Combined with the

non-Marxist theory of unequal exchange (Raffer 1987), which uses neoclassical tools, a logically consistent explanation of disadvantaging trade emerges. The Prebisch-Singer thesis also shows that really existing markets differ from textbook models: under textbook assumptions the terms of trade of raw material exporters would have had to improve rather than deteriorate (cf. Raffer 1994).

Caveats, critical statements, or theoretical findings at odds with the liberalization dogma have usually been brushed aside to be eagerly "forgotten", even though the very founders of present trade theory themselves warned of its applicability to real life. Bertil Ohlin (1967, pp. 308f) stated outspokenly:

> The obstinate conservatism with which the classical comparative cost thinking has been retained in theory as something more than a pedagogical introduction—or a model for the treatment of a few special problems—is evidence that, even today, there is in many quarters an insufficient understanding of this fundamental fact.
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> It follows that not only the comparative cost model but also the factor proportions model can only be applied in special cases and used as a general introduction to illuminate the character of trade in some essential aspects . . . It is characteristic of *the developing countries* that a good many factors do not exist at all and that the quality of others differs from factors in the industrialized countries. This means that a simple method of analysis—such as the factor proportions model—which does not take this into account is to some extent unrealistic.

Eli Heckscher (1950, p. 275; stress added) explicitly found his theory "*in full accordance with List's point of view, since his criticism of the 'school' was directed only at the dynamic factors*"—a view fully shared by List (1920, pp. 234f). Nevertheless the "Heckscher-Ohlin theory" is used to advocate unrestricted liberalization and to "disprove" List's infant industry protection argument. Either neoliberals are so much more knowledgeable about Heckscher-Ohlin theory than its founders, or neoliberals are simply lying in order to support other goals.

To back up its arguments for liberalization, the WTO often compares growth rates of GDPs or GNPs (now GNIs) with growth rates of exports, arguing, e.g. that "Trade growth has consistently outpaced overall economic growth for at least 250 years, except for a comparatively brief period from 1913 to 1950" (WTO 1998, p. 33). The comparison of growth rates looks very impressive at first sight. Not unexpectedly, the WTO fails to mention that two different concepts of measurement are compared. While GDP/GNP is measured on a net base (accumulated values added), exports are measured gross, which means import contents are not deducted. By just shipping one product around the globe from one country to another (exporting it several times), export growth is boosted. Export growth must thus be expected to exceed GDP growth normally. This point is particularly valid as processing trade has gained importance and often played a crucial part in overall trade performance.

But there is another grave problem not "seen" officially. There is a neoclassical agenda of controlling capital flows (Raffer 2015). Neoclassical trade theory can only work as posited if countervailing effects of capital flows are eliminated. Incentives have to be corrected. Upholding neoclassical trade theory and its benevolent effects on everyone demands state intervention to safeguard textbook trade mechanisms. Capital controls are thus a necessary element of neoclassical, textbook policies, as

recognized by the IMF statute, but illegally ignored by the IMF. Only if trade mechanisms are brought back into operation, can these models work, even on their highly abstract level. Whether that allows honest conclusions on really existing trade is anyone's guess.

Briefly put, textbook theory does not justify so-called free traders (that are really rent seekers) but makes a clear logical case for judicious intervention. Unwilling to accept unwelcome logic, the creed that the comparative advantages theorem and the Heckscher-Ohlin theory can be applied to reality, even that actual trade mirrors these models, ranks high among the sacred cows of orthodoxy (even though this assumption is not propagated in purely theoretic works). Doing so, one follows money. Few economists are prepared to commit crimethink, putting their career at risk merely for rectitude and science.

