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PUBLIC PRIVATE PARTNERSHIP: ENABLING INDIA'S PARTICIPATION
AT WTO DISPUTE SETTLEMENT MECHANISM

AMRITA BAHRI*

World Trade Organisation Dispute Settlement Understanding (WTO DSU) is a two-tier mechanism. The first tier is international adjudication and the second tier is domestic handling of trade disputes. Both tiers are interdependent and interconnected. A case that is poorly handled at the domestic level generally stands a relatively lower chance of success at the international level, and hence, the future of WTO litigation is partially predetermined by the manner in which it is handled at the domestic level. Moreover, most of the capacity-related challenges faced by developing countries at WTO DSU are deeply rooted in the domestic context of these countries, and their solutions can best be found at the domestic level. The present empirical investigation seeks to explore a domestic solution to the capacity-related challenges faced mainly by developing countries, as it examines the model of public private partnership (PPP). In particular, the article examines how India, one of the most active DSU users among developing countries, has strengthened its DSU participation by engaging its private stakeholders during the management of WTO disputes. The identification and evaluation of the PPP strategies employed by the government and industries, along with an analysis of the challenges and potential limitations that such partnerships have faced in India, may prompt other developing countries to review or revise their individual approach towards the future handling of WTO dispute.

* Dr. Amrita Bahri, Director, Global Legal Skills and Common Law Program, Law School, ITAM University, Mexico City. E-mail: amrita.bahri(at)itam.mx. The usual Disclaimer applies. Acknowledgments: A special thanks to Professor Gregory C. Shaffer, who has encouraged and guided me throughout this research. His scholarships on WTO dispute settlement and PPP are the key inspirations behind this research. A special appreciation and thanks to my Ph.D. supervisor Dr. Luca Rubini, who has been a tremendous mentor, advisor and guide. My words cannot express how grateful I am to the distinguished participants and interviewees who have made this research possible. In particular, I am thankful to Niall Meagher, Ricardo Melendez-Ortiz, Harsha Vardhana Singh, Abhijit Das, Anant Swarup, Petros Mavroidis, Marco Bronckers, Erwan Berthelot, William Davey, Rajan Sudesh Ratna and other interviewees who chose to be anonymous, as the invaluable insights gathered during their interviews have provided this research with a practical and diverse perspective.

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I. INTRODUCTION

The World Trade Organisation (WTO) has been a subject of criticism since its inception. The central points of its criticism have been directed at its long-standing ineffectiveness in conducting multilateral negotiations, the possible impact of multilateralism on the economic, social and environmental conditions of its Member States, the poor enforcement mechanisms provided under the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), lack of transparency in decision-making, the ambiguous special and differential treatment provisions, and the asymmetrical use of WTO DSU provisions by developed and developing Member States.¹ The present article is concerned with the last mentioned point of criticism, i.e., the utilisation of WTO Dispute Settlement Mechanism (DSM) by the developing Member States of WTO. In particular, four characteristics of WTO DSU introduce and define the focus of this investigation. *First*, the WTO DSM is a costly avenue for dispute resolution and it is therefore, not equally affordable by all WTO Member States.² In contrast to developed country Members, developing countries have faced considerable problems while invoking WTO DSU provisions because they do not possess sufficient resources to monitor and enforce their rights under international trade law. Due to resource constraints, they have faced problems in monitoring foreign trade practices and identifying or investigating trade barriers. They have also struggled in negotiating a settlement, challenging trade barriers, defending trade interests or ensuring compliance even after a favourable ruling is given by the Panel or Appellate Body (AB).³

¹ For details, see ROBERT R BALDWIN, *DOHA AND BEYOND: THE FUTURE OF THE MULTILATERAL TRADING SYSTEM* 46 (Cambridge University Press 2004); THE FUTURE AND THE WTO: CONFRONTING THE CHALLENGES, (Christophe Bellman & Miguel Rodriguez Mendoza eds., ICTSD 2012), available at <http://www.ictsd.org/downloads/2012/07/the-future-and-the-wto-confronting-the-challenges.pdf>; Panagiotis Delimatsis, *Transparency in the WTO's Decision-Making*, 27(3) LEIDEN J. INT'L. L. 701 (2014); Andrew D Mitchell, *A Legal Principle of Special and Differential Treatment for WTO Disputes*, 5(3) WORLD TRADE REV. 445 (2006); Christina L Davis & Sarah Blodgett Bermeo, *Who Files? Developing Country Participation in GATT/WTO Adjudication*, 71(3) THE J. OF POLITICS 1033 (2009).

² CONSTANTINE MICHALOPOULOS, *DEVELOPING COUNTRIES IN THE WTO* 3 (Palgrave Macmillan 2001); Marc Busch & Eric Reinhardt, *Testing International Trade Law: Empirical Studies of GATT/WTO Dispute Settlement*, in D L M KENNEDY & JAMES D SOUTHWICK, *THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW: ESSAYS IN HONOR OF ROBERT E. HUDEC* 457, 467 (Cambridge University Press 2002).

³ The problems faced by developing countries at WTO DSU are discussed extensively in the existing literature. For example, see Marc Busch & Eric Reinhardt, *The WTO Dispute*

The *second* characteristic is that, in practice, WTO DSM is a two-tier mechanism. The *first* tier is international adjudication and the *second* tier is the domestic handling of trade disputes. Both tiers are interdependent and interconnected. A case that is poorly handled (perhaps because the impugned trade barrier is insufficiently investigated or the arguments are not examined by experienced litigators or the claims are poorly substantiated) at the domestic level generally stands a relatively lower chance of success at the international level.⁴ Hence, in practice, the future of WTO litigation is partially predetermined by the manner in which it is handled at the domestic level. Moreover, most of the capacity-related challenges faced by developing countries are deeply rooted in the domestic context of these countries and therefore solutions can best be found at the domestic level.⁵ For example, paucity of lawyers and government officials trained and experienced in WTO law can, to some extent, be blamed for high litigation costs as the lack of domestic legal expertise necessitates hiring expensive overseas lawyers.⁶ Paucity of information and evidential documents with a complaining or responding government is mainly due to lack of inter-ministerial coordination and disengaged private stakeholders, and it sometimes results in increasing the litigation cost as

Settlement Mechanism and Developing Countries 3-4 (Sida 2004) available at <http://www9.georgetown.edu/faculty/mlb66/SIDA.pdf>; Asif H Qureshi, *Participation of Developing Countries in the WTO Dispute Settlement System*, 47(2) J. AFR. L. 174 (2003); Chad P Bown and Bernard M Hoekman, *WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector*, 8(4) J. INT'L ECON. L. 861, 863 (2005); Jan Bohanes & Fernanda Garza, *Going Beyond Stereotypes: Participation of Developing Countries in WTO Dispute Settlement* 4(1) TRADE L. & DEV. 45, 66-67 (2012) [hereinafter BOHANES & GARZA]; Michael Ewing-Chow, *Are Asian WTO Members Using the WTO DSU Effectively?*, 16(3) J. INT'L ECON. L. 669 (2013).

⁴ MARIE WILKE, PRACTICAL CONSIDERATIONS IN MANAGING TRADE DISPUTES 11 (ICTSD 2012), available at <http://ictsd.org/downloads/2013/02/practical-considerations-in-managing-trade-disputes.pdf> [hereinafter WILKE]. [The author notes that '...countries can take advantage of the rule of law only if they can effectively pursue their rights in this complex legal regime, which largely depends on having an adequate number of experienced legal, economic, and diplomatic staff and a well informed and active private sector'].

⁵ BOHANES & GARZA, *supra* note 3 at 50, argues that 'vast majority of existing constraints today are situated at the domestic level and thus require, first and foremost, action by the governments themselves'.

⁶ Interview with Moushami Joshi, Partner, Luthra and Luthra in Delhi, India (Audio Conferencing, June 21, 2013) [hereinafter INTERVIEW WITH MOUSHAMI JOSHI, LUTHRA AND LUTHRA]. [Interviewee observes the following: 'With more number of cases being litigated by and against India mainly from the year 2001, the government has decided to expand its legal expertise. It is not feasible and economically viable to hire expensive Geneva based lawyers, especially in the cases where India is challenged. The government therefore has started to rely more on domestic expertise for cutting down the high litigation cost?'].

data is purchased from overseas agencies.⁷ With this ethos in mind, the article centers its focus on the second tier, i.e., how can the disputes be effectively handled at the domestic level in order to improve the performance and participation of developing countries at the first tier, i.e., at WTO DSU.

The *third* feature of the dispute settlement system is that every trade disagreement which grows into a formal legal action at WTO DSU (if not resolved or diffused by way of negotiations or consultations) generally emanates from cross-border commercial transactions between exporters and importers or business entities and public sector authorities.⁸ Violation of WTO rules, in essence, directly affects business interests of exporters, importers, manufacturers and producers. Moreover, exporters and importers can generally gather information, evidence and documents concerning foreign trade measures and their impact during the course of conducting their everyday business activities.⁹ Hence, some form of coordination between the government and industry, in most cases, is embedded in the nature of WTO dispute settlement proceedings. In light of these observations, read together with the *first* and *second* characteristics mentioned above, the article argues that the engagement of affected industries during the management of trade disputes is a 'crucial enabling element' for any government action that is undertaken to safeguard or expand business interests.

The *fourth* characteristic is that WTO dispute settlement is an inter-governmental process and the exclusive authority to file or respond to WTO litigations is conferred to the governments of Member States. Hence, this characteristic of WTO dispute settlement positions the government as the key participant of WTO DSM, and when it is read together with the *third* characteristic, it lends further support to the argument that the governments should handle WTO disputes in close coordination with the affected industries. They should form partnership arrangements to exchange resources during the conduct of WTO dispute

⁷ In *EC – Export Subsidies on Sugar (Thailand)*, the sugar industries in Brazil, Australia and Thailand jointly purchased the evidential data from LMC International for substantiating and updating their litigation briefs and responses. [Panel Report, *European Communities – Export Subsidies on Sugar, Complaint by Thailand*, WT/DS283/R (Apr. 28, 2005) (adopted May 19, 2005) as modified by Appellate Body Reports WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, DSR 2005:XIV, 7071]; World Trade Organisation Conference, Geneva, Switzerland, Oct. 4 2011, ACWL, *The ACWL at Ten: Looking Back, Looking Forward* 25, available at: <http://www.acwl.ch/e/documents/reports/ACWL%20AT%20TEN.pdf>.

⁸ Robert Echandi, *How to Successfully Manage Conflicts and Prevent Dispute Adjudication in International Trade*, ICTSD Issue Paper No 11, 2, 3, available at <http://www.ictsd.org/downloads/2013/04/how-to-successfully-manage-conflicts-and-prevent-dispute-adjudication-in-international-trade.pdf>.

⁹ GENE M GROSSMAN & ELHANAN HELPMAN, *SPECIAL INTEREST POLITICS* 4 (The MIT Press 2001).

settlement proceedings. In light of this exposition, the article centers its focus on India's dispute settlement partnership experience as it seeks to examine two specific issues: *first*, how a particular government in a developing country can manage disputes by engaging the affected private stakeholders, and *second*, what problems, if any, can the government face in doing the same.

