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## **Indian Trade Lawyers and the Building of State Trade-Related Legal Capacity**

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# **Indian Trade Lawyers**

## **and the Building of State Trade-Related Legal Capacity**

by

Gregory Shaffer, James Nedumpara, and Aseema Sinha<sup>1</sup>

### **Introduction**

The law of the World Trade Organization (WTO) is not autonomous. It shapes and is shaped. It affects not only countries' trade and tariff policies, but also shapes their laws, regulations and institutions. In particular, it creates new accountability mechanisms with particular normative frames, and opens markets creating new demand for professional expertise, such as legal expertise. The WTO institutionalizes capitalism, and thus provides opportunities directly and indirectly for business lawyers. Yet it does not do so in a uniform manner. Rather, nation-states, working with private constituents, negotiate the terms of WTO law and shape its meaning, whether directly through engagement, or indirectly through lack of engagement.

The WTO should not be viewed as static and deterministic, autonomously affecting states. Rather, the WTO legal order is shaped by those who negotiate its terms and who participate in their interpretation, affecting how WTO law is understood and applied. The negotiation and interpretation of WTO law, in turn, affects countries' policy space for social and developmental initiatives as well as their ability to challenge foreign countries' trade restrictions affecting their exports. The scope of the WTO legal order entails not only formal disputes, which are of great interest and generate reams of scholarship, but also the shadow effects of law on claims that are settled and never known and on domestic regulatory policy initiatives that are advanced, not considered, or are shelved.<sup>2</sup>

Participating in the construction and interpretation of WTO law, however, is not free, not for governments, nor for private parties. Its interpretation has become highly complex and evolving, with its jurisprudence exceeding 70,000 pages of panel and Appellate Body decisions issued through mid-2012.<sup>3</sup> Not all are in the position to participate in shaping the WTO legal order and its effects.

For India, the negotiation and interpretation of WTO law affects multiple policy issues, from the contours of intellectual property (IP) law, to the export of generic drugs, to the

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<sup>2</sup> See Gregory Shaffer, *How the WTO Shapes Regulatory Governance*, in (forthcoming 2014).

<sup>3</sup> This figure was calculated from the database at *WTO Dispute Settlement Reports* (Cambridge, U.K.: Cambridge University Press) 1996-2010, available at <http://www.cambridge.org/aus/series/sSeries.asp?code=DSR>.

development of an automotive sector, to the regulation of labor and the environment, to restrictions on imports and exports through antidumping law. All of these issues have been directly or indirectly the subject of WTO disputes, and all of them involve disputes in which India has been a party. Formal WTO disputes, however, only begin to reflect the implications of WTO law.

This chapter examines the growing role of Indian lawyers in the transformation of Indian trade policy through the development of trade-related legal capacity. By trade-related *legal capacity* we mean, broadly, the ability of a country to use law to engage proactively in the development and defense of international and domestic policy. Such capacity is critical for the drafting and interpretation of international legal agreements, the adoption of domestic regulation within those agreements' constraints in order to defend policy space, the monitoring of foreign commitments, and the development of legal arguments in formal international litigation and informal dispute settlement. Through developing legal capacity, public and private actors work together to open export opportunities abroad and defend domestic policy measures at home. While others have written of the legalization of international trade through the increased role of the WTO legal secretariat and the emergence of the WTO Appellate Body in international dispute settlement,<sup>4</sup> this chapter addresses the growing role of lawyers in the development of trade policy at home in one of the world's rising powers, India.

The chapter builds from years of field research in India and Geneva, involving semi-structured interviews with over fifty Indian officials and stakeholders.<sup>5</sup> The interviewees included former Ambassadors, members of the bureaucracy, private lawyers, private trade association and industry representatives, researchers in think tanks, academics, and news reporters. We complemented these interviews with participant observation in Geneva and in New Delhi, and reviewed our findings against primary and secondary documents.

### **I. Terrain of the Debate and Theoretical Context**

Our arguments and findings resonate with and contribute to three interrelated literatures and debates that implicate the role of lawyers in emerging economies. They are: the creation of transnational legal orders, the rise of the new developmental state, and the building of legal capacity to engage with and shape such transnational legal orders and their implications for the developmental state.

First, this study documents the increasing role of transnational legal ordering and its implications for law and lawyers in nation states.<sup>6</sup> The study of transnational legal ordering places the relationship between international, transnational, and domestic legal processes in tension that gives rise to the potential institutionalization of legal norms, and in particular within nation states. Transnational legal ordering involves both top-down and bottom-up processes that operate recursively and dynamically, shaping the meaning of legal norms. This chapter addresses how India has engaged lawyers to enhance its ability to participate and shape the WTO legal order, and in the process also changed, in part, itself. It examines the reciprocal transformations

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<sup>4</sup> Joseph Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, 13 *American Rev Int'l Arbitration* 177 (2002).

<sup>5</sup> We respectively conducted distinct field work on Indian trade law and policy for over a decade, from 2003-2012. We identify some sources only by interview number pursuant to their request for confidentiality.

<sup>6</sup> Gregory Shaffer, *Transnational Legal Ordering and State Change* (2013); Terrence Halliday and Gregory Shaffer, *Transnational Legal Orders* (2014 forthcoming).

entailed in the WTO legal order, about how a country transforms itself in order to engage with the WTO and, in turn, shape it, giving rise to transnational legal ordering.

Second, our findings contribute to an emergent revisionist argument about the developmental state across regions and issue areas.<sup>7</sup> We find that the Indian state has not withdrawn from global and transnational influences (per the developmental state model of the 1950s), but rather been transformed and enhanced. The WTO catalyzes the building of new state capacity, including legal and regulatory capacity, even though its *raison d' être* is to free markets and liberalize trade among nations. As Aseema Sinha writes, the “globalization of trade rules... creates pressures to strengthen national state agencies and trade policy processes.”<sup>8</sup> We find that the WTO and WTO law have spurred the Indian developmental state to enhance its legal capacity in relation to both international economic law and its implications for domestic law reform.

Third, because of the implications of transnational legal ordering for the developmental state, states invest in the building of legal capacity so as to engage in the shaping of global rules and assess alternatives for their implementation in order to protect policy space.<sup>9</sup> This study contributes to our understanding of how developing countries build legal capacity so as to better participate in the construction of the WTO legal order and its implications for the developmental state. India is pressed to adapt to WTO legal norms, and at times uses them to facilitate policy reforms. But it also seeks to shape and modify the understanding of the rules for its own ends. To do so, it must build legal capacity, in particular through opening the state bureaucracy to engage with the private sector and private lawyers.

## **II. India and the GATT Years: Little Role for Law and Lawyers**

Before the creation of the WTO, India was a closed economy, built on a socialist model of five-year plans, wary of international economic commitments in light of its colonial heritage, erecting a centralized bureaucracy and administering what was known as the “License Raj.” The Indian bureaucratic system was viewed as sclerotic in that decision making could be time- and resource-consuming, slowing entrepreneurial endeavor, although it also demanded a certain nimbleness for businesses to navigate.<sup>10</sup> Firms were preoccupied with obtaining licenses to import, and subsidies to export, as part of complicated government policies to manage Indian balance of payments, for which they had little need for lawyers. The result was considerable rent seeking by Indian businesses. Their primary market was domestic. They felt unable to compete internationally. As the development economist I.M.D. Little wrote in a widely read text in the

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<sup>7</sup> David M. Trubek, ed., *Law and the New Developmental State: The Brazilian Experience in Latin American Context* (Cambridge University Press 2013); Richard Stubbs, “The East Asian Developmental State and The Great Recession,” *Contemporary Politics*, Vol: 17, No. 2, pp. 151-166 (June 2011).

<sup>8</sup> Aseema Sinha, “Global Linkages and Domestic Politics: Trade Reform and Institution Building in India in Comparative Perspective,” *Comparative Political Studies*, Vol. 40, 1, 2 (Oct. 2007).

<sup>9</sup> See Gregory Shaffer, Michelle Ratton Sanchez, & Barbara Rosenberg, *Winning at the WTO: What Lies Behind Brazil's Success*, 41 *CORNELL INTERNATIONAL LAW JOURNAL* 383-501 (2008); Gregory Shaffer and Ricardo Ortiz Melendez, *Dispute Settlement at the WTO: The Developing Country Experience* (2011); and Alvaro Santos, *Carving out Policy Autonomy for Developing Countries in the World Trade Organization: The Experience of Brazil and Mexico*, 52 *VIRGINIA JOURNAL OF INTERNATIONAL LAW* 123 (2012).

