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The War of the White Gold

How the increased legalization of WTO affect Burkina Fasoôs ability to influence American cotton subsidies

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Traditionally international trade disputes within the WTO have been handled through diplomacy or soft law. In recent years there has been a shift towards a more rule based system within the organization, a shift towards legalization, hard law. States that are not acting in compliance with the WTO rules might be brought to the Dispute Settlement Body. The first time Least Developed Countries, LDC, were involved in a legal dispute in the WTO was in 2003, when American cotton subsidies were challenged by Brazil. West African cotton producing states, C4 signed up as third parties, however not Burkina Faso. Instead Burkina Faso was involved in the cotton initiative which was presented at the same time. Through a qualitative textual analysis of articles I study legalization versus negotiations in the WTO and its effect on LDC. No actual change has come of the legal case or the negotiation track but scholars are increasingly considering the leverage that legal measures provide negotiations with. The increased legalization has ñlevelled the playing fieldò and increased the presence of developing countries in the WTO negotiations and legal disputes. Not only by the rulings but because of the increased attention from media, civil society and the reputational costs associated with breaking the law.

Keywords: WTO, Legalization, Cotton, Soft law, Hard law, Burkina Faso

Word Count

DSB, Dispute Settlement Body
DSU, Dispute Settlement Understanding
GATT, General Agreement on Tariffs and Trade
GDP, Gross Domestic Product
IMF, International Monetary Foundation
LDC, Least Developed Countries
MDC, Most Developed Countries
SCM, Subsidies and Countervailing Measures
SIFC, Sectoral Initiative in Favour of Cotton
UNECA, United Nations Economic Commission for Africa
VAT, Value Added Tax
WB, World Bank
WTO, World Trade Organization

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International agreements have traditionally been based on diplomatic negotiations. This has also been the case in international trade. The reliance on diplomacy in negotiations has been decreasing over time and a more rule based, legalized; system has taken its place (Seth 2004:80). This has by some scholars been seen as a positive change as bilateral negotiations, according to them, tend to create an uneven power situation giving some states greater influence in trade negotiations (Jackson 2008:439). No other international organization can be compared to the legal framework within the WTO. John H Jackson describes the WTO dispute settlement system as òprobably the most powerful and most significant international tribunal system in existence todayò (Jackson 2008:439)

ñ*...the degree of rule orientation in what is often described as the most powerful international juridical institution in the world today****ò*** (Jackson 2008:438).

This shift towards *hard law*, increased legalization, within the WTO, some scholars argue, has helped level the playing field in favour of the developing countries. No longer do they have to hesitate challenging a more influential state on which its trade and international relations depends (Jackson 2008:440f). Regardless of rulings against influential actors like the EU and US within the WTO these actors still seem to have great power and the playing field seems far from levelled. The aim of this thesis is to study how the increased legalization of the WTO has affected Least Developed Countries, LDCôs, in West Africa and its cotton industry.

Cotton is West Africaôs most important export crop. Benin, Chad, Burkina Faso and Mali, the C4, have economies that are highly depending on producing and exporting cotton. The cotton industry also employs many farmers in the United States. Due to influential lobbying groups within the US the cotton farmers receives large subsidies. In 2003 Brazil, supported by Benin and Chad challenged the US subsidies through the Dispute Settlement Body, DSB. The aim was to find out if the subsidies were inconsistent with the WTO rules which were later to be the outcome. While the DS267 was dealt with by the DSB the C4 presented a cotton initiative. The initiative aimed to achieve a lowering of the same subsidies that were being challenged in DSB through negotiations, a soft law approach.

In this thesis a certain emphasis will be put on Burkina Faso as space does not allow a focus on all four states. Burkina Faso is sub-Saharan Africaôs largest cotton producer (IMF 2 October 2008). Burkina Faso is heavily dependent on its cotton exports. The US subsidies increased the supply of cotton and suppressed the world price causing disastrous effects for Burkina Faso.

n dispute DS267 little change has been made and aso cotton industry has not improved (Oxfam 18 Initiative in Cancún caused a stalemate in the negotiation but did not create any real effect as the Doha Development Negotiations seems to be in a constant stalemate. Regardless of the lack of an outcome the C4 utilizing the WTOs legal framework has gained increased interest from international scholars in recent years

1.1 Research question and disposition of the thesis

By analysing articles published by renowned scholars on the cotton issue the overarching interest with this thesis is regarding developing countries impact within the increasingly legalized WTO.

Has the increased legalization of the WTO resulted in a changed position for small, developing states in the WTO?

I will narrow this down to the more manageable question

Has the use of the WTO legal system regarding the cotton case resulted in changed position for Burkina Faso within the WTO according to international scholars?

International scholars will be defined further in to the thesis. Research should have the ambition to be able to make generalizations from (Esaiasson et al 2004:25). However, it is bold to make generalizations based on a single -case study.

ò*Tracing the links between trade and poverty is going to be a detailed and frustrating task, for much of what one wishes to know is just unknown. It will also become obvious that most of the links are very case specific****ò*** (Hertel &Winter 1068).