One may question the viability of focusing on the dispute settlement experience of India, a large middle income country (MIC), to provide guidance to a very heterogeneous group of developing countries that ranges from small economies which are predominantly based on subsistence agriculture, to large and emerging economies like China, Brazil, Mexico and India.¹⁰ However, this selection can be justified on the basis of the following three reasons: *First*, an examination of India's management of WTO disputes is vital as the country has cost-effectively developed its dispute settlement capacity and demonstrated a growing ambition to use WTO DSU. India has participated numerous times in the WTO dispute settlement process as a complainant, respondent and third party.¹¹ From the years 1995 to 2015, it has in different capacities participated in 151 cases out of 496 cases filed at WTO DSU during this period.¹² *Second*, India has faced capacity-related participation challenges, in common with other developing countries that have endeavoured to use DSU provisions. *Third*, India is one of the most active developing country users of dispute settlement partnership approach, and from a legal realist's perspective, it will be useful to assess India's relevant experience to provide practical insights to its peers, i.e., the other developing countries. Shaffer and Ortiz-Melendez present India as one of the most distinct examples of developing countries that have engaged its private sector for the effective conduct of dispute settlement proceedings.¹³ With the wealth of India's dispute settlement and private sector participation experience, the present study can usefully review

¹⁰ Out of the 161 WTO Members (as on Apr. 26, 2015), only 37 members are developed countries. More than 80 percent of WTO Members have self-designated themselves under the wide category of 'developing countries'. *Understanding the WTO: Member and Observers*, WORLD TRADE ORGANISATION, available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited May 16, 2015).

¹¹ From the year 1995 to 2013, it has acted as a complainant in 21 cases, as a respondent in 22 cases and as a third party in 90 cases. Member Information, *India and the WTO*, WORLD TRADE ORGANISATION available at http://www.wto.org/english/thewto_e/countries_e/india_e.htm (last visited Sept. 4, 2013).

¹² The data includes the cases filed from January 1995 to June 2015.

¹³ Biswajit Dhar & Abhik Majumdar, *Learning from the India - EC GSP dispute: the issues and the process*, in DISPUTE SETTLEMENT AT THE WTO: THE DEVELOPING COUNTRIES EXPERIENCE 21,137,174 (Gregory C Shaffer & Ricardo Melendez-Ortiz eds., Cambridge University Press 2010) [hereinafter DHAR & MAJUMDAR].

and analyse the characteristics, weaknesses and the capacity-building potential of PPP approach.

The findings provided in this article are almost exclusively based on empirical research conducted by the author.¹⁴ The author has conducted semi-structured interviews with officials, practitioners and bureaucrats working in various public and private sector authorities in India and abroad. Mainly, these officials are from the World Trade Organisation, Ministry of Commerce (India), Ministry of law & Justice (India), Permanent Mission of India to WTO, Centre for WTO Studies (India), law firms based in India and Geneva, Fisheries and Fishing Communities in India, and trade associations based in India such as TEXPROCIL, MPEDA and SEAI.¹⁵ Semi-structured interviews were conducted with the help of selectively designed and individuated sets of questions.

The interviewees were identified through a purposive snowball sampling approach.¹⁶ With this approach, it became possible to identify those officials who, in various capacities, have been engaged in the process of WTO dispute settlement, and could therefore share their first-hand experiences and provide practical insights into the study. The sampling was done in an unbiased and balanced manner as different perspectives from government officials, private sector representatives, lawyers, academics and diplomatic officials were taken into account. The claims made by government officials have been verified and cross-checked against the observations provided by private sector representatives and vice versa. Their claims and perceptions have further been corroborated, endorsed or refuted in the statements received from lawyers, academics and officials from international and inter-governmental organisations. Subsequently, these findings are verified with the help of other primary sources including written statements provided by the Ministry of Commerce, Government of India (as a response to the Right to Information Applications filed by the author under India's Right to Information Act 2005).¹⁷ The findings are further examined in the light of existing literature.¹⁸ All sources are fully documented in the footnotes.

¹⁴ All interview summaries are on file with the author.

¹⁵ See *id.*

¹⁶ ALAN BRYMAN, SOCIAL RESEARCH METHODS, 202 (Oxford University Press 2012).

¹⁷ The information was requested by the author via RTI application dated Sept. 17, 2013. The RTI reply was received on Dec. 5, 2013 vide Document No. 1/27/2013- TPD [hereinafter WRITTEN RESPONSE TO THE RTI APPLICATION].

¹⁸ DHAR & MAJUMDAR, *supra* note 13 at 182; Gregory C Shaffer et al., *Indian Trade Lawyers and the Building of State Trade-Related Legal Capacity in THE INDIAN LEGAL PROFESSION IN THE AGE OF GLOBALIZATION* (DAVID WILKINS ET AL., eds., Cambridge University Press, forthcoming 2016) [hereinafter SHAFFER ET AL.].

In section *two* and *three*, the article presents an overview of India's political and economic conditions and their interaction with the emergence of existing institutional and procedural frameworks established for the management of trade disputes. In section *four*, the article analyses certain landmark WTO disputes that were jointly handled by the Government of India and the business entities. With these examples, this empirical investigation explores the nature and elements of informal PPP arrangements formed in India. Section *five* outlines the potential challenges which PPPs in India may face and the obstacles that India may generally face during the conduct of foreign trade disputes. It further proposes certain suggestions that can be considered for overcoming the potential challenges and limitations. Section *six* provides concluding remarks.

II. INDIA'S POLITICAL ECONOMY AND THE EVOLUTION OF DOMESTIC PROCEDURES AND INSTITUTIONS: KEY DEVELOPMENTS

India is a parliamentary democracy. It enjoys a dual polity system of governance, with central and state governments discharging their functions in accordance with the constitutional provisions. Before the year 1991, India followed a socialist and closed model of economy which was largely controlled by the national government. The policy of 'License Raj' was employed to control and regulate the business endeavours, and the policy of 'export promotion import substitution' was created to manage India's balance of payment and protect domestic industries against international competition.¹⁹ Dominant state-owned industries in a mixed economy and discretionary powers of the government over the regulation of trade and commerce made India one of the most controlled economies in the "non-communist" world.²⁰

In 1990s, India's political economy underwent a major transition. With the conditionality requirements imposed by International Monetary Fund (IMF) during the economic crises of 1990s,²¹ and with the advent of WTO, India started to

¹⁹ 'License Raj' was abolished with 1991 economic reforms. It was an economic policy in India which aimed to create a state-controlled, state-owned and state-regulated economy. The 'export promotion import substitution' was another economic policy prevalent in India before 1990s, and it aimed to achieve economic development through expansion of exports and minimisation of imports. For a detailed discussion on these policies, see ASEEMA SINHA, *THE REGIONAL ROOTS OF DEVELOPMENTAL POLITICS IN INDIA: A DIVIDED LEVIATHAN* (Indiana University Press 2005); JAGDISH BHAGWATI, *INDIA IN TRANSITION: FREEING THE ECONOMY* (Clarendon Press 1993).

²⁰ For discussion on pre-1990s import control and other protectionist policies in India, see JAGDISH BHAGWATI & T N SRINIVASAN, *FOREIGN TRADE REGIMES AND ECONOMIC DEVELOPMENT: INDIA* (NBER Publications 1975).

²¹ During the economic crisis of 1991, India applied for an emergency aid from IMF and IMF imposed several conditions to its financing. The conditions required that India should

liberalise its economy.²² As India moved towards an export-oriented market economy with lower trade barriers, deregulation and a capitalist framework, it started to emerge as a major economic power. Today, it is one of the fastest-growing economies in the world.²³ Through various economic reforms, including the creation of 'Special Economic Zones' and 'Export Processing Zones', and reduction of state-intervention and trade barriers in India, the economy has moved towards deregulation, privatisation and globalisation.²⁴

In order to prepare itself for a new economic climate, and to meet the multilateral obligations it had undertaken under the WTO agreements, India was required to reorganise its approach with regard to the management of domestic and international trade. To facilitate this process of reorganisation, the Ministry of Commerce was given the responsibility of reaching out to the exporting communities to conduct discussions and training programmes with different export promotion councils around the country. The purpose of the outreach programme was to inform the private sector entities about trade liberalisation, the changes involved and their impact, the new international commitments and rights, gradual removal of trade barriers, and the global pact of promoting trade between

open its economy to foreign trade, competition and investment; it should reduce the intervention of state in the operation of trade and commerce; it should abandon its licensing requirements and eliminate subsidies. Bernard Weinraub, *Economic Crisis Forcing Once Self-Reliant India to Seek Aid*, N.Y. TIMES, June 29, 1991, available at: <http://www.nytimes.com/1991/06/29/world/economic-crisis-forcing-once-self-reliant-india-to-seek-aid.html>. For further details, see FRANCINE R FRANKFURT, *INDIA'S POLITICAL ECONOMY 1947-2004: THE GRADUAL REVOLUTION*, 603 (Oxford University Press 2005) [hereinafter FRANKFURT].

²² For a discussion on the nature of India's economy pre and post 1990s, see Shalendra D Sharma, *From Central Planning to Market Reforms: India's Political Economy in Comparative*, 23 (1/2) HUMBOLDT J. SOC. REL. 175 (1997); FRANKFURT, *supra* note 21 at 603, 625.

²³ In terms of GDP (purchasing power parity), India was the fourth largest economy in the world in the year 2012. [The World Bank Database 2013, available at: <http://data.worldbank.org/country/india> (last visited June 12, 2014)]. From 1991 to 2014, the GDP annual growth rate in India (in percentage) has increased from 1.1 to 7.4 percent. [The World Bank Database 2015, available at: <http://data.worldbank.org/country/india> (last visited June 12, 2014)]

²⁴ For details on 'Special Economic Zones' and 'Export Processing Zones', see *Special Economic Zones in India*, <http://sezindia.nic.in/index.asp> (last visited July 14, 2015).

nations resulting from the ratification of the WTO Agreements.²⁵ The outreach exercise was carried out throughout the country for around two to three years.²⁶ By the end of 1990s, state control over economic sectors was substantially reduced; industries were being privatised; trade barriers were being reduced and the government was committing itself to trade without discrimination. International trade had assumed greater importance and it became the backbone of economic growth and development in India. During these years, the export promotion councils became very popular with the exporting sectors. They became the primary agents of private industries for approaching the Ministry of Commerce whenever the interests of their industry were infringed by a foreign policy.²⁷ Since then, they have continued to play a significant role in the management of trade disputes, by integrating the exporting interests and representing them to the government. Additionally, several other developments could be traced during these evolutionary years.²⁸

First, the Ministry of Commerce was designated as the nodal ministry for WTO negotiations, policy-making and dispute settlement. Three specialised departments were established (under the Ministry) to handle WTO-related matters: a. Department of Industrial Policy & Promotion (DIPP); b. Tariff Commission; c. a reorganised Directorate General of Anti-Dumping & Allied Duties (DGAD). Subsequently, in 1996, Trade Policy Division (TPD) was created as a specialised division to handle trade disputes and to increase the WTO-related expertise within the Ministry.²⁹

Second, following the reorganisation of the Ministry of Commerce, and a series of litigations filed by the US and the EU against India during the initial years of WTO, the government significantly increased the size of its WTO Mission at Geneva. From 1995 to 2012, the number of officers deputed at the Mission was increased from four to eleven.³⁰

²⁵ For details on these workshops and consultation meetings, see Centre for WTO Studies, *India, WTO and Trade Issues*, 1(1) Bi-monthly Newsletter of the Centre for WTO Studies, IIFT 4-5 (July-Aug. 2008) available at http://wtocentre.iift.ac.in/NewsLetters/NewsLetter_01.pdf.