<sup>10</sup> Aseema Sinha, *The Regional Roots of Developmental Politics in India: A Divided Leviathan* (2005).

early 1980s, “developing countries never expected to be able to export manufacturers to the developed countries.”<sup>11</sup>

Neither the government nor the private sector had much of a focus on international trade, so that India paid little attention to the GATT (General Agreement on Tariffs and Trade), the predecessor to the WTO, and made few legal commitments under it. At the time that the Uruguay Round negotiations were in full swing in 1990-91, India’s maximum tariff rate was 355 percent and its simple average applied tariff rate was 125 percent. Only six percent of Indian tariff lines were bound, meaning that India could raise tariff rates for ninety-four percent of its tariff lines at any time. India complemented the tariff regime with different types of quantitative restrictions. These restrictions took various complicated forms, such as those administered through non-automatic licenses, through canalized agencies, through special import licenses, and subject to different conditions. They were imposed on the grounds that India had to monitor continually its unfavorable balance-of-payments situation.<sup>12</sup>

The administrative system for import restrictions required a bureaucracy, creating delays, uncertainty, and opportunities for corruption. The bureaucracy was insular and non-transparent and the private sector that engaged with it did so to obtain quota rents from the licensing system.<sup>13</sup> As an example of such non-transparency, a former Commerce official told us that the first shredder provided to a service within the Indian Ministry of Commerce went to the trade division handling the GATT.<sup>14</sup> In such a closed, non-transparent system, law and business lawyers had little role to play.

### **III. Catalysts of Building Indian Legal Capacity in Trade Law**

The Indian development model changed in the 1990s. With the fall of the Berlin Wall in 1989 and the socialist model discredited, Indian officials eyed with envy the rise of East Asian economies with their export-oriented growth models. While East Asia grew, India in 1991 was struck by a severe economic crisis from the Gulf War oil shock and India’s dependence on petroleum imports. The government went to the International Monetary Fund for emergency credits of US \$ 2.3 billion dollars.<sup>15</sup> As a condition to IMF financing (a conditionality, in the IMF’s terms), the IMF called for reforms of the Indian system, including an opening to foreign trade. Under duress, the Indian government of Prime Minister Narasimha Rao and its Finance Minister Manmohan Singh responded. They later spun these reforms as homegrown, known as the “1991 reforms,” which is how the reforms are conventionally discussed within India to this day.<sup>16</sup> Yet as a former high level member of the Indian Administrative Service (IAS) confirmed to us, “the IMF and international institutions helped to provide an excuse to do what otherwise

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<sup>11</sup> I M D LITTLE, *ECONOMIC DEVELOPMENT: THEORY, POLICY AND INTERNATIONAL RELATIONS* 61 (1982).

<sup>12</sup> Rajesh Mehta, *Removal of QRs and Impact of India’s Import*, *ECON. & POL. WEEKLY*, VOL. 35, NO. 19 (May 6- 12, 2000), at 1667.

<sup>13</sup> Many Indian businesses were not so much interested in obtaining the subsidies to gain market share in international markets, than to use the funds to obtain price advantages in the more important, but profit-squeezed, domestic market. Shaffer interview # 26 in 2010.

<sup>14</sup> Shaffer interview # 26 in 2010.

<sup>15</sup> Vijay Joshi and Little state that “[f]or the first time India was nearly forced to the prospect of defaulting on its international financial commitments.” VIJAY JOSHI & I M D LITTLE, *INDIA’S ECONOMIC REFORMS 1991* (1998).

<sup>16</sup> Manmohan Singh, Finance Minister, Budget Speech to the Indian Parliament (July 24, 1991).

was more difficult to do politically, as change was otherwise very difficult to obtain.”<sup>17</sup> The reforms had a significant impact, as India engaged with a globalizing economy. The proportion of trade (imports and exports) to India’s GDP was 8% in 1970, but expanded six-fold to 46% by 2010.<sup>18</sup>

The United States (U.S.) and European Union (E.U.) dominated the Uruguay Round negotiations, and India was pressed to respond to U.S. and E.U. initiatives. Although the Indian government consulted with the private sector and civil society, civil society activists roundly critiqued the government for insufficient consultations. The most controversial issues for civil society activists were agriculture and patents, although much of the industrial sector was also concerned about the implications of the agreements for their competitiveness.

The Uruguay Round negotiations and the resulting WTO agreements that became effective on January 1, 1995 were broad in their coverage, encompassing nineteen distinct multilateral agreements, affecting market access in manufacturing, agriculture and textiles, intellectual property, services, and trade-related investment measures. Joining the WTO meant that India had to implement these WTO commitments, opening its economy to competition, and, in the process, providing new opportunities for business lawyers, directly and indirectly.

Under the WTO, India bound almost 65 percent of its tariff lines.<sup>19</sup> It significantly reduced import duties. In practice, India lowered its applied tariff rates much beyond its actual WTO commitments to an average of around twelve percent by 2010.<sup>20</sup> India also joined the new Information Technology Agreement in 1996 that a subset of WTO members finalized at the WTO Ministerial Meeting in Singapore, which binds tariff rates at zero percent on information technology products. India, in addition, made market access commitments regarding services for the first time under the General Agreement on Trade in Services (GATS), involving thirty-three services sectors. Pursuant to the transparency provisions of the WTO Agreement on Technical Barriers to Trade (TBT Agreement) and the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement), India also created new administrative enquiry points for all technical regulation and sanitary and phytosanitary protection measures.

However, the Indian government and business did not engage in legal capacity building immediately in response to the WTO’s creation. Rather, they responded to the WTO law-in-action, and in particular to politically sensitive complaints brought against India by the U.S.. What spurred India’s development of legal capacity, as in the case of Brazil and China, was being placed on the defensive.<sup>21</sup> The U.S. and E.U. brought a series of critical cases against India in the WTO’s first years that pressed the Indian bureaucracy to develop new partnerships with the private sector and private lawyers. The key disputes were *India-Patents* involving a U.S. and E.U. challenge to India’s implementation of the TRIPS agreement;<sup>22</sup> *India-QR* involving a U.S.

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<sup>17</sup> Shaffer interview # 1, Jan. 16, 2012.

<sup>18</sup> Data calculated from World Development Indicators at: <http://data.worldbank.org/data-catalog/world-development-indicators>. Use Indicators Tab to get data for India. See India's Trade (% of GDP) in 1970, WORLD BANK.

<sup>19</sup> World Trade Organization, Trade Policy Review: India (1998).

<sup>20</sup> World Trade Organization, *Trade Policy Review: India* 43, WT/TPR/S/249 (Aug. 10, 2011).

<sup>21</sup> See Shaffer & Melendez, *supra* note.... (chapters on Brazil and China).

<sup>22</sup> Appellate Body Report, *India- Patent Protection for Pharmaceuticals and Agricultural Chemical Products*, WT/DS 50/R and WT/DS 50/AB/R, adopted on 19 December, 1997[hereinafter *India- Patents*]

challenge against India's use of quantitative restrictions on balance-of-payments grounds;<sup>23</sup> and *India-Autos* involving a U.S. challenge of Indian measures to favor the development of a domestic auto sector.<sup>24</sup> The U.S. itself worked through public-private partnerships involving government and private U.S. lawyers,<sup>25</sup> a model that India would soon take into account.

In *India-Patents*, the U.S. and E.U. challenged India's implementation of its commitment under the TRIPS Agreement to create a transitional "mail-box system" where patent applications could be filed to establish priority and obtain exclusive marketing rights on a transitional basis until India provided patent protection for pharmaceuticals and chemical products used in agriculture, such as fertilizers and pesticides. In defense, India contended that it had fulfilled its commitments through administrative instructions, but it was unsuccessful before the panel and Appellate Body. Within India, the case was called a "shot over the bow of a Hobbesian essence of sovereignty."<sup>26</sup> The case nonetheless triggered significant legal analysis regarding how India could ultimately comply with the TRIPS Agreement in a way that would make use of the flexibilities provided in the agreement in light of India's development and social policy objectives.<sup>27</sup>

The most broad-reaching case affecting Indian industry and agriculture was the *India-QR* decision that implicated the reform of India's import licensing regime. India had experienced a major balance-of-payments crisis in 1990-1991 and it had to go to the IMF to receive U.S.\$ 2.3 billion dollars in credit. As a condition to the credit, India agreed to a series of reforms, including the removal of quantitative restrictions and import licensing on most goods.<sup>28</sup> India nonetheless maintained import licensing and quantitative restrictions on consumer goods that accounted for 2,714 tariff lines, nearly 30 percent of its total number. In *India-QR*, the United States challenged India's invocation of quantitative restrictions on balance-of-payments grounds for these remaining tariff lines. The case was a "wake up" call for India given its systemic importance for India's import controls. India had wished to keep the measures in effect until at least 2006, and invoked its status as a developing country in defense. But India did not prevail. Rather, an IMF representative reported that India no longer faced a balance-of-payments crisis, and the panel and Appellate Body cited the IMF report as critical support of their decision against India.

The case exhibited the role of judicialization of WTO dispute settlement in comparison with that under the GATT. Under the GATT, disputes over balance of payments had been addressed politically within the GATT committee system.<sup>29</sup> India contended that preexisting

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

<sup>24</sup> Appellate Body Report, *India- Measures Relating to Trade and Investment in the Motor Vehicle Sector*, WT/DS 175/AB/R(adopted May 15, 2000) [hereinafter *India-Auto*].

<sup>25</sup> See GREGORY SHAFFER, *DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION* (2003).

<sup>26</sup> See Ulrich Camen and Charles Norchi, *Challenging Sovereignty: India, TRIPS and the WTO*, in *SOVERIGNTY UNDER CHALLENGE: HOW GOVERNMENTS RESPOND* 167, 184 (John D. Montgomery & Nathan Glazer eds., 2002).

