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James J. Nedumpara, *Naming, Shaming and Filing: Harnessing Indian Capacity for WTO Dispute Settlement*
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‘NAMING, SHAMING AND FILING’: HARNESING INDIAN CAPACITY FOR WTO DISPUTE SETTLEMENT

JAMES J. NEDUMPARA^{*}

Developing countries generally lack human and institutional capacity for analyzing the compatibility of trade measures taken by themselves and by other WTO members. As a result, the WTO legal order was significantly shaped by the United States and European Union and developing countries had very little participation in the dispute settlement process. India’s experience in overcoming some of these legal and institutional shortcomings in the matter of WTO dispute settlement is an interesting case study. India lost a few important cases such as the Mail Box (India-Patents) and the Balance of Payments (India-QR) in the decade of the late 1990s, the political overtones of which were felt for a long time. India relied on outside legal expertise for defending its interests in WTO dispute settlement and the costs involved in hiring external resources were often highlighted by opponents of trade and economic liberalization in India to argue against India’s participation in the WTO and the numerous trade agreements it administered. However, times have changed. India is now in a much better position to engage its own domestic lawyers and law firms in WTO dispute settlement. This article examines the measures taken by India, including the role of the government, private sector and inter-governmental organizations, in building legal capacity in India to augment its standing in WTO dispute settlement during the last few years and also the factors which have brought about this transformation. More recently, WTO cases involving India have exhibited a bottom-up approach of stakeholder participation where the government’s role is, to a greater extent, that of a handmaiden in meeting stakeholder demands. This article also analyzes the mechanisms available in India for identifying and challenging

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putative WTO inconsistent measures compared with the mechanisms available in the US, the EU and some key developing countries. On the one hand, this article will show how the WTO has shaped Indian strategies to engage with international dispute settlement, while on the other it addresses how India's building of legal capacity can affect WTO legal ordering.

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I. INTRODUCTION

For well over thirty years after joining the GATT, India's GDP growth averaged just 3.2 percent a year—lower than the global average for developing countries and even that of countries in Sub-Saharan Africa, East Asia and Latin America. This gave rise to the popular expression “Hindu” rate of growth, which meant a growth rate of around 3.5 percent per year and just 1.9 percent per capita.¹

¹ JEFFERY SACHS, *THE END OF POVERTY* 177 (2005). The term “Hindu rate of growth” was coined by Indian economist Raj Krishna. According to Jagdish Bhagwati, this expression “suggests predestination and thus captures the sense of despair that we felt

That trend has definitely changed for the better in recent times. Currently, India is one of the fastest developing economies of the world with an annual GDP growth rate of 6-7%.² India is also one of the founding members of the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO).

When India signed the WTO Agreement in 1994, the initial reactions were pessimistic.³ Many critics felt that joining the WTO could adversely affect India's sovereignty and deepen poverty. This view almost looked like a predictable response considering the economic and trade policies that India had pursued up to that point. India had adopted an inward looking strategy of industrialization and had imposed a system of high tariffs such as import licensing and quotas. When India initiated its major economic reforms in 1991, the weighted average import tariff was around 81%.⁴ For nearly four decades starting from the mid-fifties, India had also maintained quantitative restrictions on a number of products on balance-of-payment grounds. India's foreign trade also remained anaemic and at extremely low levels during the mid-nineties when it joined the WTO.⁵

India's involvement with the GATT decision making process is not well documented. However, like many other developing countries, it was not actively involved with the GATT *à la carte* process and had only played a marginal role in the GATT dispute settlement process.⁶ India was involved in only a couple of disputes in the entire history of the GATT.⁷

As a result, India's initial response to the Uruguay Round of Trade Negotiations (1986-1994) was tepid. India was reluctant to join the new trade round in the first place and had opposed the inclusion of services, intellectual property, and trade related investment measures in the GATT agenda. India was repeatedly targeted as being "obstructionist".⁸ One of the widely held criticisms

about our capacity to reform and improve our performance." See JAGDISH BHAGWATI, *INDIA IN TRANSITION: FREEING THE ECONOMY* 3 (1993).

² GOVT. OF INDIA, *ECONOMIC SURVEY 2012-13*, at 5.

³ Pradeep S. Mehta & Praveen Kumar, *Emerging Powers in Global Trade Governance: The Role of India* (CUTS Working Paper, 2010).

⁴ Report of the WTO Secretariat, *Trade Policy Review-India*, 41, WT/TPR/S/33 (March 15, 1998).

⁵ Martin Wolf, *India in the World*, in *INDIA'S ECONOMY: PERFORMANCE AND CHALLENGES* 369, 389 (Shanker Acharya & Rakes Mohan eds., 2010) (noting that "[India] has still room to lower protection unilaterally, as well as to negotiate lower bound rates in the WTO").

⁶ AMRITA NARLIKAR, *INDIA AND THE WORLD TRADE ORGANIZATION* 273 (2006).

⁷ See *infra* Part II (A) for details.

⁸ Ambassador Yeutter, the then USTR noted, "We simply cannot afford to have a

against India during the Uruguay Round was that its forays into the process could “throw the negotiation process into disarray.”⁹ During this time, not only was India’s share in international trade very small; it also had great difficulty in convincing its domestic constituents of the benefits of joining the new multilateral trade negotiations.

India’s tryst with the WTO dispute settlement process started off with a complaint against the United States with respect to a transitional safeguard action on certain textiles and clothing items (woven wool shirts and blouses).¹⁰ The panel and the Appellate Body ruled in favour of India. This dispute is also widely noted for its elucidation of the principle of “burden of proof” in WTO dispute settlement. However, it was not until the challenge¹¹ by the United States, and later by the European Community, of India’s arrangement for introducing the “mail box” system under the TRIPS Agreement that the general public became aware of the far reaching implications of India’s WTO commitments. India lost the case before the panel and the Appellate Body affirmed the findings which resulted in a public outcry and condemnation of India’s decision to join the WTO.¹² A year later, the decision of the WTO panel and Appellate Body to rule against India’s quantitative

handful of nations with less than 5 percent of world trade dictating the international trading destiny of nations which conduct 95 percent or more of international commerce in this world”. See J. H. JACKSON, *THE WORLD TRADING SYSTEM*, 147 (1992).

⁹ S. Narayanan, *Trade Policy Making in India*, (Institute of South Asian Studies Insights, No.3, National University of Singapore, May 15, 2005) (noting that “trade policy making in India was perceived as confused, contradictory and ill conceived”).

¹⁰ Appellate Body Report, *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS 33/AB/R and Corr.1 (Apr. 25, 1997) (*adopted* May 23, 1997) [hereinafter *US- Shirts and Blouses*].

¹¹ Appellate Body Report, *India – Patent Protection for Pharmaceuticals and Agricultural Chemical Products*, WT/DS 50/R and WT/DS 50/AB/R, (Dec. 19, 1997) (*adopted* Jan. 16, 1998) [hereinafter *India – Patents*].

¹² Parliament of India, *India and the WTO*, Department Related Parliamentary Standing Committee on Commerce, 35th Report, Rajya Sabha Secretariat (1998). (The Standing Committee notes, “Deciding the contents of international trade diplomacy will constitute the nation’s more absorbing challenge. The rich countries have already served notice that their activism within the WTO will soon gravitate towards issues related to agriculture and services.... The WTO also proposes to add to the agenda issues concerning trade-related investment. Negotiations on behalf of the poor countries without question have to be conducted with skill and speed. But the greater need is to seek to rebuild the cohesion which the Group of 77 was wont to display... in the past and which disintegrated, for, whatever reason, in the late 1980’s. Since unity is strength, a rapprochement between the developing countries on the basis of a common minimum programme should be of vital importance to each of them. In the changed circumstances, Japan and some of the erstwhile Asian Tigers, could also be interested in such a regrouping.”).

restrictions on various industrial and consumer items¹³ literally stoked fear and apprehension that the WTO could spell doom for India.

Times have changed. India is one of the leading developing country users of the WTO dispute settlement system along with Brazil and Mexico. Of the 454 disputes taken by the dispute settlement panels at the end of May, 2013 India was involved in 21 disputes as a complainant and in another 22 disputes as a respondent in addition to directly participating as a third party in almost 89 disputes.¹⁴

This article seeks to examine India's capacity in dealing with the GATT/WTO dispute settlement process since the establishment of the multilateral trade body. Broadly, this article examines the ability of the Indian government and institutions, diplomats and other stakeholders in formulating appropriate strategies in the GATT and WTO dispute settlement. In order to conduct this study, I have interviewed a number of diplomats, trade lawyers and private sector stakeholders who were associated with filing and defending cases concerning India at the GATT and the WTO. This article has four parts. Part I provides a snapshot of India's involvement with the GATT/ WTO dispute settlement system. Part II focuses on the efforts made by India in developing capacity in WTO related matters at multiple levels. For a clearer understanding, India's experience in the GATT/WTO dispute settlement may be divided into three phases. The first phase is from 1947 to 1995, i.e. from the establishment of GATT to India's joining of the WTO. The second phase is from 1995 to 2003 and the third phase is from 2004 till date. These phases are constructed to get a more balanced perspective of India's participation in the GATT/ WTO dispute settlement process. Part III examines the prospects and challenges of WTO dispute settlement concerning India on the basis of an assessment of the capacity of domestic institutions and agencies that are responsible for WTO and trade related matters. Part IV concludes.

II. CONSTRUCTION OF TRADE RELATED CAPACITY IN INDIA

Trade-related capacity has different facets in modern times. Agreements of far reaching commercial significance are regularly negotiated between nation states. At the multilateral level such as the GATT/WTO, a large collection of countries negotiate complex trade agreements which may have significant implications for

¹³ Appellate Body Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS/AB/R (Aug. 23, 1999) (adopted Sep. 22, 1999) [hereinafter *India-QR*].

¹⁴ World Trade Org., *Dispute Settlement: Dispute by Country*, http://wto.org/english/thewto_e/countries_e/india_e.htm (last visited August 19, 2013).

different sectors of the economy and its various constituents. In this context, trade-related capacity building is quite a complex exercise.

Trade-related capacity building partakes establishing and nourishing human, institutional and stakeholder capacity with respect to various facets of trade policy formulation and enforcement. It is not just limited to nominating the most competent diplomats to negotiating bodies or creating a cadre of skilled lawyers, but it also includes the capacity to coordinate at various levels with all concerned interested parties. As international economic relations literature indicates, a true trade-related capacity refers to the ability of countries to structure relations among government agencies, and between government and industry in ways that ensure optimal use of policy space and development goals.¹⁵ Strengthening such capacities is central to enabling developing countries to effectively participate in the multilateral trading system.

1. Human capacity

Human capacity refers to the capacity of the professionals that governments rely on for advice on WTO matters. This includes the competence of trade lawyers, economists, negotiators, etc. A country that lacks sufficient capacity in this respect is clearly at a disadvantage when implementing existing trade agreements, when negotiating new ones, and when handling trade disputes.¹⁶ Most importantly, trade diplomats and officials need to understand the syntax and grammar of international trade law and economics to appreciate the subject matter of the negotiations. There are various capacity building programmes available at present, instructing delegates from developing countries on how their countries can benefit from the multilateral trading system. Trade diplomats cannot function unless there is steady information flow and feedback from the concerned stakeholders. Therefore, the focus has slowly shifted to empowering the real actors in the dispute settlement process, i.e. the domestic sector stakeholders who will be directly impacted by a change in trade policy.

¹⁵ David Trubek, *Reversal of Fortune? International Economic Governance, Alternative Development Strategies, and the Rise of BRICS*, Paper presented at the European University Institute, Florence (June 12, 2012) (on file with author); see also Mihaela Papa, *Emerging Powers in International Dispute Settlement: From Legal Capacity Building to a Level Playing Field*, 3(3) J. INT'L DISPUTE SETTLEMENT (2012); Alvaro Santos, *Carving out Policy Autonomy for Developing Countries in the World Trade Organization: The Experience of Brazil and Mexico*, 52 VIRGINIA J. INT'L L. 551, 592 (2012).

¹⁶ See Hunter Nottage, *Developing Countries in the WTO Dispute Settlement System* 1-28 (Global Economic Governance Working Paper 2009/47), available at: <http://www.globaleconomicgovernance.org/wp-content/uploads/nottage-working-paper-final1.pdf>.

2. Institutional capacity

Institutional capacity broadly refers to the institutions that businesses and governments rely upon for trade. These include customs, national standard-setting authorities, trade remedy authorities, and agencies that represent the country at the WTO or other regional fora. Institutional capacity is essential for negotiating and obtaining optimal outcome in multilateral and regional treaties. Establishment of strong institutions is also a *sine qua non* for effectively redressing the grievances of the affected stakeholders arising from the non-implementation or poor implementation of treaty outcomes in international trade matters.