²⁶ Interview with an official, Ministry of Law & Justice, Government of India in Delhi, India (Telephone Conversation, June 3, 2013) [Name withheld] [hereinafter INTERVIEW WITH AN OFFICIAL REPRESENTATIVE, MINISTRY OF LAW & JUSTICE].

²⁷ See *id.*

²⁸ SHAFFER ET AL., *supra* note 18.

²⁹ See *id.*

³⁰ See Permanent Mission of India to WTO, *List of Officers*, PERMANENT MISSION OF INDIA, GENEVA <http://www.pmindiaun.org/pages.php?id=851> (last visited June 12, 2014).

Third, the increasing involvement of India in multilateral negotiations and dispute settlement activities created the need to enhance trade policy expertise within the government. To this end, the government established the Council of Economic Advisers in 2004. It was obliged to meet periodically to discuss and report the developments in international trade laws.³¹ The Advisory Council was divided into subject-specific groups. Each group was responsible for handling claims and concerns relating to its allocated subject, and for making recommendations to the National Advisory Council.³²

Fourth, due to the increasing number of proposals and recommendations made by these subject-specific subgroups, there arose a need to create a specialised advisory council only for WTO affairs. Hence, in the year 2004, the central government established a Cabinet Committee on WTO Matters (CCWTO).³³ The newly constituted Committee was obliged to analyse and make decisions concerning important trade disputes, negotiations and issues with a focussed, expert-driven approach.³⁴ However, in the year 2014, with democratic transition in the political leadership of India, the Cabinet Committee on WTO Matters was disbanded, and WTO matters were officially transferred to the Cabinet Committee on Economic Affairs.³⁵ This decision was taken to fast track the process of dispute management by minimising the layers of decision-making in the matters of WTO.³⁶ However, in practice, it is expected that the Ministry of Commerce will continue to be the main decision-maker in most WTO matters.

These developments have resulted in the evolution of various institutions and procedures that are currently employed by the Government of India for handling

³¹ Details on its constitution and functions can be accessed at Prime Minister of India: PM's Committees and Councils <http://archivepmo.nic.in/drmanmohansingh/committeescouncils.php> (last visited June 6, 2016).

³² INTERVIEW WITH AN OFFICIAL REPRESENTATIVE, MINISTRY OF LAW & JUSTICE, *supra* note 26.

³³ The CCWTO was constituted on 9 June 2004 with the Prime Minister of India as its Chairman. See Press Releases, *Cabinet Committee on WTO Matters constituted*, PRIME MINISTER OF INDIA, (June 9, 2004), <http://pmindia.nic.in/press-details.php?nodeid=11> (last visited Sept. 20, 2013).

³⁴ For information on roles assigned to the Committee, see *Cabinet Committees*, CABINET SECRETARIAT, http://cabsec.nic.in/showpdf.php?type=council_cabinet_committees (last visited Sept. 20, 2013); *Cabinet Panel on WTO to discuss revised offer on services this week*, THE HINDU: BUSINESS LINE (New Delhi), May 25, 2005.

³⁵ *PM disbands four Cabinet panels, to set up four key committees*, TIMES OF INDIA (Delhi), June 11, 2014, <http://timesofindia.indiatimes.com/india/PM-disbands-four-Cabinet-panels-to-set-up-four-key-committees/articleshow/36369253.cms>.

³⁶ See *id.*

foreign trade disputes.

III. CURRENT INSTITUTIONAL AND PROCEDURAL FRAMEWORKS: MANAGEMENT OF FOREIGN TRADE DISPUTES IN INDIA

A. Institutional Framework

Currently, there are multiple public and private sector entities in India that are commonly engaged in the management and resolution of foreign trade disputes. The institutional framework for the same has gradually evolved, and the key entities involved in the process have assumed specific (yet overlapping) functions. A diagrammatic illustration of the institutional framework established in India is provided in the figure below.

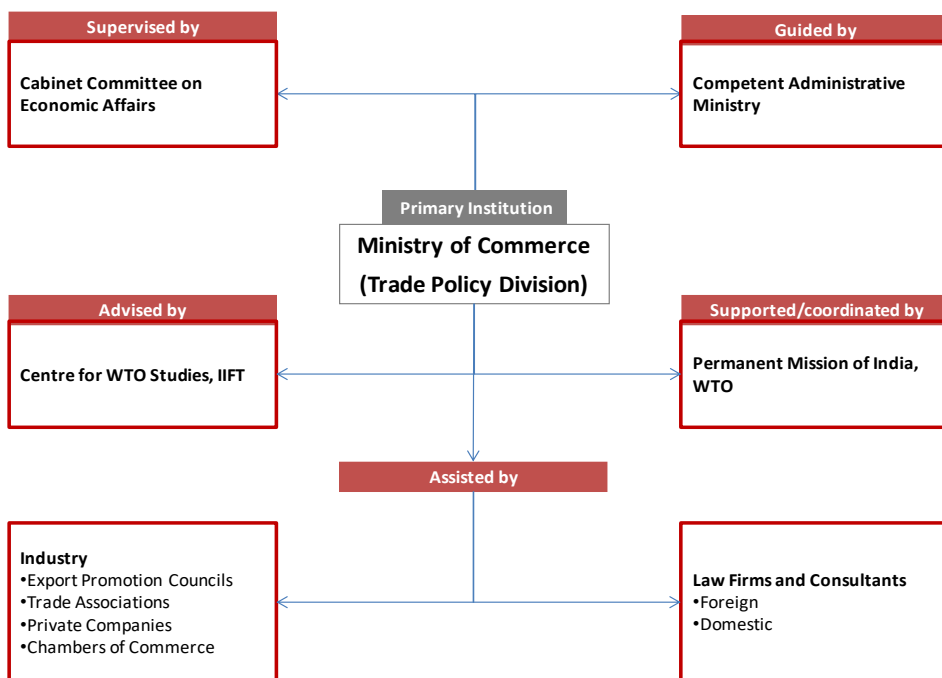


Figure 1: Institutional Framework in India

Given that international trade and commerce is the prerogative of the central government under the Constitution of India, the Ministry of Commerce is made chiefly responsible for handling international trade issues, including the settlement of foreign trade disputes and disagreements. More precisely, Trade Policy Division

(TPD) is responsible for coordinating with the private sector, identifying and investigating disputes and litigating them at the WTO.³⁷

Other Ministries which deal with the subject-matter of the case at hand also play an important role. They are officially known as the 'Competent Administrative Ministry'.³⁸ The officials at the TPD are expected to perform their tasks in coordination with the Competent Administrative Ministries, and these Ministries are expected to provide expert assistance to the TPD during investigation of barriers and preparation of cases.³⁹ The Permanent Mission of India (PMI) to the WTO also plays an active role in the management of foreign trade disputes as it provides the government with information on WTO rules, especially with respect to substantial, procedural and other administrative requirements.⁴⁰

The Centre for WTO Studies, Indian Institute of Foreign Trade (IIFT) works as a think tank for the Ministry of Commerce. It gathers information and evidence, organises outreach programmes and consultative meetings with the private sector, monitors foreign practices and analyses the legality and scope of trade disputes.⁴¹ The Centre often works in close coordination with law professionals and expert consultants hired by the government or the private sector, depending upon the nature and requirements of each case. The regional offices of the Centre are mainly

³⁷ Details provided in the Interview with Rajan Sudesh Ratna, [Economic Affairs Officer, United Nations ESCAP, (Former Deputy Directorate General, Foreign Trade Division)], Ministry of Commerce, Government of India (Video Conferencing, May 3, 2013) [hereinafter INTERVIEW WITH RAJAN SUDESH RATNA, ECONOMICS AFFAIRS OFFICERS]. The trade and commerce with foreign countries come under the Union List given in Part XI of the Constitution of India. It is the Central Government which is authorised to deal with the items under the Union List. Further confirmed in WRITTEN RESPONSE TO THE RTI APPLICATION, *supra* note 17.

³⁸ INTERVIEW WITH RAJAN SUDESH RATNA, ECONOMICS AFFAIRS OFFICERS, *supra* note 37.

³⁹ *See id.*

⁴⁰ For more details, see Permanent Mission of India to the WTO, Geneva <<http://pmindiaun.org/pages.php?id=6>> accessed Sept. 9, 2013. Their functions have been confirmed in the Interview with Anant Swarup, [Former First Secretary (Legal), Indian Mission to WTO], Permanent Mission of India to the WTO, in Geneva, Switzerland (In-person, Apr. 12, 2012) [hereinafter INTERVIEW WITH ANANT SWARUP].

⁴¹ Details of the outreach and training programmes provided by the Centre can be accessed at *List of Seminar/Conferences 2013*, CENTRE FOR WTO STUDIES: INDIAN INSTITUTE OF FOREIGN TRADE, <http://wtocentre.iift.ac.in/ORP6.asp> (last visited Sept. 19, 2013) and *Stakeholder Consultation*, CENTRE FOR WTO STUDIES: INDIAN INSTITUTE OF FOREIGN TRADE, <http://wtocentre.iift.ac.in/SHC.asp> (last visited Sept. 19, 2013) [hereinafter STAKEHOLDER CONSULTATION, CENTRE FOR WTO STUDIES].

responsible for coordinating with the private sector operating in their regional jurisdictions.⁴²

Export Promotion Councils (EPCs) play an important role in the settlement of disputes as they are expected to serve as an interface between the concerned private entities and the governmental units. They are established and sponsored by the Government of India, and they finance their activities through membership subscription fees, governmental aid and other payments received from industry members. Amidst increasing privatisation of industries in India, EPCs are made responsible to present the government's viewpoints and decisions to the private sector on one hand, and on the other, they serve to integrate the interests of the private sector and represent them to the government on a sectoral basis.⁴³

Industries in India are also represented by various other private sector representatives, such as trade associations, trade cooperatives, trade unions and chambers of commerce.⁴⁴ However, all economic sectors in India are not well-represented because trade associations are not sufficiently resourceful or well-connected in many sectors of Indian economy. Small scale industries and MSMEs play a very important role in Indian economy, and they have grown rapidly during the past few years. Due to the remnants of its pre-1990s socialist framework, and to promote decentralised economic development in various states of India, the state governments have encouraged the formation and growth of small businesses. They have also encouraged these businesses to participate in foreign trade activities, and as a result, they account for more than forty percent of overall exports from India. However, these businesses remain insufficiently organised and represented.⁴⁵

The establishment of the above-mentioned public and private sector institutions, along with the government's past practices of engaging the industries in the

⁴² A list of Nodal Agencies and Focal Points can be accessed at: *Nodal Agencies and Focal Points*, CENTRE FOR WTO STUDIES, INDIAN INSTITUTE OF FOREIGN TRADE, <http://wtocentre.iift.ac.in/outreach.asp> (last visited Sept. 17, 2013).

⁴³ A list of all export promotion councils in India is available at About Us, *Export Promotion Councils under Department of Commerce*, MINISTRY OF COMMERCE, GOVERNMENT OF INDIA, http://commerce.nic.in/aboutus/aboutus_epc.asp (last visited Sept. 9, 2013).

⁴⁴ INTERVIEW WITH AN OFFICIAL REPRESENTATIVE, MINISTRY OF LAW & JUSTICE, *supra* note 26.