3 The Uruguay Round

Promises that the WTO would contribute to a rule-based, predictable, non-discriminatory multilateral trading system, upholding the rights and interests of weaker trading partners—as promised by the North—made the South accept these treaties. Immediately after signing the Final Act at Marrakesh, UNCTAD advocated the quick implementation of the new GATT framework and in particular of the WTO as in the interest of Southern Countries (SCs). Similarly, SCs also saw the new framework in a positive light. Logically, strengthening the rule of law in international trade is always in the interest of less powerful participants. Multilateral decision-making, mirrored in the stronger role of the WTO, is often seen as a bonus for SCs and small countries in general, but theory turned out very different from practice. Installing the one country-one vote principle, the WTO, like the UN General Assembly, gives the group of SCs representing the majority of countries and of people also the majority of votes. Establishing majority decisions and consensus, this is said to form the legal base for full participation of SCs in decision-making. Once this exceptional voting mechanism has served its purpose to lure SCs into signing and ratifying, changes are demanded to allow the WTO "to operate efficiently" (Schott 2018). Like at the Bretton Woods twins "an executive board . . . with permanent participation by the major industrial countries, weighted voting" is needed according to Schott, who works at a US think-tank.

It was often argued that the WTO's legal framework would put an end to bilateral, GATT-violating measures such as the US Super 301. But apparently the devil you don't know turned out to be worse than the devil you knew. Commenting briefly on the main component parts of the treaties:

The OECD (2000, p. 31) quotes a study according to which "rich countries' average tariffs on manufactured imports from poor countries are four times higher than those on imports from other developed countries". Tariff escalation hinders Southern exports: "OECD tariffs on finished industrial products are about eight times higher than on raw materials . . . These barriers delay entry into the export-

oriented industries, which are most accessible to developing countries—namely commodity processing, light manufactures, and textiles and clothing" (*ibid*., pp. 31f). The OECD also mentions the pivotal role of agriculture in development and the damaging effects of Northern agrarian policies that "impair the role of agriculture as an engine for … overall growth". Non-tariff measures, certain "behind-the-border" regulations and practices, greatly impede trade.

While estimates of incredibly large gains by the Uruguay Round had been presented when signing had been advocated, criticizing model assumptions disconnected from reality, Matto and Subramanian (2005, p. 21) concluded soberly a few years later: "the benefits of the Round were exaggerated and its costs were underplayed".

Meaningful proposals to reform the WTO have been made, but—not in the interest of the powerful members—have not been taken up (cf., e.g. Raffer and Singer 2001, pp. 250–254; or Raffer 2002).

Preferential and Special Treatment Preferential treatment for SCs (Part IV of GATT 1947), an exception from the basic understanding of equal treatment, was gained by strong political pressure in 1965 and enabled developing GATT members to achieve preference systems from Northern Countries (NCs). In spite of the sobering results of preference systems, the principle of preferential treatment as such is valuable, because it justifies demands to take the special developmental needs of SCs into account. The WTO has largely, though not completely, done away with that, although some formal preferences such as "longer" implementation periods are stipulated. Compared with the time the North needed to adapt one sector, textiles and apparel, these additional years are a joke.

Trade Tariff escalation was not abolished. Reductions in protectionism, in particular substantial cuts in export subsidies, are unfulfilled promises made to SCs, while their signatures were coveted. Results fell far behind promises.

Voluntary export restrictions (VERs) became legal. NCs safeguarded their subsidy schemes. Art. 3 of the Agreement on Subsidies and Countervailing Measures exempts agrarian subsidies, expressly prohibiting subsidies in the interest of SCs, such as those contingent on using domestic inputs or export performance. Annex 1 specifically allows official subsidies for exports in line with the OECD's *Guidelines for Officially Supported Export Credits*. Although the WTO declares to want to liberalize global markets, they are not considered prohibited export subsidies. These Guidelines also form a suppliers' cartel anointed with legal respectability. Agriculture, whose inclusion into the system was presented as a chocolate on the tray, remains highly protected by the North. After years of protecting textiles and clothing, the North insisted on further 10 years of protection in order to avoid market disruptions. One should note that SCs are requested by the North and multilaterals controlled by it to liberalize their whole economies immediately—market disruption is not seen as dangerous for economies much less developed than theirs by the protectionist North. Initially, the USA and the EU wanted to legalize rather than phase out the decades-old trade restrictions of textiles and apparel in the new framework. In comparison one may thus call the phasing out after 10 more years a

"success" of the South. It goes without saying that liberalization was backloaded; little liberalization took place during these 10 years. The first stage of "liberalization" under the WTO "liberalized"—with one exception—products that had not been subject to any restrictions. As the Textiles Monitoring Body observed, only one product imported by Canada—girls' singlets, liberalizing women's singlets would have overburdened Canada—was really liberalized (WTO 1996a, p. 96). Such rabid liberalization made the USA invoke Article 6 (transitional safeguards) on 24 occasions in the first half of 1995 alone (*ibid.*). Comparing NC behaviour with what they demand SCs to do one cannot help thinking of sanctimonious masquerading.