This thesis starts with a description of the qualitative textual method used and a thorough review of the material analysed. This is followed by an overview of the theoretical framework used in this thesis; the theory of hard and soft law developed by Kenneth W Abbott and Duncan Snidal. This is followed by a brief description of the legal principles in the WTO and its impact on developing states. Burkina Faso and the impact on the American subsidies have on its cotton industry will be addressed in the light of hard law; the legal case DS267 and soft law; the cotton initiative presented in 2003. An analysis of the hard law versus the soft law approach and Burkina Fasoôs impact on them follows which leads up to the conclusion of whether the increased legalization has had an impact on developing states situation within the WTO.

terial and limitations

2.1 Method

The method used in the thesis is what Esaiasson et al chose to call a qualitative textual analysis. The method is frequently used in social studies (Esaiasson et al 2004:233f). Through a detailed study of the selected material the aim is to find the specific parts of the texts of significance to the topic. This means that a larger emphasis is put on certain parts of the texts. Also the text as a whole and the context in which it exists is taking in consideration (Esaiasson et al 2004:233). These facts make a qualitative textual analysis suitable when much of the content is found between the lines. It is a natural choice when basing a study on previous research which this thesis does.

The study at hand uses an open approach. This means that the topics that are of interest for the analysis is based on the material itself (Esaiasson et al 2004:240). By starting the research with a brief overview of the chosen material the main topics on which the analysis would be based were selected. Certain topics were reappearing in the material and therefore further studied. To let the material have an exaggerated influence on the reached conclusions is one of the largest risks with an open approach. It is therefore important to consider possible outcomes before reaching conclusions and if a different material would have provided a different result (Esaiassion et al 2004:241f). A different conclusion might have been reached if the material was mainly based on texts by either legal- or international relations scholars. A different result would probably also have been reached if the material was mainly produced in one part of the world. My assumption when starting the research was that a larger importance would be given to the legal approach, this as the WTO repeatedly is described as the worldôs most advanced international tribunal (see Jackson 2008). By keeping in mind the key points of the theory the risk of losing sight of the topic itself is minimized. Many scholars highlight the impact of civil society and media, topics that are not discussed in the theory. I will further address this issue in the analysis.

2.2 Material

The primary material on which the analysis is based on is articles by international scholars published in scientific journals. International scholars are defined as persons who are specialists in a particular branch of knowledge. In this case the special branch is international relations. Political scientists, economists and

ternational relations are of interest for the study. It
e actors that are of relevance in the research.
lly focus on the case DS267 as that would give an unwanted emphasis on hard law. The articles deals with the cotton issue in the WTO in vast aspects as that better gives an unbiased image of a changed position for LDCôs with regards of soft or hard law. The articles are found by a search on the WTO, cotton and West Africa in two different internet based search engines. From the retrieved articles reviews, publications without an acknowledged author and articles that are mainly focused on other issues have been disregarded. The fact that the articles are published within the last years increases the probability that the studied scholars and the author of this paper make similar assumptions on the topic. The scholars have vast ethnicity and different cultural backgrounds. It is important to acknowledge this fact as it increases the possibility that different interpretations are made by the scholar and the interpreter (Esaiasson et al 2004:245). Many scholars in this thesis and the journals in which their articles are published are African.

The secondary material mainly consists of reports published between 2002 and 2008. The reports are from international organizations such as the WTO, Oxfam, the International Monetary Foundation, IMF, and the WB as to keep the paper objective. Scholars on the topic of trade and development are referred to occasionally. Though not always unbiased I consider their contribution on the matter of high relevance to provide the reader with necessary background information. The choice to mainly base the paper on articles is a consequence the topic being very recent and debated in scientific journals. The articles represent the scholars own view and give a picture of the prevalent trend from when the article was published.

2.3 Limitations

Putting the emphasis on a single case like that of cotton and LDCôs position within the WTO gives a greater possibility to thoroughly examine the subject. It increases the possibility to gain a greater familiarity with the detail and allows for a deeper understanding of a single case. However, it leaves the author with no other choice than to disregard certain aspects. Some scholars, of course, consider other factors crucial for LDCôs impact in the WTO. The thesis at hand leaves no space to further dwell upon factors that are not in line with the theory of hard and soft law and these will therefore only be touched upon briefly. Similarly there is no room for an in debt study of the economical effects of the US subsidies on Burkina Fasoôs economy. The general effects that are of relevance to understand the importance of the research topic will be acknowledged but this thesis will not engage in a discussion on trade liberalization and its economical effects. This paper examines only one case study and its conclusion; while this casts light as to whether increased legalization of the WTO has given developing countries more strength in multilateral trade negotiations, a definitive empirical theory will

ich includes more or all LDC to Most Developed

There are different ways of solving international disputes. Dispute resolution can be said to take place on a scale with diplomatic negotiations on one end and legal settlements on the other (Seth 2004:80). The essay is theory using based on Kenneth W Abbott and Duncan Snidalsôtheory of hard and soft law (International Organisation, volume 54, number 3 from 2000, edited by Judith Goldstein, Miles Kahler, Robert O. Keohane and Anne-Marie Slaughter).

Hard law refers to legally binding obligations that are specific and that delegate authority for interpreting and implementing the law to a third party. Hard law has historically been used nationally but has become increasingly important in on the international arena. In legal disputes both the procedure and the verdict of the case are regulated through norms and praxis. There are no negotiations only a judgment of what is in compliance with the law and what is not (Seth 2004:80). Use of hard law increases the credibility of international commitments (Abbott & Snidal 2000:422). The loss for a party in an agreement characterized by hard law is significant as the application of hard law may restrict the actorsôbehaviours and to some extent their sovereignty (ibid). By accepting an agreement to be bound by hard law the parties largely increase their trustworthiness. An increased level of legalization gives states higher credibility by increasing costs for non-compliance (Abbott & Snidal 2000:427). It also provides the parties with an increased degree of predictability by shifting the authority to interpret legal conflicts to a third part (ibid). Legal commitments are credible in domestic societies since aggrieved parties can enforce rulings with the power of law. This is still not feasible practise with regards to international law (Abbott & Snidal 2000:426). However this does not mean that legal standards of an international agreement are meaningless and unenforceable. To tie an agreement to a broader regime is an effective way to ensure compliance since the reputational costs for non-compliance would be enormous and spread through the entire regime (Abbott & Snidal 2000:427). Hard law does however reduce the costs for enforcement when put in perspective with the political and economical cost of ñrenegotiation, persuasion and coercionò that characterizes soft law (Abbott & Snidal 2000:431).

