

Chapter 2

India's Trade Disputes: Implications for Public Policy

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Abstract The chapter examines how India proactively participated in WTO dispute settlement by discussing some of the landmark disputes involving India. The discussion highlights how India's participation in the early years was influenced by its concern to protect small and vulnerable sectors of the economy and, more so, to preserve the *status quo*. This chapter also discusses how India's WTO litigation strategies evolved over a period, especially since 2010, in using offensive and defensive strategies in WTO dispute settlement to leverage its economic potential and create policy space for its development needs and strategies. This transformation has emboldened India to pursue a development pathway which is not necessarily shaped and driven by its international commitments.

Keywords Trade and public policy • WTO dispute settlement and India • India and national solar mission • Trade and development

2.1 Introduction

The WTO offers two kinds of opportunities to its member countries: a platform for negotiations for international rule-making on trade and a mechanism for dispute settlement. As the Doha round is badly trapped in emerging global political economy, the negotiating platform has not been able to deliver results. India, despite its small share in world trade, has acquired a significant position in the multilateral trading architecture. It is one of the most important players in trade

All views are personal.

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negotiations in the WTO. This has been possible because India has taken a leadership position for the developing world.

The other side of the WTO is the dispute settlement mechanism. This side is a more stable and steady platform capable of greater sustainability. International negotiations do not offer the best solution to every participating country, as a consensus-based negotiating framework essentially involves compromises at all levels. Therefore, achieving results out of multilateral negotiations is a great challenge in the rule-making process. This logically throws up two kinds of situations. First, as all nations have compromised their principal positions to some extent in achieving results, no country prefers to miss out on the smallest opportunity of reasserting its position. Second, because economic life of nations does not wait for international rule-making and moves at its own pace; gaps in the rules framework appear quite often, which is where the dispute settlement framework plays a prominent role in supplementary rule making.

Most of the litigation in the WTO has been initiated by developed nations who are leaders in international trading.¹ Amongst the developing nations, Brazil and India have played a prominent role in raising and facing challenges in the WTO.² As far as India is concerned, the initial challenges that it faced could largely be attributed to India's desire to remain in the status quo and resist change. In the years following the early period, the interest has been driven by the desire to create a framework which will support nurturing of certain specific sectors such as the automobiles and pharmaceuticals. Since 2010, India has particularly been more proactive in the area of raising and responding to disputes in the WTO. It is noteworthy that India used the GATT dispute settlement process only on three occasions. However, under the WTO, it has so far initiated 21 disputes. It has faced 23 challenges so far (WTO 2015).

The period since 2010 clearly saw a certain amount of aggressiveness and greater involvement in India's approach to the WTO dispute settlement process. This was most visible in the *EC—Drug Seizure* dispute.³ During this period, India also pursued a proactive challenge against the US Anti-Dumping Procedure on certain hot-rolled carbon steel products.⁴ India's challenge against Turkey in the area of textiles and clothing is also part of this phase.⁵ On the defensive side one can clearly see the replay of a conscious policy to navigate around WTO rules

¹The United States has filed 108 complaints and the European Union has filed 95 complaints whereas India has filed 21, China 13, Brazil 27, Argentina 20, and Mexico 23 complaints as of 30 November 2015. See, WTO, Disputes by country/territory https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm.

²Ibid.

³WTO (2010) European Union and a Member State—Seizure of Generic Drugs in Transit: Request for Consultations, WT/DS408/1.

⁴WTO (2002) United States—Countervailing Measures on Hot-Rolled Carbon Steel Flat Products from India: Request for Consultations, WT/DS436/1.

⁵WTO (2012) Turkey—Safeguard Measures on Imports of Cotton Yarn: Request for Consultations, WT/DS428/1.

(especially TRIMS⁶) to nurture a domestic industry by mandating local content and providing subsidies therefore. Another case, during this period, was the *India—Agricultural Products* which involved import restrictions on poultry products on account of avian influenza.⁷ India clearly preferred an appeal before the Appellate Body, knowing well certain weak links in its arguments. This is clearly indicative of its desire to continue to protect its vulnerable sectors such as livestock and animal husbandry where back end of the sector is dominated by an unorganized and under-developed producer class.