⁴⁵ For details on MSMEs in India, see Sultan Singh Jaswal, *Problems and Prospects of Micro, Small and Medium Enterprises (MSMEs) in India*, 3(5) INNOVATIVE RES. & STUD. 1 (2014). For discussion on the problems of MSMEs, see R Narayan, *Tackling problems of delayed payments in MSME sector*, THE ECONOMIC TIMES, July 6, 2015), http://articles.economicstimes.indiatimes.com/2015-07-06/news/64142856_1_msme-sector-msmes-kalraj-mishra-indian-micro.

handling of foreign trade disputes have given rise to a set of informal procedures that are employed by government in an ad-hoc fashion on a case-by-case basis. A description of these procedures, which is entirely based on original empirical research conducted by the author, is provided in the following section.

B. Procedural Framework

As a common practice, the individual exporters or their representatives (like trade associations, chambers of commerce and export promotion councils) approach the Ministry of Commerce and/or their subject-specific ministry when they face a foreign measure infringing their trade interests.⁴⁶ On receiving a complaint from the private sector, or on identifying a barrier on a *suo moto* basis, the TPD examines the prima facie legitimacy of the barrier, its consistency with the WTO laws and its impact on the affected industry. The examination is mainly conducted on the basis of information provided by the industry. Based on their judgement following a preliminary examination, the TPD officials decide whether further investigations should be launched in a matter or not.⁴⁷

If the Ministry of Commerce decides to launch a detailed investigation into the matter, it may seek further informational and evidentiary inputs from the concerned private stakeholders. Moreover, the TPD officials at this stage can seek assistance from the Centre for WTO Studies to examine the viability of initiating a trade dispute.⁴⁸ The TPD is also obliged to refer the case file to the Competent Administrative Ministry for its opinion and inputs. When required, the TPD can also seek assistance from law firms (including ACWL) and economic consultants at this stage for intensive analysis and investigation of the barrier.⁴⁹

⁴⁶ INTERVIEW WITH AN OFFICIAL REPRESENTATIVE, MINISTRY OF LAW & JUSTICE, *supra* note 26; The findings gathered from this interview are confirmed in the Interview with an Official Representative, Ministry of Commerce, Government of India in Delhi, India (June 12, 2013) [Name withheld] [hereinafter INTERVIEW WITH AN OFFICIAL REPRESENTATIVE, MINISTRY OF COMMERCE]. They are further confirmed by a private sector representative in the Interview with an Official Representative, TEXPROCIL in Mumbai, India (Telephone Conversation, June 27, 2013) [Name withheld] [hereinafter INTERVIEW WITH AN OFFICIAL REPRESENTATIVE, TEXPROCIL].

⁴⁷ INTERVIEW WITH RAJAN SUDESH RATNA, *supra* note 37.

⁴⁸ Interview with an Official Representative, Centre for WTO Studies, Indian Institute of Foreign Trade (IIFT), in New Delhi (Audio Conferencing, June 5, 2013) [Name withheld] [hereinafter INTERVIEW WITH AN OFFICIAL REPRESENTATIVE, CENTRE FOR WTO STUDIES]; Confirmed in INTERVIEW WITH AN OFFICIAL REPRESENTATIVE, MINISTRY OF COMMERCE, GOVERNMENT OF INDIA, *supra* note 46.

⁴⁹ For example, the Ministry of Commerce approached an India based law firm, Luthra and Luthra, to seek its legal opinion during investigations in the recent Solar litigation. [Panel Report, *India - Certain Measures Relating to Solar Cells and Solar Modules*, WT/DS456/R/Add.1

The depth and scope of the investigation carried out at this stage is comprehensive, as the matter is analysed from several different perspectives.⁵⁰ The investigation mainly seeks answers to the following key questions:

- a. Is the barrier legally inconsistent with WTO law?
- b. What is the impact of the barrier on the economic interests of the industry, and to what extent?
- c. What are the prospects of winning the case at the WTO?
- d. What are the costs involved in litigating the dispute, and whether sufficient resources for the same are available?
- e. Is the affected private sector willing and motivated to assist the government in bringing a challenge against the offending Member State?
- f. Is it diplomatically and politically viable to launch the dispute? What might be the systemic implications of launching the dispute?
- g. What are the chances of compliance in this case, and would it be viable to pursue the case up to the stage of retaliation in case of non-compliance?

Once these issues are addressed, TPD prepares a report to recommend the further course of action. Depending upon the TPD's recommendation, the Ministry of Commerce can either discontinue the pursuance of the matter at this stage or can initiate informal bilateral consultations with the offending Member States.⁵¹

If trade disagreement is not resolved through informal ways of conflict resolution, the dispute can enter its next phase where internal discussions on the systemic viability of launching a formal dispute will be conducted.⁵² At this stage, the

(Feb. 6, 2013) (adopted Feb. 24, 2016). INTERVIEW WITH MOUSHAMI JOSHI, LUTHRA AND LUTHRA, *supra* note 6. Similar advice during investigation was sought from ACWL in the *EC – Tariff Preferences*, Panel Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R (Dec. 1, 2003) (adopted Apr. 20, 2004 as modified by Appellate Body Report WT/DS246/AB/R, DSR 2004:III, 1009) [hereinafter PANEL REPORT, EUROPEAN COMMUNITIES]. This information is gathered during the INTERVIEW WITH AN OFFICIAL REPRESENTATIVE, TEXPROCIL, *supra* note 46.

⁵⁰ These concerns were expressed during interviews with two officials from the Ministry of Commerce, an official from Ministry of Law & Justice and an official from the Centre for WTO Studies, IIFT. These issues are also suggested in WILKE, *supra* note 4.

⁵¹ INTERVIEW WITH AN OFFICIAL REPRESENTATIVE, MINISTRY OF COMMERCE, *supra* note 46; INTERVIEW WITH AN OFFICIAL REPRESENTATIVE, CENTRE FOR WTO STUDIES, *supra* note 48.

⁵² INTERVIEW WITH RAJAN SUDESH RATNA, *supra* note 37.

government would normally initiate consultations with the affected private stakeholders to discuss and apprise them of the situation, its possible impact and the potential tasks required for its settlement.⁵³ The government can also discuss the possibility of seeking assistance from the private sector, if required, for conducting consultations and possible litigation.⁵⁴ The government can also seek private sector inputs to calculate the anticipated levels of benefit to the affected industry from the removal of the barrier in question.⁵⁵ A TPD official makes the following observation:

The model of PPP is inherent in almost every dispute we litigate. The government will always consult the industry before making a determination on the initiation of a dispute. There will rarely be a case where the government will proceed to the formal stages of settlement without engaging with the private sector.⁵⁶

A dialogue with private sector representatives can be established at any stage of dispute settlement, and nowadays, it is usually established with the help of the Centre for WTO Studies.⁵⁷ With the feedback received from the private sector, the Ministry of Commerce calculates and compares the expected cost of litigation with the expected benefits from the removal of the questioned measure. If the expected benefits from its removal are higher than the anticipated cost of dispute settlement process, the case would normally progress ahead towards the formal stages of

⁵³ Details on recent consultations can be accessed at STAKEHOLDER CONSULTATION, CENTRE FOR WTO STUDIES, *supra* note 41.

⁵⁴ INTERVIEW WITH AN OFFICIAL REPRESENTATIVE, TEXPROCIL, *supra* note 46.

⁵⁵ INTERVIEW WITH AN OFFICIAL REPRESENTATIVE, CENTRE FOR WTO STUDIES, *supra* note 48; WRITTEN RESPONSE TO THE RTI APPLICATION, *supra* note 17.

⁵⁶ INTERVIEW WITH AN OFFICIAL REPRESENTATIVE, MINISTRY OF COMMERCE, *supra* note 46; WRITTEN RESPONSE TO THE RTI APPLICATION, *supra* note 17.

⁵⁷ The lead coordinator during the consultative meetings with the private sector is one of the leading chambers of commerce or federation of industries in India, i.e., Federation of Indian Chambers of Commerce and Industry (FICCI), Confederation of Indian Industry (CII), the Associated Chambers of Commerce and Industry of India (ASSOCHAM), Federation of Indian Export Organisations (FIEO) or Federation of Indian Micro and Small & Medium Enterprises (FISME). An example of a private stakeholder's consultation is the 'Consultation with the Indian Industry on EU Reach Regulation by Centre for WTO Studies'. [Details can be accessed at STAKEHOLDER CONSULTATION, CENTRE FOR WTO STUDIES, *supra* note 41]. Further details on recent consultations held with private stakeholders, lead coordinators, venues and dates for the consultative meetings held in recent years and those planned for the future, can be accessed at STAKERHOLDER CONSULTATION, CENTRE FOR WTO STUDIES, *supra* note 41. The information is derived from SHAFFER ET AL., *supra* note 18.

dispute settlement.⁵⁸ This analysis is not conducted entirely on the basis of quantifying the benefits *versus* the costs, but it is largely based on the 'systemic evaluation' of these anticipated factors, along with other factors considered during the investigation stage.⁵⁹

If TPD recommends that the government should launch a formal challenge against a foreign measure, the Union Minister of Commerce would normally approve such recommendation.⁶⁰ In cases with substantial strategic implications or in cases that are sensitive in nature, the file may further be referred to the Cabinet Committee on Economic Affairs or the full Cabinet for final approval.⁶¹ Hence, there could be multiple decision-makers for such actions in India. Once the file has been signed by the Commerce Secretary or the Commerce Minister, it is sent to the PMI, Geneva for further coordination of tasks.⁶² In addition, a request is also sent to the Ministry of External Affairs for requesting the launch of formal consultations with the offending Member State(s).

The government employs a similar approach when it acts as a respondent during the settlement of WTO disputes. On receiving a formal consultation request from a WTO Member State, the Ministry of Commerce refers the matter to its TPD for detailed investigation. The TPD, PMI and Competent Ministry are together responsible for preparing a defence.⁶³ They decide the course of action, the appropriate response to the challenge, the lawyers to be engaged and the channels for gathering information and evidence.⁶⁴ On being approached by the government or otherwise, the export promotion councils, trade associations, chambers of commerce and relevant government departments usually provide information, evidence and commercial arguments to help the government prepare

⁵⁸ The *cost* generally includes the 'cost of monitoring and information collection', 'the cost of industry organisation and engaging government policymakers and legal service providers', 'cost of actual WTO enforcement litigation', and the 'cost to obtain compliance'. *Benefits* would mainly include the financial benefits, chances of winning and enforcement, and other benefits which could be social, diplomatic, political or ethical in nature. For a further discussion on 'cost-benefit' analysis, see BOHANES & GARZA, *supra* note 3, at 66-67.

⁵⁹ INTERVIEW WITH RAJAN SUDESH RATNA, *supra* note 37.

⁶⁰ Confirmed in three Interviews with the officials from the Ministry of Commerce, Government of India (Telephone Conversation, Aug. 12, 2013 & Aug. 15 2013) [Names withheld].

⁶¹ WTO case files have only been referred twice or thrice to the Cabinet Committee. Hence, it is not a practice, but more of an exception. [INTERVIEW WITH AN OFFICIAL REPRESENTATIVE, MINISTRY OF LAW & JUSTICE, *supra* note 26].

⁶² INTERVIEW WITH ANANT SWARUP, *supra* note 40.