On the other hand, reimports of products exported by domestic enterprises to have them further processed in other countries are explicitly allowed more favourable treatment (Art. 6.6(d)) when "transitional safeguards" are applied. Apparently, competitors exporting final products are to be kept at bay without restricting possibilities to cut cost. Or, investment and employment are only endangered by competition, not by relocation of labour-intensive processes.

Agriculture: The Survival of Northern Planned Economies at Their Worst Reductions in protectionism, in particular substantial cuts in Northern export subsidies distorting global "markets" substantially, are unfulfilled promises made to SCs while their signatures were coveted. Results fell far behind promises. Meaningful export subsidy cuts did not occur. Heavy subsidies to agrarian production were made perfectly legal: "the aggregate level of European farm protection has barely moved since the late 1980s (reflecting the limited effective farm liberalization under the Uruguay Round)" (Messerlin 2005, p. 25). The "justification" that subsidies must have "no, or at most minimal, trade distorting effects or effects on production" is at odds with logic. Any production existing only because of subsidies produces what would not be produced otherwise, thus having effects on production. This produce is marketed, crowding out imports or destroying SC export markets, thus distorting trade. But logic is unwelcome if it goes against NC interests.

Cotton and sugar are prime examples to illustrate double standards: in 2002 Brazil started WTO proceedings against US cotton subsides. This was followed by protests against agrarian subsidies by many SCs. Burkina Faso, e.g. is one of the world's most efficient cotton producers. US exports at prices 65% below production costs dumped comparative advantage away. Twenty-five thousand US cotton farmers got perceptibly more subsidies than the value of the GNI of either Mali or Burkina Faso (11 million people each). Producing rice in the USA cost 2.5 times as much as in Vietnam. Due to subsidies, both exported the same volume. The EU exported sugar and beef at less than half their production costs. WTO cotton and sugar panels legally established that NCs had even failed to abide by the loose rules on subsidies they crafted during the Uruguay Round, as SCs had claimed (Oxfam 2005, p. 4). The collapse of cotton prices is estimated to have cost eight West African countries nearly US$200 million in lost annual export revenue (FAO 2004, p. 25). As explained further down, in spite of losing the dispute and the Appellate Body's finding, the USA has continued to subsidize cotton farmers.

At the same time, the EU subsidized sugar beet farmers with over US$2.2 billion per year, changing from an importer to the world's largest sugar exporter. Prices 75% below its production costs (*ibid*, p. 24) are technically dumping. But unlike with manufactures where NCs want to keep cheaper SC suppliers out of their markets, it is perfectly legal. "Comparative access to subsidies, not comparative advantage" (Oxfam 2005, p. 9) shapes "world markets". A free market is not what NCs want. Institutions interlink: in the name of economic efficiency, the IBRD pressured Mali to pay local cotton producers this (subsidized) "world market price" in 2004. The government ultimately refused to bankrupt domestic peasants.

As meaningful cuts in subsidies—as promised before SCs had signed—would have increased food prices, NCs apparently perceived a need to assure net-importing SCs of compensatory measures. The Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries recognized substantial negative effects. Promised relief did not materialize in spite of Article 16 of the Agreement on Agriculture. After ratification SCs were referred to existing BWI facilities financing commercial imports, which are subject to conditionality. The WTO tried to help SCs, but remained unsuccessful. After the promise of additional help had served its purpose, it was broken and turned into another means of control.