Trade policy in India is primarily the responsibility of the Ministry of Commerce and Industry (MoCI) and it plays a key role in defining and formulating the trade and external commercial policy. The MoCI and various state governments at the regional levels have initiated steps to set up research and coordination centers at various levels. In addition, a number of intergovernmental organizations such as the WTO, UNCTAD, UNESCAP, UNDP, ADB, World Bank—to name a few—also play a crucial role in providing trade related capacity building.

3. Stakeholder capacity

The real stakeholders are those who directly produce or consume a product or service that is internationally traded. Since most of such stakeholders are spread over and scattered across different parts of the country, the industry bodies have assumed a representative capacity. The stakeholders complement the government's participation in WTO negotiations and dispute settlement. In trade-related capacity building literature, stakeholders are referred to as the "third pillar".¹⁷ The third pillar broadly includes business, law, academia and civil society. In that context, 'stakeholder capacity' in trade-related capacity building literature broadly refers to the ability of the stakeholders or the third pillar to 'identify, analyse, pursue and litigate a dispute'¹⁸ at the WTO or other tribunals or adjudicative forums resolving trade disputes. During the last 18 years of implementation of the WTO regime, several such industry associations and civil society organizations in India have played a pivotal role in strengthening India's capacity at the WTO dispute settlement forum.

¹⁷ Gregory Shaffer *et al.*, *Winning at the WTO: What Lies Behind Brazil's Success*, 41 CORNELL INT'L. L.J. 383 (2008) (provides a detailed empirical investigation of WTO dispute settlement and its impact on Brazil and how Brazil influences and shapes the WTO system).

¹⁸ Andrew Guzman & Beth Simmons, *Power plays and Capacity Constraints: The Selection of Defendants in WTO Disputes*, 34 J. LEGAL STUDIES 557 (2005).

The process of engagement of government officials with stakeholders, known in trade capacity building literature as “public-private partnership” model, determines to a great extent a country’s capacity to effectively participate in the WTO dispute settlement or negotiation process.¹⁹ The development of public-private networks is critical in pursuing a winning strategy in WTO disputes.²⁰

A. Phase-I: India’s Involvement with GATT negotiations and Dispute Settlement

The period of 1947-1995 represents one of the most difficult phases in the economic development of India. For an inward looking economy which believed in import substitution, there was no real incentive in focusing on external markets. Furthermore, items such as textiles and clothing, in which India had a competitive advantage, were still subject to restrictions under the Multifibre Agreement (MFA) and were not integrated into the GATT.²¹ Accordingly, the need for taking recourse to the GATT dispute settlement process was not an immediate one.

The GATT dispute settlement system was considerably slow, weak and power-oriented as compared to the WTO dispute settlement system. Developing countries including India had only limited participation in this system. There were three cases involving India under the GATT. The first case involved a complaint filed by Pakistan for not granting excise rebates on goods exported from India to Pakistan while providing this benefit for goods destined for other countries.²² The GATT Working Party decided in favour of Pakistan. The second case involved a complaint by India against the United States for the imposition of countervailing duties on certain dutiable products. The matter was mutually settled after the first hearing.²³ The third case related to a complaint by India on certain Japanese restrictions on leather. This dispute was settled even before it was referred to a panel.²⁴ In addition to these disputes, which involved the invocation of Article

¹⁹ GREGORY SHAFFER, *DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION* (2003) (providing an informative discussion on the public-private partnership in WTO litigation involving the US and the EU).

²⁰ *Id.* at 113-117.

²¹ VEENA JHA *ET AL.*, *TRADE LIBERALISATION AND POVERTY IN INDIA* 115 (2005).

²² Ruling by the Chairman, *Application of Article I:1 to Rebates on Internal Taxes* (Aug. 24, 1948), GATT B.I.S.D. II/12.

²³ Report of the Panel, *United States Countervailing Duty Without Injury Finding*, L/5192 (Nov. 3, 1981), GATT B.I.S.D. (28th Supp.) at 113 (1982). (India’s complaint about United States countervailing duty laws, was pressed forward to the first panel meeting and settled on the basis of an offer from the United States. India was satisfied with this outcome).

²⁴ Complaint by India under special Article XXIII procedure for developing countries, *Japanese Import Restrictions on Leather*, GATT Document L/5623 (1984); see also ROBERT E. HUDEC, *DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM* 92 (2010).

XXIII procedures of the GATT, India brought legal claims against Pakistan,²⁵ United States²⁶ and the European Community²⁷. These complaints were settled without a formal decision. Besides these, India also responded to two complaints brought against it by the United States.²⁸

1. Human and Institutional Capacity

Although India's record under GATT dispute settlement has been insignificant, it will be incorrect to state that India was a fringe player in the GATT trading system. India was one of the few developing countries to have been invited for the Green Room informal discussions of the GATT.²⁹ Again, some well-known Indian diplomats who have later occupied key positions in India's foreign policy as well as economic policy formulation had represented India during the GATT discussions and negotiations. It would be pertinent to recall that a number of Indian career civil servants and diplomats have served key positions in GATT forums. Ambassadors K. B. Lall³⁰ (1962), B. L. Das³¹ (1982) and B. K. Zutchi³²

²⁵ Complaint by India, *Pakistan – Export fees on Jute*, GATT/L/41 (1952); see also ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN LEGAL GATT SYSTEM 417-418 (1993) [hereinafter Hudec, *Enforcing International Trade Law*].

²⁶ Complaint by India, *United States – Countervailing Duty Procedures*, GATT/SCM/20 (Apr. 22, 1982).

²⁷ Complaint by India, *European Community – Sugar Regime*, GATT / L/5309 (Apr. 8, 1982).

²⁸ Complaint by the United States, *India – Import Restrictions on Almonds*, GATT/C/M/211 (June 17, 1987); Complaint by the United States, *India – Import Licenses on Almonds*, GATT/C/M 211 (June 17, 1987); see also Hudec, *Enforcing International Trade Law*, *supra* note 25, at 548-549.

²⁹ The “Green Room” is a phrase taken from the informal name of the director-general's conference room. It is used to refer to meetings of 20–40 delegations, usually at the level of heads of delegations. These meetings can take place elsewhere, such as at Ministerial Conferences, and can be called by the minister chairing the conference as well as the director-general. Similar smaller group consultations can be organized by the chairs of committees negotiating individual subjects, although the term Green Room is not usually used for these. See http://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm (last visited March 30, 2012).

³⁰ Commerce Secretary of India during 1966-1970 and also served as Permanent Representative to GATT and UNCTAD during 1962-66 and 1973-74. Ambassador Lall headed key committees in the GATT. For a biographical sketch see K. B. Lall, STRUGGLE FOR CHANGE: INTERNATIONAL ECONOMIC RELATIONS (1983).

³¹ Former Ambassador and Permanent Representative of India to the GATT (1980-1983).

³² Ambassador Zutchi was Permanent Representative of India to the GATT from 1989 to 1994. He was also a panelist in the *US- Gambling* Dispute.

(1992) have served as Chairpersons of GATT Council. Madan G. Mathur served the GATT as a Deputy Director General before he retired in 1991.³³ A. V. Ganesan,³⁴ a former Commerce Secretary of India during the latter stage of the Uruguay Round Negotiations, was later elected as the Chairman of the WTO Appellate Body; Anwarul Hoda, a former Special Secretary at the Ministry of Commerce and the lead negotiator at the time of the Uruguay Round, was appointed as a Deputy Director General of WTO.³⁵ Hardeep Singh Puri³⁶ and Mohan Kumar,³⁷ who were actively involved in the Uruguay Round Trade Negotiations, have been nominated as panelists in multiple and perhaps some of the landmark GATT and WTO dispute settlement proceedings.

In respect of institutional capacity, India had a mission in Geneva which was responsible for GATT negotiations and deliberations. Even now, a good number of WTO members have no permanent missions in Geneva³⁸, and when compared to this situation, the Indian institutional capacity was fairly commendable during the GATT period. In order to take care of commercial diplomacy, the Indian government had established a Trade Policy Division (TPD) within the Commerce Ministry in the 1960s.

³³ GATT Secretariat, *Reorganization of GATT Secretariat*, GATT/1590 (May 17, 1991), available at: http://www.wto.org/gatt_docs/English/SULPDF/91530566.pdf.

³⁴ A.V. Ganesan was the former Chairman of the WTO Appellate Body and also the Indian Commerce Secretary during 1991-1993. He was also in charge of India's foreign trade policy and was the chief negotiator for India in the Uruguay Round, see *WTO Completes Appointment of Appellate Body Members*, available at: http://www.wto.org/english/news_e/pres00_e/pr179_e.htm (last visited May 24, 2011).

³⁵ Anwarul Hoda was a deputy Director General of the WTO and also worked as the Member of the Planning Commission in India. See <http://www.stewartlaw.com/stewartandstewart/Portals/1/Douments/Bios.pdf> (last visited May 20, 2011).

³⁶ Hardeep Singh Puri is the current Permanent Representative of India to the United Nations. Ambassador Puri has been appointed as a panelist in a number of WTO disputes and was also appointed as the Chairman of the Committee on Subsidies and Countervailing Duties, see also <http://www.un.int/india/pr.bio.pdf> (last visited May 24, 2011); see also <http://worldtradelaw.net> (search "Subscriber's Page"; then follow "Dispute Settlement" hyperlink; then follow "Panelists" hyperlink).

³⁷ Mohan Kumar was associated with the Uruguay Round of Trade Negotiations and was also involved in India's negotiation in areas such as Textiles, Intellectual Property Rights and Services and represented India at the WTO Marrakesh Ministerial Conference of 1994. He was also a panelist in some important disputes such as *US – Steel Safeguards*, *EC – Biotech*, *EC – Sardines* and *Chile – Alcohol*, available at: http://indianembassybahrain.com/about_ambassador.html (last visited on May 25, 2011).

³⁸ PETER VAN DEN BOSSCHE, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS* 107 (2007) (notes that nearly twenty WTO members do not have a mission in Geneva).

2. Stakeholder Capacity

Stakeholder consultations involving the government and other industry and civil society organizations had started during the Uruguay Round of trade negotiations. However, most of such consultations were limited to India's negotiating positions and approaches in sectors such as textiles, agriculture and pharmaceuticals. Moreover, the role of private sector organizations and industry associations was limited in an inward looking economy which had used tariff, quantitative restrictions, permit and licensing procedures to restrict imports. It is, therefore, not surprising that stakeholder capacity in trade dispute settlement was almost non-existent during the GATT period.

In sum, India's limited use of the dispute settlement process during the GATT days should not be attributed to lack of human or institutional capacity only. It may be linked to multiple other factors as well, such as: (i) a proper dispute settlement mechanism was incorporated into the GATT only during the Tokyo Round; (ii) Indian economy was inward looking and was focused at protecting the domestic market rather than seeking market access in third countries; (iii) the dispute settlement was predominantly transatlantic-centric during this period, thus the developing countries hardly had the expectation of being able to effect compliance through the GATT instruments in a power-oriented system.

B. Phase-II (1995- 2003)

1. India and WTO Dispute Settlement

This part will examine India's capacity to participate in the WTO dispute settlement system in the initial years after the establishment of the WTO in 1995. The Dispute Settlement Understanding (DSU) of the WTO is widely regarded as the "backbone of the multilateral trading system".³⁹ The changes introduced by the new DSU, which included the concept of "automaticity",⁴⁰ "cross-retaliation",⁴¹ strict timelines and the opportunity to file appeals before an appellate forum,⁴² ensured that the developing countries could secure a more meaningful

³⁹ William Davey, *The WTO Dispute Settlement System: The First Decade*, J. INT'L. ECON. L. 79 (2001).

⁴⁰ Understanding on Rules and Procedures Governing the Settlement of Disputes, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, art. 6.1, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU]. Once a panel is formed, it is almost impossible to block the adoption of the panel or the Appellate Body report. See, David Palmeter, *The WTO as a Legal System*, 24 FORDHAM INT'L L.J. 444, 468 (2000).

⁴¹ *Id.* art. 22.3.