If we look at the types of disputes raised by India, we would notice that most of the time the State has pursued the interest of small producers. If we look at the sectoral distribution of disputes raised by India, it could be clearly seen that textiles and clothing, marine products, low value engineering products, and pharmaceuticals-products manufactured by small industry have received greater State support. The reason is not difficult to find, as much of India's export is represented by the small sector. The political economy of exports clearly supports the situation.

2.2 India as a Respondent in WTO Disputes: Implications for Public Policy

2.2.1 *India—Patents Dispute*

As stated earlier, India has faced legal challenges and has been an active complainant in the WTO. In order to derive an understanding on how these disputes have influenced policy making in India, it may be useful to very briefly analyze some of the major disputes where India has been a party in the last few years. India's first dispute in the WTO as a respondent was the challenge against its Patent law by the United States.⁸ Measure at issue was India's 'mail box' rule under which patent applications for pharmaceutical and agricultural chemical products could be filed. Article 27 of TRIPS was under examination. The Panel decided against Indian practice of creating a mail box through 'administrative instruction'. It held that India had not complied with its obligations under Article 70.8(a) or Article 63(1) and (2) of TRIPS by failing to establish a mechanism for the grant of exclusive marketing rights. The Appellate Body also largely upheld the panel's findings that India's filing system based on administrative practice for patent obligations for

⁶Agreement on Trade-Related Investment Measures, in THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS, THE LEGAL TEXTS (1994).

⁷WTO (2002) United States—Countervailing Measures on Hot-Rolled Carbon Steel Flat Products from India: Request for Consultations, WT/DS436/1.

⁸Appellate Body Report on *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R.

pharmaceutical and agricultural chemical products was inconsistent with Article 70.8 of TRIPS. India's continued discomfort with the new international patent regime was reflected in this case as well. India has very successfully used the flexibilities provided in the TRIPS agreement and thus, despite the unease with the agreement, it has been able to carve out a unique regime for intellectual property rights, more in line with its developmental needs.

2.2.2 *India—Quantitative Restrictions*

The US challenge to India's quantitative restrictions on imports of agriculture, textile and industrial products was the second critical challenge which India faced.⁹ Pre-liberalisation, India adopted an inward looking economic development policy. Protection to domestic industry and agriculture was ingrained in the economic philosophy of the time. Post—1991 liberalization, while industrial and economic policy opened up in several respects, approach to imports was still nuanced by protectionist tendencies and, importantly, import substitution philosophy prevailed over the trade and industrial development establishment. This was clearly reflected in the quantitative restrictions which created a restricted import environment for roughly 2700 agricultural and industrial tariff lines. A WTO Panel found India's measures on import restrictions including its import licensing system as quantitative restrictions, inconsistent with the GATT. India's defence for maintaining such restrictions was based on balance of payment necessity. It was ruled that BOP constraints were not borne out by the facts. The Appellate Body found these restrictions unjustified and upheld Panel's findings. This decision led to removal of market restrictions and India announced that with effect from 1 April 2001 it had removed the quantitative restrictions on imports in respect of all items. A similar challenge was pursued by Australia, Canada, New Zealand, Switzerland and the EU.¹⁰ These cases were resolved by agreeing on a mutually accepted solution. While this decision hit at the very root of India's trade policy of the time, it opened India's trade policy in a very significant manner. Today quantitative restrictions are gone but the flexibilities of Article XI of the GATT in relation to essential supplies are often used (Mitra and Josling 2009). In the last 5 years, the use of these flexibilities has been reduced significantly; nevertheless it creates an environment of uncertainty, speculation and price volatility. It is often challenged by India's trading partners. A few years ago, Government took a decision to refrain from frequent restrictions on imports and exports of agricultural products under Article XI of the GATT 1994. Therefore, with the latest decision, the situation has normalized and

⁹Appellate Body Report on *India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/AB/R (Hereinafter *India—Quantitative Restrictions*).