Soft law is defined by compromising largely due to respect for states sovereignty. There is a lack of a legally judging third party and a soft law approach does not have efficient measure to ensure and enforce compliance (Abbott & Snidal 2000:423). As mentioned above, the diplomatic dispute settlement has historically been the most common as a consequence of the importance of respecting state sovereignty in international relations (Seth 2004:80). Abbott and Snidal suggest that the use of soft law in an agreement is a deliberate choice between the parties as a superior institutional agreement. An advantage of soft law is that it is more achievable, especially when the issue at

ereignty. Soft legalization is often more effective it allows longer periods of time to implement room for compromising and thereby mutually beneficial cooperation between the parties (Abbott & Snidal 2000:423). Even though hard law provides an agreement with often needed predictability, the use of strict rules may sometimes be counterproductive. The aim of soft law is to reach the same results and benefits as with hard law but at a lower economical as well as political cost. Since no juridical expertise is needed soft law reduces the costs for creating rules, judge in compliance with it and to ensure compliance. Politically, states do not have to sacrifice their sovereignty and it also gives the state a possibility to discover the consequences of the agreement over time (Abbott & Snidal 2000:435).

ñSoft legalization allows states to adapt their commitments to their particular situation rather than trying to accommodate divergent national circumstances within a single textò (Abbott & Snidal 2000:445).

The current trend in international relations and international organizations is a shift towards hard law.

3.1 The WTO and the increased legalization

The WTO dispute settlement system was introduced as a part of the Uruguay agreement from 1995. ñDispute settlement is the central pillar of the multilateral trading system, and the WTOôs unique contribution to the stability of the global economyñ(WTO web page). The DSB procedure is based on clearly defined rules and has strict timetables for completing a case. All disputes are first to be a subject for consultations. 130 out of 332 cases had been a matter for the Panel, most cases where settled out of court or remained in a prolonged consultation phase (WTO web page July 2005), a *soft law* or diplomatic solution. Diplomatic dispute settlement is still preferred in the WTO and consultation is therefore a mandatory first step in the dispute settlement procedure. If the parties are unable to solve a conflict through consultation they may ask the DSB to appoint a Panel. A party who does not accept the Panelôs decision has the possibility to appeal the verdict to the Appellate Body, it is however only possible to appeal the legal consequences of the verdict and not presented facts (article 17:6 DSU), (Seth 2004:86). The preferred method of solving disputes in the WTO is through consultation. The Appellate Body gives a report with their findings and it is then up to the DSB to accept or reject the report and make a final ruling (Seth 2004:94f). In this way the judging power is still a ñpoliticalò matter between the WTO member states.

The losing party is obliged to implement rulings within a ñreasonable period of timeò (Seth 2004:97). The DSB are entitled to overlook the implementation and if proper implementation is not taking place the complaining party may ask for

n measures (22:2, 22:6 DSU). The authorization of
liance is a strong incentive for its parties to act
000:427)

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3.1 Developing countries and the increased legalization

It is likely to believe that industrialised countries with much legal knowledge and the economical possibility to hold a large juridical staff is more willing to commit to agreements characterized by hard legalization than developing countries (Abbott & Snidal 2000:432f). On the other hand developing countries often seek hard legalisation for protection against developed states and thereby avoid uncertainty by trying to predict their behaviour (Abbott & Snidal 2000:447f). Developing countries are also more willing to concur on hard law agreements since they, due to their low impact and control over their own fate, are more willing to give up some of their sovereignty. Developed countries with already large influence on the outcome of conflicts are, according to international relations scholars, less willing to give that up by obeying to hard law agreements (ibid).

Legal scholars tend to argue that hard law benefits weaker states whereas international relations scholars consider hard law an advantage for powerful states (Abbott & Snidal 2000:447). Abbott and Snidal however consider legally binding agreements and precise rules as a factor that evens out the inequalities between weak and strong states, e.g. increased legalization levels the playing field. Even though industrialised states have a significantly larger influence on agreed upon rules it is crucial to make agreements attractive for the developing states as well to encourage their participation (Abbott & Snidal 2000:448).

Hard law might create a problem for developing states as the binding agreements might be more politically and economically costly for the poor state to follow (Abbott & Snidal 2000:449). A legal agreement creates higher demands regarding a legalized way to organize international arrangements within the country. Large knowledge of the legal system is crucial to fully be able to use it. This creates large economically costs for developing countries due to education and expensive legal staff. A political problem for certain developing countries is that supervisory rights have to be delegated to international agencies which some developing regimes with questionable democratic legitimacy are not open for (ibid).

white gold

Burkina Faso is one of the worldôs poorest countries (Freedom House report in Burkina Faso 2008). It is a landlocked country of 13 million inhabitants. Because of its disadvantageous geographical location the country has limited natural resources and is highly vulnerable to natural disasters and regional instability (World Bank Country Brief 2008). Over 80 percent of the population is engaged in agriculture of which cotton is the most exported crop. This undiversified economy further increases their vulnerability to exogenous factors which is clearly stated in the IMF report from October 2008 in which favourable weather conditions are referred to as the main reason for a good harvest which will lead to a large boost of the countries real GDP (Statement by IMF Staff Mission October 2, 2008; World Bank report October 2008; Freedom House 2008). Since 1991 Burkina Faso has implemented economical and political reforms, mostly in the form of trade liberalizations, with the help of the World Bank and the IMF, this in order to be eligible for loans and debt relief from the same institutions. This has lead to decreasing custom duties and value added taxes, VAT (IMF October 2. 2008; WB report October 2008).