⁴² *Id.* art. 17.12.

role in the dispute settlement system. The time period selected for assessment i.e. 1995-2003, is particularly interesting as the sheer caseload processed by the system during this period is truly extraordinary and unparalleled in the history of the organization; a vast majority of the cases brought before the DSB during this time also led to the successful resolution of outstanding issues with a few exceptions.⁴³ The first few years of the WTO dispute settlement were a revelation. The effectiveness of the DSU was seriously tested during this time. This period witnessed a variety of complaints from developed countries *inter se* and between developing countries and developed countries. A number of developing countries such as India, Brazil, Mexico, Venezuela, Pakistan and Thailand were involved in some of the most high profile cases filed before the WTO during this time.⁴⁴ A few such examples include *US- Shrimp*,⁴⁵ *EC- Bed Linen*,⁴⁶ *US- Gasoline*⁴⁷ and *US- Cotton*.⁴⁸

India's experience with the WTO negotiation process and the WTO dispute settlement system presents quite a contrasting picture. In the negotiation arena, India emerged as an influential player and a representative voice of the developing countries during this period.⁴⁹ India participated proactively in the various negotiating forums of the WTO and took leadership positions in the WTO Ministerial Conferences in Singapore (1996), Geneva (1998), Seattle (1999), Doha (2001) and Cancun (2003). These changes happened at a time when India's trade share was still very insignificant; India's merchandise trade was less than 1 percent and services trade was less than 2 percent.⁵⁰

⁴³ Andrew Stoler, *The WTO Dispute Settlement Process: Did We Get What Negotiators Wanted?* Paper presented at the International Conference on Business, Economics and Law, University of Adelaide (2003) (on file with author).

⁴⁴ *Report of ACWL* (2010), available at: http://www.acwl.ch/e/documents/reports/Oper_2010.pdf.

⁴⁵ Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS 58/AB/R (Oct 12, 1998) (adopted Nov. 6, 1998) [hereinafter *US – Shrimp* or *Shrimp/Turtle*].

⁴⁶ Appellate Body Report, *European Communities – Anti-dumping Duties on the Imports of Cotton-Type Bed Linen from India*, WT/DS 141/AB/R (March 1, 2001) (adopted March 12, 2001) [hereinafter *EC- Bed Linen*].

⁴⁷ Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS/AB/R (Apr. 29, 1996) (adopted May 20, 1996).

⁴⁸ Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS 267/AB/R (March 3, 2005) (adopted March 21, 2005).

⁴⁹ Sheila Page, *Developing Countries in GATT/WTO Negotiations* (Overseas Development Institute Working Paper 2002), available at: <http://www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/4738.pdf> (discussing the role of developing countries including India in trade negotiations under GATT/WTO).

⁵⁰ Report of the Secretariat, Trade Policy Review-India, WT/ TPR/S/182 (Apr. 18, 2007).

Dispute settlement was one area where India's presence was prominently noticed. In that context, an examination of the human, institutional and stakeholder capacity would help us identify as to how India dealt with some of the significant challenges. India was acutely aware of the implications of signing a comprehensive treaty such as the WTO. Parliamentary debates⁵¹ and intense internal discussions on the impact of the Dunkel Draft took place long before India signed the Marrakesh text.⁵² However, there is a very strong indication that a serious debate on the implications of the treaty obligations took place in India only in the aftermath of the losses in *India - Patents*⁵³, *India - QR*⁵⁴ and *India - Auto*⁵⁵ disputes. Some of these cases acted as catalysts in shaping India's participation in WTO negotiations and dispute settlement. The following discussion provides a brief analysis of the above cases and how they shaped India's approach in enhancing trade related legal capacity.

Tables I and II provide a snapshot of India's disputes at the WTO between 1995 and 2003.

Table I
India as a Complainant in WTO Disputes (1995-2003)

Title of the case	Dispute Number	Year of Consultation	Covered Agreement(s)	Sector Concerned
<i>Poland – Automobile</i>	19	1995	GATT 1994	Automobile
<i>US – Women's and Girl's Wool Coats</i>	32	1996	ATC	Textiles and Clothing
<i>US – Wools and Shirts</i>	33	1996	ATC	Textiles and Clothing
<i>Turkey – Textiles</i>	34	1996	GATT 1994	Textiles and Clothing
<i>US – Shrimp</i>	58	1996	GATT 1994	Fisheries/Marine
<i>EC – Rice</i>	134	1998	GATT 1994, AoA, TBT, Customs Valuation, etc.	Agriculture

⁵¹ PARLIAMENT OF INDIA, REPORT OF THE DEPARTMENT-RELATED STANDING COMMITTEE ON COMMERCE (Dec. 13, 1993) (on file with author).

⁵² V M Tarkunde, *Final GATT Agreement: An Assessment*, 29(36) ECON. & POL. WEEKLY 2378 (1994).

⁵³ *India – Patents*, *supra* note 11.

⁵⁴ *India – QR*, *supra* note 13.

⁵⁵ Appellate Body Report, *India – Measures Relating to Trade and Investment in the Motor Vehicle Sector*, WT/DS 175/AB/R (March 19, 2002) (*adopted* April 5, 2002) [hereinafter *India – Auto*].

<i>EC – Unbleached Cotton Type Bed Linen</i>	140	1998	GATT 1994, ADA	Textiles and Clothing
<i>EC – Bed Linen</i>	141	1998	GATT 1994, ADA	Textiles and Clothing
<i>South Africa – Pharmaceuticals*</i>	168	1999	GATT 1994, ADA	Pharmaceuticals
<i>US – Steel Plate</i>	206	2000	GATT 1994, ADA	Steel
<i>US – Byrd Amendment</i>	217	2001	GATT 1994, ADA, ASCM	n/a*
<i>Brazil – Jute Bags*</i>	229	2001	GATT 1994, ADA	Textiles and Clothing
<i>Argentina – Pharmaceuticals</i>	233	2001	GATT 1994, TBT	Pharmaceuticals
<i>US – Textiles Rules of Origin</i>	243	2002	GATT 1994, ARO	Textiles and Clothing
<i>EC – GSP</i>	246	2002	GATT 1994, Enabling Clause	Textiles and Clothing

* Not available. Multiple sectors have been affected

Source: Compiled from information on the WTO website

Table II
India as a Respondent in WTO Disputes (1995-2003)

Title of the case	Dispute Number	Year of Consultation	Covered Agreement(s)	Sector concerned
<i>India – Patents (US)</i>	50	1996	TRIPS	Pharmaceuticals and Chemicals
<i>India – Patents (EU)</i>	79	1996	TRIPS	Pharmaceutical and Chemicals
<i>India – QRs</i>	90, 91, 92, 93, 94, 95 and 96	1997	GATT 1994	Agricultural, Textiles and Industrial Products
<i>India – Certain Commodities</i>	120	1998	GATT 1994	Agriculture, Leather
<i>India – Auto (EC)</i>	146, 175	1997	GATT 1994, TRIMS	Automobile
<i>India – Import Restrictions (EC)</i>	149	1998	GATT 1994, AoA, Import Licensing, etc.	n/a*
<i>India – Customs Duties (EC)</i>	150	1998	GATT 1994	n/a*
<i>India – EXIM Policy EC)</i>	279	2003	GATT 1994, AoA, TBT, SPS, etc.	Agriculture and Chemicals

<i>India – Anti-dumping on Certain Products (EC)</i>	304	2003	GATT 1994, ADA	n/a*
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*Not available. Multiple sectors have been affected

Source: Compiled from information on the WTO website

Immediately after joining the WTO, India had to face challenges to its patent mail-box system from the U.S. and the EC.⁵⁶ Article 70 of the TRIPS Agreement provides that where a Member does not make available patent protection for pharmaceutical and agricultural chemical products as of the date of entry into force of the TRIPS Agreement, that Member must establish a system for filing patent applications with regard to those products (the so-called “mail-box” filing). The objective of the mail box filing was to provide a legal basis for establishing filing and priority dates to be used when these applications were examined later. The Appellate Body upheld the panel’s decision when it held that India’s use of “administrative instructions” in the absence of a domestic legislation did not provide a sound legal basis for ensuring compliance with the TRIPS Agreement. In a way, the WTO panel and the Appellate Body decisions were a direct indictment of how the Indian government would view its own powers. India’s loss in these disputes triggered a series of debates in India and generated an unprecedented level of interest in IPR matters.

In yet another instance, in *India – QR*⁵⁷ the United States challenged India’s invocation of quantitative restrictions on some 2714 tariff lines citing balance of payment grounds. Until the QRs were challenged by the U.S., it was considered that developing countries had the autonomy to maintain import restrictions on balance-of-payment grounds and for that reason, India had maintained restrictions from the mid-1950s.⁵⁸ This case also raised a systemic issue of whether a WTO panel can review the justification of balance-of-payment restrictions under Article XVIII: B of GATT 1994. This was important in light of the practice under the GATT, which was to respect the divisions between political organs, such as the Balance-of-Payments Committee, and judicial organs, such as the dispute

⁵⁶ Appellate Body Report, *India – Patent Protection for Pharmaceuticals and Agricultural Chemical Products*, WT/DS 50/R and WT/DS 50/AB/R (*adopted* Jan. 16, 1998) [hereinafter *India – Patents*].

⁵⁷ *India – QR*, *supra* note 13.

⁵⁸ S.P. Shukla, *From GATT to WTO and Beyond*, Working Paper No. 195, United Nations University, Helsinki (2000); *see also* ROBERT E. HUDEC, *DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM* 27 (1987) (asserting that “[s]ince developing countries have an almost infinite need for additional development resources, [Article XVIII] made it possible to justify almost any restrictions.”).

settlement panels.⁵⁹ The panel as well as the Appellate Body maintained that the quantitative restrictions amounted to a violation of Article XI: I of the GATT and that they cannot be justified under Article XVIII: B of GATT, 1994. The Appellate Body stated that clear WTO rules could not be disregarded in order to safeguard institutional balance between political and quasi-judicial organs of the WTO.⁶⁰ This case also brought a marked change in the substantive approach to balance-of-payments issues, which some commentators have interpreted as a movement away from the pragmatism of the GATT towards a more adjudicatory, “legalistic” approach.⁶¹

Almost as a concurrent development, the United States requested the DSB to establish a panel in *India – Measures Relating to Trade and Investment in the Motor Vehicle Sector (India – Auto)*, concerning India’s use of local content, foreign exchange and trade balancing requirements in the automobile sector.⁶² The *India – Auto* dispute was by and large a “mopping up” operation to eliminate some of the remaining vestiges of the import licensing regime which India was required to modify in the *India – QR* decision.⁶³ India lost the case, but the outcome in this decision was almost expected after the panel and Appellate Body findings in the *India – QR* dispute.

The losses in the *India – Patents* and the *India – QR* decisions served as a wake-up call for the government, the industry and other stakeholders. India looked for adequate defensive measures to protect the domestic sector from any import surge.⁶⁴ India’s use of anti-dumping provisions substantially increased during this time and the government also used other types of trade contingency protection including safeguards.⁶⁵

The highlight of this period is that India was a successful complainant in some of the disputes which have attained a legendary status in WTO law and practice

⁵⁹ Deborah E. Siegel, *Legal Aspects of the IMF/WTO Relationship: The Fund’s Articles of Agreement and the WTO Agreements*, 96 AM. J. INT’L L. 561, 588 (2002); see also Kenneth W. Abbott, *The Many Faces of International Legalization*, 92 AM. SOC’Y INT’L PROC. 57 (1998).

⁶⁰ Frieder Roessler, *The Institutional Balance Between the Judicial and the Political Organs of the WTO*, in NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW 325, 325-46 (2000).

⁶¹ Chantal Thomas, *Balance-of-Payment Crises in the Developing World: Balancing Trade, Finance and Development in the New Economic Order*, 15 AM. U. INT’L REV 1249, 1274.

⁶² *India – Auto*, *supra* note 55.

⁶³ Kyle Bagwell and Alan Sykes, *India- Measures Affecting Automotive Sector*, in THE AMERICAN LAW INSTITUTE REPORTERS’ GUIDE ON WTO CASE LAW 158 (Henrik Horn & Petros C. Mavrioidis eds., 2004).

⁶⁴ Romain Wacziarg, *India in the World Trading System* (Centre for Research on Economic Development and Policy Reform, Working Paper No. 146, 2002).

⁶⁵ *Id.* at 9.

and continue to be important milestones in the evolution of the international trade law jurisprudence.

India along with Indonesia, Malaysia and Thailand were the complainants in the landmark *US – Shrimp* (Shrimp/Turtle) dispute.⁶⁶ India also challenged the EC practice of “zeroing” in anti-dumping proceedings in the famous *EC – Bed Linen* dispute.⁶⁷ In *Turkey – Textiles (QR)*,⁶⁸ India successfully challenged Turkey’s imposition of quantitative restrictions on 19 categories of textiles and clothing items ostensibly for the formation of the Turkey-EC Customs Union. The panel in this dispute had the unenviable task of finding out whether the claimed customs union in fact met the requirements of Article XXIV of the GATT, an issue which was quite a difficult one for a dispute settlement panel to resolve.