¹⁰WTO (1998) *India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*:Request for Consultations WT/DS96/8.

criticism from trading partners has been lessened to some extent. However, decisions to impose minimum export price and bans on exports of agricultural products are often resorted to.¹¹

2.2.3 *India—Auto Dispute*

Following the two major disputes mentioned above, the next challenge India faced was on its automotive policy. The auto policy of 1995 had elements which mandated trade balancing as well as domestic content tied with investments. Both these provisions were violative of GATT and TRIMS and the US and the EU challenged India's measures in the WTO. The Panel decided against India on both the counts. India preferred an appeal knowing well that there was very little chance of succeeding. The auto policy, however, had come into operation in 1995 itself through the Exim Notification. More than ten global auto makers pushed their investments in India. Most of them complied with the stipulations of the auto policy. A few of them, however, defaulted on trade balancing. A good number achieved more than 50 % indigenization. By the time the Panel's decision was finalized and made public and appeal was preferred by India, the auto policy had already been in operation for almost 7 years. Although, India withdrew the appeal, it had secured enough time for itself to see that the auto policy had taken roots and desired results were achieved. The market potential of India's Auto sector was adequately leveraged under the cover of the Auto policy and investments were made by most major auto players by the time the Panel ruling came up for implementation. Subsequently, in compliance with the DSB decision, the restrictive stipulations were withdrawn.¹² Auto sector had been chosen as a preferred sector for the obvious multiplier developmental advantages it offered. Thereafter, the Government again decided to keep a tariff wall around the auto sector and developed technical regulations which provide enough protection to the domestic industry. It can be seen that the State through a conscious policy intervention facilitated the development of the sector and, despite having lost the dispute in the WTO, maintained a legitimate cover of tariffs and technical regulations to nurture the sector.

¹¹See for example, imports of certain goods such as cashew kernel (HS 08013210 and 08013230), areca nuts (HS 0802 80) and marbles (HS 25151100 and 25151210—from 20 November 2014) are subject to import restrictions depending on their import price. These imports are restricted when a c.i.f. price is lower than the minimum import price: WTO (2015) Trade Policy Review of India: Report by the Secretariat, WT/TPR/S/313, at 3.49.

¹²WTO (2002) India—Measures Affecting the Automotive Sector: Communication from India, WT/DS146/14; WT/DS175/14.

2.2.4 India—Additional Duties

Among the challenges India faced during the last decade, the US and the EC challenges against ‘additional duties’ or ‘extra additional duties’ on imports of wines and distilled products and the EC challenge against discriminatory taxation on imported wines and spirits by some Indian States are notable.¹³ These disputes clearly brought out the multilayered taxation structure in India embedded in a three layered democratic system bound by a constitution which distributed powers on taxation between different layers. It was clearly seen in these consultations that the Central Government’s “control” over powers of the State in respect to State excise duties was non-existent. The Central Government in accordance with the Constitution of India is responsible for India’s external obligations whereas in a federal structure, a large part of developmental action takes place in the States and local government institutions which have no accountability towards country’s international commitments. While the US challenge went to the Panel and later the Appellate Body, the EC sought several consultations and through a process of persuasive discussion with various State Government bureaucracies, the taxation structure was aligned to a large extent and brought in line with the GATT commitments reflected in the national treatment and MFN provisions. These cases brought in a serious issue of how India would be responding to its external commitments on issues where action lies in the State Government or local governments. The Constitution offers the possibility of a Central legislation defining the Central Government’s power to influence State legislation on account of Central Government’s international commitments but recognizing the higher sensitivity of Centre-State relations, no Central Government would have ventured into doing so. The EU dispute, in particular, brought to the fore the persuasive skills of the Central Government to see that the matters were settled rather than progress to a full-fledged dispute.

2.2.5 India—Agricultural Products and India—Solar Cells

In the last 5 years, India has faced two challenges namely, one against measures concerning the importation of certain agricultural products from the United States (DS430) and the other concerning certain measures relating to solar cells and solar modules (DS456). While India has lost the first dispute even at the Appellate Body, the Panel ruling in the second dispute is yet to come. The first case is clearly indicative of policy lethargy and technical incapacity. India’s notification under the SPS agreement allows restrictions on imports from those countries that have

¹³WTO (2007) India—Additional and Extra-Additional Duties on Imports from the United States: Request for Consultations, WT/DS360/1.

declared themselves as infected by avian influenza. The two major issues of agriculture trade policy raised here were:

- (i) the availability of a scientific risk assessment on products facing such restriction; and
- (ii) availability of regionalization in respect to the product in question.