TRIMs The new TRIM rules restrict SCs policies, enforcing the obligation of national treatment of foreign investment in the field of goods. They deprive SCs of important policy options, such as the possibility of using national laws as a bargaining chip when negotiating with Transnational Enterprises (TNE) or the possibility of fostering its own infant industry by demanding the use of domestic inputs in production. No clear definition of a TRIM was provided, but the Agreement's annex explicitly prohibits any requirements of using local inputs, restricting TNEs' access to foreign exchange in percentages of inflows attributable to it, or export restrictions. This may often make it impossible to develop domestic industries. Historical evidence from successful countries, such as South Korea or Taiwan, does strongly suggest that liberalization of foreign investment is not necessarily conducive to developing domestic productive capacities. Both countries, as well as Japan, have restricted foreign investments heavily and have not eased their restrictions until recently. Historically, Europe and the USA, too, have protected their new industries from foreign competition. As infant industries are by definition less accomplished than mature and experienced firms, TRIMs are likely to restrict development options seriously.

Europe and the USA, however, still restrict foreign investment. The Committee on Foreign Investment in the USA (CFIUS) reviews transactions that could result in control of a US business by a foreigner. Germany, e.g. has similar laws that are to be tightened. At the moment the government can only act against investors having more than 25% of an enterprise. A Chinese investor acquiring 9.7% of Daimler makes Germans reconsider that limit, as the *Spiegel* (3 March 2018) reports. Briefly, those countries still restricting foreign investments demand from and are preaching to SCs

allowing foreign investment without any restrictions as this would benefit their—apparently in contrast to Northern—economies. NCs know better than that.

Taking the bargaining chip of domestic law away from SCs may be seen as one-sided disarmament. As long as no enforceable code of conduct for TNEs exists (or international anti-cartel norms), the country has lost its countervailing capacities against restrictive business practices by TNEs. The old demand of the South that TNE power should be checked by international norms was not written into the Agreement. Not even a general reference to restrictive business practices (as in Art. IX of the Agreement on Trade in Services, where the word restrictive is avoided, though) can be found in the TRIMs Agreement. Briefly put, it is a clear victory of NCs.

TRIPS As local indigenous knowledge remains totally unprotected—it would have been easy to do so—the TRIPS Agreement does strictly speaking not protect intellectual property. It only protects specific intellectual property defined according to Northern criteria, wishes, and needs. The whole host of tribal knowledge in many SCs is put at the disposal of the North. Many people from the South complain that their knowledge is just being robbed under the WTO cloak—there are some very prominent cases. Expressions such as "kleptocracy", biopiracy, and other very badly sounding words are often used to describe this new situation.

Unfortunately the TRIPS Agreement did away with demanding an inventive step. The word inventive step is still in the treaty. Art. 27 speaks of the involvement of an "inventive step" as a condition. But the pertaining footnote 5 redefines it as "non-obvious", which makes an important difference. If someone uses tribal or traditional knowledge obtained in the South, applying it to a problem in the North, this might not involve any inventive step. But it may be considered non-obvious. The WTO confers a licence to take other people's intellectual property to Northern interests. In parentheses it might be said that the WTO itself stole the acronym of the World Tourism Organization (WTO), which is a clear breach of Article 15 of its own TRIPS Agreement. Article 15 explicitly protects letters and combinations of letters. This attitude of a powerful institution vis-à-vis the rights of a less powerful one bodes ill for the weaker members. It is a troubling sign how their rights are going to be protected.

The disadvantage of Southern producers is compounded by Article 34 of the TRIPS Agreement, which shifts the burden of proof in the case of process patents onto the defendant. This inversion of the burden of proof is a highly unusual and dangerous legal practice.

Not less disturbing is the fact that the membership rights of SCs have continuously been infringed. The TRIPS Agreement contains a wide range of safeguards to protect public health, a flexibility, which according to the World Health Organization is not used by SCs. The *Financial Times* (20 June 2001) explains why. Over the years the USA threatened trade sanctions against countries revising their legislation to incorporate TRIPS safeguards. Pressure by AIDS activists made the administration announce it would no longer oppose TRIPS-consistent measures. Health groups, however, said the USA was still exerting pressure on countries to forgo or

weaken TRIPS safeguards, e.g. in negotiations on the Free Trade Agreement of the Americas. Over 100 NGOs urged the WTO to adopt a seven-point strategy including a moratorium on dispute settlement action and an agreement not to pressure SCs to forgo TRIPS rights (Raffer 2003).