<sup>27</sup> Amy Kapczynski, *Harmonization and Its Discontents: A Case Study of TRIPS Implementation in India's Pharmaceutical Sector*, 97 CALIF. L. REV. 1571 (2009); K M Gopakumar, *Product Patents and Access to Medicine in India: A Critical Review of the Implementation of the TRIPS Regime*, 3THE LAW & DEVELOPMENT REVIEW. 326, 338 (2010) (Indian Patents Act has limited the scope of patentability by defining patentability criteria on novelty, inventive step and industrial applications, as well as by excluding certain types of inventions).

<sup>28</sup> ARVIND PANAGARIYA, *INDIA: THE EMERGING GIANT* (2006), p106.

<sup>29</sup> Richard Eglin, "Surveillance of Balance-of-Payments Measures in the GATT." *The World Economy* 10: 1-26 (1987).

practice under GATT precluded the dispute settlement panel from hearing the case, but it again failed in this defense.

The WTO decision spurred fears in India that foreign products would flood the Indian market, and, in particular, marine and dairy products, confectionary items, and fruits and vegetables.<sup>30</sup> The Commerce Ministry promised to establish a “war room” to keep a vigil on some 300 sensitive products, and it constantly assured stakeholders that it had put adequate monitoring mechanisms in place.<sup>31</sup> The government appointed a Committee headed by the Commerce Secretary and the Secretaries of Agriculture and of Small-Scale Industries to identify any safeguards required and to forewarn industries and trade bodies if any action was needed.

Shortly later, the United States challenged India’s policy to support the development of a national auto sector in *India-Autos*, which involved India’s use of local content, foreign exchange, and trade balancing requirements as conditions for imports and investment in the auto sector. The *India-Autos* dispute was in part a “mopping up” operation to eliminate the remaining vestiges of the import-licensing regime that India was required to modify in the *India-QR* decision.<sup>32</sup> In addition, however, the Memorandum of Understanding (“MoU”) that the government required from auto companies included commitments both to meet local content requirements in their manufacturing operations and to ensure that the value of their exports balanced the value of their imports. India lost this case as well, but, in practice, was able to use the dispute settlement system to continue its requirements for a number of years to help develop local manufacturing know-how and enhance competitiveness.<sup>33</sup> Government officials contend that the policy was successful, as India now exports autos to the Middle East, South Asia and Central Asia, creating a new hub in competition with Thailand and Indonesia in the region.<sup>34</sup>

In each case, India had to defend its system in a losing case, but, in the process, learned the importance of developing legal capacity, including to adapt its domestic measures to protect development objectives. The Indian media covered these politically sensitive cases against India in the WTO’s early days, raising awareness about the implications of the WTO dispute settlement system for India. As Atul Kaushik, the lawyer in the government who handled WTO dispute settlement in Geneva from 2003-2006, states, “these disputes were of high visibility for India. The government felt it needed to build capacity regarding WTO law.”<sup>35</sup>

With the launch of the Doha Round in 2001, the government and business realized that they needed to invest more resources in trade law-related capacity. As a representative of the Indian chamber of commerce FICCI states, FICCI realized that it was “imperative” that business become more involved “because of our sense of failure to do so in the Uruguay Round.”<sup>36</sup> Although the Doha Round collapsed, India engaged in a growing number of bilateral and plurilateral trade negotiations for which private sector collaboration was needed, and continued to engage in periodic multilateral trade negotiation initiatives. By late 2006, advocates of a “new

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<sup>30</sup> Sukumar Muralidharan, *Opening the floodgates*, Frontline Vol. 18 (April 2001).

<sup>31</sup> Shaffer Interview #11, in New Delhi (Jan 11, 2012). The government set up an inter-ministerial monitoring body consisting of the Secretaries for Commerce, Revenue, Agriculture, Small Scale Industries, Animal Husbandry, and the Director-General of Foreign Trade to monitor surges on imports of products where QRs were eliminated, and potentially take action under India’s new import relief laws.

<sup>32</sup> Kyle Bagwell and Alan Sykes, *India- Measures Affecting Automotive Sector*, American Law Institute, 2004.

<sup>33</sup> Shaffer interview #24, Jan. 18, 2010.

<sup>34</sup> Shaffer interview #24, Jan. 18, 2010.

<sup>35</sup> Shaffer interview, Atul Kaushik, July 9, 2010.

<sup>36</sup> Shaffer interview # 3, Jan. 19, 2010.



India” saw the country as part of a global shift of economic power away from the U.S. and E.U. and toward larger developing countries, namely the BRICs. Yet to be a global leader, India needed to continue to enhance its legal capacity in the public and private sectors, giving rise to public-private partnerships. While economists traditionally have been most important for Indian policymaking analysis within and outside of the government, and they continue to be so today, the bureaucratic establishment and economists were pressed to gradually recognize the importance of law and lawyering.<sup>37</sup> Since legal capacity was not built into the traditional Indian government service, new methods were needed that could work with India’s bureaucratic context.

#### **IV. Reforming the State and the Creation of Public-Private Partnerships for Trade Law and Policy**

India responded to the challenges of the WTO by significantly investing in greater expertise in the Indian bureaucracy that, in turn, became an interlocutor with the private sector and private legal counsel. The government reformed the state, investing in state capacity within the Ministry of Commerce and Industry (MoCI) as a node of trade law and policy, opening the state bureaucracy to build and tap into legal capacity in the private sector, and creating a government think tank, the Centre for WTO Studies to engage in policy relevant research and act as a liaison between the Ministry of Commerce, the private sector, and private lawyers and consultants.

The government designated MoCI as the nodal ministry for WTO negotiations and policy and the ministry grew in prominence within the Indian bureaucracy.<sup>38</sup> Within MoCI, the government created three new specialized agencies to handle matters implicated by WTO law: a *Department of Industrial Policy and Promotion* (DIPP) that manages, among other matters, intellectual property rights administration, a new Tariff Commission, and a reorganized Directorate General of Antidumping and Allied Duties (DGAD). In 1996, K.M. Chandrasekhar became Joint Secretary at the Department of Commerce and reconstituted the Trade Policy Division to enhance government competence on trade matters and support the India mission to the WTO in Geneva.<sup>39</sup> The ministry increased staff strength from nine to forty officials within a few years.<sup>40</sup> The status of trade positions, moreover, increased within the Indian bureaucracy, so that officials increasingly sought them. This trend complementarily increased the qualitative capacity of Commerce ministry officials in trade law and policy.<sup>41</sup>

The government concurrently more than doubled the size of its mission in Geneva for WTO matters and enhanced coordination between the Geneva mission and the Commerce Ministry in New Delhi. In 1995 when the WTO started, the Indian mission in Geneva had one ambassador and three officers. By 2010, the mission had six to eight officers, including one dispute settlement specialist.<sup>42</sup> As a former Ambassador of India to the WTO noted, “in the old

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<sup>37</sup> Shaffer interview # 41, Jan. 2010 (an Indian lawyer who worked with economists in think tanks).

<sup>38</sup> Sinha, *Global Linkages*, supra note...

<sup>39</sup> A senior official noted, “It was important to get around the system, and that it was almost unheard of to have two Additional Secretaries” in a department, which Chandrasekhar was able to obtain. Shaffer interview #13 (May 24, 2012). Chandrasekhar later became the Indian Ambassador to WTO and eventually the Cabinet Secretary of India

<sup>40</sup> Sinha, *Global Linkages*, supra note...

<sup>41</sup> Traditionally, generalist administrators have been more dominant within the Indian civil service, but this ratio was reversed in the MoCI and agencies associated with international trade negotiations.

<sup>42</sup> Shaffer interviews #2 (Jan. 2012, New Delhi) and #11 (Jan. 2010, New Delhi).

days, the Geneva mission received no meaningful inputs from the capital,” a situation unlike today.<sup>43</sup>

Despite the relative growth in the capacity of trade officials in the Commerce Ministry in Delhi and Geneva, the government still faced challenges given the scope of WTO issues. It realized that it needed to spur the development of complementary private sector capacity building, and to open itself to greater private sector and civil society input. The government obtained critical external support for capacity building within India through a capacity building project led by UNCTAD and supported by India’s Commerce Ministry and Britain’s Department for International Development (DFID), named “Strategies and Preparedness for Trade and Globalisation in India” (UNCTAD Capacity Building Project). The UNCTAD Capacity Building Project lasted eight years, from January 2003 to December 2010, and was first led by Veena Jha, an Indian trade economist whose husband, Harsha Singh was one of the four Deputy Director Generals at the WTO.<sup>44</sup> Aiming to strengthen human and institutional capacity for responding to trade issues, the project organized a series of broad-based and sector-specific stakeholder consultations in India. Through developing a new network of stakeholders, the UNCTAD Capacity Building Project was able to mobilize farmers, fishermen, and small producers to articulate their interests and concerns to inform the government’s approach to WTO and new free trade agreement (FTA) negotiations for the first time. The aim was both to facilitate their providing input to the government, and to enable them to develop better strategies to adapt to economic globalization processes. The UNCTAD project also helped to spur MoCI to work with various state governments to establish WTO cells in order to enhance awareness of the WTO and provide feedback to MoCI from state governments, which govern populations larger than most WTO members.<sup>45</sup>

Given the difficulty of changing the bureaucracy from within, the Ministry decided to outsource research and the building of public-private collaboration to government-sponsored think tanks, and, in particular, the Centre for WTO Studies (which directly reports to MoCI), and private lawyers that contract with MoCI or the Centre. MoCI created the Centre for WTO Studies in 1999.<sup>46</sup> The last head of the UNCTAD project, Abhijit Das, son of B L Das, former Indian ambassador to the GATT, became the head of the Centre for WTO Studies, which continues the networking initiatives begun in the UNCTAD Capacity Building Project. Das formerly worked in the division of the Commerce Ministry handling WTO disputes and so understood the need for home-grown legal capacity in light of the implications of WTO law.