India’s challenge of the EC’s generalized system of preferences (GSP) in as much as it provided preferential duty access to certain products originating from 12 countries under the garb of combating drug production and trafficking is yet another landmark decision. The WTO dispute settlement panel’s finding in December 2003 that the term “non-discriminatory” in the 1979 Enabling Clause required “that identical tariff preferences under GSP schemes be provided to all developing countries without differentiation except for the implementation of *a priori* limitations”⁶⁹ and preferential treatment for certain LDCs was hailed as a major success for India. The finding of the panel was modified in appeal; nonetheless, the panel as well as the Appellate Body decision led to significant improvement in clarity on the operation of the GSP schemes.

2. Human and Institutional capacity

India’s capacity to effectively participate in trade negotiations drastically improved during this period. The adverse decisions in *India – Patents* and *India – QR* disputes provided important lessons for the need to significantly augment India’s capability in WTO dispute settlement. In fact, India’s experience of dealing with some of these disputes provided significant guidance to other developing countries in participating in dispute settlement matters.

⁶⁶ *US – Shrimp*, *supra* note 45.

⁶⁷ *EC – Bed Linen*, *supra* note 46; Zeroing takes place when the dumping amount is set to zero rather than its calculated negative value in cases where the export price is higher or where those transactions are non-dumped. See Edwin Vermulst & Daniel Ikenson, *Zeroing Under the WTO Anti-Dumping Agreement: Where Do We Stand?* 2 GLOBAL TRADE & CUSTOMS J. 231 (2007).

⁶⁸ Appellate Body Report, *Turkey – Restrictions on Import of Textile and Clothing Products*, WT/DS 34/AB/R (Oct. 22, 1999) (*adopted* Nov. 19, 1999) [hereinafter *Turkey – Textiles*].

⁶⁹ Panel Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, ¶ 7.161, WT/DS246/R (Dec. 1, 2003) [hereinafter *EC – GSP*].

In a way, the *India - Patent* and *India - QR* disputes typify some of the problems generally faced by developing country members in effectively participating in the dispute settlement system. During the early days of the WTO, India defended its cases without any external legal help and depended on the advice of its Attorney General and its Permanent Representative to the WTO.⁷⁰ Although India availed the services of Frieder Roessler, a legal expert in the field, in some of these cases, it was a relatively uncommon practise.⁷¹ It seems quite obvious to an observer that the Indian government lacked an effective institutional mechanism for seamlessly responding to a WTO panel process during the early days of the WTO. During the course of the *India - QR* panel proceeding, India requested that it be granted additional time in order to prepare and present its first submission. India stated that the underlying subject matter is of “systemic importance” covering a wide range of issues and that it occurred at a time when the new government had not been sworn in and the post of Attorney General had not yet been filled.⁷² It must be acknowledged that India’s preparedness for participation in the WTO dispute settlement system has significantly improved since then. A plea for additional time premised on the change of government at the federal (Union Government) level is unlikely to be raised in the current scenario.

After this dispute, it became a practice for the Attorney General, who is the chief legal officer of the Government of India, not to directly participate in WTO disputes. This was almost an acknowledgment that lawyers with domain expertise needed to be engaged for WTO disputes, and also that engagement in a WTO dispute is a fairly long-term commitment which may not be feasible for senior government lawyers who may have to appear in several cases in domestic courts and tribunals during regular court days.

In *EC - Bananas III*, one of the early cases decided under the WTO dispute settlement process, the Appellate Body explicitly ruled that private lawyers could represent and make pleadings at oral hearings on behalf of a Member.⁷³ After this ruling, a number of developed and developing country Members of the WTO, including India, started using specialized private lawyers and law firms for WTO

⁷⁰ India has traditionally engaged international law professors to argue cases before various international law tribunals. However, use of private lawyers for arguing international law disputes was relatively unheard of.

⁷¹ Interview with a senior Indian government official, in New Delhi (Nov. 30, 2012) (on file with author).

⁷² Submission of India, *India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS 90/R, ¶. 17 (June 4, 1999).

⁷³ Appellate Body Report, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (Sep. 9, 1997) (adopted Sep. 25, 1997) [hereinafter *EC - Bananas*] (“[W]e rule that it is for the WTO Members to decide who should represent it as members of its delegation in in an oral hearing of the Appellate Body.”).

dispute settlement. Arthur E. Appleton of Lalive and Partners appeared for India in the *US – Shrimp/Turtle* dispute.⁷⁴ Frieder Roessler appeared for India in the *India – Patents*, *India – QR* and *India – Auto* disputes;⁷⁵ Brussels based law firm Vermulst Waer & Verhaeghe (VWV) appeared in the *EC – Bed Linen* dispute.⁷⁶ US law firm Squire Sanders assisted India in *US – Steel plate*.⁷⁷ Krishnan Venugopal,⁷⁸ a New Delhi based lawyer has been involved in disputes such as *India – Patents*, *India – QR*, *India – Auto*, *EC – GSP* and *US – Customs Bond Directive*,⁷⁹ either alone or jointly with other lawyers. During 2002-03, India engaged the Advisory Centre on WTO Law (ACWL) in two disputes, namely, the *EC – GSP* and the *US – Rules of Origin* disputes. During this period, India predominantly depended on foreign lawyers including ACWL, and the concept of domestic legal capacity building was not high on the agenda of the Indian government at that time.⁸⁰

3. Stakeholder capacity

During the Uruguay Round negotiations, India had only a limited offensive agenda; to seek the elimination of quotas and other restrictions on textiles and apparel items in leading developed country markets. Not only did the WTO Agreement on Textiles and Clothing (ATC)⁸¹ succeed in eliminating the quotas, but it also paved the way for developing countries to challenge trade restrictions in other markets.

India's experience in dealing with two leading WTO disputes demonstrates to some extent the role and importance of stakeholder capacity in successfully challenging third country commercial practices. The first one is *EC – Bed Linen*⁸²

⁷⁴ Email from Arthur E. Appleton to the author (July 25, 2013) (on file with author).

⁷⁵ See Gregory Shaffer, *The Challenges of WTO Law: Strategies for Developing Country Adaptation*, 5 WORLD TRADE REV. 177 (2006).

⁷⁶ VERMULST, WAER & VERHAEGHE, available at: <http://www.vvvgb-law.com/publications/Edwin%20Vermulst/Zeroing%20in%20on%20zeroing.pdf> (last visited May 21, 2011).

⁷⁷ Mihaela Papa, *Emerging Powers in International Dispute Settlement: From Legal Capacity Building to a Level Playing Field*, 3(3) J. INT'L DISPUTE SETTLEMENT 1, 12 (2012).

⁷⁸ Profile of Krishnan Venugopal, available at: <http://www.itechlaw-india.com/2009/KrishnanVenugopal.html> (last visited May 21, 2011).

⁷⁹ Appellate Body Report, *United States – Customs Bond Directive For Merchandise Subject to Anti-dumping/ Countervailing Duties*, WT/DS/AB/345/R (July 16, 2008) (adopted July 28, 2008) [hereinafter *US – Customs Bond Directive*].

⁸⁰ Papa, *Emerging Powers in International Dispute Settlement*, supra note 77, at 14 (noting that emerging countries such as Brazil and India have been not consistent in supporting the private legal sector in WTO dispute settlement).

⁸¹ Agreement on Textiles and Clothing, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex IA, 1868 U.N.T.S. 14.

⁸² *EC – Bed Linen*, supra note 46.

and the second one is *EC – GSP*⁸³. The Cotton Textiles Export Promotion Council (“Texprocil”), an industry association, played an important role in both these disputes. In the *EC – Bed Linen* case, the Indian exporters were represented by Texprocil. Texprocil was involved from the stage of selection of law firm in Brussels to dealing with the EC investigation on aspects including choice of sample of exporters for the purpose of dumping margin calculation to verification proceedings. Thanks to the role of Texprocil, almost all Indian exporters accounting for more than 80% of the production made themselves known before the EC anti-dumping authorities.⁸⁴

Texprocil also played a proactive role⁸⁵ in the *EC – GSP* and the *US – Textiles Rules of Origin* disputes.⁸⁶ In fact, a memo submitted by Texprocil to the Ministry of Textiles in July 2002 sought to draw the attention of the Government of India to the problems faced by the textiles and clothing sector as a result of the operation of the EU drug arrangement.⁸⁷ The letter pointed out that the introduction of the new GSP scheme resulted in the drastic increase of exports from Pakistan to the detriment of Indian exporters. Such a prompt response from an industry association helped to alert the government on key policy changes in commercial instruments in major importing countries.

C. Phase III: 2003- Present

1. An Emerging India in WTO Dispute Settlement

By the time of the Cancun Ministerial, India had already emerged as a powerful influence in WTO negotiations and dispute settlement.⁸⁸ Therefore, the developments post-2003 should be looked at in a different context. Although the selection of this particular year has been arbitrary, there is every reason to think that India’s stature in the WTO system underwent a major change around this

⁸³ *EC – GSP*, *supra* note 69.

⁸⁴ *Id.*

⁸⁵ Biswajit Dhar & Abhik Majumdar, *The India – GSP Dispute: Issues and Processes*, 8 (ICTSD Working Draft, 2006), <http://ictsd.org/downloads/2008/06/dhar.pdf>.

⁸⁶ Report of the Panel, *United States – Rules of Origin for Textiles and Apparel Products*, WT/DS 243/R (adopted July 21, 2003) [hereinafter *US- Textiles Rules of Origin*] (India argued that Sections 334 and 405 of the United States Trade and Development Act of 2000 were inconsistent with Articles 2 (b) - (e). Interestingly, this was the only case which India lost as a complainant at the WTO). See Anwarul Hoda, *Dispute Settlement in the WTO, Developing Countries and India* 20 (Indian Council for Research on International Economic Relations Policy Series No. 15, 2012), http://www.icrier.org/pdf/Policy_Series_No_15.pdf.

⁸⁷ Dhar & Majumdar, *supra* note 85, at 8.

⁸⁸ Amrita Narlikar, *India and the World Trade Organization, in THE WORLD TRADE ORGANIZATION: A VERY SHORT INTRODUCTION* 270, 272 (Steve Smith et al eds., 2005).

time. India was no longer considered as a “force that could throw the negotiation process into disarray”, but was considered as a contributor to the coalition building process. As David Deese notes in his work while referring to Brazilian and Indian leadership on the ongoing Doha negotiations, “[f]or the first time there was also a shared structural leadership beyond the United States and the EU at the heart of the international trade negotiations.”⁸⁹ The various developing country coalitions that emerged in the run up to the Cancun Ministerial are testimony to India’s leadership in trade negotiations along with other developing countries.⁹⁰ India was prepared to shed its defensive posture and participate as a more confident player by this time.⁹¹

The loss in *India - QR* had significant political costs, although the economic benefits of eliminating quotas is a matter of further analysis.⁹² In all likelihood, had India’s measures not been challenged, the QRs on almost 1429 items would have been maintained for a longer period.⁹³ This case marks a watershed moment in India’s preparedness for WTO related capacity building, as the removal of long maintained import protection underlined the need to develop the much needed trade-related capacity. Fortuitously, the fear that elimination of QRs would lead to a surge in imports did not happen.⁹⁴

⁸⁹ David Deese, WORLD TRADE POLITICS: POWER, PRINCIPLES AND LEADERSHIP 153-55; see also Gregory Shaffer et. al., *The Trials of Winning at the WTO: What Lies Behind Brazil’s Success*, 41 CORNELL INT’L L.J. 383, 389 (2008).

⁹⁰Ujal Singh Bhatia, *G-20- Combining Substance with Solidarity and Leadership*, in REFLECTIONS FROM THE FRONTLINE: DEVELOPING COUNTRY NEGOTIATORS IN THE WTO (Pradeep S. Mehta ed., 2012)

⁹¹Aravind Panagariya, *It’s a Big World Out There: India in the Global Trading System*, ECON. TIMES, April 4, 2005; see *India Leads New Developing Country Attack on Singapore Issues*, INSIDE U.S. TRADE (August 29, 2003).

⁹² See ARVIND PANAGIRIYA, *INDIA: THE EMERGING GIANT* (Oxford University Press, 2007) (spelling out the reforms required to achieve double digit reform in India which among others include an outward-oriented trade policy).