⁶³ *See id.*

⁶⁴ *See id.*

a sound defence.⁶⁵ They provide practical insights to the government relating to the commercial situation of a measure and its implications for the affected industry.⁶⁶ The Ministry of Commerce, after consulting the Competent Ministry and relevant stakeholders, determines whether to withdraw the challenged policy and resolve the matter with the complainants during the consultation stage, or to allow the matter to proceed to the stage of Panel proceedings.⁶⁷

Together, these procedures are employed, somewhat on an ad-hoc and informal basis, by the government and private sector during the handling of trade disputes. However, these procedures remain in the confidential files of the government, and the public and private sectors in India do not have legislation or a rule book (as in the case of the US⁶⁸, the EU⁶⁹ and China⁷⁰) which they can refer to while they are jointly conducting dispute settlement procedures. The following section analyses the manner in which the above-mentioned institutions and procedures have, in practice, been utilized by the government and industries during the conduct of selected WTO litigations.

IV. PUBLIC PRIVATE COORDINATION: ANALYSIS OF SELECTED TRADE DISPUTES

This section introduces and analyses three WTO disputes which have been conducted through varied forms of coordination between the government and private stakeholders in India. It analyses the manner in which the public and

⁶⁵ WRITTEN RESPONSE TO THE RTI APPLICATION, *supra* note 17.

⁶⁶ INTERVIEW WITH AN OFFICIAL REPRESENTATIVE, TEXPROCIL, *supra* note 46.

⁶⁷ Confirmed in various interviews with Officials from the Ministry of Commerce and the Ministry of Law & Justice (Telephone Conversation, 13 & 15 March 2013) [Names Withheld]. Also, confirmed in the WRITTEN RESPONSE TO THE RTI APPLICATION, *supra* note 17.

⁶⁸ Trade Act, Pub. L. No. 93-618, 19 U.S. C § 2411 (1978), (*amended* 2012), <http://uscode.house.gov/download/pls/19C12.txt>.

⁶⁹ Trade Barrier Regulation (TBR) mechanism provided in Council Regulation (EC) No. 3286/94 of 22 December 1994, 1994 O.J. (L 349) 79, amended by Council Regulation (EC) No. 356/95 of 20 February 1995, 1995 O.J. (L 41) 3, and Council Regulation (EC) No. 125/2008 of 12 February 2008, O.J. (L 40) 1 and EU Regulation No. 654/2014 of 15 May 2014, O.J. (L 189) (laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization) [1994] O.J. L349, *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1994R3286:20080305:EN:PDF>.

⁷⁰ Rules on Foreign Trade Barrier Investigation, (promulgated by Ministry of Commerce, P.R.C., Feb. 3, 2005, effective Mar. 1, 2005, (China).

private sector agencies have coordinated in these disputes, and the extent to which they have acted in accordance with the above-mentioned institutional and procedural frameworks established for dispute settlement coordination. The primary purpose of this analysis is to identify those characteristics of PPP strategies that have introduced *effectiveness* into the domestic procedure of dispute settlement in India. The *effectiveness* or success of government-industry coordination, in the context of this article, will not be measured in terms of the nature and extent of resources exchanged between the partners, or the extent to which an industry has financed a dispute. A PPP strategy will be *effective* and advantageous if it can strengthen the countries' WTO dispute settlement capacity.

A. EC-Tariff Preferences

In the case of *EC-Tariff Preferences*⁷¹, India challenged the tariff concessions granted by the European Communities (EC) to twelve developing countries⁷² under the 'Drug Arrangements'⁷³ (one of the five preferential tariff 'arrangements'⁷⁴).⁷⁵ India alleged that the EC's tariff system was violating the provisions of Most Favoured Nation (MFN) and the Enabling Clause.⁷⁶ The Panel and the Appellate Body upheld the challenge as they found that the tariff preferences were inconsistent with GATT 1994, and the measures were not justified under the Enabling Clause.⁷⁷ This case is a significant example of coordination formed between the government and the affected export promotion council, the Cotton Textiles Export Promotion Council of India (TEXPROCIL)⁷⁸. The existing literature claims that the case was principally initiated by the Ministry of Textiles and the Ministry of Commerce, and

⁷¹ PANEL REPORT, EUROPEAN COMMUNITIES, *supra* note 49.

⁷² The preferred countries were: Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Pakistan, Panama, Peru and Venezuela.

⁷³ It is known as the 'Special arrangements to combat drug production and trafficking'. Council Regulation (EC) No 2501/2001 of Dec. 10, 2001, art. 1.2., 2001 O.J. (L 346) 8 applying a scheme of generalised tariff preferences for the period from Jan. 1, 2002 to Dec. 31, 2004.

⁷⁴ Council Regulation (EC) No 2501/2001 of Dec. 10, 2001, art 1.2., 2001 O.J. (L 346) 1.

⁷⁵ It was pursuant to Council Regulation (EC) No. 2501/2001, *see id.*, under its Generalised System of Preferences Scheme.

⁷⁶ The 'Enabling Clause' is officially known as the 'Differential and more favourable treatment reciprocity and fuller participation of developing countries'. It permits developed countries to make preferential arrangements with developing countries in goods trade. The Enabling Clause is the WTO legal basis for the Generalised System of Preferences. [Decision of Nov. 28, 1979 (L/4903) para 2].

⁷⁷ For more details, *see* Dispute Settlement, *European Communities — Conditions for the Granting of Tariff Preferences to Developing Countries*, WORLD TRADE ORGANISATION, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds246_e.htm (last visited Sept. 9, 2013).

⁷⁸ For details, *see* TEXPROCIL, www.texprocil.org (last visited Oct. 8, 2012).

that the private stakeholders were largely absent during most of the consultation and initial investigation phase of the dispute.⁷⁹ It further observes that TEXPROCIL filed a report (requesting the government to protect its trade interests) with the Ministry of Commerce only *after* the government had invoked WTO DSU provisions in the matter.⁸⁰ In contrast, the private sector (in the empirical investigation) claims that the measure was identified by TEXPROCIL and a representative from TEXPROCIL was part of the national delegation during all stages of dispute settlement, including the stage of formal consultation and Panel proceedings.⁸¹ It can therefore be seen that the findings from the literature and empirical research contradict each other and are difficult to reconcile.⁸²

The literature and empirical findings confirm that TEXPROCIL provided the government with the required information relating to India's performance before and after the EC's implementation of Drug Arrangements. It supplied data on the declining exports of Indian textiles and cotton to the EC, and other related information required at the litigation stage.⁸³ As per the claims made by a TEXPROCIL representative, 'TEXPROCIL provided data on the lost market access, the impact it is having on textile exporters and industry, what kind of amount we are losing, and what we could have gained in the absence of the preferential regime. The entire datasheet was provided by us, along with the commercial arguments.'⁸⁴ A TPD official confirms this claim as he states that 'TEXPROCIL had very close association with the government and it provided all the required evidence and information during the dispute.'⁸⁵

⁷⁹ DHAR & MAJUMDAR, *supra* note 12 at 182-185; BISWAJIT DHAR & ABHIK MAJUMDAR, THE INDIA-EC GSP DISPUTE: THE ISSUES AND THE PROCESS, (ICTSD Asia Dialogue on WTO Dispute Settlement and Sustainable Development, Jakarta Working Draft (Jan. 25, 2006) available at <http://www.ictsd.org/downloads/2008/06/dhar.pdf> [hereinafter DHAR & MAJUMDAR, LEARNING FROM THE INDIA-EC GSP DISPUTE].

⁸⁰ *See id.*

⁸¹ INTERVIEW WITH AN OFFICIAL REPRESENTATIVE, TEXPROCIL, *supra* note 46.

⁸² Information is based on discussions with a representative from TEXPROCIL who participated throughout the process and was leading the partnership on behalf of the textiles industry [INTERVIEW WITH AN OFFICIAL REPRESENTATIVE, TEXPROCIL, *supra* note 46]. On the other hand, it is claimed in Dhar and Majumdar that '[i]n the absence of industry participation, the consultations in respect of the dispute remained confined to the Ministry of Textiles and the Ministry of Commerce' [DHAR & MAJUMDAR, LEARNING FROM THE INDIA-EC GSP DISPUTE, *supra* note 79 at 183].

⁸³ DHAR & MAJUMDAR, LEARNING FROM THE INDIA-EC GSP DISPUTE, *supra* note 79 at 183; INTERVIEW WITH AN OFFICIAL REPRESENTATIVE, TEXPROCIL, *supra* note 46).

⁸⁴ INTERVIEW WITH AN OFFICIAL REPRESENTATIVE, TEXPROCIL, *supra* note 46.

⁸⁵ INTERVIEW WITH AN OFFICIAL REPRESENTATIVE, MINISTRY OF COMMERCE, *supra* note 46.

The government in this case relied heavily on the subsidised legal services provided by ACWL. The representatives from TEXPROCIL assisted the ACWL lawyers with required commercial evidence and information. The Government of India states, in an explicit manner, that all WTO disputes are financed entirely by the Government, and that 'no financial assistance is taken from the industry'.⁸⁶ However, a private sector representative claims that a part of the ACWL's legal fees in this case was paid by TEXPROCIL.⁸⁷ The claim is confirmed by a government's trade adviser in the following statement: 'Because TEXPROCIL had its commercial interest in the dispute, and was backed by the concerned exporters, it also incurred some of the legal costs for hiring lawyers to prepare and litigate this case at the WTO'.⁸⁸ The ACWL's legal team was further assisted by a trade lawyer based in India, Mr. Krishnan Venugopal.⁸⁹ His participation was limited in the case as ACWL was the main legal service provider. But one of the purposes of appending an in-house lawyer to the ACWL lawyers can possibly be seen as the government's initiative to build and enhance domestic legal expertise in WTO laws.

Another striking feature of this dispute settlement partnership was that an official from TEXPROCIL was part of the national delegation during consultation and Panel proceedings. Direct participation of a private sector representative at the official meetings was a unique feature of this partnership as the government has usually preferred to keep private sector representatives out of the official meeting rooms.⁹⁰ A private sector representative further explains this aspect of PPP in the following statement:

...This is how we felt like a part of the system and the feeling motivated us to invest our resources and time in the process. I was an equal participant and a partner with the government in the process throughout. When you are kept outside the room, you become an indirect contributor. But when you participate directly to this extent, the problems and the issues can be raised in consultation with the private sector and be answered there and then, and the momentum of the proceedings is therefore not lost.⁹¹

⁸⁶ WRITTEN RESPONSE TO THE RTI APPLICATION, *supra* note 17.

⁸⁷ INTERVIEW WITH AN OFFICIAL REPRESENTATIVE, TEXPROCIL, *supra* note 46.

⁸⁸ INTERVIEW WITH AN OFFICIAL REPRESENTATIVE, CENTRE FOR WTO STUDIES, *supra* note 48.

⁸⁹ *See id.*

⁹⁰ WRITTEN RESPONSE TO THE RTI APPLICATION, *supra* note 17.

⁹¹ INTERVIEW WITH AN OFFICIAL REPRESENTATIVE, TEXPROCIL, *supra* note 46. For

In other words, it is suggested that the momentum of the arguments during consultation and official proceedings can be maintained with the help of regular and close cooperation between industry and the government, more so through direct participation of industrial representatives during the proceedings in Geneva. A private sector representative claims that this approach has its merits, as it enables an industry to fully contribute to the settlement of a dispute, and it allows the government to gain full confidence and support from an industry. However, there could be possible drawbacks to the approach as it might enable an industry to dominate the inter-governmental process at the WTO. It might also provide an industry with an opportunity to protect its own special economic interests at the cost of wider national interests.⁹² However, that risk could be counterbalanced to some extent, especially in the present case, as the industry representative (TEXPROCIL) was a body established and sponsored by the government. Therefore, it is natural to assume that the government could have, if required, influenced the council to some extent.