The mission of the Centre for WTO Studies is three-fold: (1) to conduct research for MoCI; (2) to act as a liaison between MoCI and industry and civil society; and (3) to assist in capacity building and information diffusion through organizing workshops and publishing newsletters and reports.<sup>47</sup> As of December 2012, the Centre had eight members, one of whom is

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<sup>43</sup> Shaffer interview #1, India (Jan 16, 2012).

<sup>44</sup> Shaffer interview with Abhijit Das, January 21, 2010 when he worked in the UNCTAD project. Nedumpara, one of the co-authors of this chapter, also worked in the project.

<sup>45</sup> WTO cells were established at the state level in Kerala, Punjab, Andhra Pradesh, Maharashtra, Rajasthan, Tamil Nadu, Uttar Pradesh, Orissa, Karnataka, West Bengal, Madhya Pradesh, Delhi, Tripura, Nagaland, Haryana and the Union Territory of Dadra and Nagar Haveli. Suprita Jayaram, *Functioning of WTO Cells in India: A Critique*, CUTS International (2006), available at <http://www.cuts-citee.org/pdf/BP06-DI-9.pdf> (last visited Oct. 16, 2012).

<sup>46</sup> The Centre is housed in the Indian Institute of Foreign Trade (IIFT), a public management school in Delhi See <http://wtocentre.iift.ac.in/>.

<sup>47</sup> Shaffer interview #24, Jan 18, 2010.

a lawyer. The Ministry of Commerce refers questions to the Centre relating to international trade negotiations, domestic policy that may be affected by international trade law, and potential claims against trading partners' measures that affect Indian exports. The Centre then outsources some of this work to private contractors, such as private lawyers and academics. One of the authors of this study, James Nedumpara, has served as a consultant.

Over time, the government has felt more freedom to work with the private sector, including skilled private Indian lawyers regarding WTO legal issues, whether directly or through the Centre, instead of trying to do everything in-house. As a result, today "there is a small industry of [legal] consultants growing around the Department of Commerce that helps to fill the government's needs."<sup>48</sup> As Abhijit Das, Head of the Centre for WTO Studies, states, trade policy making became both much more "participatory" and was "based on stronger empirical foundations."<sup>49</sup> Today, for all major WTO dispute settlement rulings, Commerce tries to organize a session where a private consultant will make a presentation to the Department of Commerce and other ministries.<sup>50</sup> For example, following the *China-Raw Materials* case, the Commerce Ministry identified twenty affected Indian ministries and invited all of them to hear a presentation of the findings to "raise awareness."<sup>51</sup>

The Centre's initiatives exemplify how the WTO has helped to catalyze major changes in government relations with affected stakeholders and with private lawyers, giving rise to a trade law variant of public-private partnerships. The Indian system remains rather top-down where the private sector plays a much more limited role than in comparison with the U.S. Nonetheless, the change constitutes a major one in India, one that appears to be here to stay. As Professor Bipin Kumar of the National Law University Jodhpur told us, "the new mantra in India is public-private partnerships. The old mentality regarding government is changing."<sup>52</sup>

## **V. The Field of Private Indian Trade Lawyers and their Role**

Over the last decade, a small group of private Indian lawyers have developed trade law expertise and served the government on a variety of trade law matters. These lawyers perform three types of work. They advise the government on its policies for purposes of its negotiating positions (negotiating work). They provide input on the drafting of legislation and regulation and the consideration of policy in light of WTO law (internal policy work). They assist the government in evaluating WTO cases for and against it (litigation work). And they represent the private sector in import relief cases, such as antidumping, countervailing duties, and safeguards cases (covered separately by Mark Wu in this volume).

The number of lawyers working on trade law matters is rather small in light of the primarily intergovernmental nature of the WTO legal system. These highly skilled lawyers have a particular passion for international trade law. They largely work within boutique firms, although such firms can have over one hundred attorneys overall. The largest elite law firms generally have not developed a major international trade law practice, though a partner in Luthra & Luthra (Moushami Joshi) works on trade matters as part of her portfolio, and the founder of Clarus Law Associates (R.V. Anuradha), a small boutique firm, was formerly a partner at India's

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<sup>48</sup> Shaffer interview Kaushik, July 9, 2010.

<sup>49</sup> Shaffer interview, Das, Jan 21, 2010

<sup>50</sup> Shaffer & Nedumpara interview with Amar Sinha, Joint Secretary of MoCI, Jan. 13, 2013.

<sup>51</sup> Shaffer & Nedumpara interview with Amar Sinha, Joint Secretary of MoCI, Jan. 13, 2013.

<sup>52</sup> Shaffer interview with Bipin Kumar, Jan 9, 2012.

largest law firm, Amarchand & Mangaldas & Suresh A Shroff & Co. A list of the law firms working on international trade law matters, noting the type of law firm (using the categorization set forth in chapter 1 of this volume) and the type of trade law work, is listed in *Annex I*.

The private lawyers working in India on trade issues often received some graduate legal education in the U.S. or Europe. The leading Indian lawyer experienced in WTO cases, Krishnan Venugopal, went to Harvard Law School where he received an LLM and started an SJD, and practiced with the U.S. law firm, Paul Weiss. Suhail Nathani, who started the boutique firm Economic Law Practice (ELP) based in Mumbai and Delhi, received a BA from Cambridge and an LLM from Duke Law School. Samir Gandhi, who was earlier with ELP went to the London School of Economics for his LLM. R.V. Anuradha who founded Clarus Law Associates received a masters at SOAS at the University of London and was a global law scholar at NYU Law School. Moushami Joshi, a partner at Luthra & Luthra, received her LLM from George Washington University Law School. As Joshi says regarding her experience in the U.S., “I had an interest in international trade and it just got strengthened when I was in DC. And DC being an international place, you get to attend so many conferences; you are constantly going to all these meetings that think tanks have, which was great because I think it just opened up my mind to this whole new world of law and legal practice.”<sup>53</sup>

The government facilitated the rise of talented, elite lawyers through its investment in the development of highly selective national law schools. Most directly regarding trade law, in 1996, just after the WTO’s creation, the government funded a WTO Chair at the leading Indian law school, the National Law School of India University (NLSIU) in Bangalore. The government’s funding of a specific chair in trade law signaled the government’s view of the growing importance of the subject, and the hope that the government would indirectly benefit from new talent among young legal professionals.<sup>54</sup> As K.M. Chandrasekhar, who was instrumental in the chair’s creation when he was Joint Secretary in the Trade Policy Division, informed us, “the idea was to get young lawyers who can follow and provide expertise on WTO matters. The idea was to create new structures within the Indian context.”<sup>55</sup>

Students at these elite law schools have taken a number of independent initiatives that further spurred knowledge building in international trade law in India. For example, NLSIU started one of the first student edited Journals on international trade law, *The Indian Journal of International Economic Law*. The National Law University in Jodhpur followed by creating a specialization in International Trade and Investment Law and publishing a journal founded by a student in 2009 entitled *Trade, Law and Development*. A young generation of academics at Jindal Global Law School organized a concentration on international trade law and trade remedy law for LL.M students, and run a research center on international trade and economic law (CITEL) where students from leading law schools in India and abroad are offered a paid internship under the Global Research Internship Program (GRIP).

A number of Indian international trade lawyers came out of the national law schools, such as R.V. Anuradha who graduated from Bangalore National Law School in 1995 and Samir Gandhi and Moushami Joshi who respectively graduated from there in 1998 and 2001. As Joshi told us, she had three graduates from the national law schools working for her on trade law

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<sup>53</sup> Shaffer interview with Moushami Joshi, Luthra & Luthra, Jan. 20, 2010.

<sup>54</sup> Shaffer interview with Atul Kaushik, July 9, 2010. The endowment for this Chair is only roughly around \$60,000, but it was nonetheless viewed as a coup by Indian trade law officials. Shaffer interviews #1 and #13.

<sup>55</sup> Shaffer interview with Chandrasekhar, Jan 16, 2012.

matters in 2012.<sup>56</sup> Similarly, within the Centre for WTO Studies, Shailaja Singh joined as a legal consultant following receiving a degree from the West Bengal National University of Juridical Sciences, Kolkata, followed by an LLM at Cambridge University.<sup>57</sup>

Building from an earlier Brazilian model,<sup>58</sup> MoCI has also created an internship program for law students, which is overseen by the India Institute of Foreign Trade.<sup>59</sup> In parallel, other Indian public and private institutions have run internship programs for students in trade law as well, including the Centre for WTO studies, CUTS International, and law firms such as Luthra & Luthra Law Offices, APJ-SLG Law Offices, Dua Associates, Lakshmikumran & Sridharan, Economic Law Practice, Seth Dua & Associates, Clarus Law Associates, and Amarchand & Mangaldas & Suresh A Shroff & Co.. Placement in these internships is highly competitive, and law graduates have opted for them even when they have had an opportunity to work full-time in the more lucrative corporate law sector. These students have great interest in international trade law.