⁹³ In 1997, India proposed a three-stage and nine-year phase-out schedule, which if had been agreed to by other WTO members would have helped India to maintain QRs until 2006.

⁹⁴ Bishwanath Goldar, *Impact on India of Tariff and Quantitative Restrictions* 16 (Indian Council for Res. on Int’l Econ. Rels. Working Paper No. 172, 2005) (noting that, overall, there has only been a limited increase in imports of products freed from QRs).

Table III
India as a Complainant in WTO Disputes (2004-till date)

Title of the case	Dispute Number	Year of Consultation	Covered Agreement(s)	Sector Concerned
<i>EC – Steel Products</i>	313	2004	GATT 1994, ADA	Steel
<i>US – Customs Bond Directive</i>	345	2006	GATT 1994, ADA	Fisheries/Marine
<i>EU – Expiry Review of AD/CVD on PET</i>	385	2008	GATT 1994, ADA, ACM	Chemicals and Plastics
<i>EU – Seizure of Generic Drugs</i>	408	2010	GATT 1994, TRIPS	Pharmaceuticals
<i>Turkey – Transitional Safeguards</i>	428	2011	GATT 1994, AoS	Textiles
<i>US – CVD on Carbon Steel</i>	436	2012	GATT 1994, ASCM	Steel

Source: WTO (as at April 20, 2013)

Table IV
India as a Respondent in WTO Disputes (2004- Till Date)

Title of the case	Dispute Number	Year of Consultation	Covered Agreement(s)	Sector concerned
<i>India – Lead Acid Batteries (Bangladesh)</i>	306	2004	GATT 1994, ADA	Chemicals
<i>India – Anti-dumping Measures (Chinese Taipei)</i>	318	2004	GATT 1994, ADA	n/a*
<i>India – Import Measures on Wines (EC)</i>	352	2006	GATT 1994	Agriculture/ Wine and Spirits
<i>India – Additional Duties (U.S)</i>	360	2006	GATT 1994	Agriculture/ Wine and Spirits
<i>India – Taxes on Wine and Spirits</i>	385	2010	GATT 1994	Agriculture/ Wine and Spirits
<i>India – Import Measures on Agriculture products (US)</i>	430	2012	SPS	Agriculture
<i>India – Solar Cells and Solar Modules</i>	456	2013	GATT, TRIMS and ASCM	Renewable Energy equipments

* Not available. Multiple sectors have been affected

Source: WTO (as at April 20, 2013)

The total number of WTO complaints filed by members dropped significantly during this period. Interestingly, this was contrary to popular expectation that the work load of the WTO dispute settlement body would increase exponentially. This expectation was based on at least three premises: (i) greater understanding of the WTO dispute settlement mechanism would lead to more violations to be identified; (ii) expiry of the “peace- clause” under the Agreement on Agriculture⁹⁵; and (iii) WTO review of rising trade remedy measures.

It is difficult to identify the reasons for the drastic decline in trade disputes. But one possible reason could be that trade disputes tend to go up and down depending on the economic and political atmosphere prevailing at the time. Another reason could be that disputes are likely to rise during the initial implementing years of a new treaty. According to this view, only additional commitments under a fresh trade treaty could lead to a new wave of trade disputes. Again, the lack of an apparent trade gain may hold back countries from filing new cases.⁹⁶ The delay in the settlement of a trade dispute could be yet another factor. Although the number of disputes to which India was a party had come down markedly during this period, India still had a fairly good success rate in those cases in which it was a complainant. It had successfully challenged the enhanced customs bond requirement imposed by the United States on countries including India.⁹⁷ In certain other cases, even without actively pursuing a matter before the panel, India was able to achieve the desired objective. For example, Indian generic drugs were seized in some ports in Europe (mainly in the Netherlands) based on a suspicion of domestic patent violation under the manufacturing fiction.⁹⁸ India’s

⁹⁵ Article 13 of the Agreement on Agriculture, which is also known as “due restraint”, protects countries using subsidies which comply with the Agriculture Agreement from being challenged under other WTO Agreements. See Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 33 (1999), 1867 U.N.T.S. 410.

⁹⁶ Marco Bronkers & Naboth van den Broek, *Financial Compensation in WTO: Improving the Remedies of WTO Dispute Settlement*, 7 J. INT’L ECON. L. 101(2005); Gary N. Horlick, *Problems With the Compliance Structure of the WTO Dispute Resolution Process*, in THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW 636 (Daniel Kennedy & James Southwick eds., 2002). See also Gregory Shaffer, *The Challenges of WTO Law: Strategies for Developing Country Adaptation*, 5 WORLD TRADE REV. 177, 177 (2006) (discussing the general challenges posed by the WTO dispute settlement system).

⁹⁷ Appellate Body Report, *United States – Customs Bond Directive For Merchandise Subject to Anti-dumping/ Countervailing Duties*, WT/DS/AB/345/R (July 16, 2008) (adopted July 28, 2008) [hereinafter *US – Customs Bond Directive*].

⁹⁸ The IP status of in-transit medicines were judged under the fiction that the medicines have been manufactured in the concerned EU jurisdiction. Under the Border Measures Regulation 1383/2003, Dutch, and on one occasion German, customs authorities

WTO challenge prompted the EU to re-examine its policy with respect to the seizure of in-transit generic drugs.⁹⁹ The matter was resolved without resorting to a panel process at the WTO.¹⁰⁰

As a respondent, India faced a challenge from the United States against India's levy of "additional duties" and "extra additional duty" on wine, spirits and other agricultural and manufactured products as being inconsistent with WTO commitments and in particular, with Article II:1(a) and (b) as well as Article III:2 of the GATT.¹⁰¹ The panel ruled in favour of India whereas the Appellate Body reversed the panel findings.¹⁰² The Additional Customs Duty which was challenged was imposed to offset the incidence of state level excise duty charged on domestically manufactured products. The duty was pegged at the highest level of state taxation. Removing this duty for imports without removing excise duty for domestically manufactured wine and spirits was not easy.

2. Human and Institutional Capacity

During Phase-I and Phase-II of India's engagement with the dispute settlement system, India had articulated its case through official diplomats or Geneva or Brussels based law firms and other agencies such as the Advisory Centre on WTO Law (ACWL). However, it appears that of late, India has gained the confidence to appoint domestic Indian legal practitioners in representing India's case before the panels and the Appellate Body. Records indicate that India did not avail the services of ACWL for any dispute after 2004.¹⁰³ However, in one of the interviews with a trade official in the Department of Commerce, it was stated that India had sought legal opinion from ACWL with respect to various legal issues.¹⁰⁴ In any case, rendering legal opinion is not a deep and pervasive involvement with the process and is a service that is provided free of cost on most occasions.¹⁰⁵

detained 20 shipments of generic drugs. See John Miller & Geeta Anand, *India Prepares EU Trade Complaint*, WALL ST. J. (Aug 6, 2006).

⁹⁹ Request for Consultations by India, *European Union – Seizure of Generic Drugs in Transit*, WT/DS408/1 (May 11, 2010).

¹⁰⁰ Press Release, Government of India, India EU Reach an Understanding on Issue of Seizure of Indian Generic Drugs in Transit, (July 28, 2011).

¹⁰¹ Appellate Body Report, *India – Additional and Extra-Additional Duties on Imports from the United States*, WT /DS 360/AB/R (Oct. 30, 2008) (*adopted* Nov. 17, 2008) [hereinafter *India – Additional Duties*].

¹⁰² *Id.*

¹⁰³ Advisory Centre on WTO Law, Reports on Operations (2006-2010), available at: <http://www.acwl.ch/e/about/reports.html>.

¹⁰⁴ Interview with a Department of Commerce Official, [Name Withheld] (May 17, 2011) (on file with author).

¹⁰⁵ *Id.*

There was a conscious effort during this time to engage domestic lawyers and law firms in WTO litigation. Economic Laws Practice (ELP),¹⁰⁶ a law firm with offices in Mumbai and New Delhi, was retained at the panel and Appellate Body stage for India in *India – Additional Duties*.¹⁰⁷ Krishnan Venugopal and Frederick Abbot were consulted¹⁰⁸ for the *EC - Drug Seizure*. Currently, the Department of Commerce has engaged Luthra and Luthra Law Offices for the *India – Agricultural products*¹⁰⁹ and Lakshmikumaran and Sridharan for the *US – Steel Plate*¹¹⁰ disputes. Clarus Law Associates has been retained by the MoCI in the WTO consultation initiated by the United States in early 2013 on India's measures concerning solar cells and solar modules.¹¹¹ On the whole, India's reliance on foreign lawyers and law firms was limited during this period and the focus was to develop domestic legal capacity.

An important point to note is that during Phase-II, India depended on a relatively limited pool of talent for defending or pursuing its interests in the GATT/WTO dispute settlement. It is still unclear whether dependence on a limited number of legal professionals has constrained India's capacity in WTO dispute settlement, either in bringing new claims to the DSB or in participating as a third party in some of the important cases. At least the absence of any major adverse finding against India during this period demonstrates that India's dispute management skills have significantly improved during Phase-II when compared to Phase-I.

3. Stakeholder capacity

Stakeholder capacity is critical to successfully bringing a claim of WTO violation before a dispute settlement panel. The proactive role played by the industry stakeholders in India in *US – Custom Bond Directive*¹¹² is an interesting case study. In February 2005, the U.S. Customs implemented the enhanced bonding

¹⁰⁶ *WTO Update: The Wine and Spirits Dispute against India*, (Trade Newsletter of Economics Laws Practice, Mumbai, Issue 1, 2007) (on file with author), at 1.

¹⁰⁷ *India – Additional Duties*, *supra* note 101.

¹⁰⁸ Letter from Mukesh Bhatnagar, Director, Trade Policy Division, to Prashant Reddy, Reply filed under the Right to Information Act, 2005, F. No.1/13/2012, Ministry of Commerce and Industry (March 6, 2012) (copy on file with author).

¹⁰⁹ Request for the Establishment of a Panel by the United States, *India – Measures Concerning the Importation of Certain Agricultural Products*, WT/DS430/3 (May 14, 2012).

¹¹⁰ Request for the Establishment of a panel by India, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel flat Products from India*, WT/DS436/3 (July 13, 2012).

¹¹¹ Meeting with Anuradha R.V., Partner, Clarus Law Associates, in New Delhi on Feb. 15, 2013.

¹¹² *US – Customs Bond Directive*, *supra* note 97.

requirement with respect to all imports of certain warm water shrimp from India, subject to anti-dumping duties. This measure was allegedly taken to ensure full collection of anti-dumping or countervailing duties under the U.S. retrospective system of duty collection.

Following the application of the enhanced bond requirement, the shrimp exporters/importers faced significantly higher security obligations. In this matter, the response of the government sponsored Marine Products Exporters Development Authority (MPEDA) and of the Seafood Exporters Association of India (SEAI) are worth mentioning. These two agencies have the mandate, *inter alia*, to enhance market access opportunities available for seafood products from India. These two agencies were also intimately involved in defending Indian exporters in the anti-dumping investigation on certain frozen warm water shrimp before the U.S. authorities. The seafood exporters, who are by and large scattered, saw their exports declining by almost one-third consequent to the imposition of the anti-dumping duties in the U.S. in 2004 and pledged their support.

According to an official of the SEAI, the experience of working together with the industry stakeholders beginning from the choice of an overseas law firm to assistance during the verification process and subsequent hearing before the U.S. agencies helped in the better understanding of issues. MPEDA and SEAI also contributed to the lawyer's fee and other expenses.¹¹³ An intimate involvement with the whole process helped MPEDA and SEAI effectively articulate and explain the complex matters to officials in the Trade Policy Division, MoCI and the Indian Embassy in Washington, D.C.

An official of SEAI stated in an interview that effective participation in dispute settlement matters hinges to a significant extent on familiarity with the importing country system.¹¹⁴ The official added that the Indian seafood exporters had to pay a high price for their ignorance of the U.S. anti-dumping technicalities and had to spend nearly US \$12 million (equivalent to Indian Rupees 60 crores at the 2012 average exchange rate) for defending the case at various stages (2003-2010) including the administrative reviews whereas challenging the measure at WTO was

¹¹³ Telephonic interview with Zandu Joseph, Secretary, SEAI (May 12, 2011) (on file with author). It is stated that the funding was provided from the Market Access Initiative of the Marine Product Export Development Authorities (MPEDA), available at: <http://www.mpeda.com/HOMEPAGE.asp> (last visited May 27, 2011). See also B. Bhattacharyya, *The Indian Shrimp Industry Organizes to Fight the Threat of Anti-dumping Action*, in *MANAGING THE CHALLENGES OF WTO PARTICIPATION: 45 CASE STUDIES*, 241 (Peter Gallagher *et al.* eds., 2007) (noting that the MPEDA and the Indian shrimp exporters paid an amount of 70 million Indian rupees for defending this case).