The United States are the biggest cotton producer in the world in regards to quantity exported (Stieglitz 2007:84ff). There are about 25000 active cotton farmers in the US. The estimated amount of cotton farmers in Burkina Faso is 700 000 (Stieglitz 2007:85, Yartey 2008). In Burkina Faso the cotton stands for about 50-60 percent of the countryôs export earnings (Yartey 2008). About 95 per cent of the cotton produced in West Arica is exported (Oxfam 2004) The US cotton industry is largely subsidized by the US government with between $3 billion to 4$ billion a year (Stieglitz 2007:85) The most common defence for the subsidies is that they are essential to maintain small family farmers however, most of the money goes to large agribusiness (ibid). The consequence of the subsidies is an increased profitability by US farmers which they would not have gained on an open world market. Daniel Sumner at University of California at Davis estimates that American cotton producers would have lost $10 billion between 2000 and 2005 without support from their government (Oxfam 18 October 2007). The subsidies cause an increased total world supply and the price goes down. This has a disastrous effect on Burkina Fasoôs entire economy as the cotton industry employs 17 percent of the population (Stieglitz 2007:86;Yartey 2008) More than 10 million people in Central and West Africa are dependent on cotton production. These farmers are among the worldôs lowest-cost producers, working on small areas which they plant and harvest by hand (Heinisch 2006:253).

The International Cotton Advisory Committee, ICAC estimates that an elimination of the American cotton subsidies would raise the world market price with between 15-26 percent. Oxfam estimates that as a consequence of the

countries about $ 191 million a year. In Burkina
s that exceeds one percent of the countryôs GDP
rkina Faso farmers produce cotton for about three times less that the US cost of production (Heinisch 2006:254). Although Burkina Faso has had increased exports by almost 50 percent since 1994, they receive $60 million less from export earnings than in the mid 1990s. The C4 together lost 30 - 40 percent more on the US subsidies than what they received in development assistance from the US (Heinich 2006:267). In 2002 Burkina Faso received $10 million in US aid but due to decreasing cotton prices they lost $13.7 million in export earnings (Oxfam 2004).

4.1 The WTO case DS267

Hard law is in this thesis illustrated by the DS267. On 27 September 2002 as a necessary first step of dispute settlement within the WTO Brazil requested consultations with the US (WTO homepage on DS267), this regarding subsidies and assistance given to US cotton farmers and exporters, subsidies prohibited within the WTO. As a next step in the legal procedure Brazil requested the establishment of a panel on 6 February 2003. Benin reserved its third party rights in March 2003. Chad did the same in April 2003. A panel was established and on the 8 September 2004, the report of the panel was circulated to the Members of the WTO. The Panel found that:

ñagricultural export credit guarantees are subject to WTO export subsidy disciplines and three United States export credit guarantee programmes are prohibited export subsidies which have no Peace Clause[1] *protection and are in violation of those disciplines; the United States also grants several other prohibited subsidies in respect of cotton; United Statesô domestic support programmes in respect of cotton are not protected by the Peace Clause, and certain of these programmes result in serious prejudice to Brazilôs interests in the form of price suppression in the world market.ò* (DSB Panel report 8 September 2004).

Later in 2004 the US notified its intention to appeal the panelôs findings. The Appellate Body was handed the case and on 3 March 2005, the Appellate Body Report was circulated (ibid). The Appellate Body generally came to the same conclusion as the Panel had. A reasonable period of time for the US to revoke its illegal subsidies was set to 1 July 2005. On 18 August 2006 still no changes regarding the subsidies had been made and Brazil requested the establishment of a compliance panel (ibid). On 18 December 2007, the compliance panel report was circulated to Members. The Panel found that the US was still acting inconsistently

[1] Provision in Article 13 of the Agriculture Agreement. The cause is an agreement by WTO members not to challenge agricultural subsidies that did not grant support to a specific commodity in excess of that decided during the 1992 marketing year Expired at the end of 2003.

e subsidies[2] in the form of marketing loans and to implement the rulings under DS267. Assistance producers and the impact on the world price was still significant (WTO webpage on DS267). The US was found to have failed to comply with the DSB recommendations and rulings of the SCM Agreement which states that they were ***ñ****to take appropriate steps to remove the adverse effects or ... withdraw the subsidy****ò*** (ibid).

On 12 February 2008, the United States notified its decision to appeal the legal aspect of these findings. Brazil did the same a few days later.

4.2 The Cotton Initiative

Soft law is here illustrated by the cotton initiative. Prior to the ministerial conference in Cancún in 2003, the second under the Doha Development Round, the Sectoral Initiative in Favour of Cotton, hereafter referred to as the cotton initiative was presented (Gross 2006:374). The initiative was presented by Benin, Chad, Mali and Burkina Faso, the C4, in the General Council and agricultural negotiations (WTO webpage on the cotton initiative). It described the harm the developed worldôs subsidies caused their cotton producers and their countriesô economies. The US as well as other developed countries was approached (Anderson & Valenzuela 2007:1292). The aim was to eliminate the subsidies and demand compensation for lost income (WTO webpage). The initiative was also presented by Burkina Fasoôs president Blaise Compaoré in the Agriculture Committeeôs Special Sessions (WTO webpage on the cotton initiative). The proposal became an official document in the Cancún negotiations but it was not agreed upon whether it should be dealt with as a separate issue or as a part of the agricultural negotiations (ibid). No conclusion on the matter was reached in Cancún. The conference ended in a stalemate. The C4 walkout from the negotiations is seen as a reason for the stalemate but their action cannot be blamed for the entire conference failure (Bhagwati 2004). The walkout was supported and encouraged by the civil society and influential NGOôs (Heinisch 2006:262). Prior to the conference developed states had been engaged in negotiation to which developing states were not invited.