### *1. Trade Negotiations Support*

With the launch of the Doha negotiating round in 2001, India adapted in order to play a more engaged role in the WTO system. To do so, the government created new linkages with stakeholders and consulted with them more regularly and transparently. While the trade division was previously known for being remote and non-transparent, now the government began to more proactively and regularly share analysis and documents with the private sector and seek legal opinions from Indian law firms. The government did so because of a sense that it would embarrass itself if the administration did not become more proactive and effective in tapping into and making use of the information and expertise of the private sector and a new generation of professionals engaged with global issues.<sup>60</sup>

Perhaps most significantly, India worked with Brazil to respond at the 2003 Cancun Ministerial meeting to a Joint E.U.-U.S. proposal on agriculture that failed to reflect the interests of Brazil and India. The Brazilian and Indian governments worked with think tanks in their respective countries to develop new modalities for WTO agricultural negotiations. Many consider this proactive developing country stance on negotiating modalities to be a “defining moment of change for the WTO” and its negotiating system.<sup>61</sup> It was the first time that emerging economies had come together to submit an integrated, detailed proposal on modalities that reflected their concerns. The think tanks’ analyses provided the analytic heft for the G-20 in the Doha Round agricultural negotiations.

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<sup>56</sup> Shaffer interview with Moushami Joshi, Luthra & Luthra, Jan. 12, 2012.

<sup>57</sup> Shaffer interview with Shailija Singh, Centre for WTO Studies, Jan. 10, 2012.

<sup>58</sup> See Shaffer et al, *Winning*, supra note...

<sup>59</sup> Indian Institute of Foreign Trade, Internships, *available at* [http://cc.iift.ac.in/docs/iift/Intern\\_27122011.pdf](http://cc.iift.ac.in/docs/iift/Intern_27122011.pdf)

<sup>60</sup> Shaffer interview #26, in 2010.

<sup>61</sup> DAVID DEESE, *WORLD TRADE POLITICS: POWER, PRINCIPLES AND LEADERSHIP* 155 (2007) (noting that in 2004, “the Brazilian and Indian ministers established themselves as co-leaders in the most contentious issue area, agriculture, because they were able to gradually press the US and EC for substantial agricultural reforms they would not offer on their own”). Ambassador Ujjal Singh Bhatia calls this a “watershed moment” in the history of the WTO. Ujjal Singh Bhatia, *G-20- Combining Substance with Solidarity and Leadership*, in *REFLECTIONS FROM THE FRONTLINE: DEVELOPING COUNTRY NEGOTIATORS IN THE WTO* 239, 245 (Pradeep S. Mehta ed, 2012) (argues that the formation of G-20 challenged the hegemony of the EU and US in agenda setting at the WTO). Shaffer discussed in interview with K.M. Chandrasekhar in Trivandrum, India (Jan. 16, 2012).

In order to enhance its capacity, the Indian trade policymaking process became more inclusive.<sup>62</sup> As one senior Indian official observed, the new Trade Policy Division decided to “open its doors” to the private sector and civil society during the Doha Round of negotiations.<sup>63</sup> The government increasingly invited industry and civil society representatives for consultations. Industry associations such as the Federation of Indian Chamber of Commerce and Industry (FICCI) and the Confederation of Indian Industry (CII) responded. FICCI established a new WTO Division and CII a new Trade Policy Section. They, in turn, conducted their own stakeholder consultations with their members.<sup>64</sup> Other industry organizations such as ASSOCHAM and PHD Chamber did as well, conducting industry-wide consultations on trade negotiation matters before and after key events such as Ministerial conferences and free trade agreement negotiations. The government shared the cost of these industry consultations and provided technical support,<sup>65</sup> recognizing its ultimate dependence on private sector support.<sup>66</sup>

Although the WTO Doha Round of negotiations stalled since 2008,<sup>67</sup> trade negotiations remained active in bilateral and regional forums, and continued in a less ambitious manner within the WTO itself. Bilateral and regional trade negotiations give rise to competition among countries to gain market access. These competitive processes have spurred India to enter a slew of bilateral and regional trade negotiations and agreements. India has signed trade agreements with Japan, South Korea, Thailand, Singapore, Malaysia, ASEAN (separately from its members), Sri Lanka, Chile, Afghanistan, Mercosur, South African Customs Union (SACU), Gulf Cooperation Council, and an Agreement on South Asia Free Trade Area (SAFTA) involving Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, and Sri Lanka.<sup>68</sup> India has also launched negotiations for free trade agreements with the E.U., EFTA, Canada, Australia, New Zealand, Indonesia, Egypt, Israel, and a Regional Comprehensive Economic Partnership with the countries of Asia. Developments in these bilateral and regional forums potentially could trigger momentum for broader multilateral negotiations.

The government consults a group of trade lawyers regarding the legal texts being negotiated in these trade agreements, as well as other international law agreements implicated by trade law. The government hires private Indian attorneys for specialized assistance in specific legal areas, such as intellectual property, services, standards, import relief, and government procurement. For example, the government hired the Strategic Law Group (now part of the APJ-SLG Law Offices) to help in the preparation of India’s proposal for a lesser duty rule under the Rules Negotiations in the Doha Round.<sup>69</sup> For FTA negotiations, firms such as Economic Laws

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<sup>62</sup> Aseema Sinha, *When David Meets Goliath: How Global Markets and Rules are Shaping India’s Rise to the Power*, p. 14 (working draft).

<sup>63</sup> Shaffer interview #1, Jan. 2012.

<sup>64</sup> Gregory Shaffer interview #3 in New Delhi (Jan 2010); Shaffer interview # 6 in New Delhi (Jan. 12, 2012).

<sup>65</sup> Id.

<sup>66</sup> Shaffer interview # 7, India (Jan. 9, 2012).

<sup>67</sup> Negotiations effectively stopped when the Geneva ministerial meeting collapsed without agreement on modalities in July 2008. See Sungjoon Cho, *The Demise of Development in the Doha Development Round*, 45 TEXAS INTERNATIONAL LAW JOURNAL 573 (2010).

<sup>68</sup> See the MoCI website for more details on these bilateral agreements: [http://commerce.nic.in/trade/international\\_ta.asp?id=2&trade=i](http://commerce.nic.in/trade/international_ta.asp?id=2&trade=i).

<sup>69</sup> Nedumpara during his employment at the UNCTAD program in New Delhi organized the review process where the proposal was revised and submitted to the WTO negotiating committee.

Practice and Lakshmikumaran and Sridharan have also provided the government with advice.<sup>70</sup> At times, the lawyers work with economists who address the economic implications of particular negotiating positions and modalities, whether for trade in goods or trade in services.<sup>71</sup> At times, other government departments have engaged these attorneys for international law-related work that may be indirectly implicated by WTO law, such as the Ministry of Environment and Forests regarding climate change.

Indian business also increasingly recognized the implications of WTO trade negotiations. As Kaushik states, as India opened up its economy to international trade, “there was recognition of industries that they need to get to a higher competitive level vis-à-vis their competitors. Those industries recognized the need for internal capacities to deal with international trade matters.”<sup>72</sup> The process started with the creation of WTO cells within Indian trade associations and large companies in the late 1990s and early 2000s. These cells were created across sectors, from auto components to financial services to textiles. They handle different aspects of trade law and policy, including market access issues in trade negotiations, as well as (more broadly) export and import issues, export control matters, trade remedy matters such as antidumping, countervailing duty and safeguard investigations, technical regulations and standards and other regulatory matters. For example, Tata Iron and Steel Company (TISCO), the largest Indian steel maker, engaged a senior consultant to advise the company and the consortium of Indian steel companies in the OECD steel subsidies negotiations.

## *2. WTO Implementation and Policy Space*

The WTO system has significant implications for national law and policy. As illustration, WTO rules and dispute settlement affected the substance and timing of India’s dismantling of its license raj and system of quantitative restrictions, India’s adoption and implementation of a new patent law, and the rise of Indian import relief laws and administrative actions. Yet WTO law and its implementation are also subject to legal interpretation, potentially creating work for lawyers.

The government and business have engaged private lawyers to assess government policy options in light of existing trade law. The Commerce Department receives a large number of questions from other Indian departments on WTO compatibility of legislation and regulation and it at times outsources such questions to private consultants. Regarding Indian legislation generally, the Joint Secretary in MoCI informed us that it “gets references about every single day” regarding the WTO implications for proposed legislation, regulation or policy.<sup>73</sup>

As other government departments become aware of the implications of WTO agreements, they also have contacted private attorneys for consultations. WTO law affects industrial policy choices, such as the use of subsidies and domestic content requirements, and thus implicates many Indian ministries. For example, the powerful Indian planning commission has contacted private attorneys regarding choices over building power infrastructure, including options for increasing or reducing tariffs and applying local content requirements to build domestic

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<sup>70</sup> Shaffer interview # 9, in New Delhi (Jan 12, 2012).