¹¹⁴ Telephonic interview with Zandu Joseph, Secretary, SEAI (May 14, 2011) (on file with author).

cost effective.¹¹⁵ Obviously one has to take into account the complex questionnaire responses and injury analysis typical of the U.S. system.

Evidence suggests that, as expected, trade disputes concerning India have focused on textile and apparel items, seafood products, steel, and pharmaceutical products. India is not yet a leading exporter of IT hardware products and other agricultural items including alcoholic beverages, which traditionally have greater exposure to WTO dispute settlement actions. In the future, some of these growth oriented sectors should assume greater responsibility for identifying trade barriers and dealing with them through dispute settlement means.

The role played by the UNCTAD, MoCI and DFID Project on “Strategies and Preparedness for Trade and Globalisation in India” [UNCTAD-DFID-MOCI Project]¹¹⁶ deserves a special mention here. The Project was started in the year 2003 and ended in 2010. This project had two inter-related components: Component I and Component II. Component I was aimed at assisting the Indian trade negotiators, policy makers and other stakeholders in enhancing an understanding of the development dimension of multilateral trade negotiations. Component II sought to strengthen human and institutional capacities to enhance stakeholders’ understanding of globalization and to facilitate a policy environment that would support and sustain an equitable process of globalization.

The UNCTAD-DFID-MOCI Project had its limitations in strengthening the capacity of lawyers. A few seminars and trainings on dispute settlement aspects were indeed organized;¹¹⁷ however, the thrust of the Project was to understand and approach various issues with an informed mind. During my interviews with various Component II partners of this Project,¹¹⁸ it was evident that the stakeholders’ ability to understand and appreciate the issues was considerably enhanced by the Project. UNCTAD and the project partners conducted a series of stakeholder consultations in India on issues under the Doha work program and various FTA and sector specific negotiations. The involvement of apex and small industry associations in this project made the government-industry interaction substantial and meaningful.

¹¹⁵ *Id.*

¹¹⁶ The capacity building project was a joint initiative of UNCTAD, Government of India and the Department for International Development, UK. See Press Release, Government of India, Project on Strategies and Preparedness for Trade and Globalization in India to Facilitate Informed Consensus on Key WTO Issues: UNCTAD (Aug. 19, 2003).

¹¹⁷ UNCTAD-DFID-MOCI Project, *Building Capacity For Trade, Project Wrap-up Report* (2010) (on file with author).

¹¹⁸ Interviews with Component II Partners of the UNCTAD-DFID-MOCI Project, [Name withheld] (April 18, 2011).

III. INDIA AND WTO DISPUTES: PROSPECTS AND CHALLENGES

India's role in the WTO negotiating process is well known. In the words of Marc Galanter, there are two types of litigants: one-shotters, who take occasional recourse to courts, and repeat players, who are engaged in similar disputes over an extended period of time.¹¹⁹ Repeat players have long-term interests and play for the rules. The fact whether a party is a repeat player or a one-shooter matters significantly in assessing its ability to extract benefits from the system. This analogy may be useful in the context of WTO dispute settlement as well.

In terms of the number of disputes (both as complainants and respondents), India tops the list of developing country users of the WTO dispute settlement system. In the last 18 years, India has filed cases mainly against various high income and upper middle income countries. The only exception to this list is Turkey, which is a low middle-income country. India has used the dispute settlement process to seek remedies against countries which it would not have been able to do in a power oriented system. As a repeat player, India has used the system effectively to challenge measures taken by powerful trading nations such as the United States in *US – Shirts and Blouses*, *US – Shrimp*, *US – Steel*, *US – Byrd Amendment* and *US – Customs Bond*, and the European Union in *EC – Bed Linen*, *EC – GSP*, etc. As I have already stated *in passim*, each of the above disputes had a profound role in shaping WTO jurisprudence and has significant systemic importance. Without the benefit of previous experience of some of the early disputes under the new WTO dispute settlement system, it is difficult to imagine whether India could have contributed to the development of landmark jurisprudence.

The public-private partnership model followed in India has severe limitations. Nonetheless, in certain sectors such as fisheries, textiles products and generic drugs, the collaborative model pursued by India has been remarkably efficient. A bottom-up initiative from stakeholders can encourage the internal administrative division responsible for trade policy to take up complaints expeditiously. The *US – Customs Bond Directive* and the *EC – Drug Seizure* disputes are testimonies to the fact that if local coordination within stakeholder groups is effectively managed, there will be greater certainty and urgency in pre-litigation stakeholder alignment and preparedness for dispute settlement actions. In both these cases, India's leadership role persuaded other similarly affected countries to file separate complaints.

¹¹⁹ Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits Legal Change*, 9 LAW & SOC'Y REV. 95, 97 et seq. (1974) (provides a socio-legal analysis of dispute settlement in the U.S. legal system); see also Alvaro Santos, *Carving out Policy Autonomy for Developing Countries in the World Trade Organization: The Experience of Brazil and Mexico*, 52 VIRGINIA J. INT'L L. 551, 573 (2012).

At a broad sectoral level, it does not appear that India has developed sufficient capacity to deal with potential disputes. India has very little experience in dealing with fact-intensive disputes involving SPS or TBT matters.¹²⁰ These disputes call for engagement of experts during the pre-litigation and litigation stage. India's engagement in the recent challenge¹²¹ by the US against certain import measures adopted by India on ground avian influenza needs to be examined with interest.¹²² The following section examines whether India has adequate levels of institutional, human and stakeholder capacity to promptly identify and initiate WTO inconsistent actions by other members.

A. Internal Decision-making Process

Even when the Indian government consciously develops capacity in WTO matters, it has to deal with constraints and difficulties which are unique to the Indian administrative system. The WTO has a mandate which is significantly broader and unquestionably more complex than that of its predecessor, the GATT. Agreements reached at the WTO or decisions adopted in certain cases can affect multiple sectors of the economy. It is therefore necessary to examine whether there is a need to reorganize the system so as to make it more effective to respond to various challenges.

Trade policy in India is primarily the responsibility of the Ministry of Commerce and Industry (MoCI) and it plays a key role in defining and formulating the trade and external commercial policy.¹²³ The MoCI occupies a unique and special space in trade policy governance; it used to formulate policy largely in isolation without necessarily seeking the concurrence of other branches of the government. Even the Ministry of External Affairs (MEA) has a limited role in this area. The MoCI also negotiates bilateral and regional agreements. However, the consistency and harmony of domestic and external policies is addressed at the Union Cabinet level headed by the Prime Minister with the assistance of advisory

¹²⁰ See Chad P. Bown & Rachel McCulloch, *Developing Countries, Dispute Settlement, and the Advisory Centre on WTO Law*, 19 (2) J. INT'L TRADE & ECON. DEV 33, 37 (2010) (arguing that detecting less visible trade barriers such as subsidies, SPS measures and technical regulations is more resource intensive and requires greater coordination and communication with the private sector).

¹²¹ Request for the Establishment of a Panel by the United States, *India – Measures Concerning the Importation of Certain Agricultural Products*, WT/DS 430/3 (May 14, 2012).

¹²² Suhail Nathani & James Nedumpara, *India Back Among WTO Disputes: An Update on India's Current and Potential WTO Disputes*, 7 (11) GLOBAL TRADE & CUSTOMS J. 466, 468 (2012) (providing an analysis of India's recent WTO consultations).

¹²³ Official Website of the Department of Commerce, Ministry of Commerce and Industry, Government of India, available at: http://commerce.nic.in/trade/international_trade.asp?id=1&trade=i (last visited July 29, 2013).

committees. Before an important policy measure is formulated and adopted, inter-ministerial consultations with key Ministries such as the Ministry of Finance (MoF) and Ministry of External Affairs (MEA) is invariably undertaken. Ministry of Textiles (MoT), Ministry of Agriculture (MoA) and other nodal Ministries are involved on a case by case basis. Moreover, there is a Standing Committee of the Cabinet formed to advise the Prime Minister on WTO matters.¹²⁴ As on August 30, 2011, this Committee consisted of the Ministers of Commerce and Industry, Law, Finance, Home Affairs, Human Resources Development, Communication and Information Technology.¹²⁵ The Standing Committee of the Cabinet is invariably consulted on negotiating positions and strategies, and the Prime Minister and his office is constantly kept informed of the progress and status of the negotiations.¹²⁶ The Commerce Minister is also bound to brief the Parliament with respect to the developments in the negotiations.

In addition, a separate institutional mechanism known as Trade and Economic Relations Committee (TERC) has been constituted in 2005 to draw up the extent, scope and operational parameters of India's economic relations with other countries in a co-ordinated and synchronised manner. TERC is chaired by the Prime Minister and serviced by the Prime Minister's Office. TERC has met eighteen times until 2012 and has been instrumental in determining the mandate for negotiating groups in a number of free trade agreements involving India.¹²⁷

Although the current structure of trade policy formulation is working in India, inter-ministerial coordination can be delaying at times. Again, the state governments whose policies may have an impact on India's WTO commitments need to be consulted on a regular basis. This is particularly important when the subject matter of the governmental policy falls within the concurrent list of the Indian Constitution. The concurrent list is a list of subjects on which both the union and the state governments have a right to legislate.¹²⁸ In the *India – Additional Duties*¹²⁹ dispute, India faced challenges from the United States and

¹²⁴ See Schedule 1 of the Government of India (Transaction of Business Rules), 1961, available at: http://cabsec.nic.in/showpdf.php?type=allocation_businessrule.

¹²⁵ See Composition and Functions of the Cabinet Committees (as on Aug. 30, 2011), at 9, available at: http://cabsec.nic.in/files/archive/cabinet_committees_30.08.2011.pdf.

¹²⁶ Prior to the finalization of a note for the Union Cabinet or the Cabinet Committee, the concerned issues are discussed at a Committee of Secretaries (CoS) or a Group of Ministers (GoM) to arrive at a consensus on the contentious matters. Interview with an official in the Govt, of India, [Name Withheld], in New Delhi (April 28, 2013) (on file with author).

¹²⁷ See Sujay Mehdudia, *The PM-headed panel for early ASEAN Agreement*, THE HINDU, Nov. 3, 2012.

¹²⁸ See INDIA CONST. art. 256(3); see also INDIA CONST. List III, Schedule VII.

¹²⁹ Appellate Body Report, *India – Additional and Extra-Additional Duties on Imports from*

European Union regarding its duty regime on imported wine and spirits. The additional duty was originally introduced by the federal (Union of India) government in lieu of the incidence of state level excise duties on domestically manufactured wine and spirits at the point of importation.¹³⁰ Since different states apply different rates of excise duty, the uniform rate of the border adjusted duty in certain cases exceeded the equivalent rate of state duty leading to a WTO complaint. One of the options to deal with this problem was to eliminate additional duties, but such a step could have created a bias against domestically manufactured goods. In such situations, coordination between various state governments in India is necessary to formulate a coherent and uniform system of internal taxation which is consistent with India's WTO obligations.

The current system of needs-based coordination is not optimal. Inter-departmental consultations generally take place only when a trade dispute is around the corner or when the MoCI has to respond to certain queries or request for clarifications from other WTO members. Furthermore, the level of understanding of WTO issues within specialized ministries leaves room for improvement. Specialized ministries overwhelmingly depend on MoCI for guidance on WTO issues and have little capacity of their own to undertake independent assessment. Interviewees noted that officers who have worked at the MoCI do not often get opportunity to work on trade related areas in their subsequent postings in other specialized ministries.¹³¹ In other words, there is no emphasis to tap the existing resources within the government by deploying them in other specialized ministries which may have a direct interface with WTO matters. The capacity of the negotiating group must also be strengthened. The MoCI, and especially the Trade Policy Division (TPD), continue to attract competent officers from the Indian Administrative Service, the Indian Foreign Service and other allied services.¹³² However, the system should gear towards empowering the current policy makers and negotiators to serve the system better. Some officers whom I interviewed have admitted that despite the steady rise in human and institutional capacity in India,

the United States, WT/DS360/AB/R (Oct 30, 2008).