The Republic of South Africa was sued by pharmaceutical companies alleging it to violate international patent regulations by facilitating access to low-cost medicines. Public pressure made them withdraw the lawsuit. In 2001 all conceded South Africa's law allowing the government to purchase brand-name drugs at the lowest rates available anywhere in the world complied with international trade agreements—after accusing the country of wanting to destroy international treaties before—and paid the government's legal costs (Swarns 2001). Instead of respecting the TRIPS treaty, the US government had put pressure on South Africa. It is also highly interesting to ask how such a lawsuit could be started in a WTO member country bound to respect WTO treaties. Providing the "cocktail" of needed drugs free of charge, Brazil reduced AIDS mortality from 10,592 deaths (1995) to 1700 (2000). The USA filed a complaint against Brazil.

The USA itself forced Bayer to sell its Cipro tablets at roughly 20% of its market price, threatening to override Bayer's patent. Canada had placed large orders with a local company for a Cipro copy before, reopening the debate about patent protection for essential medicines. The *Financial Times* reported on 25 October 2001 both about the US-enforced price cut and fierce opposition by a US-led group including Canada against SCs led by Brazil and India, insisting on a declaration by ministers at Doha that "nothing in the Trips agreement shall prevent governments from taking measures to protect public health", which basically states that one has the right to do what one is entitled to by the Treaty. At Doha the right of WTO members to use, to the full, the provisions in the TRIPS Agreement was "reaffirmed"—unnecessary if their rights had been respected before and a sobering example of equal treatment within the WTO. In plain English this means that membership rights are now to be respected even if and when exercised by SCs, at least according to official wording.

Preshipment Inspection This might be called a victory of the South. SC buyers are now allowed to check whether what they paid for is actually delivered. NCs had strongly opposed that, calling this basic requirement of any market economy a non-tariff trade barrier.

4 Dispute Settlement

The new procedure of dispute settlement was—like the one country-one vote principle—presented as another chocolate on the tray for SCs and small countries in general. The rule of law would govern international trade relations. Unlike under the old GATT, disputes would be solved quickly and efficiently. Reality did once again turn out quite differently.

The Understanding on Rules and Procedures Covering the Settlement of Disputes states that its "last resort" provided to "Members invoking the dispute settlement procedures is the possibility of suspending the application of concessions and other obligations ... vis-á-vis the other Member, subject to authorisation by the DSB [Dispute Settlement Body] of such measures" (Art. 3.7). One may speculate whether the authorized suspension of concessions by Antigua vis-à-vis the USA will be equally effective as a suspension the other way round. Suspending concessions and obligations is subject to strict rules and not always possible (Art. 22.5). Compensation for damage inflicted by breach of contract is voluntary (Art. 22.1). Like in the case of voluntary export restraints, where SCs volunteer more often than certain NCs, one may assume that compensation will not be forthcoming with equal eagerness from all countries either. Art. 3(7) contains a subtle warning to SCs and small countries in general: "Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful. The aim of the dispute settlement mechanism is to secure a positive solution to the dispute".

Not protecting contractual rights or the law but fruitfulness is demanded. If, e.g. the USA or EU is likely simply not to implement a decision of the DSB or the Appellate Body, lodging a complaint would be unfruitful, thus violating dispute settlement rules. While the WTO's dispute settlement mechanism is a convenient legal veil to allow disciplining smaller countries and most SCs, it is toothless, when it comes to bigger members. In a way, it is the law of the jungle hypocritically hidden under a "pseudo-legal" cloak.

Theoretically, one could have opted for authorizing or even encouraging all members to suspend concessions and obligations vis-à-vis any country breaking the rules. Reducing asymmetries of power, this solution would protect the interests of smaller players, strengthening the rule of law and the enforceability of the norms, which were agreed on by all members. One could have stipulated the obligation to compensate damages caused by breaching WTO obligations. Apparently, interest in doing so does not exist.

