



CTIL MAGAZINE

Fifth Anniversary Issue

July 22



Creating Ideas for Better Trade Policy

About CTIL



Editorial Team

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The Centre for Trade and Investment Law (CTIL) was created in 2016 by the Ministry of Commerce and Industry, Government of India, in pursuit of its objective of developing international trade and investment law capacity in India. The Centre is a part of the Centre for Research in International Trade (CRIT) at the Indian Institute of Foreign Trade, New Delhi. It provides sound and rigorous analysis of legal issues pertaining to international trade and investment law to the Government of India and other governmental agencies. The Centre functions as a repository of information on trade and investment law, with a wide range of resources at its disposal. It also serves as a leading Indian platform for engaging in and influencing the evolving discourse on global economic law issues.

The Centre has been consistently providing technical inputs to the Government of India on issues of international trade and investment law. Since its inception, more than 700 advisory opinions have been provided by the Centre to the Department of Commerce on vital trade issues including the planning and implementation of trade promotion schemes under India’s Foreign Trade Policy, interpretation and analysis of multilateral and bilateral trade agreements, providing research and inputs to assist India in its ongoing trade negotiations, E-Commerce policy, the Personal Data Protection Bill, matters of international and domestic taxation, imposition of royalty, and the development of domestic laws that affect India’s trade commitments.

CTIL meets the Department of Commerce’s objective of having a dedicated pool of legal experts who provide technical inputs for enhancing India’s participation in international trade and investment negotiations and dispute settlement. The Centre has also established itself as a thought leader in the various domains of international economic law such as WTO law, international investment law and legal issues relating to economic integration, by publishing a variety of books, articles and papers, and by holding and participating in conferences, stakeholder consultations, seminars and training programmes.

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Letter from the Editor



For any aspiring human enterprise, the path from zero to one is the longest ever. The initial years are always difficult with all attendant disadvantages – fairly unknown existence, lack of visibility and credibility challenges. But at the same, the initial years are also the most rewarding, with the real opportunity to create a work culture, a professional outlook and the desire to do well.

As a think-tank and advisory center on international trade law and emerging aspects of international economic law, CTIL has grown and emerged as a reliable and capable professional team of lawyers and legal professionals. The profile of lawyers in our team is relatively young, but it has not affected the rigour of our outputs or the quality of perspectives we bring in. Let me outline the areas where CTIL should commit itself with greater vigour and the renewed focus.

Supporting the Negotiation arm: The period 2021-22 was perhaps the busiest for the Department of Commerce in its recent negotiating history with India's

strong push for free trade agreement negotiations with a half dozen countries including some of the major economies. Again, the WTO MC 12 outcomes were stellar, and we have more work to do in this area as well. Modern trade agreements present a kaleidoscopic array of topics, some of which will indeed test the negotiating mandate and the maneuvering capabilities of the negotiators. This is indeed an area where CTIL can play a meaningful and responsible role in highlighting the red flags to avoid and suggesting the strategies to win.

Focus on clinics and experiential learning: CTIL's activities under the TradeLab clinics is perhaps the most extensive in India with three leading law schools participating in this initiative. The TradeLab clinics present an opportunity to work on real issues with real clients in the most lively spirit of collaboration. The clinics can attract the brightest talent to this field and can help us build the platform for developing trade law related capacity within our law schools.

Capacity building activities: With the stronger role of trade in our economy, there is a greater need for offering training, sensitization and capacity building programmes on trade rules and strategies to trade negotiators, implementing agencies and other allied departments. There is also a need to create awareness on these issues to stakeholders outside the system. CTIL is well poised to undertake these activities.

Research and publication: This is, and will remain, our core activity. Reading, researching and publishing will make tough calls on one's spare time, but these activities should remain the bedrock of our existence as

a knowledge bank and resource centre.

An anniversary is an opportunity to reflect upon one's past mistakes and take corrective steps. More importantly, it is an occasion for thanks giving, to appreciate the help and good wishes – small and big. We would like to express our profound gratitude to the Hon'ble Minister of Commerce and Industry, Shri. Piyush Goyal and the Commerce Secretary, Shri. B V R Subrahmanyam whose belief in our capabilities is a source of strength for us. We are also truly grateful to Shri. Amit Yadav, Additional Secretary (TNM), Smt. Rachna Shah, Additional Secretary (TNB), and Professor Manoj Pant, Vice Chancellor, IIFT for their continued support. We want to thank the countless support we received from other officials and staff at the Department of Commerce and other agencies, but for space constraints, we reserve the opportunity to express our gratitude for another day.

A word of gratitude to all my colleagues at the Centre for Trade and Investment Law, Centre for WTO Studies and the Centre for Regional Trade.

Finally, a big thank you to Sunanda Tewari, Sathiabama Sathiamoorthy, Smrithi Bhaskar for their tireless efforts in co-editing this Magazine at a very short notice.