¹³⁰ WTO Members may use customs services to collect internal charges in respect of imported products and may make the importation of products conditional upon the payment of charges equivalent to internal taxes on like domestic products. See Frieder Roessler, Comment, *India – Additional and Extra-Additional Duties on Imports from the United States*, American Law Institute Reporters Studies on WTO Law (2009), available at: [http://www.ali.org/doc/wto/wto2008/7%20Additional%20Import%20Duties%20\(India\)%20Comment.pdf](http://www.ali.org/doc/wto/wto2008/7%20Additional%20Import%20Duties%20(India)%20Comment.pdf)

¹³¹ Interview with a government official in New Delhi [Name Withheld], April 20, 2013.

¹³² The preference for deputation positions in key economic ministries is clearly evident if one looks at some popular websites such as <http://whispersinthecorridors.com>; and <http://www.babusofindia.com>.

Indian negotiators and officials in the TPD or in India's Mission in Geneva would like to seek second opinions from overseas legal or consulting firms including ACWL before deciding to go-ahead in a WTO dispute.¹³³ This often points to the unavailability or limited availability of competent legal services in conclusively taking a call on critical WTO disputes. However, a wave of new disputes involving India at the WTO could potentially change this situation as more and more Indian lawyers could get the opportunity to work on WTO disputes.¹³⁴

B. Profile of Indian Trade remedies investigation agencies

India is one of the leading initiators of anti-dumping actions in the world.¹³⁵ India has initiated more anti-dumping action than any other country in the world ever since the establishment of the WTO¹³⁶ and has been largely fortunate not to be involved in any long drawn dispute with any other WTO country. As Mark Wu notes, India's major trading partners such as the US and the EU have not viewed India's anti-dumping regime as problematic.¹³⁷ Although the EC challenged¹³⁸ a number of anti-dumping actions (27 investigations) by India against EC member countries, the dispute was not actively pursued.

A number of Indian lawyers have gained significant experience in anti-dumping investigation and litigation.¹³⁹ The official body in India administering

¹³³ Interview with an official in the MOCI, in New Delhi [Name withheld], May 25, 2012 (on file with author)

¹³⁴ There has been a deliberate effort to engage Indian law firms or lawyers in the recent disputes. The Indian government has been represented in all the recent disputes (2011-13) by either Indian law firms or lawyers.

¹³⁵ See <http://www.anti-dumpingpublishing.com/info/free-resources/anti-dumping-statistics.aspx> (last visited May 24, 2011); see also <http://www.globaltradealert.org> (last visited May 24, 2011).

¹³⁶ World Trade Organization, *Anti-dumping Investigations by Reporting Member from 01/01/1995 to 30/06/2012*, available at: http://www.wto.org/english/tratop_e/adp_e/AD_InitiationsByRepMem.pdf.

¹³⁷ Mark Wu, *Anti-dumping in Asia's Emerging Giants*, 53 HARV. J. INT'L. L. 1, 23 (2012) (noting that on an overall rule-of-law perspective, both India and China are in compliance with international treaty obligations on Anti-dumping).

¹³⁸ Request for Consultation by the European Communities, *India – Anti-Dumping Measures on Imports of Certain Products from the European Communities*, WT/DS304/1 (Dec 8, 2003) (after consultation between India and the EC, mid-term reviews were initiated in certain cases, which seemed to result in a solution). See Satoru Taira, Tara Hamda and Naofumi Makino, *India*, in ANTI-DUMPING LAWS AND PRACTICES OF NEW USERS 165, 198 (Junji Nakagawa ed., 2007) [hereinafter ANTI-DUMPING LAWS AND PRACTICES OF NEW USERS].

¹³⁹ *Chambers and Partners, Asia Pacific Guide for Lawyers* (2011), available at: http://www.chambersandpartners.com/Asia/Editorial/41754#org_112542.

anti-dumping measures, namely the Directorate General of Anti-dumping and Allied Duties (DGAD), has come of age in handling complex investigations on a wide variety of products. However, certain aspects of its functioning have been frequently called into question in the concerned WTO committees.¹⁴⁰ The approach followed while establishing injury and causal link in anti-dumping proceedings is also not without blemish. The extant approach to causality determination is, by and large, qualitative and the DGAD does not engage professional econometricians to take care of quantitative approaches.¹⁴¹ In practice, the threshold for injury and causation is met so long as the injury can be attributed to dumping.¹⁴² The DGAD has to substantially augment its resources while performing the injury and causal link analysis.¹⁴³ In the absence of a requirement to provide econometric analysis of injury and causation, most of the law firms carrying out trade remedy work in India are yet to engage economists or experts with quantitative skills.¹⁴⁴ In other words, lack of rigorous approach in the injury and causation standards has hindered the development of expertise in the area of injury analysis—a key component of an anti-dumping investigation. Moreover, relatively lax approaches could make the decisions of the DGAD susceptible to adverse findings in the appellate forums including the WTO panels.

Furthermore, India has not yet imposed a countervailing duty (CVD) on imports. An investigation with respect to imports of sodium nitrite from China was initiated in January 2008, but was terminated without the imposition of countervailing duties.¹⁴⁵ Even in this area, there is a need to strengthen the capacity of the investigation agency.

Finally, the safeguard mechanism has been haphazardly used in India.¹⁴⁶ Although India has conducted several safeguard investigations and few actions are

¹⁴⁰ World Trade Organization, Trade Policy Review Body, *Minutes of the Meeting of 14 and 16 September*, WT/TPR/M, 249 (Oct. 14, 2011).

¹⁴¹ Interview with a Mumbai based trade lawyer, [Name Withheld], Aug. 26, 2012.

¹⁴² Mark Wu, *Anti-dumping in Asia's Emerging Giants*, *supra* note 137, at 13.

¹⁴³ DGAD has twelve investigating and costing officers to conduct investigation, but has no separate economic division. *See* Department of Commerce, Annual Report 2011-12, available at: http://commerce.nic.in/publications/pdf/CHAPTER_1.pdf.

¹⁴⁴ Interview with a DGAD official, [Name withheld], in New Delhi (Jan. 7, 2012) (on file with author).

¹⁴⁵ World Trade Organization, WTO document G/SCM/N/212/IND (Sep. 6, 2010).

¹⁴⁶ An overall review of safeguard investigations in India indicates that the DG Safeguards does not often provide a detailed analysis of 'unforeseen developments' or 'non-attribution' requirement in the injury and causation analysis. The WTO panels and Appellate Body in several cases have explained that a failure to satisfactorily establish these aspects would render a safeguard investigation inconsistent with the rigorous standards of Article XIX of the GATT and Articles 2 and 4 of the Agreement on Safeguards. *See* Alan

pending at present, a cursory reading of some of the safeguard findings makes one wonder how such findings could stand judicial scrutiny. The Directorate General, Safeguards (DG Safeguards) is quite poorly equipped at present and does not generally engage professional accountants or statisticians. Most of the personnel are appointed on deputation basis and do not have sufficient experience of conducting complex analyses including trend analysis, causation determination, etc.¹⁴⁷

C. Domestic courts and WTO dispute settlement

There are specialised Indian tribunals such as the Central Excise and Service Tax Appellate Tribunal (CESTAT) empowered to hear appeals from the findings of trade remedy investigating agencies such as the DGAD and DG Safeguards. The decisions of CESTAT can be appealed to the concerned state High Court and also the Supreme Court of India. Although CESTAT is considered as a specialised tribunal, its reputation in dealing with trade law related disputes is not stellar.¹⁴⁸ It has arrived at a series of erroneous findings with respect to the interpretation of the implementing statute that incorporates the WTO commitment at the domestic level, most of which were taken up in appeal to the Supreme Court.¹⁴⁹

Even the Supreme Court of India has made gross errors of interpretation of the implementing legislation, namely the Customs Tariff Act, 1975 (as amended) with respect to basic concepts. Two decisions that are worth mentioning include the decisions of the Supreme Court in *Designated Authority v. Haldor Topsoe*¹⁵⁰ and *Reliance Industries v. Designated Authority*¹⁵¹. The Supreme Court held in the latter case that 'Normal Value' in a dumping margin calculation was country-specific and not exporter-specific as any trade practitioner would understand that term. The Central Government had to make an amendment to the Customs Tariff Act in order to rectify this error of appreciation.¹⁵² Regrettably, the DGAD had to follow the

Sykes, *The Safeguard Mess: A Critique of WTO Jurisprudence* 14-21 (Univ. of Chicago Law School John M. Olin Law & Econ. Working Paper No. 187, 2003), available at: http://ssrn.com/abstract_id=415800.

¹⁴⁷ Response to a query under the Right to Information Act (Nov. 11, 2009) (on file with author).

¹⁴⁸ *Anti-dumping Laws and Practices of New Users*, at 184 (noting that the average time taken for disposal of an appeal is 17 months).

¹⁴⁹ It is reported that as of January 2013, almost 25 special leave petitions were pending before the Supreme Court of India against the finding of CESTAT. See M.N. Jha, *India: A 3-Tier Judicial Review System*, in JUDICIAL REVIEW OF TRADE REMEDIES (Muslum Yilwaz eds., 2013).

¹⁵⁰ *Designated Authority v. Haldor Topsoe*, (2000) 6 S.C.C. 626 (India).

¹⁵¹ *Reliance Industries Ltd. v. Designated Authority*, 2006 (2) E.L.T. 23 (India).

¹⁵² The Finance Act, No. 26 of 2009, INDIA CODE (amending Subsection 1 of Section

incorrect methodology suggested by the Supreme Court till the applicable legislation was amended in 2009.

D. *Bringing Disputes to WTO*

In trade capacity literature, a country's participation in a system is a function of its ability to process knowledge of trade injuries, their causes and their relation to the concerned treaty provisions.¹⁵³ A number of developed countries such as the United States and European Union have put in place clearly defined channels for the affected parties to complain about foreign trade barriers in other countries.¹⁵⁴ Most of the developing countries do not provide a mechanism to entertain formal complaints or petition which could trigger a consultation process. Certain officials in the Trade Policy Division commented that the absence of a formal complainant need not impede the ability of a country to bring legitimate disputes to the notice of the TPD.

However, interviews with private industry sources reveal that there is a certain lack of proper communication flow between the policy makers and the private industry members.¹⁵⁵ Various Ministries in India compile trade statistics and other data to highlight the performance of the concerned sectors on a regular basis. However, as Stephen Denning once remarked, “[o]rganizations that focus completely on collecting information with little or no effort to foster people connections end up with repositories of dead documents”.¹⁵⁶ There seems to be a lack of coordination between ministries in India and private sector stakeholders.¹⁵⁷ Unless the government takes ownership of the private industry grievances, complaints for seeking WTO consultation on a specific matter are unlikely to make much headway.

The consultation sought by India against the EC in the PET resin case is an

9A of the Customs Tariff Act, 1975 by substituting the words “any article is exported by an exporter or producer” for the words “any article is exported”).

¹⁵³ Shaffer *et al.*, *The Trials of Winning at the WTO*, *supra* note 89.

¹⁵⁴ See Trade Act of 1974, Pub. L. 93-618, §301 (a) (1), 88 Stat. 1978 (1975); Council Trade Barrier Regulation 3286/94, 1994 O.J. (L349) 71 (EC), amended by Council Regulation Nos. 356/95 and 125/2008.

¹⁵⁵ Telephonic interview with an official in an Indian petro-chemical company (Jan. 12, 2012) (on file with author)

¹⁵⁶ Stephen Denning, *Technical Cooperation and Knowledge Networks*, in *CAPACITY FOR DEVELOPMENT: OLD SOLUTIONS TO NEW PROBLEMS*, 242 (Fukuda-parr, Khalid & Malik eds., 2002).

¹⁵⁷ The success of the Right to Information Act, 2005, which recognizes the right of citizens to seek information regarding the process of administrative decision making, is noteworthy in this regard.

interesting study.¹⁵⁸ The subject matter of the consultation request was the expiry review of anti-dumping and anti-subsidy measures initiated by the EC on certain PET products from countries including India. The allegation was that the expiry reviews were not initiated within the five year period of the imposition of original measures and thereby constituted a violation of Article 11.3 of the WTO Agreements on Anti-Dumping (ADA) as well as on Subsidies and Countervailing Measures (SCM). The alleged review was initiated on December 1, 2005 and the consultation request was filed only in 2008, although the concerned industry seems to have brought this matter to the notice of the government in 2006.¹⁵⁹ It goes without saying that even if a panel is established and the dispute proceeds on time, the panel findings would not have come out before the end of the expiry review measures. The panel process has therefore been rendered redundant in such a scenario. Far worse, the industry that had spent considerable resources in taking up this complaint this far admitted that they could not say with certainty whether the matter was dead or active at the time. A member of the Polyethylene Terephthalate Forum (PET Forum), the concerned industry association admitted that for them the case is lost forever and that it would not make business sense to enquire whether remedies have a prospective or retrospective effect in WTO jurisprudence.¹⁶⁰

There is a need to institutionalise the relationship between the government and the private sector in India. In the United States, section 301 of the Trade Act has been used by the USTR to protect export interests; likewise, under the Trade Barrier Regulation in the EU, individuals can approach the Commission to investigate possible trade barriers.¹⁶¹ The facility provided under section 301 of the Trade Act in the U.S. and the Trade Barrier Regulation in the EU enables the government to permit private parties and business enterprises to open a channel of communication with the concerned governmental authorities as well as to seek unofficial alignment of private interests.¹⁶² China too has invested heavily in developing WTO-related legal capacity in recent times and has participated as a third party in almost every WTO case since August 2003.¹⁶³ In addition, China has

¹⁵⁸ Request for Consultations by India, *European Communities – Expiry Reviews of Anti-dumping and Countervailing Duties Imposed on Imports of PET from India*, WT/DS385 (Dec. 4, 2008).