Historical record shows that powerful countries can just disregard rulings they do not like.

1. The EU's complaint against the US Helms-Burton Act (officially called "Cuban Liberty and Democratic Solidarity Act"): The USA threatened that "the WTO panel process would not lead to a resolution of the dispute, instead it would pose serious risks for the new organization" (WTO 1996d, p. 2). Following US "advice" to "explore other avenues" (*ibid.*), the EC requested the panel to suspend its work in April 1997 after agreeing bilaterally not to apply Helms-Burton to EU corporations. While Helms-Burton is a clear violation of US obligations under the WTO, one could as well call the EU's move illegal due to its evident unfruitfulness. The USA insists on choosing whether to comply with decisions or not. One may assume that the EC and, for instance, Japan, unlike many other countries, are equally able to assert themselves.
2. Section 301: This section, allowing unilateral action by the USA, is clearly at odds with multilateral dispute settlement as stipulated. Apparently, the aim of replacing (Super) 301, a unilateral measure implemented in breach of international treaties,

by WTO dispute settlement was unsuccessful. Conducting its review on the USA in November 1996, the WTO's Trade Policy Review Body expressed "a general dissatisfaction with the continued unilateralism inherent in 'Section 301' legislation" (WTO 1996c, p. 16), questioning in particular the WTO consistency of the Helms-Burton Act and the Iran-Libya Trade Sanctions Act. The USA "saw Section 301 as a means for communication of exporters' concerns" (*ibid.*), continuing to resort to it (cf. WTO 1998, p. 79). Deciding on a complaint by the EU, the DSB ruled in 2000 that though "a *prima facie* violation" of WTO obligations, this legislation is "not inconsistent with US obligations under the WTO" (WTO 2000, p. 68). Briefly put, the USA had declared not to apply the law as it stands. The panel had stated that carrying a big stick without using it would already influence markets, but this "actual threat"—to use WTO language—was finally considered all right. According to the WTO, these sections now "provide an important avenue for the United States to enforce its rights under WTO agreements" (*ibid.*, p. 67; for more details *v.* Raffer and Singer 2001, p. 213). Apparently, the promise of replacing (Super) 301 by WTO dispute settlement (another chocolate on the tray) was not kept. The WTO's (1998, p. 22) statement that "bilateral approaches to trade have been brought under multilateral control" is contradicted by the very same WTO source some pages later.

3. Canada, a country subsidizing its own small aircraft industry, complained about subsidies granted by Brazil to her aircraft producers. Brazil in turn complained against Canadian subsidies. Canada simply refused to provide the information requested by the panel, in particular about the debt financing activities of its Export Development Corporation (EDC). Declining Brazil's demand to infer that the information withheld was prejudicial to Canada's position, the panel stated that Brazil's evidence was insufficient. The Appellate Body found that Canada had violated its obligation to respond promptly and fully pursuant to Article 13.1 of the Understanding on Rules and Procedures Covering the Settlement of Disputes. It remarked that "a party's refusal to collaborate has the potential to undermine the functioning of the dispute settlement system" (WTO 2000, p. 59). The Appellate Body "might well have concluded that the facts on the record did warrant the inference that the information Canada withheld ... included information prejudicial to Canada's denial that the EDC had conferred 'benefit' and granted a prohibited export subsidy". Nevertheless the panel's finding was upheld, as Brazil had not done enough to compel it to make the inferences requested. Adding insult to injury, the Body did "not intend to suggest that Brazil was precluded from pursuing another complaint against Canada ... concerning the consistency of certain of the EDC's financing measures" with contractual obligations (*ibid.*). It remains unclear, however, why Canada should then provide prejudicial information it withheld successfully and illegally before. There remains one encouraging thought: if the accused had been Benin or Jamaica, the full rigour of the law would have hit the offender—all animals are equal.

4. Cotton: The case of cotton was already mentioned above. Brazil finally reached a mutually agreed solution with the USA in 2014: Brazil received $300 million for her cotton industry, plus some changes of the export guarantees programme (GSM-102) fitting Brazil's needs. At present the US lawmakers demanded again to increase cotton subsidies. At least, the agreement with Brazil is acknowledged to put some restrictions on these plans (Bjerga 2017).

