Chapter 14
Conclusions

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Abstract The various chapters in this book provide a detailed account of the various determinants and factors that influence the filing of a dispute at the WTO. While most trade issues do not result in full-fledged dispute settlement proceedings, commercial diplomacy remains an effective tool. Although commercial or economic diplomacy is different from political diplomacy both could work in tandem and in complementary tracks. Furthermore, various case specific studies in this book demonstrate the importance of bottom-up participation in WTO disputes, led by a vigilant industry and professional trade lawyers often buttressing the work of the trade officials. The various chapters in this book reaffirm the effectiveness of the public-private participation model that India has employed since the early days of WTO dispute settlement.

Keywords India · WTO dispute settlement · Commercial diplomacy · Public-private partnership

For an outsider interested in examining different facets of dispute settlement mechanism at the WTO, but not directly involved in a dispute, the process of dispute settlement and the underlying dynamics may appear rather obscure. It may be difficult for such a person to obtain answers to many critical questions, for example—why did the country pursue the dispute at the multilateral forum and not seek resolution of the matter through bilateral channels, when did the complaining country decide to pursue the dispute, what factors triggered the decision to initiate the dispute, what were the influences on the government's decision making process during the course of the dispute, what were the litigation strategies followed by the disputing countries, whether the outcome of the dispute met the objectives of the

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A. Das and J.J. Nedumpara (eds.), *WTO Dispute Settlement at Twenty*,
DOI 10.1007/978-981-10-0599-2_14

complaining country and how the findings influenced the jurisprudence as well as the dispute settlement process itself, etc. The various chapters of this book provide answers to some of these questions. What makes this book relevant and important are some of the lessons that can be drawn from India's participation in WTO dispute settlement. While each dispute may highlight certain aspects of India's engagement with the dispute settlement mechanism, a study of India's disputes presents a more detailed and textured understanding and provides an opportunity for identifying common lessons that go beyond the facts and imperatives of a particular dispute. We do not attempt to summarise the wealth of information and insights contained in the different chapters, but try to identify common lessons that emerge from across the disputes. According to us the key findings are the following: (i) protection of national interests in commercial diplomacy requires a distinct approach—for commercial or trade interests cannot alone be addressed by or resolved through traditional diplomacy; (ii) governments will have to work in tandem and in a symbiotic manner with the industry and other pluralist bodies; (iii) governments will have to proactively support the development of a trade law bar, by creating demand and encouraging the bottom-up participation in trade related legal capacity building. We will briefly address each of these observations in some detail below.

An important lesson that emerges from India's engagement at the dispute settlement mechanism is that national interests in commercial and international trade matters may not always coincide with those in political diplomacy. In a few disputes, in seeking to redress its complaints, India had no option other than to file disputes against countries with which it shares close political and cultural ties. It has not hesitated in raising disputes against countries that are its key partners in important coalitions in the Doha Round of multilateral trade negotiations. India's experience seems to suggest that political and diplomatic costs of raising disputes at the WTO against countries with which it may otherwise have a friendly relationship may not be high.

We have argued in our Introduction to this book that countries that had previous experience and exposure to the WTO dispute settlement have clearly come out ahead in framing litigation strategies—either in proactively filing disputes or seeking dispute avoidance especially if the outcome is likely to be unfavourable. It is no surprise that close coordination between government, industry and lawyers emerges as an essential element for successful participation in a WTO dispute. The various chapters in this book demonstrate how repeat players, i.e. parties that have participated in the process before, have leveraged their experience to reap the benefits. Texprocil, the textiles exporters' body, was well prepared with facts and figures in establishing adverse effects of the contested measures and inferring a violation of WTO norms in cases such as *Turkey—Textiles*, *EC—Bed Linen* and *EC—Tariff Preferences*—disputes that will have a unique place in WTO law and policy. The industry stakeholders were able to push these challenges, because they knew the trade implications of these measures, a potential breach of WTO covered agreements, and the significance of their challenge within the WTO system. The stakeholder associations gained this advantage in view of their understanding of the

sector and the measure(s), their familiarity of law enhanced through their interactions with lawyers and law firms, and their access to the officials handling the concerned sectors within the government. The support provided by the government, backed by a strong legal team, in pursuing the disputes at the WTO played a crucial role in the eventual outcome of the disputes. Weakness in any of these three links—government, industry and lawyers—would have reduced the possibility of eventual success. In the above disputes, while the role of the exporters' body remained important throughout the course of each dispute, the significance of adverse trade effects, complemented by legal analysis, appears to have been an important determinant in the decision of the government to initiate the dispute at the WTO, after bilateral discussions failed to resolve the disputes.