The initiative was further dealt with in 2004 through an agreement to give cotton ñappropriateò priority and to be dealt with independently. A cotton sub-committee set up to increase the focus on the matter. In 2004 it was agreed that cotton would be addressed ñambitiously, expeditiously and specificallyò but within the negotiations for agriculture (WTO webpage on the cotton initiative). An apparent success for the negotiations was the commitment at the ministerial conference in Hong Kong in 2005. An agreement to end developed country cotton export subsidies by 2006 was reached. It was also agreed that duty-free and quota-

[2] For exact information of inconsistent aid provided by the US government to its cotton producers see WTO webpage on the DS267. For the subsidies impact on the C4 and the world market price for cotton see Anderson & Valenzuela 2007:1287.

rts was to be provided. Cotton subsidies were to be nt and within a shorter timeframe than other *eventual Doha agreement***ò** (WTO Hong Kong Ministerial Declaration, 2005, Gross 2006:375). However, according to Oxfam this may have seemed to be a success for the negotiations but was rather a legal success as the ruling in DS267 stated that the subsidies were to be removed within the same timeframe. The largest commitment by the US was to impose duty free and quota free access to the US market. A worthless promise as the C4 does not export cotton to the US market.

The last update on the cotton sub-committees work program on WTO webpage is from 2005. The importance of success on cotton was addressed by Director General, Pascal Lamy on 2 December 2008. His speech indicates that the topic is still considered important and that both the EU and the US agrees on the importance of ñbringing the issue to a closureò. The negotiations are however continuously locked (Lamysô speech on WTO webpage).

5.1 The price of justice and the cost of countermeasures

As Abbot and Snidal highlights, soft law lowers contracting costs for solving disputes and would therefore be of greater use to poor countries without financial possibility to make use of the DSB. The DS267 was the first time any of the C4 were involved in a DSB procedure (Gross 2006:369). It is not stated why Burkina Faso did not enter the DS267 as a third party but lack of financial resources as well as experience of the legal system are reasons to consider. Amrita Narlikar argues that developing countries have traditionally sought greater stability in international relations through rules and regimes. This is the opposite of what most scholars point out. Narlikar does however claim that hard law has not always been favourable. This since the WTO members themselves brings the case to the DSB which stress knowledge of the system as well as large financial assets (Narlikar 2004:139). The lack of knowledge of the system and insufficient funding are two factors of what Abbott and Snidalôs consider to be the largest disadvantages for developing countries in a hard law system. The developing countries have largely increased their presence in the dispute settlement procedure over the last years. But in order for LDCôs to bring a case to the DSU on their own considerable resources and skills have to be invested (Jackson 2008:439; Narlikar 2004:139). Hard law might be favourable in international dispute resolution but only when combined with increased economical resources.

A stateôs ability to influence WTO decision-making goes hand in hand with its economic strength. Given the unequal power relations between developed and developing nations, the latter simply do not have the wherewithal to influence WTO policy-making (Makori 2005:222)

The issue has been whether the LDCôs are able to utilize their right under the WTO law when negotiating with large developed states. Increased influence both in legal matters and negotiations has largely been achieved by forming coalitions, like the C4 did regarding the cotton initiative and DS267 (Mori 2004:411). The alliance with a larger developing state like Brazil in the DS267 was crucial for the LDCôs to take part in the case. Mainly because of Brazilsô larger financial resources and the countries joint political and economical power.

The developed states have experience and knowledge of the DSB system and can afford permanent representation at the WTO head quarter in Geneva. Developing countries rarely have time or resources to get locked in to the often

cesses in the WTO (Narlikar 2004:139f). This is too costly for developing states. Donna Lee and he most important actions for the C4 is the United Nations Economic Commission for Africa, UNECA, workshops for African representatives in Geneva. These workshops aim to increase deliberative capacity for the small Africa developing countries. This is the most important investment for these states as trade negotiations are the key instrument of development (Lee & Smith 2008:8). Burkina Faso is supposed to establish a committee in Geneva and to take part in trade policy courses and educational activities. However Burkina Faso does not have sufficient human and financial resources to participate (WTO Trade Policy Review 2004:viii). Most LDCsô have a minimum of representation in Geneva; their representatives are often responsible for their countries international relations as a whole rather than specifically focused on the WTO matters (Gross 2006:371). As such they are diplomats rather than trade specialists and they have limited knowledge on the dispute settlement procedures within WTO (ibid). This compared to developed states stationary large legal staff in Geneva which Abbott and Snidal sees as one of the biggest advantages of hard law for developed countries (Abbott & Snidal 2000:432f). Elinor Lynn Heinisch means that the representation of top level politicians rather than trade experts is not only a financial issue but also a way to put trade matters on a political level. This was the case regarding the cotton initiative when the C4 was directly represented by their presidents rather than trade delegations.