<sup>71</sup> Shaffer interviews with Indian attorneys, economists in think tanks, and government officials, January 2010 and January 2012.

<sup>72</sup> Shaffer interview with Atul Kaushik, July 9, 2010.

<sup>73</sup> Shaffer & Nedumpara interview with Amar Sinha, Joint Secretary of MoCI, Jan. 13, 2013.

manufacturing capacity.<sup>74</sup> In the past, we were told, the Planning Commission would never have consulted outside lawyers, much less regarding international trade law, so this development is a significant one in indicating the broader implications of WTO law for Indian law and policy. The government likewise engaged consultations from private law firms regarding the implications of the GATT and WTO agreements on India's emerging renewable energy policies, including consideration of renewable energy requirements for utilities.<sup>75</sup> These government departments have also worked with private attorneys who initially worked with the Department of Commerce on trade law matters, and who now also provide consultations regarding Indian legislation in relation to other international law.<sup>76</sup> The WTO can be seen as a catalyst, and part of a broader trend, for the government becoming aware of the need to integrate outside legal counsel in understanding the international law implications of Indian legislative and administrative policy initiatives.

The WTO cells in private companies and trade associations, addressed above, also provide analysis of trade policy initiatives and regulatory issues. Large Indian companies, more generally, have hired in-house lawyers to reduce the dependence on law firms, including for work that may require knowledge of WTO law. For example, a Commerce official told us he saw that a "textile fashion designer recruited three lawyers with terms of reference regarding how much WTO law they know."<sup>77</sup> Small and medium sized Indian companies (SMEs), in parallel, have used the services of specialists within industry and trade associations, such as Texprocil, Confederation of India's Textile Industry (CITI),<sup>78</sup> Automotive Component Manufacturers Association of India (ACMA),<sup>79</sup> Federation of Indian Export Organization (FIEO),<sup>80</sup> Society of Indian Manufacturers (SIAM),<sup>81</sup> Automobile Components Manufacturers Association of India (ACMA), Association of Synthetic Fiber Industry (ASFI) and the National Association of Software & Services (NASSCOM).<sup>82</sup>

WTO law grants countries some flexibility in interpreting its provisions so that India had some leeway in determining how to revise its laws and adapt its institutions. India, for example, radically revised its patent law, expanding protection to pharmaceutical and agricultural chemical products pursuant to the TRIPS Agreement. Yet the government did so in an innovative manner after a long internal study and consultations with stakeholders. It created new definitions of what a patent must show in terms of novelty and an inventive step, thus narrowing the scope of patent

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<sup>74</sup> Shaffer interview with Moushami Joshi, Luthra & Luthra, Jan. 12, 2012.

<sup>75</sup> *Id.*

<sup>76</sup> Shaffer interview with #31, Jan. 10, 2012.

<sup>77</sup> Shaffer interview #26, 2010.

<sup>78</sup> For example, CITI organized a series of awareness programs during the phase out period of the Multi-Fiber Agreement (1995-2004) and published a newsletter entitled "FocusWTO" to educate its subscribers of the various challenges faced by the India Textile industry.

<sup>79</sup> ACMA attended the Fifth WTO Ministerial Conference in Hong Kong and had opposed the proposal for sectoral approach under the NAMA negotiations in the Doha Round. See [http://expressindia.indianexpress.com/story\\_print.php?storyId=87113](http://expressindia.indianexpress.com/story_print.php?storyId=87113) (last visited Oct. 24, 2013).

<sup>80</sup> Website of Indian Federation of Export Organizations, see <http://www.fieo.org> (last visited Oct. 24, 2013).

<sup>81</sup> Society of Indian Manufacturers, <http://www.siamindia.com/scripts/EconomicAffairs.aspx> (last visited Oct. 24, 2013) ("[I]n the Trade Policies section we have given write-ups on India's engagements in various Trade Negotiations, Indian Preferential Trade agreements and NAMA negotiations in WTO and Indian Automobile Industry").

<sup>82</sup> Website of NASSCOM, see <http://www.nasscom.in/global-trade-development> (last visited Oct. 24, 2013).



claims.<sup>83</sup> In parallel, India made it considerably easier to challenge patents than under U.S. and E.U. models by including both pre- and post-grant challenges, and permitting these challenges to occur before an administrative body that is more efficient in processing them than a court.<sup>84</sup>

The WTO has created work for lawyers beyond traditional trade law work, as exemplified by intellectual property law. As the World Intellectual Property Organization (2013) reports, “[f]rom 1997 to 2011, patent filings increased ... in India by 605 percent.” Major litigation over intellectual property rights is taking place in India in the shadow of the TRIPS Agreement, such as *Novartis v. Union of India* in 2007, *Novartis Ag v. Union of India* in 2013, and *Bayer v. Union of India* in 2010.<sup>85</sup> Norms in India have shifted regarding patents. As a former Indian Ambassador to the WTO quipped to us, “now one speaks of patent or perish; whereas before the mantra was no patents or perish.”<sup>86</sup> These developments reflect the important, but indirect, ways in which the WTO has affected law and lawyering in India in subject-specific areas.

### 3. WTO Dispute Settlement

A small group of Indian lawyers in the private sector have become increasingly important for providing counsel to India on potential and actual WTO trade disputes. The GATT dispute settlement system was slow and weak compared to the WTO's, and India participated little. In GATT's roughly fifty-year history, India was a party in three minor cases, of which only one resulted in a formal GATT report.<sup>87</sup>

With the commitments that India and other countries made in the Uruguay Round, and with the rise of the WTO's legalized and judicialized dispute settlement system, this situation changed. India has become one of the leading users of the WTO dispute settlement system, along with Brazil and China among non-OECD countries. Through October 2013, India was a complainant in 21 disputes and a respondent in 22 disputes.<sup>88</sup> It was a third party in 91 additional ones. A complete list of disputes where India has been involved as a complainant or respondent is provided in *Annexes 2 and 3*, together with the lawyers who assisted the government in these disputes.

India has brought systemically important claims before the WTO system, in addition to those in which it has been a respondent. The *US-Shrimp* dispute is arguably the most referenced WTO case regarding the interpretation of the GATT exception clause, Article XX, addressing the interaction of trade rules with environmental protection measures. The *EC-GSP* case is central for understanding legal requirements under the General Systems of Preferences. The

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<sup>83</sup> Kapycznski, *supra* note...

<sup>84</sup> *Id.*

<sup>85</sup> World Intellectual Property Organization (2013). Statistical Country Profiles. Available at URL: [http://www.wipo.int/ipstats/en/statistics/country\\_profile](http://www.wipo.int/ipstats/en/statistics/country_profile); Ellen Hoen, A Victory for Global Public Health in the Indian Supreme Court, *Journal Of Public Health Policy* 1-5 (2013); Sudip Chaudhuri, Chan Park and Gopakumar K.M. *Five years into the Product Patent Regime: India's Response*. UNDP, New York (2010).

<sup>86</sup> Shaffer interview with former Ambassador to the WTO, India, Dec. 14, 2013.

<sup>87</sup> The three complaints were: Complaint by India, *Pakistan- Export fees on Jute*, GATT/L/41 (1952) (resulting in GATT report); GATT, *United States Countervailing Duty Without Injury Finding*, Complaint by India, BISD, 28th Supplement (1982), p. 113; GATT, *Japanese Import Restrictions on Leather*. Complaint by India under special Article XXIII procedure for developing countries, GATT Document L/5653 (1984).

<sup>88</sup> World Trade Organization, Dispute Settlement: Dispute by Country, *available at* [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_by\\_country\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm). (last visited Nov. 2, 2013)

*Turkey-Textiles* case establishes the jurisdiction of the WTO dispute settlement body in assessing the legality of regional trade agreements under GATT Article XXIV. The *EC-Bed Linen* case was the first to challenge the practice of zeroing used by the E.U. and U.S., which creates biased calculations of dumping margins against imports.<sup>89</sup> And in the early case, *US-Shirt and Blouses*, the Appellate Body clarified the burden of proof in WTO cases.<sup>90</sup> To bring cases, however, is not enough, given the systemic implications of these decisions. A country's aim is not only to win a case, but also to shape the understanding of WTO law in line with its broader economic policy objectives.

After the *India-Patents* case, the government initially outsourced work to foreign lawyers, but then increasingly worked with a cadre of Indian lawyers, sometimes working with or sometimes without foreign ones. The government first turned to Frieder Roessler, the former head of the GATT legal secretariat, initially in his private capacity, and then as the first Executive Director of a new Advisory Center on WTO Law (ACWL) in Geneva in 2002. India quickly became the ACWL's most active user. Roessler worked for India in the *India-QR* and *India-Auto* disputes in his individual capacity, and in the *EU-GSP* and the *US-Rules of Origin* disputes as part of ACWL. The government also periodically works with foreign lawyers in cases involving foreign application of import relief laws against Indian imports, such as with the Brussels based law firm *Vermulst Waer & Verhaeghe (VWV)* in the *EC-Bed Linen* dispute which had represented the country in the underlying antidumping case in Brussels.

