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WTO Dispute Settlement at Twenty, Insiders' Reflection on India's Participation

edited by Abhijit Das and James J. Nedumpara
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Abhijit Das and James J. Nedumpara, the editors of this book and both long-standing and leading practitioners and academics in international trade law in India, compiled, for the very first time, a unique collection of essays reflecting upon the 20 years of India's participation in the World Trade Organization (WTO) dispute settlement system (DSS). This publication is certainly timely as in 2015 the WTO and its DSS had just celebrated 20 years since their establishment.

India was a founding Contracting Party in the General Agreement on Tariffs and Trade (GATT) and an original WTO Member. From 1995 to 2015, India was one of the most prominent users of the WTO DSS. It was involved in 21 disputes as complainant and in 23 disputes as respondent, ranking fifth in the total number of disputes to which WTO Members were disputing parties. It was also a third party in 114 disputes. Moreover, among developing Members, India has been playing a leading role not only in terms of its participation in the WTO DSS, but also through its participation in the negotiations. In the words of S. Narayanan, former Ambassador and Permanent Representative of India to the WTO, in the foreword to the book, '[a]s a founding Member … India has been an influential voice in the multilateral trading system. India was, and still is, relentless in expressing its concerns and perseverant in its efforts to shape a more equitable trading system' (p. v).

The stated goal of the editors was to produce a volume that provided insights into India's trade disputes, including the political economy context, and the capacity building challenges facing India, from which 'lessons' could be drawn. The book lives up to its promise and, just as intended by the authors, provides a thorough examination of India's approach in participating in the WTO DSS, including the framing of litigation strategies, developing a legal and stakeholder infrastructure, implementing dispute settlement decisions, and considering the impact of the findings of the WTO panels/Appellate Body on domestic policymaking and India's long-term trade interests.

The book is organized into 14 chapters, each chapter containing an essay from one or more authors, all of whom have been involved in India's WTO disputes in their respective capacities as legal practitioners, industry representatives, policy-makers, or academics. The first five chapters, as well as the final concluding chapter, are of a more general nature, describing India's experiences from its participation in the WTO DSS over the 20 years, and its on domestic policy, the 'lessons learnt' and its contribution in the development of WTO jurisprudence, as well as the interaction between the Indian government and commercial and other stakeholders within the country. In contrast, chapters 6–13 are case-specific, each one dealing in more detail with an individual case in which India was involved. The order of the chapters follows the chronological order in which these disputes were brought and decided.

Chapter 1, co-authored by the editors of the book, is the 'Introduction' and provides a brief overview of the WTO DSS and how it evolved from the GATT era. It describes the challenges facing Members, especially developing ones, that have sought to use it. The authors claim that India's experience is an example of a 'learning by doing' process. The chapter also profiles all of India's WTO disputes in terms of the trading partners involved or affected, the products covered by the challenged measures, and the motivations for initiating each dispute. The chapter also discusses India's overarching dispute settlement philosophy to settle a dispute rather than litigate, the political economy surrounding each dispute, and the effects of the WTO rulings on India's domestic legal order, including the relationship between the government and other key stakeholders. One of the many interesting insights emerging from this discussion is, for example, that in all disputes in which it lost, India complied within the reasonable period, and none of its compliance measures has been challenged so far.

Chapter 2 focuses on some of India's WTO disputes (*India–Patents, India–Quantitative Restrictions, India–Autos, India–Additional Duties, India–Agricultural Products, and India–Solar Cells*) from the perspective of their implications for India's public policy. Some of them, like *India–Quantitative Restrictions*, had a positive influence in bringing about what was to be later understood as a necessary change in moving from a more protectionist to a more liberalized economy. In contrast, in its sensitive sectors, such as automobiles and pharmaceuticals, India has been more resistant to change and more prone to use the flexibilities provided for in the WTO covered Agreements or to 'navigate around WTO rules' until challenged.

Chapter 3 focuses on 'lessons learnt' by India through its involvement in the WTO DSS from the stage of consultations until the stage of compliance, and even before the initiation of a dispute when it had to weigh its interests in bringing a certain case to the WTO dispute settlement mechanism. These lessons are also useful knowledge for any developing Member that has not yet engaged or has engaged only infrequently in the WTO DSS. The chapter author, V. S. Seshadri, served as a Joint Secretary in the Trade Policy Division of India's Ministry of Commerce and Industry and shares his insights from India's early disputes (*EC–Bed Linen, India–Autos, US–Offset Act (Byrd Amendment), EC–Tariff Preferences*, and *Turkey–Textiles*). One of these interesting lessons learnt from India's experience is that, for instance, a WTO Member need not only have the legal and technical capacity to identify and defend its trading interests when those are threatened by trade-restrictive measures other Members adopt; rather, that Member should also be alert and aware of what other Members

are negotiating in non-WTO fora and be able to forestall possible adverse developments by bringing a case to defend its systemic interests and its broader strategic trade agenda (as was the case of *Turkey–Textiles*).