India had failed on both counts.¹⁴ The lesson from this particular dispute is the need for a strong technical framework to generate scientific risk assessment and basing trade policies on such risk assessments. As well as to create a discerning policy framework in order to distinguish infected and non-infected areas within a political entity for trade purposes. The sector policy action is awaited in this direction.

The second case involved a challenge in respect of the Jawaharlal Nehru National Solar Mission, where the Government in its ambitious programme for producing electricity from solar energy has prescribed domestic content of solar modules and cells in procurements for the programme as well as subsidizing that domestic content. The challenge involved two phases of the mission. The quantities involved were not much and practically speaking, most of the procurement was being made from the United States and China. Yet the United States challenged these provisions at the WTO. Local content requirements in the context of renewable energy programmes have doubtful existence in WTO, especially in the background of the Ontario FIT case.¹⁵ Yet the Government of India chose to follow the same path ignoring alternatives such as production subsidies. The ground for taking such path was to create domestic capacities for manufacturing solar cells and modules. However, the sectoral economy clearly showed over capacities and extremely competitive Chinese products, so much so, that some manufacturing facilities in Germany and the United States had closed down, not being able to face the competition.¹⁶ Subsequently, India launched an even more ambitious programme. This has created the potential for huge scales for procurement. Interestingly, at the time when one department of the Government of India was pursuing a restrictive policy, another department was recommending imposition of anti-dumping duties on solar cells and modules.¹⁷ However, the Government chose

¹⁴Appellate Body Report on *India—Measures Concerning the Importation of Certain Agricultural Products*, WT/DS430/AB/R.

¹⁵The Ontario FIT Programme found as inconsistent with the national treatment obligations of Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement. See WTO, Appellate Body Reports on *Canada—Certain Measures Affecting the Renewable Energy Generation Sector/Canada—Measures Relating to the Feed-in Tariff Programme*, WT/DS412/AB/R and WT/DS/426/R.

¹⁶The Economist, Green energy: Still short of puff. <http://www.economist.com/news/business/21597920-europes-wind-turbine-makers-are-pleading-more-political-support-still-short-puff>. Accessed on 5 Dec 2015.

¹⁷The Solar Mission is implemented by the Ministry of New and Renewable Energy(MNRE), while the antidumping actions are initiated by the Directorate General of Anti-dumping and Allied Duties (DGAD), a part of the Ministry of Commerce and Industry, See DGAD, Ministry of

to not follow the anti-dumping route and preferred to go ahead with restrictive policies. The lesson from this dispute is, however, clear that in its development pursuit India has not hesitated in adopting a pathway which though possibly violative of the WTO rules, could also leverage the huge potential of its renewable energy market—a case somewhat similar to the phased manufacturing programme in the auto sector. While the auto sector has clearly benefitted with the auto policy, to what extent domestic manufacturing of solar cell and modules has been encouraged is yet to be seen. Around the time when India faced the challenge to its solar power policy it carried out some useful research to find that United States was itself a major violator of GATT, TRIMS and ASCM¹⁸ in the solar power sector as many of its states were adopting exactly similar policies as were being challenged by it. The temptation to challenge was too strong but India not being an exporter of these products realized the waste of effort and did not pursue the matter any further.

2.3 India as a Complainant in WTO Disputes: Implications for Public Policy

As a complainant, India has pursued many disputes. Amongst the earlier disputes pursued by India, textile and clothing sector, marine products, pharmaceutical and low value engineering products hold the place of prominence as these sectors have significant market access issues in other countries. Pharmaceutical sector is yet another sector which is protected by the Indian policy establishment recognizing its potential and present contribution to the economy both in the economic and the social context. Pharmaceutical sector significantly contributes to global public good as India is a major supplier of generic medicines. Amongst the recent disputes, the most significant dispute as raised by India as a complainant are two: the first one relates to the seizure of generic drugs in transit¹⁹ and, the second relating to countervailable measures on certain hot-rolled carbon steel flat products from India.²⁰

The former was filed against the EC and the latter was against the US. Both these disputes ended successfully for India. The first case of generic medicines is notable. India supplies medicines globally. These are non-patented generic medicines which

(Footnote 17 continued)

Commerce and Industry, Government of India, *Notification*, 14/5/2012-DGAD, 22 May 2014, http://commerce.nic.in/writereaddata/traderemedies/adfin_Solar_Cells_Malaysia_ChinaPR_Chinese_Taipei_USA.pdf. Accessed on 5 Dec 2015.