In parallel, however, the government began to work with an Indian attorney, Krishnan Venugopal, on WTO cases, starting with the *India-Patents* case when Venugopal was attached to the Attorney General's office of India (from 1996-1998). Venugopal would continue to work with the government in future disputes on an ad hoc basis as he established an important Supreme Court practice, following the path of his father, one of India's most renowned lawyers before the Indian Supreme Court. Venugopal worked on the *India-Patents*, *India-QR*, *India-Autos*, *EC-GSP*, and *US-Customs Bond Directive* cases, either alone or jointly with other lawyers.<sup>91</sup> The *U.S.-Customs Bond* case was the first in which Venugopal worked with the government where it was not also assisted by Roessler and the ACWL. This move reflected the government's growing confidence in being able to work with Venugopal, individually, and with Indian attorneys more generally.<sup>92</sup>

As a new generation of WTO-specialized legal talent developed in India, the government worked with a broader cadre of Indian law firms. The government hired Economics Laws Practice (ELP) in the *India-Additional Duties* case, in which the Indian attorneys Suhail Nathani and Samir Gandhi worked,<sup>93</sup> Luthra & Luthra Law Offices in the *India-Agricultural products*

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<sup>89</sup> James J Nedumpara, *Antidumping Proceedings and 'Zeroing' Practices: Have We Entered the Endgame?*, 7 (1) GLOBAL TRADE & CUSTOMS JOURNAL 15, 20-21 (2012) (provides a list of all 'zeroing' cases adjudicated by the WTO panels and the Appellate Body).

<sup>90</sup> *United States- Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS 33/AB/R, (April 25, 1997), p. 16.

<sup>91</sup> See <http://www.itechlaw-india.com/2009/KrishnanVenugopal.html> (last visited May 21, 2012)

<sup>92</sup> Shaffer interviews with Indian attorneys, 2010.

<sup>93</sup> See <http://www.whoswholegal.com/profiles/34478/0/Nathani/suhail-nathani/> (last visited May 22, 2012); Appellate Body Report, *India- Additional and Extra-Additional Duties on Imports from the United States*, WT /DS 360/AB/R, (adopted Oct. 30, 2008).

case,<sup>94</sup> Lakshmikumaran & Sridharan in the *US-Steel Plate* case,<sup>95</sup> and Clarus Law Associates, a Delhi-based boutique firm, in the *India-Solar Cells* case.<sup>96</sup> To explore a potential claim, the Department of Commerce also engaged Clarus Law Associates to examine the legal issues behind a WTO challenge against restrictive U.S. Visa requirements under the Southwest Border Protection Act and the James Zadroga Act.<sup>97</sup> In addition, Indian law firms increasingly provide legal analysis and drafting support for India's third party submissions in WTO cases.<sup>98</sup> Third party submissions are important because decisions in WTO cases involving other countries can have systemic implications for the understanding and future application of WTO law, and India has increasingly asserted third party rights in WTO cases.

The Indian government's work with the affected private sector in *US-Custom Bond Directive* provides an example of a successful Indian public-private partnership.<sup>99</sup> In this case, India successfully challenged an enhanced bond requirement applied by the U.S. in an antidumping proceeding involving frozen warm water shrimp from India and other developing countries. Indian seafood exporters saw their exports decline by almost one-third following the imposition of U.S. antidumping duties in 2004. The government worked with the private sector, which is generally small and unorganized, through the government's Marine Products Exporters Development Authority (MPEDA) and the Seafood Exporters Association of India (SEAI). These two public agencies work to enhance foreign market access for Indian seafood products, including in antidumping proceedings abroad. MPEDA and SEAI covered most of the legal fees and expenses in the case.<sup>100</sup> SEAI contributed more than 50% of the total costs from its internal resources and the rest from member contributions as a function of the value of their respective exports.<sup>101</sup> Seafood exporters are on MPEDA's Management Board, which facilitated the cost-sharing agreement.

India and its seafood exporters paid a high price (from an Indian perspective) in the underlying U.S. antidumping investigations, spending nearly U.S. \$12 million (around INR 65 crores) from 2003-2010.<sup>102</sup> Challenging the measure at the WTO, in contrast, was much less costly, demonstrating the potential benefit of building WTO-related legal capacity. The Indian

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<sup>94</sup> 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).

<sup>95</sup> 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)

<sup>96</sup> Request for the Consultations by the United States, *India — Certain Measures Relating to Solar Cells and Solar Modules*, WT/DS456/1 (Feb. 6, 2013).

<sup>97</sup> *India to take US visa complaint to the WTO*, FINANCIAL TIMES, Apr. 10, 2012, available at <http://www.ft.com/intl/cms/s/0/d477c0a6-830e-11e1-929f-00144feab49a.html>; see also Interview by Gregory Shaffer with # 4, in Geneva (May 21, 2012).

<sup>98</sup> Shaffer Interview # 9, in New Delhi (Jan 12, 2012).

<sup>99</sup> Appellate Body Report, *US- Custom Bond Directive*, *supra* note [?]

<sup>100</sup> Telephone Interview by James Nedumpara with Zandu Joseph, Secretary, SEAI (May 12, 2011) (on file with author). The funding, we understand, was provided from the Market Access Initiative of the Marine Product Export Development Authorities (MPEDA), viewed at: <http://www.mpeda.com/HOMEPAGE.asp> (last visited May 27, 2011); see also B. Battacharyya, *The Indian Shrimp Industry Organizes to Fight the Threat of Antidumping Action in MANAGING THE CHALLENGES OF WTO PARTICIPATION: 45 CASE STUDIES*, 241 (Peter Gallagher et al. eds., 2007) (this study notes a figure of 70 million Indian Rupees for defending this case).

<sup>101</sup> *Id.*

<sup>102</sup> Telephone Interview by James Nedumpara with Zandu Joseph, Secretary, SEAI (May 14, 2011) (on file with author).

shrimp exporters also successfully pushed the government to join a group of countries that successfully challenged the U.S. Byrd Amendment (known in the WTO as the *US-Offset Act*) under which the U.S. distributed the revenue obtained from U.S. antidumping and countervailing duty proceedings to the petitioning U.S. domestic industry, thereby subsidizing it.

India also worked closely with the private sector in successfully settling its WTO claim against the E.U. in the *EC-Drug Seizure* case.<sup>103</sup> India challenged the seizure of Indian generic drugs at various airports in Europe (and, in particular, the Netherlands) when the planes were being refueled before taking the generics to other developing countries, such as Brazil. A number of Indian industry associations, including Pharmaxil and FICCI, worked with the government to assess the facts, legal claims, and negotiating strategies before the government commenced consultations with the E.U.. The government worked with Venugopal, U.S. law professor Frederick Abbott, and Moushami Joshi at Luthra & Luthra who provided background support, to negotiate a favorable settlement with the E.U..<sup>104</sup>

#### *4. Import Relief Work.*

Following the WTO's creation, India created and applied import relief laws, and it soon initiated more antidumping investigations than any other WTO member. India updated trade remedy legislation that would require greater legal analysis both within government and the private sector.<sup>105</sup> It reorganized the Indian bureaucracy for import controls, and reformed the Directorate-General of Foreign Trade (DGFT) within an expanded Trade Policy Division (TPD) in the Department of Commerce. Law gradually and increasingly encroached on administrative discretion.

In the private bar, a new import relief specialized practice developed. Many of the leading lawyers came from government service, moving to private practice because it was much more lucrative. For example, the three largest practitioners in the antidumping field, V. Lakshmikumar, Sharad Bhanasali, and A.K. Gupta all came from government services. This vibrant legal practice catalyzed by the WTO's creation and India's commitments under the WTO agreements is described in Mark Wu's chapter in this volume, and we do not address it further here.

## **VI. The Limits of International Trade Law Work**

Because of the government's constraints on fees, a WTO law practice is far from lucrative for Indian lawyers. Many large Indian firms thus do not engage in WTO law work. Others, such as Luthra & Luthra Law Offices, Economic Laws Practice, and Lakshmikumar & Sridharan, complement their WTO work with a tax, customs, competition, and antidumping law practice. The bulk of trade law practice for most Indian law firms is under India's import relief laws, and, in particular, antidumping work. For example, TPM Consulting, a firm started by AK Gupta, claims to have handled at least 200 antidumping investigations in the last ten years.<sup>106</sup> At times, domestic antidumping work can lead to WTO work as well, as antidumping measures and

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<sup>103</sup> Request for Consultation by India, European Union- Seizure of Generic Drugs in Transit, *available at*

<sup>104</sup> Shaffer interviews #6, #9 and #16 in New Delhi (Jan. 2012).

<sup>105</sup> See The Customs Tariff (Identification, Assessment, and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules 1995.

<sup>106</sup> See <http://tpm.in/about-us.aspx>

other trade remedies have constituted around one-third of WTO dispute settlement cases.<sup>107</sup> Some firms aim, in particular, to build a competition law practice, which somewhat overlaps with antidumping law-type analysis, such as regarding the definition of an industry, its injury from unfair competition, and causation. They include such familiar names in Indian trade law as Krishnan Venugopal, Suhail Nathani, Samir Gandhi, R.V.Anuradha, Moushami Joshi, Sharad Bhansali, S.Seetharaman, and Atul Dua. Those firms that engage in WTO-related legal work often do so for the reputational benefits of representing the country in international dispute settlement, which, in turn, can support their domestic practice.