TEXPROCIL in this case supplied vital resources to the government and their lawyers with the aim of gaining the lost market access in the EU. At the same time, the government had to ensure that the interests of the textiles industry were not injured at the cost of beneficial treatment extended by the EU to India's immediate neighbouring competitors (including Pakistan). It can therefore be argued that both the sectors had overlapping interests in exchanging their resources and litigating the case together. In other words, the resources were exchanged between them on the basis of mutual benefit and reciprocity.

B. *EC-Bed Linen*

In the case of *EC-Bed Linen*⁹³, India requested consultations with the EC in respect of anti-dumping proceedings initiated by the EC against the imports of cotton-type bed-linen products from India. India alleged that the anti-dumping duties imposed by the EC violate the provisions of the Anti-Dumping Agreement and the GATT 1994. It contended that the EC had not taken into account the developing country status of India, and had erred in making determinations, establishing the facts and evaluating them. The Panel and the Appellate Body partially upheld the claims

details, see Abigail C Dushman, *Horizontal Review between International Organizations: Why, How, and Who Cares about Corporate Regulatory Capture*, 22(4) EUR. J. INT'L. L. 1089 (2011) [The article demonstrates a situation of corporate regulatory capture with the help of a case study of World Health Organization.]

⁹³ Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R (adopted Mar. 12, 2001, as modified by Appellate Body Report WT/DS141/AB/R, DSR 2001:VI, 2077).

made by India and recommended that the EC should bring its measures in confirmation with its obligations under the Anti-Dumping Agreement.⁹⁴

This case is an instance where an export promotion council coordinated with the government from the initial stage of identification to the final stages of implementation. A private sector representative claims that the barrier was identified by TEXPROCIL which subsequently approached the Ministry of Textiles and the Ministry of Commerce with the representation that the duties imposed by the EC were infringing the interests of the textile industry.⁹⁵ The Ministry of Commerce, in coordination with the Textiles Ministry and the PMI, preliminarily examined the matter and decided to investigate the matter further. Subsequently, the government was convinced that the duties were inconsistent with the WTO rules and that the duties were causing a significant loss of market to its textile exporters.⁹⁶

A trade policy adviser to the Ministry of Commerce confirms that ‘TEXPROCIL was actively involved at each stage of the dispute in the *EC-Bed Linen* case’.⁹⁷ ‘TEXPROCIL participated in the investigations, consultations, in meetings with the Panel, and in preparation of the legal documents for the litigation. It provided all the required information’.⁹⁸ It also played a proactive role at the enforcement stage of the dispute. After receiving a favourable ruling from the Panel and the Appellate Body, TEXPROCIL continued to monitor the EC’s progress in implementing the award. On finding that the award was not being implemented, TEXPROCIL again approached the Ministry of Commerce with the evidence of non-implementation and convinced the Government to initiate compliance proceedings against the EC. Subsequently, the government requested the launch of compliance proceedings on the basis of facts provided by TEXPROCIL.⁹⁹ It can therefore be inferred that an industry can play an instrumental role, not only in the investigation, preparation and litigation of the case, but also during the implementation and compliance stages.

⁹⁴ For more details, see Dispute Settlement, *European Communities — Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India*, WORLD TRADE ORGANISATION, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds141_e.htm (last visited Sept. 10, 2013).

⁹⁵ INTERVIEW WITH AN OFFICIAL REPRESENTATIVE, TEXPROCIL, *supra* note 46. This was confirmed in the INTERVIEW WITH ANANT SWARUP, *supra* note 40.

⁹⁶ *See id.*

⁹⁷ INTERVIEW WITH AN OFFICIAL REPRESENTATIVE, CENTRE FOR WTO STUDIES, *supra* note 48.

⁹⁸ *See id.*

⁹⁹ *See id.*

TEXPROCIL hired the Brussels based Vermulst Verhaeghe & Graafsma law firm for preparing and presenting the case at WTO, and paid a substantial amount of their legal fees. A part of that expenditure was later reimbursed to TEXPROCIL by the government, and the other part of the expenditure was met by TEXPROCIL through industry contributions.¹⁰⁰ The finding indicates that this payment arrangement between the government and TEXPROCIL worked well for both entities. TEXPROCIL initially incurred the entire expenditure from the funds gathered through industrial contributions, and a part of those expenses were later reimbursed by the government. This convenient payment arrangement between the government and TEXPROCIL was instrumental in building confidence and trust in their relationship.¹⁰¹

One of the most effective features of this partnership arrangement was the openness in the channels of communication between the government and the industry. A TEXPROCIL's representative confirms the importance of 'open channels of communication' in the following statement:

The *EC-Bed Linen* is a classic case of PPP in India as the lines of communication between the Government and TEXPROCIL were very open. The entire set of information was disseminated and discussed in an open manner between the two. We never got the feeling that we were outsiders. We were very much a part of the proceedings and were updated on a regular basis by the Government.¹⁰²

The government was alert throughout the proceedings, and it reacted promptly to the updates provided and requests raised by the industry. A representative from TEXPROCIL was given a forum to express opinions and respond to commercial enquiries raised during official consultations. TEXPROCIL's representative was seen as a commercial expert in the matter, and the inputs provided from TEXPROCIL were seriously considered during the internal and official meetings and discussions.¹⁰³ The open dissemination of information and resource exchange

¹⁰⁰ The law firm is now known as VVGB law firm. The lawyers engaged in the matter were Edwin Vermulst and Folkert Graafsma. The claims were made by an official representative from TEXPROCIL [INTERVIEW WITH AN OFFICIAL REPRESENTATIVE, TEXPROCIL, *supra* note 46].

¹⁰¹ INTERVIEW WITH AN OFFICIAL REPRESENTATIVE, TEXPROCIL, *supra* note 46.

¹⁰² *See id.*

¹⁰³ The claims have been made by the council's representative in the interview conducted by the author on June 27, 2013. The interview summary is on file with the author. The claims have been confirmed by the representatives of Ministry of Commerce and a trade

could therefore be made possible with the assistance of this export promotion council.

The findings indicate that the industry and the government in this case cooperated 'like never before'¹⁰⁴. One of the key reasons behind the formation of this distinct PPP arrangement could be that the government, by this stage, had confided in TEXPROCIL. At the same time, TEXPROCIL as a repeat participant in dispute settlement process had established relevant contacts in the Ministry. A TEXPROCIL's representative states that 'we both had confidence in each other, and we trusted each other'.¹⁰⁵ Hence, government-industry coordination throughout the pre-litigation, litigation and post-litigation phases of dispute settlement is the most distinct feature of this partnership. It is a landmark case which reaffirms that partnership arrangements can enable developing countries to gain the expertise and resources required for litigating the WTO rights even against the powerful developed countries. The WTO instances discussed above have also made out a strong case for the argument that the confidence between an industry and the government can gradually, but effectively, be established with the help of export promotion councils which can serve as a reliable and a trustworthy interface between the two.

C. *US-Carbon Steel (India)*

In the case of *US-Carbon Steel (India)*,¹⁰⁶ India challenged the imposition of countervailing duties by the United States on imports of certain hot rolled carbon steel flat products from India. India alleged that the duties violate the provisions of the GATT 1994 and the SCM Agreement. With regard to the claims that were within the scope of the DSU proceedings, the Panel concluded that the US had acted in contravention of the SCM Agreement. Hence, one of the main allegations raised by India was upheld by the Panel. However, the Panel rejected numerous claims made by India against the US trade remedy laws and determinations made by the US Department of Commerce with regards to the imports of certain steel products from India. The Appellate Body reversed the Panel's recommendations with respect to the US Department of Commerce (USDOC) findings that were inconsistent with Article 1, 14, 12 and 15 of the SCM Agreement and Article 11 of the DSU. The AB ruling was a favourable decision for India as it ruled that the

policy advisor to the Ministry of Commerce in interviews conducted by the author on June 12, 2013 and June 5, 2013 respectively.

¹⁰⁴ INTERVIEW WITH AN OFFICIAL REPRESENTATIVE, TEXPROCIL, *supra* note 46.

¹⁰⁵ *See id.*

¹⁰⁶ Panel Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/R and Add.1 (adopted Dec. 19, 2014, as modified by Appellate Body Report, WT/DS436/AB/R).

countervailing duties imposed by the US on steel imports from India are inconsistent with the SCM Agreement and that the US should bring its measures in confirmation with its WTO obligations.¹⁰⁷

The government in the present instance was approached directly by the affected companies. It was unlike the previous disputes where companies approached the government departments through trade associations and export promotion councils. Essar Steel, along with Tata Steel and Jindal Steel, filed an application with the Ministry of Commerce. In their application, they alleged that the countervailing duties imposed by the US on the imports of certain hot rolled carbon steel flat products were detrimental to their exporting interests, and were inconsistent with the WTO provisions. The application was a bulky file with an intensive collection of informational facts, evidential data and commercial arguments.¹⁰⁸ The matter was subsequently investigated by TPD. Following that, the file was referred to the PMI for further investigation and preparation of a request for consultation.¹⁰⁹

Essar Steel was the chief private sector participant as it was the most affected company as compared to the other two companies. Most of the information was therefore provided by Essar Steel to the government.¹¹⁰ The government held consultations with all three affected companies. The national delegation during formal consultation and Panel proceedings comprised lawyers (Lakshmikumaran & Sridharan Attorneys), the officials from the Ministry of Commerce, officials from PMI to WTO, and the advisers from the Centre for WTO Studies.¹¹¹ The private sector in this case was not directly involved in the formal proceedings held at Geneva, but the physical absence of the private entities during consultation or Panel meetings should not suggest that they were not an essential and active part of the process. "They were indeed extensively consulted while making preparations for the consultation meetings and while preparing the consultative briefs. Their physical presence in the meeting was just not required in this case."¹¹²

¹⁰⁷ For more details, see Dispute Settlement, *United States — Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WORLD TRADE ORGANISATION, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds436_e.htm (last visited on Sept. 11, 2013).

¹⁰⁸ The author gained access to the application which was filed by Essar Steel. It was addressed to the Ministry of Commerce, Government of India [Details confidential].

¹⁰⁹ INTERVIEW WITH ANANT SWARUP, *supra* note 40.

¹¹⁰ *See id.*

¹¹¹ INTERVIEW WITH AN OFFICIAL REPRESENTATIVE, MINISTRY OF COMMERCE, *supra* note 46.

¹¹² 'Having an industrial representative in the national delegation during consultation meetings is need based.' [INTERVIEW WITH AN OFFICIAL REPRESENTATIVE, MINISTRY OF COMMERCE, *supra* note 46].