Olu Fasan argues that a large negative aspect for the developing countries ability to utilize the legal system is that it tends to be based on Western countries legal system. This provides the developed world with an advantage as they are previously acquainted with the legal principles (Fasan 2003:155)

ñ*...many developing countries find themselves more exposed to the threat and use of the DSU and poorly equipped to employ the same machinery in their defence or offence****ò*** (Narlikar 2004;140)

The same is argued regarding the possibilities to retaliation the DSB gives to parties that engage in a dispute settlement procedure and win. Countries are allowed to retaliation measures but regardless of this possibility African states are unlikely to impose effective sanctions towards developed countries as they are too small and too dependent on their larger trading partners (Narlikar 2004:140). Jackson refers to retaliation measures for LDCsô as ò*shooting itself in the foot*ò, because of the retaliations economic harm on the imposing country. By restricting access to their markets they harm the consumers and import dependent producer as these groups would face higher prices (Gross 2006:327; Jackson 2008:452).

The prevailing opinion before the cotton case tends to have been that the increased legalization would not benefit the African states if they were not actively taking part in the creating of the rules. This has not historically occurred, mainly as a consequence of lack of capacity and resources due to domestic institutional weakness (Fasan 2003:160, Makori 2005:221f). These disadvantaged would give developing countries limited possibilities to litigate in trade disputes

ore effective system of rules and the theoretical through DSB (Narlikar 2004:136).

es made use of the westernized legal system within the organization and used it against its creators may be seen as a proof for how the legalization levels the playing field. This is in line with what Abbot and Snidal points out as an important factor for developing states when benefitting from hard law. It creates justice regardless of who created the system and on whose traditions it is built. Since the US largely has been involved in the creating of the rule based system on which the DSB lies they are more eager to comply with its rulings (Heinisch 2006:253). Heinisch argues that regardless of the legal system the playing field will still not be levelled. This is because the power balance between weak and powerful states is still too uneven in global power politics in which the WTO is just a part as it is tied to a broader regime; global politics. However the fact that developing countries are increasingly filing challenges for adjudication shows that the legal system is legitimate. The dispute settlement process can therefore be seen as an effective vehicle for challenging the trade policies of more powerful industrialised states (Heinisch 2006:263).

5.2 Unilateral, bilateral or multilateral

Legalists argue that bilateral negotiations make small states hesitate challenging their larger trade partners on which their trade depends. However, precise legal rules and an enhanced dispute settlement system offer weaker states an increased control over unilateral action by powerful states such as the US (Jackson 2008:439f, Fasan 2003:144-145). As argued by Abbott and Snidal hard law protects developing states from arbitrary actions associated with negotiations. Increased legalization could benefit developing states by reducing discrimination in international trade. This would increase developing countries access for their products on Western markets by legally restraining arbitrary use of power from developed countries (Fasan 2003:145, 150). The bargaining power between LDC:s and MDC:s in multilateral trade negotiations is economically as well as politically characterized by inequality (ibid). This points towards an advantage for developing countries when administering hard law as it creates predictability and make LDC less vulnerable to arbitrary negotiations (Abbott & Snidal 2000:427).

Lee and Smith conclude that LDCsô are often weak in the WTO negotiations because of their large economic dependence on the EU and US (Lee & Smith 2008: 5). Whether this unbalanced power situation would be any different when leaning on a legalized system is disputed. In Grossô article it is argued that regardless of the multilateral dispute settlement the developing states are still very dependent on bilateral agreements outside of the WTO. These bilateral agreements are largely seen as favours to the LDCôs. They make the LDC vulnerable and effectively prevent them to engage in a legal dispute against the ñ*hand that feeds them*ò (Gross 2006:371). This is a sign that soft law is still ruling

lations between states and that the WTO disputes ganization. Abbott and Snidal argue in the case of t to a broader regime is an effective way to ensure compliance since the reputational costs for non-compliance would be enormous and spread through the entire regime (Abbott & Snidal 2000:427). This may be how LDC argue when contemplating to engage in legal disputes within the WTO; it would be too costly for them diplomatically as a reputation as uncooperative might affect their negotiations outside of the WTO. LDCôs are historically more in favour of bilateral dispute settlement, something that has also been suggested by Burkina Fasoôs president Compaoré (WTO Trade Policy Review Burkina Faso 2004; Fasan 2003:162f).

Gross sees a danger that a further increased legalization will push states to engage in bilateral diplomatic negotiations instead of risk being involved in long and cost demanding legal disputes. This would again put LDCôs and Burkina Faso in the difficult position of being vulnerable and in the hands of larger trading partners and victims for arbitrary negotiations. The use of bilateralism is common in US negotiations with developing countries, perhaps as a deliberate attempt of the US to conquer and divide. By making agreements regarding agriculture as one topic this is easily achieved as many African states are net importer of food stuff and thus benefit from subsidised farming (Lee & Smith 2008). The US favouring of soft law unilateral negotiations is likely to be preferred as it means smaller sacrifices in regard of sovereignty (Abbott & Snidal 2000:435).

5.3 Reputational cost creates compliance

The legal dispute over the cotton subsidies brought severity to the matter and seems to be what may create actual compliance. The C4s threat to leave the negotiations in Cancún and later their decision to do so if no action on the cotton initiative was taken is understandable as they are losing large amounts of income on the present system (Anderson & Valenzuela 2007:1291). Regardless of these facts the US refused to negotiate further reduction of the challenged subsidies. When the Panel ruling was announced a few months later they did however agree to comply with the ruling (Gross 2006:383). The cost for non-compliance with hard law is significant both in regards to the reputational costs associated with breaking the law and economically when risking retaliation (Abbott & Snidal 2000:431). As discussed above developing countries use of retaliation measures is rarely used. It is not a lack of power from the C4 states that is the main issue rather it is the WTOôs incapacity to force the Americans to comply with existing liberal trade rules and obligations (Lee & Smith 2008). Jackson argues that it is difficult getting compliance from the United States, because of the necessity to persuade Congress to act. Large actors in the WTO have decided in many instances to go ahead with whatever action they intended as the time horizon for compliance is not specified and they do not face an instant threat. Developed states unwillingness to comply even with legal rulings further puts an emphasis on