   African "Cotton-4" countries still struggle for a just solution. Cotton was brought up by SCs again during the Doha Round. Finally, at Bali it was decided that "dedicated discussions" should be undertaken. On 24 July 2017 an "overwhelming majority of WTO members have reiterated their support for a meaningful and specific outcome on cotton domestic support … during the latest discussions on cotton" (WTO 2017).
5. In 2003 Antigua and Barbuda complained about measures discriminating cross-border suppliers of gambling and betting services. The result is earth shaking: in 2013 Antigua was officially authorized to suspend the application to the USA of concessions or other obligations consistent with the decision by the arbitrator (WTO 2013). As the complainant stated, the USA had settled with other more powerful countries (third parties).
6. Hormone meat: The EU lost this dispute with the USA, but did not allow hormone meat in on health grounds. Of particular interest is the Appellate Body's finding that there is a necessity "for the maintenance of the delicate and carefully negotiated balance … between the shared, but sometimes competing, interests of promoting international trade and of protecting the life and health of human beings" (Appellate Body 1998, para 177). In other words, a small increase in trade might well outweigh a few dozen lives.
7. Two complaints by Korea against US anti-dumping actions were not followed. The Dispute Settlement Body "deferred consideration as the United States indicated it was not in a position to agree to both requests" (WTO 1997, p. 4)—no doubt an easy way to deal with complaints not open to all members.

In spite of the unfair special treatment of countries like the USA, dispute settlement is in crisis:

> For the past few years, US officials have blocked appointments of Appellate Body members to force WTO members to negotiate new rules that address US concerns and limit the scope for judicial overreach. (Payosova et al. 2018, p. 1)

The EU too blocked a replacement. What is meant by "overreach" is that the Appellate Body does its duty, as any court should. In cases where there are no norms clarifying a situation, it decides. Thus, decisions will eventually become impossible due to lack of members unless new dispute settlement procedures take the interests of more powerful members even more into account.

5 Practical Trade Policy: Institutionalizing Discrimination and Abolishing Democracy

Bad enough that textbook theory is abused to camouflage clearly visible special interests. But it is even worse that the countries harmed by Northern con tricks do not defend themselves more outspokenly. The history of the WTO and so-called bilateral investment agreements (BITs) proves this most clearly. The WTO (1998, p. 4) itself expressed its raison d'être unashamedly, as quoted above. Investor-state dispute settlement arrangements going beyond the WTO by allowing TNEs themselves to sue governments reduce policy space of lawmakers further.

Binding commitments not just within the WTO but also and especially within BITs or the EU are meant to disempower the sovereign, the people. Nevertheless, the real scope of such treaties is rarely presented so clearly. Normally politicians are not that dumb to declare the goals of reducing or abolishing democracy. However, the newly elected Austrian government—after one coalition party demanded binding referenda—decided that EU matters must not be decided by referenda. The Austrian constitution (Art 1) stipulates that all (which means all, including EU matters) rights emanate from the people. But politicians do not bother about ridiculous things such as constitutions when it comes to serving vested and financially powerful interests. They have used international agreements—quite in the way the WTO advises—to roll back democracy. The sovereign, the people, are denied their sovereign rights.

Internationally, fair trade is to be destroyed quite in the way democracy is to be rolled back within presently still somehow democratic countries by treaties serving the interest of powerful actors.

6 The Doha "Development" Round and the Bali Ministerial Conference

This Round was initially heralded as the "Development Round", leading one to believe that development problems including poverty would finally be tackled. It was purported that, as development concerns had been sidelined so far, this Round would address them. Launching the Doha Round, "ministers placed development at its centre. 'We seek to place developing countries' needs and interests at the heart of the Work Programme adopted in this Declaration... We shall continue to make positive efforts designed to ensure that developing countries, and especially the least-developed among them, secure a share in the growth of world trade commensurate with the needs of their economic development" (WTO 2018a).