The case confirms that a private sector (which in this case comprised the giant steel companies in India) would generally be more forthcoming and active in assisting the government during the settlement of disputes if it has high stakes in the matter and is anticipating substantial gain from the removal of a trade barrier. Therefore, as initially discussed, one of the vital stages of the dispute settlement process is the stage where the private sector examines the benefits from the removal of barrier as against its expected cost of removal. The industries' decision to approach and assist the government largely depends upon the cost-benefit analysis conducted at this stage.¹¹³

Finally, the case adds a new perspective to the way in which the Government of India has coordinated with industries in the past. The government in this case accepted and acknowledged an application filed by a private company and proceeded to the stage of investigation, consultation and litigation on the basis of the evidence provided by the private companies. There is no noticeable mention of any trade association, trade union, export promotion council or a chamber of commerce assisting the government and the private companies to coordinate and exchange resources in the case. This finding provides a testimony to the fact that resourceful and influential companies like Essar Steel can directly (and with comparative ease) approach their governments if they have a trade matter to be resolved. They may not require the intervention of an industry representative as they often themselves possess the capacity to supply required resources to the government. On the other hand, the previous two cases have established the significance of institutionalising and strengthening the private sector representative organisations as it may not be possible for the smaller and less resourceful companies (such as MSMEs) in India to directly access and partner their governments individually for the resolution of foreign trade conflicts. In this manner, the PPP approach can possibly discriminate in favour of resourceful business entities by providing them a comparatively effective access to international adjudicatory provisions at the WTO DSU. This finding suggests that the approach should not be considered without caution and the country aspiring to evaluate this approach should do so in light of its potential limitations, some of which are discussed in the following section.

¹¹³ For further details on anticipated costs and benefits, see BOHANES & GARZA, *supra* note 3 at 66-67.

V. CHALLENGES AND “LESSONS LEARNT”: A CRITICAL ANALYSIS OF PPP APPROACH

The PPP strategies employed in India have clearly enhanced the dispute settlement capacity of the country. However, it is important to note that there are multiple domestic conditions in India that may impede the formation of effective partnership arrangements – an arrangement which in itself is not free from certain weaknesses. Hence, before reaching any conclusions on the effectiveness of PPP strategies employed in India, it is important to analyse the challenges and limitations that confront this approach. These challenges and limitations, along with certain suggestions to overcome these limitations, are discussed in the following sub-sections.

A. *Unorganised Private Sector in India*

One of the biggest constraints that India may face in effectively utilising PPP approach can be attributed to its largely ‘*unorganised*’ private sector.¹¹⁴ The economic sector in India is heavily fragmented, with multinational businesses leading a handful of economic sectors including steel, automobile and information technology, and a large portion of economic sectors run by MSMEs on the other hand. Together, the MSMEs contribute significantly to foreign trade, but their individual volumes of exports and profit margins may constrain their capacity to form and finance representative organisations, gather information and approach the government with a well-researched trade issue.

An interviewee provides an example to illustrate the problem of insufficiently organised private sector in India.¹¹⁵ The fisheries industry in India, a significant

¹¹⁴ An unorganised sector in India is defined as a sector which consists ‘of all unincorporated private enterprises owned by individuals or households engaged in the sale or production of goods and services operated on a proprietary or partnership basis and with less than ten total workers.’ Over ninety percent of country’s working population is employed by the unorganised economic sector. [NATIONAL COMMISSION FOR ENTERPRISES IN THE UNORGANISED SECTOR, GOVERNMENT OF INDIA, REPORT ON CONDITIONS OF WORK AND PROMOTION OF LIVELIHOODS IN THE UNORGANISED SECTOR 1774 (Academic Foundation 2008)].

¹¹⁵ Shaffer has defined ‘well-organized’ actors as companies which can effectively operate through trade associations. [GREGORY C SHAFFER, DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION 33 (Brookings Institution Press 2003)]. From an economic perspective, there are multiple factors (such as productivity, work force, economic output, profits, industry size, wage rate and literacy) which determine whether an industry is organised or unorganised. However, the term “organised private sector” or

exporting sector, comprises micro and small producers and exporters. They are partially represented by trade associations (such as SEAI) and an export promotion council (MPEDA), but the main problem lies in the fact that the industry is not 'sufficiently institutionalised' as trade associations, councils, exporters and producers have failed to coordinate and represent the interests of unorganised and unaware exporters and producers of the sea food - the fishermen in India.¹¹⁶

The unsuccessful litigation of the *US-Shrimp*¹¹⁷ case further explains the problem of insufficiently organised fisheries industry in India.¹¹⁸ Although the Seafood Exporters Association of India (SEAI) in the case provided some commercial facts to the government during the proceedings at WTO¹¹⁹, it is contended that those facts were not comprehensive as they were detached from the realities which the fishermen in India faced.¹²⁰

"organised industry" in this article is used to refer to an industry that has the following characteristics: 1. Industries that are strongly represented by trade associations, confederations, export promotion councils or chambers of commerce; 2. Industries with established channels of communication and exchange between producers, manufacturers, exporters, importers and their representative organisations; 3. Industries in which the exporters, importers and their representatives are aware of international trade developments, foreign and national trade policies affecting their business interests and the possibility of approaching their governments to address trade grievances. 4. Industries that have the capacity and know-how to gather information and other required resources which may be required for presenting trade grievances in well-substantiated and investigated manner to their governments.

¹¹⁶ The problem is further illustrated in the words of an official from fishing industrial community: 'By and large, there is poor awareness among the fishermen about the exports market, efficient and environment friendly ways of fishing, the technological developments for minimising wastage, and the opportunities offered to them by the increasingly liberalising world trade. Some of the WTO agreements actually protect the interest of the poor fishermen who are the actual producers, but the fishermen think that the international agreements and rules are not for them but are only intended to serve the interests of the exporters.' {Interview with an Official Representative, Fisheries & Fishing Communities in India in Telephone Conversation, Mumbai, India (June 17, 2013) [Name Withheld] [hereinafter INTERVIEW WITH AN OFFICIAL REPRESENTATIVE, FISHERIES & FISHING COMMUNITIES IN INDIA]}.

¹¹⁷ Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R and Corr.1 (adopted Nov. 6, 1998, as modified by Appellate Body Report, WT/DS58/AB/R, DSR 1998: VII, 2821).

¹¹⁸ INTERVIEW WITH AN OFFICIAL REPRESENTATIVE, ICTSD IN IN-PERSON, GENEVA, SWITZERLAND (Apr. 11, 2013) [Name withheld] [hereinafter INTERVIEW WITH AN OFFICIAL REPRESENTATIVE, ICTSD].

¹¹⁹ INTERVIEW WITH AN OFFICIAL REPRESENTATIVE, CENTRE FOR WTO STUDIES, *supra* note 48.

¹²⁰ INTERVIEW WITH AN OFFICIAL REPRESENTATIVE, FISHERIES & FISHING COMMUNITIES IN INDIA, *supra* note 116.

In the dispute, you have two actors which are structurally very different. In the US, you have an organised shrimp industry which was pushing their government with sound environmental arguments for the protection of their commercial interests. On the other hand, you have a poor, almost illiterate, and not so organised fishery industry in India which had difficulties in approaching its government during the dispute.¹²¹

This case is a classic instance of 'structural asymmetry' between the fisheries industry in India and the US. Moreover, the ruling delivered in this case, which was substantially against the exporting interests of Indian fisheries industry, exhibits that an organised and knowledgeable industry is a vital requirement for the effective handling of trade disputes. An effective interaction between an industry and a government is possible only when the private sector is well organised, aware, interconnected and strongly institutionalised. This may not be the case with many industries, especially in developing and least developed countries.¹²² Investment should therefore be made in developing the institutional and resource capacity of the private sector by creating interconnected and well-funded trade unions, cooperatives, trade associations, chamber of commerce and export promotion councils.

Matthew, a representative from Indian fisheries industry, suggests that India should create interconnected trade cooperatives, associations and export promotion councils. The trade cooperatives can discharge multiple functions. The trade unions and cooperatives can jointly coordinate with the government departments and can make attempts to strike bargains for beneficial domestic and international conditions in the interest of producers and exporters.¹²³ They can assist producers to produce and market goods to their optimum capacity by imparting the right training in production and marketing techniques. They can also assist exporters to find the right markets for their products and to divert their exports to new markets in case of trade disagreements and barriers arising in the former. If, for example, the demand for prawns (a highly perishable product) in the market of country A diminishes or disappears, the concerned cooperative can identify an alternative market in country B where this perishable produce can be exported at maximum advantage and with minimum wastage.

¹²¹ INTERVIEW WITH AN OFFICIAL REPRESENTATIVE, ICTSD *supra* note 118.

¹²² BOHANES AND GARZA, *supra* note 3 at 71 [The authors note that 'the less developed a country is, the less well organized its domestic industry tends to be'].

¹²³ For example, the trade cooperatives in Europe have in the past bargained successfully for subsidised fuel for consumption by fishing vessels in the country. This has decreased the costs of operation and increased the profit margins of the fisheries industry.

Many existing export promotion councils and trade associations are a product of the 1950s when India practised the policy of “export promotion import substitution”. So they date back to a pre-liberalisation period when the markets were closed and protected, and hence they continue to employ an ‘inward-looking’ approach. Whereas today, since the markets have become global, businesses are expected to identify their markets across national borders, and are also expected to negotiate their interests nationally and internationally. Hence, in the wake of different trade rules and international trade conditions, an institutional reform of representative organisations is a much needed step for building an organised private sector in India. An organised industry comprising powerful trade associations with expert officials that can coordinate with the government on a regular basis can facilitate the coordination during monitoring, investigation, negotiations and litigation.¹²⁴ On the other hand, an industry with ‘less sophisticated’ associations and a ‘fragmented industry’ with ‘small companies’ and ‘disintegrated representatives’ may reduce the capacity building potential of the partnership approach.¹²⁵

B. Lack of Coordination

Another obstacle that not only hampers government-industry coordination but also impedes India’s participation at WTO DSU is the problem of coordination between various divisions of the government and between government and economic sectors.¹²⁶ The problem is illustrated with the help of an example. In the case of *China-Electronic Payment Services*¹²⁷, China’s practices relating to their electronic payment system were challenged by the US. An official from China’s Permanent Mission to the WTO approached his counterpart at the PMI to WTO to apprise him of the matter which, according to Chinese officials, also affected the financial interests of India. On being informed of the matter, the Mission officials made relevant enquiries with the Reserve Bank of India. The Mission officials subsequently investigated the facts and discovered that India might also be affected by the outcome of the matter due to its national electronic payment system. However, due to this delay in information flow and inter-departmental

¹²⁴ Gregory C Shaffer, Michelle Raton Sanchez Badin and Barbara Rosenberg, *The Trials of Winning at the WTO: What Lies Behind Brazil’s Success*, 41(2) CORNELL INT’L L. J. 383 (2008).

¹²⁵ BOHANES AND GARZA, *supra* note 83 [‘It would make little sense for one individual company to lobby the government to initiate action at the WTO against a trade barrier. Rather, a more rational course of action for that one company would be to adjust to the trade barrier and/or seek other export markets, especially when the company cannot tolerate revenue fluctuations’].

¹²⁶ INTERVIEW WITH AN OFFICIAL, PMI to WTO (In-person, Apr. 13, 2013) [Name withheld].