costs to achieve results. As Christine M Makori otton case was implied by Brazilôs decision to take akori 2005:207). Regardless of the outcome of the legal case its mere existence had a positive effect on the LDCsô position as the issue was brought in to daylight and acknowledged in media. Gross claims that this attention would have been non-existing if the cotton issue had only been dealt with within the DSB and not at the same time been the topic for intense negotiations within the Doha round. Anderson and Valenzuela concludes that the cotton initiative created leverage in the DS267 (Anderson & Valenzuela 2007:1281, 1291) Also in the attempt to attract the mediaôs attention a soft law approach seems to be more feasible. The fact that the general council was set to handle the matter brought on the attention of the civil society as the negotiations are a much more public matter than the legal rulings. The negotiation track brought on the interest from the general public and civil society (Gross 2006:381).

ñ**...the increased awareness created by the SIFC[3], particularly at the WTO Ministerials which are magnets for world media attention, increased the pressure on the US to comply with the Panel rulings. Thus, cotton demonstrates how linkages and complementarities can be established between the two tracks along which the cotton issue has been pursued**ò (Gross 2006:381).

Abbott and Snidal argue reputational costs are an important way to achieve compliance. Even in the context of the limited traditional WTO remedies, reputational costs are often an effective mechanism to encourage WTO-compatible behaviour. Bad reputation is costly regardless if created when using hard law or soft law. It is more obvious when using hard law whether a ruling has been disregarded and not acted in compliance with. This compared to the more blurry agreements in less transparent soft law negotiations. Therefore reputational costs may be higher in a hard law system. Developed states who are brought to court more frequently by developing countries, may be encouraged to act in a more WTO-consistent manner (Hoekman & Mavroidis 2000:540 in Gross 2006; 373). Increased presence by the LDCôs in the DSB is crucial to ensure the larger actors, in this case the US, to act in compliance with legal rulings against them.

Reputational costs became large for the US regarding the cotton. The cotton case was largely made the civil societies and mediaôs favourite issue (Heinisch 2006:264f). New York Times published a number of articles on the topic, the WB and IMF both published articles arguing for lowering of the subsidies. The human aspect and the impact the subsidies had on the West African population was highlighted by former UN secretary general, Kofi Annan and organizations like Oxfam. All these external players contributed to creating a very graphic picture of a David and Goliath situation (Heinisch 2006:264f). This media attention and the reputational costs for the US were created by the non-compliance with the ruling as well as their unwillingness to negotiate the Cotton Initiative.

[3] Sectoral Initiative in Favour of Cotton e.g. the cotton initiative

Most scholars tend to consider the cotton initiative and the increased presence in the negotiations e.g. Compaoréôs presentation of the initiative in June 2003 the most important sign of increased influence. The cotton initiative rather than the DS267 is also considered the starting point for cotton as a topic of special focus by Lee and Smith. This even though they also acknowledge the fact that by the time of publishing their study in 2008 still no actual progress has been made neither regarding the legal case or any actual result of the cotton initiative. The promises made by the US were toothless since they mostly focused on lowering tariffs in to the US something that really has no real effect on the C4 as they do not export cotton to the US (Lee & Smith). This is a good example of the downsides of soft law. The negotiations managed to lead to agreements between the parties which shows soft laws advantages as it is more achievable and allows compromising and helps parties create mutually beneficial deals (Abbott & Snidal 2000:435). However as argued by Lee and Smith this concurrence were toothless and without any real effect largely because of the non-existing costs for non-compliance. Lack of success in the Doha Development negotiations also means lack of success for the cotton initiative. Abbott and Snidalôs theory that soft law is more achievable due to the possibility to meet in the middle in negotiations is not true in this case. This point is however supported by the agreements made in Cancún and Hong Kong in regards to the cotton initiative. It was fairly easy for the states to reach an agreement since the C4 was not threatening to support the initiative with legal measures. By negotiating that certain conditions had to be met for the agreed changes to be implemented there was a possibility that no change in the subsidy policies had to be made at all. To avoid legally binding agreements was crucial for the US as the political cost of giving up sovereignty in this case would have been too large. Sovereignty costs associated with hard law is larger for developed states (Abbott & Snidal 2000:447f). This is more true regarding the US than any other WTO member due to US domestic politics and the difficulties of gain support from Congress (Jackson 2008:451). The US farm lobbying group is very strong. New farm bills with increased cotton subsidies has been approved and implemented over the years that the DS267 and the Cotton initiative has been on the agenda (Bhagwati 2004, Heinisch 2006, Lee & Smith 2008). To ignore the domestic pressure for cotton subsidies due to international law would most likely have been political suicide.

ñ*The WTO is one of the most important institutions in global economic governance, because it is legally binding for states as well as for nonstate actors.***ò** (Mori 2004:412).