Chapter 4 was written by Scott D. Andersen and Deepak Raju. The first of the two authors is particularly well-placed to write about India's participation in the WTO DSS, given that he was counsel for the United States government in four cases involving India (*US–Wool Shirts and Blouses, India–Patents, US–Shrimp, and India–Quantitative Restrictions*) and was subsequently counsel for India in yet another US–India dispute (*US–Steel Plates*). All of these disputes are referred to in the chapter. As observed by the authors, India was determined 'not [to] be a passive observer as key initial interpretations of the WTO rules and procedural system were developed' (p. 46). The outcomes of these disputes not only had a bearing upon domestic reforms (for example in the area of quantitative restrictions), but also shaped India's future stance in both WTO negotiations (for example in the areas of intellectual property and agriculture) and dispute settlement. The authors note that more than half of the disputes (28 out of 43) in which India was a party were initiated in the first five years of the WTO, and led to incremental change by establishing jurisprudence on novel issues in WTO DSS, such as the burden of proof (*US–Wool Shirts and Blouses*), the interpretation of domestic law (*India–Patents*), and the interpretation of Article XX(g) of the GATT 1994 (*US–Shrimp*), which are still regularly quoted today in panel and Appellate Body reports.

Chapter 5 analyses the contribution of India's WTO disputes in the progressive development of WTO jurisprudence. Like Chapter 4, it elaborates on the burden of proof as developed in *US–Wool Shirts and Blouses,* as well as the crystallization of the concept of legitimate expectations in the TRIPS Agreement and its association with non-violation complaints in *India–Patents*. In addition, it discusses the 'differential' burden of proof for the Enabling Clause established in *EC–Tariff Preferences* and delves into other issues that first made their appearance in cases in which India was involved. These issues, to name a few, concern *res judicata* and *abus de droit* (*India–Autos*), enhanced third party rights (*EC–Tariff Preferences*), *amicus curiae* participation (*US–Shrimp*), and the 'essential parties' concept and jurisdiction over measures adopted pursuant to an Article XXIV agreement (*Turkey–Textiles*).

Chapters 6–13 are case-specific chapters. Chapter 6 deals with *US–Shrimp* and was authored by Arthur Appleton, who represented India in that dispute. Given the influence of that decision on the case law interpreting the Agreement on Technical Barriers to Trade (TBT Agreement), and some similarities it shares with *US–Tuna II (Mexico)* – although the nature of the measures is different (in *US–Shrimp* the challenged measure was an import ban, whereas in *US–Tuna II (Mexico)* it was a labelling scheme) – the author wonders whether *US–Shrimp* could be a TBT dispute if adjudicated today. If the answer were yes, the author also asks how the terms 'necessary' and 'related to' in Article 2.2 and the first sentence of Annex 1.1 of the TBT Agreement, respectively, would need to be interpreted to accommodate this possibility. Appleton also argues that this case demonstrates that decisions that were, at the time of their issuance, at odds with interests of certain WTO Members or seemed too far-reaching, have proven in time to have been wisely construed to serve and to preserve the system as a whole. This lesson is maybe more relevant now than ever before given the current criticism towards the WTO Appellate Body. Although the author himself

criticized the Appellate Body when the report was first published, he recognizes today that the Appellate Body in that dispute 'reached an intelligent decision, from both a substantive and procedural perspective, which has withstood the test of time' (p. 94).

Chapter 7 is written from the perspective of Texprocil, a major stakeholder in India's textile and clothing sector, and provides a narrative of the efforts and pressure it exercised on the Indian government in all eight disputes that India brought concerning the textile sector (*US–Wool Coats, US–Shirts and Blouses, Turkey–Textiles, EC–Cotton Fabrics, EC–Bed Linen, Brazil–Jute Bags, US–Rules of Origin, and EC–Tariff Preferences*). The chapter highlights the importance of effective co-operation between a government and commercial stakeholders for reaching successful outcomes.

Chapter 8 provides an in-depth analysis of *EC–Bed Linen*, which is also of historic importance as the first WTO ruling on an EC anti-dumping measure and on the practice of 'zeroing' and also India's first dispute against the European Communities (notion of developing *vs*. developed Member). The legal findings in that dispute have shaped the interpretation and application of the Anti-Dumping Agreement ever since. Chapter 9 focuses on *EC–Tariff Preferences* and highlights India's concerns in deciding whether to initiate the dispute, given that a successful outcome would affect fellow developing Members who were beneficiaries of the drug arrangements in the EC's Generalized System of Preferences and who were also India's allies in the Doha Round.