¹²⁷ Panel Report, *China – Certain Measures Affecting Electronic Payment Services*, WT/DS413/R and Add.1, (adopted Aug. 2012, DSR 2012:X, 5305).

coordination, India could only manage to join the case as a third party. Hence, the lack of communication and coordination between the private financial sector and the government, and between the Ministry of Finance and the Ministry of Commerce in India becomes evident here. Such instances reflect that coordination between the government departments should be strengthened by devising affordable focal points and practical procedures of inter-ministerial coordination.¹²⁸ In addition, the coordination between the government and industry should also be improved by devising effective and open channels of communication between the two. This could facilitate regular exchanges between the affected public and private stakeholders in India, which may in turn provide the government with an adequate amount of time to coordinate and receive information from the concerned industry.¹²⁹

C. Lack of Confidence

Lack of confidence between the government and industry is another reason that can impede the formation of effective networks between the two.¹³⁰ The problem is described by a SEAI official:

We have at times faced scepticism from the government when we approached them for certain trade concerns our exporters had. We were asked to establish that the affected exporters had not done anything wrong, and that the financial loss they were facing was due to a foreign measure and not due to other internal reasons. The burden of proof was entirely on us to prove the legitimacy of our complaint.....The industry, which was asked to supply detailed evidence, felt that the government is trying to discourage them from raising their complaints. This and similar other experiences have caused a major trust deficit between us.¹³¹

It is contended that the 'first battle' for the private sector to overcome foreign trade barriers is 'internal', i.e., 'the battle of convincing our government' to investigate the problem and to launch an action at WTO. This signifies 'distrust'

¹²⁸ Practical procedures for managing internal coordination between the government departments are suggested in WILKE, *supra* note 4.

¹²⁹ Periodical meetings between the private and the public sector for open communication is suggested in BOHANES AND GARZA, *supra* note 3 at 81; Practical ways of managing external coordination with private sector entities and foreign bodies is suggested in WILKE, *supra* note 4.

¹³⁰ BOHANES AND GARZA, *supra* note 3 at 80.

¹³¹ INTERVIEW WITH AN OFFICIAL REPRESENTATIVE, SEAI (Audio Conferencing, Sept. 2013) [Name withheld].

between the government officials and private sector entities as ‘they both believe that they have different interests and their interests cannot coincide’.¹³² It is therefore important that the mindset of the government and business entities should change. The government should view industry interests through a legal and economic spectrum, and should believe that the protection of legitimate trade interests would foster international trade and economic growth in India. At the same time, industries should also trust that the government will strive for the protection of their legitimate business interests.

D. Possible Discrimination between Resourceful and Resource-Constrained Industries

Irrespective of the above-mentioned impediments and limitations, the public and private sector entities in India have demonstrated an emerging ‘pattern of coordination’ through a series of jointly managed disputes.¹³³ However, it may be recalled that only a few industries have partnered the government, with the leading repeat participant being the textiles industry. The partnership between the government and TEXPROCIL should be seen as more of an ‘exception’ than a ‘rule’ in India, as it may not be possible for other industries to approach the government in similar ways.¹³⁴ Similar levels of private participation have not been found in cases affecting the interests of other major exporting industries, such as pottery¹³⁵, sea food¹³⁶, and agriculture¹³⁷. Economies of scale and substantial stakes involved may respectively be argued as the main reasons for the active participation of the textiles and steel industries in India. On the other hand, the lack of established procedures facilitating the interaction between the two sectors,

¹³² INTERVIEW WITH AN OFFICIAL REPRESENTATIVE, TEXPROCIL, *supra* note 46.

¹³³ Some of these cases are as follows: PANEL REPORT, EUROPEAN COMMUNITIES, *supra* note 49; Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R, (adopted Mar. 12, 2001, as modified by Appellate Body Report WT/DS141/AB/R, DSR 2001:VI, 2077); *Turkey – Safeguard Measure on Imports of Cotton Yarn Other Than Sewing Thread*, WT/DS428, in consultations on Feb. 13, 2012; Panel Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/R and Add.1 (adopted Dec. 19, 2014, as modified by Appellate Body Report, WT/DS436/AB/R).

¹³⁴ *See id.*

¹³⁵ Panel Report, *India – Measures Concerning the Importation of Certain Agricultural Products from the United States*, WT/DS430/R, circulated to WTO Members Oct. 14, 2014 [Panel Report Circulated].

¹³⁶ Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R and Corr.1 (adopted Nov. 6, 1998, as modified by Appellate Body Report, WT/DS58/AB/R, DSR 1998: VII, 2821).

¹³⁷ Panel Report, *India – Measures Concerning the Importation of Certain Agricultural Products from the United States*, WT/DS430/R, circulated to WTO Members Oct. 14, 2014 [Panel Report Circulated].

weak representation, the prospective nature of WTO remedies, low trading stakes and poor economies of scale, besides other discussed impediments, may be argued as the main reasons for the non-participation of other significant exporting sectors in India.

The invocation of WTO DSM may be an unaffordable option for traders with small *commercial stakes* because the 'litigation costs are more or less independent of the commercial stakes involved in a dispute'.¹³⁸ The small trading stakes¹³⁹ 'are not sufficiently offset by smaller litigation costs or a reduced need for domestic WTO legal expertise'.¹⁴⁰ Additionally, immediate retrospective results and financial compensation are the desirable outcomes of small business enterprises (such as MSMEs in India), but these outcomes cannot possibly be achieved through WTO DSM.¹⁴¹ An interviewee observes that 'the smaller companies and industries often require immediate results and they mostly expect financial compensation as an effective remedy due to the size of their businesses'¹⁴². However, the remedies available under the WTO laws are prospective and, in practice, non-compensatory in nature.

These observations lead to an inference that PPP arrangements can generally enable resourceful business actors to protect their exporting interests through a governmental action at the WTO. But the same result may not be achieved in cases where the exporting interests of resource-constrained, developing and small scale industries are at stake. In other words, the formation of dispute settlement partnership may lead to a situation of *discrimination* between the '*haves*' and the '*have-nots*' industries in India. This is a potential limitation of PPP approach. However, it is beyond the scope of this investigation to suggest strategies for engaging private entities which cannot afford or otherwise discharge the partnership obligations. Nevertheless, the aspect of wider and fuller engagement of private sector is a topical issue which can be explored by future researchers.

¹³⁸ Hakan Nordstrom and Gregory Shaffer, *Access to Justice in the World Trade Organization: The Case for Small Claims Procedure?*, 7(4) WORLD TRADE REV. 587 (2008).

¹³⁹ Absolute trading stakes are the aggregate of a country's overall exports and imports (including the value, volume and variety of exports and imports).

¹⁴⁰ See *id* at 593.

¹⁴¹ Bernard M Hoekman & Petros C Mavroidis, *WTO Dispute Settlement, Transparency and Surveillance*, in DEVELOPING COUNTRIES AND THE WTO: A PROACTIVE AGENDA 135 (Bernard Hoekman & Will Martin eds., Blackwell Publishing 2001). [The authors note that 'standard remedies that require a member to bring its measures into compliance with WTO obligations do not involve any compensation for damage incurred or financial penalties. This reduces the attractiveness of using the system.'].]

¹⁴² INTERVIEW WITH CELSO DE TARSO PEREIRA, PERMANENT MISSION OF BRAZIL TO THE WTO IN GENEVA, SWITZERLAND (Video Conferencing, Sept. 2013).

These observations point to the fact that the formation of PPPs without a regulatory framework may result in a discriminatory protection of economic interests. More so, amidst the stark wealth inequality in India, its PPP arrangement can fall short of granting an equal *right of access* to all economic sectors because the treatment of “rule of law” remains ‘tilted’ in favour of wealthy and politically influential businesses in India.¹⁴³ Hence, it is important for a partnership arrangement (especially in countries with poor observance of “rule of law” and high rate of corruption) to have established regulatory provisions that can possibly reduce such instances of discrimination and ensure that the governments make strategic choices in the interests of the nation. It is also important that the government should always take the leading role in such partnerships, and it should be able to filter and prioritise claims and disputes in relation to their potential scope, overall impact, and their harmony with the wider economic, social and environmental interests. An *effective* regulation is a vital prerequisite for a balanced exchange of resources, and it should aim to ensure that a partnership arrangement is regulated in such a way that the interests of a nation and a private sector are properly balanced with each other, and that the protection of latter does not lead to the infringement of former.

Robert Wolfe observes that a regulation is *effective* only when the ‘regulatees’ (i) ‘know the existing rules’, (ii) ‘have the ability to shape new rules’ through ‘effective consultation’ procedures with the government, (iii) and ‘have the confidence that the rules will be implemented fairly’.¹⁴⁴ An effective regulatory framework in developing countries can be established on the basis of these transparency and accountability enhancing principles. Moreover, the ‘regulatory provisions’ can be known as ‘best practices’ or ‘good practices’ so that their enforcement does not convey a negative connotation to the regulated subjects.¹⁴⁵ The government and the individuals should not be given the feeling that they are being regulated as that might hamper the process of effective exchange of resources between the two.

¹⁴³ Carlos Pio, *Brazil: Political and Economic Lessons from Democratic Transitions* (June 2013) *Civil Society*, in PATHWAYS TO FREEDOM: POLITICAL AND ECONOMIC LESSONS FROM DEMOCRATIC TRANSITIONS, 1, 4 (Council on Foreign Relations Press 2003), available at [http://i.cfr.org/content/publications/images/csmd_ebook/PathwaystoFreedom/Chapter Previews/PathwaystoFreedomBrazilPreview.pdf](http://i.cfr.org/content/publications/images/csmd_ebook/PathwaystoFreedom/Chapter%20Previews/PathwaystoFreedomBrazilPreview.pdf).

¹⁴⁴ Robert Wolfe, Keynote Address at the Academy on Global Governance Executive Training Seminar Series: How Transparency Brings Standards to Life (Feb. 18, 20 2013).

¹⁴⁵ Interview with a former Deputy Director General of the WTO in In-person, Geneva, Switzerland (Apr. 11, 2013) [Name Withheld].

VI. CONCLUDING REMARKS

The findings suggest that *four* features of PPP approach should be considered *fundamental* to its formation and functioning. *First*, the exchange of resources between government and industry is based on reciprocity and resource interdependency. At stake, during such arrangements, are the respective national and exporting interests of the government and the affected industries, and both are mutually dependent on each other's resources for the protection of their respective interests. Their distinct yet overlapping interests are protected with the reciprocal exchange of resources through various partnership strategies. *Second*, the key partners in the proposed arrangements are the concerned government authority and affected business entities. *Third*, these participants form ad-hoc partnerships that cease to exist with the disputes in question. *Fourth*, the government, which acts as the lead partner, receives several practical benefits from the private sector engagement, including better litigation strategies, wider access to information and commercial evidence, enhanced financial capacity, comprehensive legal and commercial analysis, better monitoring and identification of barriers and increased capacity to seek compliance.

The other features and strategies that may further be vital for an *effective* partnership system can include, but are not limited to: openness in the channels of communication between the government and industry; their close interaction during all stages of dispute settlement with the help of interfacing public and private institutions such as TPD and TEXPROCIL respectively; mutually pre-agreed financial arrangements for financing the dispute settlement process; the presence of an organized, well-represented and export-oriented industry; the direct participation of private stakeholders and privately-hired counsels in WTO proceedings; and repeat participation of specific trade association or export promotion council that leads to enhanced mutual confidence among the public and private sector participants.

The above-mentioned strategies have facilitated *effective* exchange between the government and industries as they have played a capacity-building role. However, these findings should be read with a caveat, i.e, the study in no manner suggests that the above-mentioned features of PPP mechanism or a common procedure of interaction can produce similarly positive results in all developing countries. Multiple domestic conditions, including the nature of political governance, structure of economy, political circumstances, policies and social values, and bureaucratic frameworks in a country can shape and influence the functioning and effectiveness of PPP strategies, and hence, a common mechanism cannot be viable or beneficial to all. However, the strategies and features of PPP mechanism, read together with the potential limitations and challenges that can confront the

proposed partnership, identified and analysed in the article can be examined by other developing countries in accordance with their individual circumstances and requirements. Developing countries can “learn lessons” by peer-reviewing the dispute settlement partnership experience of India.