¹⁵⁹ Telephone interview with a lawyer of an international law firm based in London that represented the PET industry. [Name withheld] (May 29, 2011) (on file with author).

¹⁶⁰ Telephonic Interview with the Senior Vice-President of a PET manufacturer based in Mumbai, [Name withheld] (May 28, 2011) (on file with author).

¹⁶¹ Trade Act of 1974, *supra* note 154.

¹⁶² Kent Bohl, *Problems of Developing Country Access to WTO Dispute Settlement*, CHI.-KENT J. INT'L. & COMP. L. 156 (2009); *see also* GREG. SHAFFER, DEFENDING INTERESTS: PUBLIC PRIVATE PARTNERSHIP IN WTO LITIGATION (2003).

¹⁶³ David Evans & Gregory Shaffer, *Introduction to DISPUTE AT THE WTO: THE*

encouraged participation of its private lawyers in disputes where it is involved as a third party.¹⁶⁴ This kind of an interaction can help some of the possible violations of WTO agreements to be taken up expeditiously.

It will be a major reform if India could set up a structured process to investigate claims of violation of WTO rules. The Department of Foreign Affairs and Trade (DFAT) in Australia has instituted the WTO Disputes Investigation and Enforcement Mechanism to which the affected parties can formally complain.¹⁶⁵ Lodging a complaint will set in motion a formal process to examine the legal and factual claims from the affected parties. A preliminary assessment will be made within 30 days and a detailed assessment within 60 days if there is prima facie merit in the case. The exporter will then be required to make a formal petition to initiate the WTO dispute settlement consultations. The beauty of this mechanism is that the affected exporters have an opportunity to get a formal response on their petition within a specified time limit.¹⁶⁶ It is important for India to adopt a structure that would foster and encourage domestic stakeholders to express themselves. The model adopted by DFAT in Australia in this area is particularly impressive.

E. Stakeholder capacity: Empowering the Third Pillar

Domestic law firms in India were keen to enter the field of international economic law practice once they realized that the WTO might have a huge impact on the economy. During the launch of the Doha negotiations, several law firms led delegations to Geneva and to the WTO to explore the viability of establishing WTO or international trade law practice.¹⁶⁷ A few such firms have been successful, at least in attracting some work in the field of anti-dumping and countervailing duties.¹⁶⁸ However, most of these firms have found it difficult to gather much

DEVELOPING COUNTRY EXPERIENCE (Gregory Shaffer and Ricardo Meléndez-Ortiz, eds., 2010).

¹⁶⁴ H. Liyu & H. Gao, *China's Experience in Utilising the WTO Dispute Settlement Mechanism*, in GREG SHAFFER, *DEFENDING INTERESTS: PUBLIC PRIVATE PARTNERSHIP IN WTO LITIGATION* (2003); see also Wehualji and Cui Huang, *Chinese Experience in Dealing with WTO Dispute Settlement: A Chinese Perspective*, 45 *J. WORLD TRADE* 1 (2011).

¹⁶⁵ Official website of Dept. of Foreign Affairs and Trade, Govt. of Australia, <http://www.dfat.gov.au> (last visited May 24, 2011).

¹⁶⁶ James Nedumpara, *South Asia and WTO Dispute Settlement*, SAWTEE Publication, Kathmandu (2007), <http://www.sawtee.org/publications/Discussion-Paper-8.pdf>.

¹⁶⁷ Interview with a Managing Partner of a Law Firm [Name Withheld] (Oct. 26, 2011).

¹⁶⁸ Interview with a Partner in a New Delhi based law firm (Feb. 28, 2012) (on file with author) (noting that a substantial amount of work is in the field of anti-dumping practice, although some law firms advise clients on CVD investigations on Indian exporters mainly in the US and EU.)

work in this area. Some of the upcoming law firms have hired lawyers with good academic backgrounds and some professional experience in starting this branch of practice. A number of such law firms initially provide *pro bono* advice to various bodies, including MoCI, largely to keep alive this niche area of practice. A good number of such law firms periodically publish newsletters and trade alerts with a view to reaching out to potential clients. Some of the newsletters and other publications have demonstrated a fairly high understanding of WTO law, at least from an academic point of law. A bulk of the associate lawyers who focused on international trade law earlier have partly shifted to competition law practice, which, to an extent, shares significant similarities with anti-dumping practice.¹⁶⁹

There is evidence that the MoCI is keen to develop a pool of domestic lawyers specializing in WTO law. As indicated earlier, the MoCI has hired almost exclusively Indian law firms in the recent consultation proceedings at the WTO.¹⁷⁰ A number of domestic firms have also been engaged in preparing third party submissions in recent WTO disputes.¹⁷¹ It is pertinent to note that India joined as a third party in almost a dozen new disputes in the year 2012. The increased dispute settlement activity will imply more work for international trade lawyers based in India.

Likewise, industry bodies have opened offices in Geneva to closely monitor the WTO negotiation and dispute settlement process. The Confederation of Indian Industry (CII) was the first industry body to set up a branch office in Geneva. However, it has been reported that CII no longer maintains such an office there.¹⁷² The Federation of Indian Chambers of Commerce and Industry (FICCI), the other apex industry association, has a separate cell on WTO, FTA and Free Trade (WTO, FTA, Free Trade Division) in New Delhi, which frequently conducts industry stakeholder consultations on trade issues as well.¹⁷³ The competence of FICCI to evaluate WTO issues is well acknowledged, but it is understood that FICCI does not deal directly in dispute settlement matters.¹⁷⁴

¹⁶⁹ Papa, *Emerging Powers in International Dispute Settlement*, *supra* note 77, at 12 (arguing that as WTO activity has slowed down after 2003, it has been difficult for practitioners to keep this niche area of practice alive).

¹⁷⁰ See also Nathani & Nedumpara, *supra* note 122.

¹⁷¹ Luthra and Luthra Law Offices, *Profile of Trade Policy Practice*, available at: <http://www.luthra.com/pdfs/wto-international-trade-customs-law.pdf> (last visited Feb. 15, 2013).

¹⁷² Interview with Pranav Sharma, Head - Trade Policy Division of CII in New Delhi (Oct. 12, 2012).

¹⁷³ See FICCI: WTO, FTA and Free Trade Division, available at: <http://www.ficci.com/sector.asp?secid=72> (last visited May 20, 2011).

¹⁷⁴ Interview with Manab Majumdar, Asst. Secretary General FICCI in New Delhi (April 10, 2011) (on file with author).

Some of the think-tanks and academic institutions in India such as Indian Council for Research on International Economic Relations (ICRIER)¹⁷⁵, Centre for WTO Studies (CWS) of the Indian Institute of Foreign Trade (IIFT)¹⁷⁶, National Council for Applied Economic Research (NCAER)¹⁷⁷, Research and Information System for Developing Countries (RIS)¹⁷⁸ have been active for a fairly long time in the field of economic and policy related areas of international trade. Even a cursory browsing of their websites will give an indication of the richness and depth of their work. However, it is seen that research-focused institutions in the field of international trade law are yet to emerge in India. It will be an important challenge for India to integrate public international law into trade related capacity building in India. The need of the hour is to support institutions that can conduct high calibre research on legal issues in the field of international trade and support the Department of Commerce and various stakeholders on areas related to trade negotiations and dispute settlement.

The other interesting issue is the role or influence of powerful business groups or lobbyists in India's WTO dispute settlement practice. There is no evidence to suggest that powerful business groups or industry sections have a greater ability to bring a case before the WTO or convince the government in requesting consultations. A bulk of the disputes where India has been the complainant has arisen in respect of cluster industries such as textiles and marine industries (see Table I and II). Among the 21 complaints that India has filed so far, nine disputes pertain to the textile sector, three disputes each to the steel and pharmaceutical sectors, and two disputes in the marine sector—sectors that generally employ a large number of low skilled to semi-skilled labour and are widely considered to be pro-poor. Interestingly, not even a single powerful private sector corporate entity in India has been involved in a dispute which has reached the panel stage.¹⁷⁹ As

¹⁷⁵ ICRIER, <http://www.icrier.org> (last visited Feb. 15, 2013).

¹⁷⁶ The IIFT is a management institute established by the Government of India. The Centre on WTO Studies (CWS) is a permanent repository of WTO negotiations related knowledge and documentation and has been situated in the IIFT since 2002. *See* for details, <http://wtocentre.iift.ac.in/>

¹⁷⁷ NCAER, *available at*: <http://www.ncaer.org> (last visited Feb. 15, 2013).

¹⁷⁸ RIS, *available at*: <http://www.ris.org.in> (last visited Feb. 15, 2013)

¹⁷⁹ This is only to suggest that not even a single private company which figures in the list of Top 20 business houses in India has been prominently involved in a WTO dispute. The Steel Authority of India (SAIL), a public sector company, was directly involved in the *US – Steel* (WT/DS 206/R) dispute. Bombay Dyeing was an interested exporter in the *EC – Bed Linen* case, but ranks 261 in the list of top Indian companies. For a list of top companies in India, *see* <http://www.economywatch.com/companies/et-500-companies.html> (last visited May 30, 2011).

one interviewee put it, “most of the Indian businesses were protected by high tariff arbitration and are not wholly dependent on a single export market”.¹⁸⁰

Over the years, India has progressively reduced its dependence on the ACWL. Some of the leading developing country Members of the WTO such as Brazil, China, Mexico, Korea, Argentina and Chile are also not Members of ACWL. This underscores the fact that once a country has gained reasonable experience of the WTO dispute settlement, it is no longer the practice to depend on ACWL or international law firms alone for defending its interests. India’s focus on developing domestic legal capacity points towards acquiring self-reliance in WTO dispute settlement.

IV. CONCLUSION

India is widely considered as one of the most successful developing country users of the WTO dispute settlement system. India has achieved significant capacity in WTO dispute settlement on account of a number of factors, which include, the emergence of India as a strong and powerful influence in international trade negotiations, the rise of India as one of the leading users of trade remedy instruments, the exposure of legal practitioners and consultants to complex international trade disputes and methods of adjudication, India’s participation in some of the most high profile disputes, the ability of the burgeoning private sector firms to explore market access potential in third country markets, etc. A confluence of these factors has helped India in gaining experience and expertise in WTO litigation and, more importantly, in building capacity across sectors and stakeholders. A network community of government officials, think-tanks and WTO lawyers have also helped in strategizing effectively for WTO disputes. The involvement of industry associations such as Texprocil, SEAI, and MPEDA have directly helped India in playing a crucial role in shaping WTO jurisprudence by bringing violations of WTO obligations of other Members to the notice of governmental authorities. These cases demonstrate a bottom-up approach of stakeholder participation, where the government’s role is more of a handmaiden in meeting stakeholder demands. This is a marked difference from India’s experience in the early days of WTO dispute settlement.

India’s challenge in the future will be to sustain the capacity already built. Trade disputes are cyclical and it may require positive intervention on the part of the government to foster and nourish trade-related capacity. This article has highlighted the need to establish better channels of communication between the government and industry. Furthermore, a bottom-up approach to stakeholder

¹⁸⁰ Telephone interview with a Mumbai based senior business executive, [Name withheld] (Apr. 22, 2011) (on file with author).

participation will be feasible only if the government encourages private sector and educational institutions to take greater interest in international trade issues. A large number of trade-related governmental institutions and adjudicatory bodies in India are yet to achieve a desired level of sophistication in WTO matters. Equipping these agencies with the necessary understanding of WTO matters will be crucial for India's chances of playing a leading role in WTO dispute settlement.