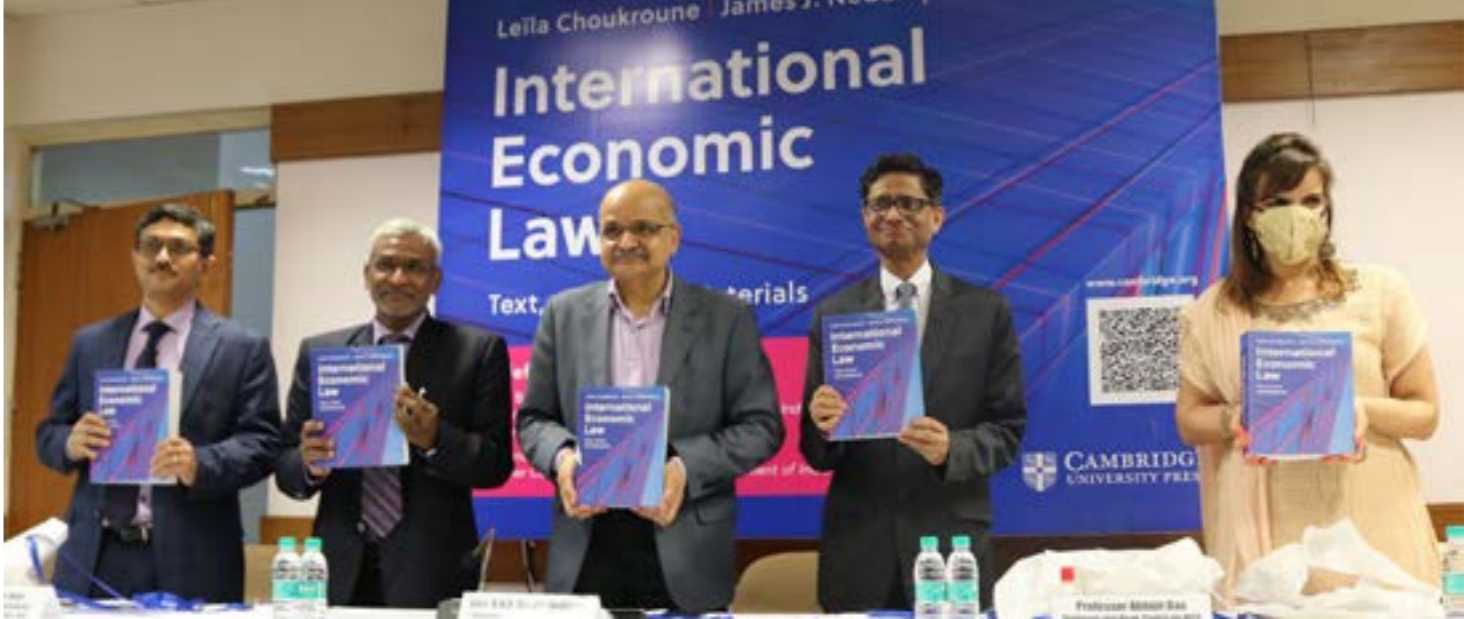
Yours sincerely,

James J. Nedumpara
Professor and Head
Centre for Trade and Investment Law

Snapshots - India's Engagements in Trade Negotiations



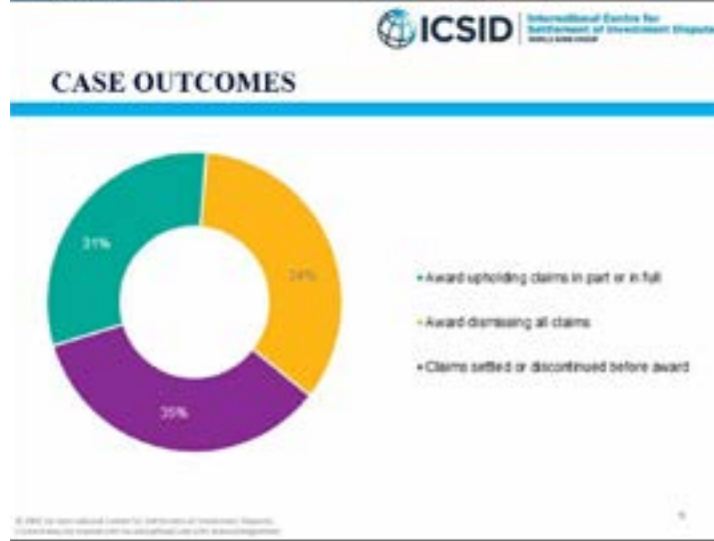
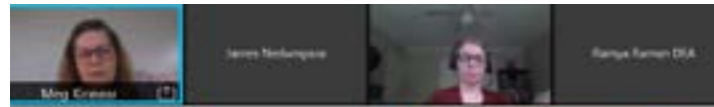
Snapshots - CTIL at a Glance



News & Events

Training Programmes

CTIL in furtherance of its objective, continued conducting its annual executive training programme and capacity building programmes on various areas. Synopsis of some of these programmes are reproduced below.