As a quick look at all issues officially on the table, such as large tariff cuts by Southern Countries (SCs), shows, this drew more on Blair's famous book *1984* than on reality, mere "spin". The so-called Swiss formula produces deeper cuts on higher tariffs or on SCs that often depend on tariff income as they are unable to raise more sophisticated levies. This would have destroyed much of the remaining policy space

of SCs. Poor countries depending largely on tariff revenues would have had budgetary problems.

The North continued to press for further changes mainly, if not exclusively, in its own interest. The Round was stalled by Southern resistance to avoid tilting trade rules further against the South.

Nevertheless, while the "WTO would seem to be the best vehicle for advancing the current interests of the industrial countries' private sectors", WTO process is a "victim" of the success of the World Bank and IMF" as Matto and Subramanian (2005, p. 20) conclude: during "structural adjustment" SC economies had been so largely liberalized that little remained to be offered by the South. Northern interests had been able to secure their main goals, especially as regards TRIPS, which "increased the monopoly power of the patent holder" (*ibid*.) against generic competition. Thus, the Doha Round "has always been plagued by a private sector interest deficit" as Matto and Subramanian (2005, p. 19) conclude.

At Bali, finally, some form of official agreement was made in order not to have to recognize the failure of the "Development Round". Naturally, its focus is not on development but on NC concerns. Trade facilitation, an urgent concern of NCs to open markets in SCs, was agreed and followed up. The Trade Facilitation Agreement (TFA) entered into force on 22 February 2017.

What might be called an SC victory is that subsidies to save poor people from starving are now "temporarily" accepted. A permanent agreement was and still is to be negotiated. Thus, SCs can do what NCs have been doing all along. Under the term "Special Agricultural Safeguards" (SSGs), NCs had assured continuing protectionism. Under this mechanism it is not necessary to demonstrate that serious injury is being caused to the domestic industry. A similar mechanism for SCs, the Special Safeguard Mechanism (SSM), has been averted by NCs so far.

Regarding the long boiling conflict on cotton, "dedicated discussions" on subsidies and export practices were agreed on. Practical consequences remain to be seen. While saving face for the WTO, Bali rendered no developmental benefits for SCs, a Development Round without real development benefits.

While the Doha Round was touted as a single undertaking, dispute settlement was not part of the negotiations.

7 Conclusion

Evaluating the WTO as a "rule-based" system that "underscores the rule of law" (WTO 2018b), protecting the contractual rights of South or smaller countries in general, shows a gloomy picture. Rather than a fair, legal system, it is a pseudo-legal club to beat SCs with, even though bigger SCs, such as India, are not always defenceless. Larger countries can choose whether to comply with DSB findings or not. Recent attempts to change the dispute solution mechanism even more away from equal treatment before the law bode ill for weaker members.

Especially for the EU, WTO commitments have been useful to free it of obligations under the old Lomé (later Cotonou) Treaties, initially granted, to remove those remnants of the 1970s Lomé framework that had been adopted in favour of and due to pressure by SC signatories. Very generous arrangements had been granted by the EU out of fear of SCs pushing for a New International Economic Order and due to the oil crisis, out of "European anxiety" as the European Commission (1996, p. 9) formulated. Thanks to the WTO all this is now history.

Generally, the Uruguay Round liberalized where it was in the interest of NCs, while sectors important to SCs remain selectively more protected. The Agreement on Textiles and Clothing was the prime example for this asymmetry, showing how easily NCs are willing to infringe on the very idea of liberalization when this is in their interest.

While the WTO has served to establish basic commitments, NCs meanwhile prefer Bilateral Investment Treaties in order to press WTO-plus obligations on SCs. Demands they could not get through WTO negotiations are now pressed upon SCs bilaterally or—as in the case of the EU—with so-called economic partnership agreements (partnership like Ministry of Love) that may include more than one SCs. These negotiations drag on against SC defence.

Present unilateral actions by the USA illustrate once again the weakness of the WTO framework: punitive tariffs are introduced without bothering about WTO dispute settlement. The USA used Section 301 instead of WTO procedures. One may wonder whether the WTO would have survived a full-blown trade war between the USA and the EU. The recent shift to preferring BITs also weakens the WTO.

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