¹⁸*Agreement on Subsidies and Countervailing Measures*, in THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS, THE LEGAL TEXTS (1994).

¹⁹WTO (2010) European Union and a Member State—Seizure of Generic Drugs in Transit: Request for Consultations by India, WT/DS408/1.

²⁰WTO (2012) United States—Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India, WT/DS436/1.

may be patented in some markets where a generic version cannot be marketed in violation of TRIPS and the local patent law. However, in many countries, such medicines may not be patented and, therefore, they could be marketed freely. However, the EC through its Regulation 1383²¹ brought in a “production fiction” where such medicines were presumed, while in transit through the EU to other markets, as if they were produced in the EC country. This would have hit India's exports to Latin America and Africa. Seventeen consignments of Indian medicines destined for Africa and South America via Europe were detained by the European customs authorities particularly in the Netherlands. Through a long process of bilateral discussions and WTO consultations, India was able to get the EC to agree that its relevant Regulation was violative of the TRIPS. India successfully persuaded the EC not just to issue operational instructions for its customs but changed the Regulation itself with the deletion of the concept of production fiction and introduction of a clear understanding on the role of customs service. This challenge helped India to deal with the highly restrictive and violative EC provisions, and to open up markets which otherwise would have been partially closed because of transit through the EC. India could clearly establish its position to pursue its economic interest in a decisive manner. While the EC has notified new regulation, few operational issues still remain unresolved. India has asked the EC to issue guidance to its custom staff and explain certain provisions of the new regulation in accordance with the agreed MoU. The matter is still under bilateral discussion. The dispute remains on the table of the DSB. Two factors *inter-alia* played a significant role in India's success. Mercantilist intervention in the pharmaceutical sector was highly sensitive to the EU's own political class. Further, the destination of these generic medicinal products was largely third world countries and the attendant noise which the civil society made on the grounds of inaccessibility of medicines was too sensitive for EU to ignore. More importantly, at that point in time the EU was very keenly looking at concluding the trade agreement under negotiation with India for some years and the mercantilist EU had to mellow down.

2.4 Conclusion

The above analysis includes only a few of the cases where India was involved as a complainant or respondent. They were selected on the basis of the influence they had on India's policy making or implications for India's public policy. All these cases were significant landmarks at different stages of evolution of India as a global player in international trade. This account shows that in the process of dispute settlement, India started with the baggage of reluctance and reservation but has

²¹Council Regulation (EC) 1383/2003 of 22 July 2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights.

reached a point where it can aggressively pursue its policy interests. It can also strategize participation in disputes in a long term context. It is noteworthy that since 2012, India has participated in 115 disputes as a third party. This was intentionally done to derive a better understanding of issues and dispute settlement process. Around this time, several initiatives were taken towards capacity development within the Government and particularly, within the legal community. In several ways, these disputes have either persuaded India to reframe/reorient its policies or to persuade its trading partners to redraft their policies. This clearly shows that India has evolved as an intelligent participant in the dispute settlement mechanism of the WTO and is in a position to use it for the benefit of policy making. There is now a larger stakeholder community in this field. Not only the legal community has benefitted, but the business sector and non-governmental institutions have also taken keen interest and developed their understanding of the dispute settlement process. Interestingly, media has shown great interest in reporting these matters. Generally speaking, these developments have proactively helped India not only to pursue some successful challenges but also develop its all-round capacities.

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WTO Dispute Settlement at Twenty

Insiders' Reflections on India's Participation

Das, A.; Nedumpara, J.J. (Eds.)

2016, XVIII, 255 p. 5 illus., 3 illus. in color., Hardcover

ISBN: 978-981-10-0598-5