Domestic legal capacity building is a crucial factor in effectively participating in WTO disputes. Within India's bureaucratic set up, there is little possibility of in-house legal expertise on international trade law. Of course, there have been some exceptions to this general shortcoming. This can constrain the government from fully understanding the legal merits of a case that an industry may want to pursue through the dispute settlement mechanism at the WTO. Inadequate in-house legal capacity within the industry might pose greater challenges to the industry to undertake legal examination of the measures impeding India's exports and building a case for seeking government intervention to initiate a dispute at the WTO. Financial constraints may often prevent the government and the industry from hiring international trade lawyers for undertaking comprehensive, regular and routine examination of trade measures of other countries. Consequently, apart from a few egregious measures that may patently not be in conformity with WTO rules and therefore be susceptible to a challenge under the dispute settlement mechanism, some of the deep seated measures undermining India's access in some of the main markets may often remain unnoticed. Till India develops sufficient domestic legal capacity on international trade issues, the situation is not likely to change. As both Kher and Seshadri have underscored in their respective chapters, there is a need to develop a sufficient number of well-trained experts who have a good understanding of not only the underlying legal issues but also of the legal culture and practice that prevail in the WTO dispute settlement fora. As legal realists have demonstrated, understanding the practice and culture of adjudicating bodies is essential to forecasting how judges interpret legal norms or respond to certain legal challenges. Stated differently, no participant in WTO disputes can afford to ignore the importance of hermeneutical insights and tactical litigation strategies. This is an important lesson that emerges from India's engagement with the WTO dispute settlement mechanism.

Developing legal capacity is not just central to gaining market access in certain products or services. It is also essential to influencing how legal interpretations are made and how countries respond especially when adjusting their policy response to adverse dispute outcomes. More importantly, it helps a country to explore policy space, especially in factoring in the consequences of mounting a WTO challenge. Two clear illustrations are the *EC—Tariff Preferences* and the US—*Shrimp* cases.

These two decisions clearly spoke about the importance of admitting certain social or environmental considerations in deciding a traditional market access type dispute. It is apprehended that in the near future protectionist measures, disguised as a means of protecting the environment, could pose a serious threat to market access. It is unlikely that while deciding to initiate the two disputes, India would have factored in the possibility of dispute settlement findings which could undermine its market access in the future. Clearly, the complaining country needs to be prepared for findings that might run counter to some of its objectives that it may want to pursue through a dispute at the WTO. These concerns emphasise the need for long-term strategizing.

While engaging in a WTO dispute, a country gets an opportunity to not only shape the jurisprudence on specific provisions of different agreements, but also contribute to systemic issues. In addition to determining the outcome of cases, parties to WTO disputes have also the opportunity to clarify and, in certain cases, provide new meanings and content to the law. Legal capacity in trade matters is a crucial element of the development capacity. India has effectively used this opportunity to shape the jurisprudence on issues such as zeroing in the context of anti-dumping. As discussed by several authors in this book, except for rare occasions, the practice of zeroing has virtually come to an end in anti-dumping investigations and in reviews. Several of India's disputes have brought in the much needed interpretative clarity and doctrinal flexibility to a range of issues. The Appellate Body findings in *US—Shrimp* have become the basis for expanding the environmental window at the WTO. *Turkey—Textiles* is perhaps the only available jurisprudential guidance in forming preferential trade agreements that are consistent with the WTO. Likewise, *EC—Tariff Preferences* made a number of countries recraft and redesign their unilateral tariff preference schemes. Again, the Appellate Body ruling in *US—Carbon Steel (India)* especially on the definitional issue of "public body" will have a profound influence on how CVD investigations are conducted. Some of the disputes involving India have provided the foundational jurisprudence on burden of proof and have had a lasting impact on India and the dispute settlement process. On the whole, it would be fair to say that India's strategy to influence the emerging jurisprudence by actively participating in the initial disputes has had a lasting impact.

It is our hope that this compilation of the personal views and analysis of some of the leading participants and insiders in India's WTO dispute settlement activity will spur more discussions and debates, and encourage newer thoughts and perspectives on how India should prepare for the next phase of WTO dispute settlement. We also hope that India's experience of handling international trade disputes will also be instructive and edifying to a number of developing and least-developed countries at the WTO.