Chapter 10 highlights the discussion in *India–Additional Import Duties* on the relationship between Articles II:1(b), II:2(a), and III:2 of the GATT 1994, including its *Ad* Note and the burden of proof in Article II of the GATT 1994. The chapter also discusses the implications of that dispute for WTO Members' autonomy in imposing and administering taxes. Chapter 11, for its part, chronicles the dispute in *Turkey–Safeguard Measures on Imports of Cotton Yarn*. This is an example of one of India's disputes that were resolved during the consultations stage after co-ordinated diplomatic efforts by India's government, Texprocil, and the law firm assisting India in that dispute. Chapter 12 discusses *India–Agricultural Products*, which was the first case in which India's SPS measures were challenged. India's participation in that case once again offers important lessons and brings up the issue of technical capacity building for developing Members; specifically, it highlights the significance of being able to participate in the international fora where international standards are developed, as well as the importance of meeting the requirements of the SPS Agreement for scientific evidence and regionalization. Chapter 13 analyses the *US–Carbon Steel (India)* dispute, yet another influential trade remedies dispute, this time in the field of subsidies. This dispute dealt with novel issues, such as cross-cumulation, but also contributed further to previous case law on the concepts of public body, benefit assessment, and application of facts available. Chapter 14 offers the conclusion summarizing the different conclusions reached in the preceding chapters.

This volume is a novel and valuable addition to the literature on the WTO DSS, in particular at a time when scholars and practitioners reflect both on the success of, and future challenges for, the WTO DSS, including the particular situation of developing Members who are still in need of technical and legal capacity building. Some overlap exists between the various chapters, in that several chapters refer to the same disputes; nevertheless, this is to be expected to a certain extent in an edited volume of this type that combines contributions from different authors. In any event, however, the book is not repetitive in that each chapter provides a unique and individual perspective. The lessons learnt from

India's experience are valuable for other developing WTO Members, in terms of building capacity, identifying the policy space a government needs as well as the interests worth pursuing through WTO DS, and strategizing and co-ordinating with commercial and other stakeholders. Last but not least, it was fascinating to be reminded of the origins of the interpretation of basic concepts both in substantive and procedural WTO law in many of the cases that India was involved in. Even for readers not intimately familiar with details of WTO jurisprudence, the well-written and in-depth analysis in this volume elucidates clearly the many interesting interpretative questions addressed by WTO adjudicative bodies in disputes involving India.

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1 These are the reviewer's views and do not necessarily reflect the views of the European Commission.

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International Economic Law after the Global Crisis: A Tale of Fragmented Disciplines

by S.L. Lim and Bryan Mercurio
Cambridge: Cambridge University Press, 2015

This is an ambitious compendium of 20 articles exploring the 'fragmented nature of international economic law'. It covers monetary cooperation, trade and finance; investment law and intellectual property protection; and climate change regulation in the aftermath of the 2008 financial crisis.

The introductory article sets out twin concerns about multiplication of disciplines and tribunals, norm fragmentation, and authority fragmentation. The authors set the stage by looking at the history of international economic regulation since the Bretton Woods system to find out how what was initially conceived of as an '*integrated* or *cohesive* system of global regulation' ended up in the current fragmented state.

Weber provides an overview of the 'fragmentation of legal sources' in the field of international financial regulation. He tackles what he calls 'the hard law v. soft law controversy'. He contrasts the 'robust', 'hard law' framework of the WTO and the IMF/World Bank with informal law-making, sometimes by 'inter-agency institutions with ambiguous legal status', in the field of international financial law. The article supports 'multilayered governance': 'By means of standard-setting, the different layers of governance must be dynamically interlinked to enable them to address developments in the ever-evolving financial markets.'

Cervone's focus is on credit rating agencies (CRAs). Since the financial crisis, CRAs have come under closer scrutiny, both because of their alleged roles in the events leading up to the financial crisis, and, since 2010, in respect of the sovereign debt issue, and because of the increasing integration of CRAs into the regulatory fabric of financial transactions. New EU regulations have certification and endorsement provisions that 'could have considerable extraterritorial implications' as a global regulatory strategy.

The regulation of CRAs is only one response to the variegated crises that engulfed financial markets after 2007. What Avgouleas and Arner describe as the 'near collapse of national financial systems' in the Eurozone is not given to evident diagnoses, let alone