Jackson, who is an outspoken legalist, claims that an institutional structure must have an existing rule-system that the members are expected to comply with.

rgues that it creates stability and predictability Smith suggest that any significant progress is often her than only negotiation (Lee & Smith 2008:6). They argue, as Abbott and Snidal mean often is the case with legalists, that ñ*negotiations are conducted in the shadow of law*ò which indicate the view that soft law is the absence of hard law. Regardless of the many voices in favour of legal disputes Burkina Faso chose not to engage in the DS267 as a third party but was instead highly involved in the cotton initiative. The initiative is also considered a more important turning point by The Re´seau des Organisations Paysannes et des Producteurs de lôAfrique de lôOuest, ROPPA, a labour organization for west African cotton farmers (Heinisch 2006:267). Burkina Faso and the C4 countries preferred to engage in the Cotton initiative rather than DS267 for various reasons. Within the dispute settlement mechanism in the WTO a ruling may state that steps towards compliance are to be taken by the loosing part. These steps might also only be taken only towards the complainant regardless of the WTO principles of Most Favoured Nation, MFN[4] (Gross 2006:372f). This might leave countries that sign up as third parts to a dispute in a no better situation then before regardless of a victorious outcome (ibid). The differences in gains from DS267 compared to the possible gains for developing countries in regards to the cotton initiative are discussed by Kym Anderson and Ernesto Valenzuela in their article from 2007. The reforms suggested in the cotton initiative would benefit the C4s position to a lager extent than compliance with DS267 would. The difference is that compliance with the ruling would unilaterally force the US to change their support program to their farmers while the cotton initiative calls for cuts in subsidies from all parties. Economically the C4 would therefore be better off with an agreement on the cotton initiative (Anderson & Valenzuela 2007:1292).

ñ*Thus while the WTO dispute settlement case is potentially very helpful to non-US cotton producers, at best it is likely to generate barely half the benefits that could come from Doha cotton reform****ò*** (Anderson & Valenzuela 2007:1297).

[4] No WTO member country can discriminate between their trading partners. A favour towards one member state must be given equally towards all member states (WTO web pages on principles).

clusion

It is a fine line to walk when allowing an open approach to steer the emphasis of the analysis without letting the result be too dependent of the chosen material. Many scholars argue for a soft law approach or hard law approach due to different factors. As seen in the analysis, focus is put on topics that tie in well with the theory; for example the US unwillingness to debate the cotton initiative but, at least on paper, agreement to comply with the DS267. Other topics, like the impact by civil society do not find support in the theory of hard and soft law presented by Abbott and Snidal but still provides valuable standpoints in the importance of DS267 as well as the cotton initiative.

The aim with this thesis was to answer the question;

Has the use of the WTO legal system regarding the cotton case resulted in changed position for Burkina Faso within the WTO according to international scholars?

My answer to the question will be yes, both due to topics supported by the theory and topics not addressed in the theory. In the analyzed material a consequent emphasis is put on the C4sô raised voice when suggesting the cotton initiative. The political pressure the cotton initiative created as the C4 were represented by top level politicians in the negotiations is stressed as advantages for soft law. The soft law approach and the involvement of top level politicians managed to engage the civil society to a larger extent than the hard law approach. The involvement of civil society and the media attention that was created is at least briefly touched upon by every studied scholar. The much lower economical cost for the cotton initiative is also highlighted by numerous scholars. Most important tend to be the ability to reach agreements by applying soft law since compromising is an option.

However feasible the cotton initiative proved to be to some extent, the C4sô ability to achieve their goals through hard law is increasingly acknowledged by scholars. The increased cost for non-compliance and the developed states unwillingness to break the law is seen as a levelling of the playing field. The US showed willingness to act in compliance with the legal ruling but unwillingness to engage in negotiations regarding the cotton initiative unless on certain conditions. This creates an image were, if only a soft law approach is taken, Burkina Fasoôs position in the WTO might change due to increased presence but no real influence would be reached as their presence is neglected by the developed countries. For actual influence to the C4 most scholars seems to consider an increased use of the DSB necessary as it ensures legitimacy to the world trade system. That a levelled

also suggested by the emphasis many scholars put use of the westernized legal system. Burkina Faso ut Benin and Chadôsô participation equally affect Burkina Fasoôs position within the organization as a consequence of the MFN principle. An important consequence for C4 due to the increased legalization is predictability. It is stressed that the arbitrary outcomes of negotiations are extremely costly for developing states as they to a large extend will have to accept whatever is offered to them. To have a legal ruling on their side is important leverage in any further dealing in regards to the cotton issue.

Regardless of lack of actual compliance the studied articles show an increased positive attitude towards the legal approach from the year of 2003 to 2008. Also an increased amount of articles on the subject has been published especially after the Cancún conference in 2005 and the ruling against America the same year. This quantitative observation however indicates an increased interest in the C4 and their struggle against the US, the David and Goliath image, rather than saying anything about the consequences of the legalization.

The US, the worldôs most powerful state was legally challenged on equal terms by a part supported by C4 states. The fact that the case was initiated proves that large developed states no longer can consider WTO as an organization for their own convenience. The legal principles are to be followed by all member states. The price for non-compliance is so far mostly reputational but as certain developing states are increasingly important for the world trade it may soon be economically costly to be faced with countermeasures from these states. Regardless of the larger medial interest in the negotiations the DSB cases are more transparent and it becomes more obvious when a state is acting inconsistently with the rules thus the reputational cost also gets larger.

These factors highlighted by various scholars, shows that the legal system in the WTO has resulted in a changed position for Burkina Faso in the organization. Regardless if the legal approach will be increasingly used by LDCsô, which is the prevalent opinion by studied scholars; it gives the opportunity to approach one issue in two different ways.

6.1 Topics for further research

The topic of increased legalization in the WTO is an interesting field to study as the organization has such an intricate legal system for an international organization. Compliance and implementation of the WTO rulings is a suggested topic for further research. The aim to implement within ña reasonable period of timeò has led to slow progress not only in the US but in the EU and large developing states as well. The relationship between LDCôs and larger developing will prove interesting over the next years. Larger developing countries like India, China and Brazil provides there farmers with favourable deals on electricity and pesticides creating an unfair advantage. Increased cooperation between

fluence might take place but it is possible that the smaller developing countries will enhance.

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