These practices would be helped if Indian corporations and trade associations were to hire them more frequently for WTO-related work. Although the government has sought to work more closely with the business sector, the government has generally had to cover all of the costs for legal analysis and litigation, unlike in other countries such as Brazil. This reliance on government funds reflects, in part, an attitude in the Indian private sector that international trade relations are the government's responsibility. Many in the government, as well as private lawyers, hope that this attitude will change.

#### **IV. Conclusion**

The WTO trading system is a point of entry for understanding law and lawyers in India in the broader global context. This chapter examined India's reciprocal relationship with the global trading system. On the one hand, it assessed India's efforts to build legal capacity for trade negotiations, dispute settlement, and domestic policy in order to defend its interests and shape the international trade legal order. India aims to influence the rules through negotiation and litigation, and thereby both gain market access abroad for its exports and preserve policy space domestically for its policies. On the other hand, the chapter showed the impact of the international trade law system on domestic institutions in India in light of India's wish to engage it, and the opportunities and constraints the system provides for public and private actors who promote internal reform, defend policy space, and challenge market barriers abroad.

The WTO privileges the value of legal expertise to a much greater extent in trade and regulatory policy than before. It catalyzed the development of new legal capacity within the Indian state and pressed the Indian bureaucracy to become more transparent and open to greater input from the private sector and civil society. It spurred the government to outsource work to private Indian law firms to address WTO claims, potential claims, negotiating positions, the implementation of WTO requirements, and the consideration of domestic policy initiatives in light of them. Indirectly, but critical for the GLEE project represented in this volume, WTO law and processes facilitate and embed market opening to trade and investment that, in turn, bolsters a market for business lawyers.

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<sup>107</sup> From 2001-2009, the WTO Dispute Settlement Body spent nearly one-third of its time on cases involving trade remedies. Chad P. Bown and Thomas J. Prusa, *U.S Antidumping: Much Ado About Nothing* 1-55, The World Bank Development Research Group, Trade and Integration Team, Policy Research Working Paper 5352, June 2010.

## Annex 1: Indian law firms engaged on trade matters

Among the large law firms in India, only Luthra & Luthra has been involved in WTO dispute settlement. Firms such as Amarchand Mangaldas and J. Sagar Associates handle trade remedy work (mainly antidumping), but they have never been engaged by the government for WTO dispute settlement. We do not list firms engaged in legal practices implicated by WTO law, such as intellectual property law.

### WTO Litigation/consultation

Law Firm (WTO dispute settlement)	Number of Lawyers	Typology
Luthra & Luthra	>300 lawyers	Elite
Economic Laws Practice	>150 lawyers	Boutique
Lakshmikumaran & Sridharan	~150 lawyers	Boutique
Clarus Law Associates	~10 lawyers	Boutique
Law Offices of Krishnan Venugopal	Senior Advocate, Supreme Court( Litigation)	Focused

In addition to WTO work, many of the above firms work on trade remedy, export control, FTA and other trade issues, in addition to the following other firms which provide a sampling of the broader field of trade remedy law.

### Trade Remedy (Antidumping, Countervailing Duty (Anti-Subsidy), Safeguards) Practice

Law firm	Number of Lawyers	Typology
Amarchand Mangaldass	~600 lawyers	Elite
J. Sagar	>200 lawyers	Elite
APJSLG	~ 50 lawyers	Boutique
Joseph Vellappally	Senior Advocate, Supreme Court( Litigation)	Focused

A number of consulting firms such as AK Gupta and Ernst & Young also carry out trade remedy, export control and consulting practice.

### Customs, Customs valuation, export control, FTAs/Trade Agreements and Trade Remedies

A K Gupta*	Accounting and Consulting Firm
Ernst and Young	'Big 4' (Accounting and Consulting Firm)

\*Mr A K Gupta was a cost accountant at the DOC (DGAD), and handles the bulk of the trade remedy work in India. E&Y recently established a "best friend firm" called PDS Legal to establish this practice.

## Annex 2. India as a Complainant in WTO Disputes

Title of the case	Dispute Number	Year of Consultation	Panel Established	Appellate Body	Sector Concerned/ Trade Association	Lawyers who represented India
Poland- Automobile	19	1995	No	No	Automobile	
US- Women's and Girl's Wool Coats	32	1996	Yes	No	Textiles and Clothing	
US-Wool Shirts & Blouses	33	1996	Yes	Yes	Textiles and Clothing	
Turkey- Textiles	34	1996	Yes	Yes*	Textiles and Clothing	
US- Shrimp	58	1996	Yes	Yes*	Fisheries/Marine	Arthur Appleton/ Lalive Lawyers
EC- Rice	134	1998	No	No	Agriculture	
EC-Unbleached Cotton Type Bed Linen	140	1998	No	No	Textiles and Clothing	Vermulst Waer & Verhaeghe (VWV)
EC-Bed Linen	141	1998	Yes	Yes*	Textiles and Clothing (Texprocil)	Vermulst Waer & Verhaeghe (VWV)
South Africa- Pharmaceuticals	168	1999	No	No	Pharmaceuticals	
US- Steel Plate	206	2000	Yes	No	Steel	Sidley and Austin
US-Byrd Amendment	217	2001	Yes	Yes**	n/a*** (MPEDA/SEAI)	Wilkie Farr & Gallagher (Advised MPEDA/SEAI)
Brazil- Jute Bags		2001	No	No	Textiles and Clothing	
Argentina- Pharmaceuticals	233	2001	No	No	Pharmaceuticals	
US- Textiles Rules of Origin	243	2002	Yes	No	Textiles and Clothing (Texprocil)	ACWL

EC- GSP	246	2002	Yes	Yes	Textiles and Clothing (Texprocil)	ACWL/Krishnan Venugopal
EC- Steel Products	313	2004	No	No	Steel	Squire Sanders
US- Customs Bond Directive	345	2006	Yes	Yes	Fisheries/Marine (MPEDA/SEA I)	Krishnan Venugopal/Clarus/Wilkie Farr and Gallagher
EU-Expiry Review of AD/CVD on PET	385	2008	No	No	Chemicals and Plastics (Chemplast)	(Consultation stage Krishnan Venugopal/ ACWL / Steptoe & Johnson assisted some of the Indian exports
EU- Seizure of Generic Drugs	408	2010	No	No	Pharmaceuticals	Consultation stage Krishnan Venugopal/Frederick Abbot
Turkey- Transitional Safeguards	428	2011	No	No	Textiles (Texprocil)	Lakshmikumaran and Sridharan
US- CVD on Carbon Steel	436	2012	Yes	no	Steel	Lakshmikumaran and Sridharan

*\*Article 21.5 panel established and the findings were appealed to the AB.*

*\*\*Authorization for suspension of concession further to Arbitrator's findings.*

*\*\*\* Not available. Multiple sector have been affected*

*Source: Compiled from information on the WTO website*



### Annex 3. India as a Respondent in WTO Disputes

Title of the case	Dispute Number	Year of Consultation	Panel	Appellate Body	Sector concerned/ Association	Lawyers who represented India
India- Patents (US)	50	1996	Yes	Yes	Pharmaceuticals and Chemicals	Friedler Roessler/ Krishnan Venugopal
India- Patents (EU)	79	1996	Yes	No	Pharmaceutical and Chemicals	Friedler Roessler/ Krishnan Venugopal
India- QRs	90, 91, 92, 93, 94, 95 and 96	1997	Yes	Yes	Agricultural, Textiles and Industrial Products	Friedler Roessler/ Krishnan Venugopal
India- Certain Commodities	120	1998	No	No	Agriculture, Leather	
India- Auto (EC)	146, 175	1997	Yes	Yes	Automobile	Friedler Roessler (ACWL)/ Krishnan Venugopal
India- Import Restrictions (EC)	149	1998	No	No	n/a**	
India- Customs Duties (EC)	150	1998	No	No		
India- EXIM Policy (EC)	279	2003	No	No	Agriculture and Chemicals	
India- Antidumping on Certain Products (EC)	304	2003	No	No	n/a*	
India- Lead Acid Batteries (Bangladesh)	306	2004	No	No	Chemicals	
India- Antidumping Measures (Chinese Taipei)	318	2004	No	No	n/a*	
India- Import Measures on Wines (EC)	352	2006	No	No	Agriculture/Wine and Spirits	Economic Laws Practice

India-Additional Duties (U.S)	360	2006	Yes	Yes	Agriculture/Wine and Spirits	Economic Practice	Laws
India-Taxes on Wine and Spirits	380	2010	No	No	Agriculture/Wine and Spirits	Economic Practice	Laws
India- Import Measures on Agriculture products (US)	430	2012	Yes	No	Agriculture	Luthra & Law offices	Luthra
India- Solar Cells and Solar Modules	456	2013	No	No	Renewable Energy	Clarus Associates	Law

*\*Involved challenges against antidumping actions against various products*

*\*\* Not available. Multiple sector have been affected*

Source: Compiled from information on the WTO website