Meg Kinneer, Secretary-General, ICSID

DEA-CTIL Executive Training Programme on Investment Treaties and Investor-State Dispute Settlement System for Government Officials

The Department of Economic Affairs, Ministry of Finance and CTIL, jointly conducted the Second (Virtual) Executive Training Programme on Investment Treaties and Investor-State Dispute Settlement Systems for the government officials. The objective of the training programme was to enhance capacity of the government officials for levels within the government regarding investment law, developments in investment treaty practice, and Investor-State Dispute Settlement.

Capacity Building Programme for FTA Negotiations

The Department of Commerce in partnership with the other CRIT Centres organised a comprehensive Capacity Building Programme for the purposes of FTA Negotiations for the DGFT/DGTR officials with a view to involving them in future trade negotiations. During the programme, CTIL conducted a session on “Legal Issues relating to FTAs”.

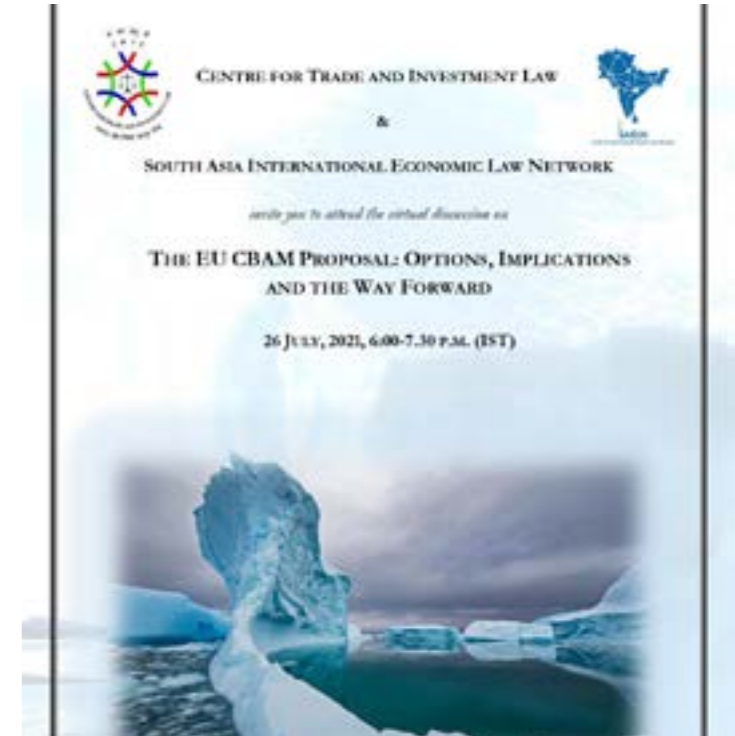


News & Events

CTIL Events with our Academic partners/collaborators:

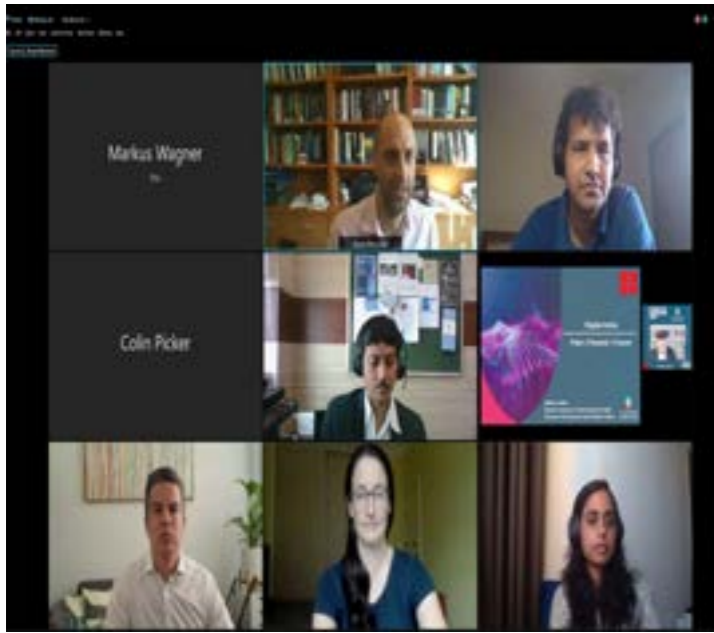
Virtual Discussion on “The EU CBAM Proposal: Options, Implications and the Way Forward”

CTIL in collaboration with South Asia International Economic Law Network (SAILEN) conducted a virtual discussion on July 26, 2021, on the topic, “The EU CBAM Proposal: Options, Implications and the Way Forward”. The discussion focused on the role, status, and the compatibility of the measures with the WTO law, in dealing with measures such as the EU CBAM Regulation. The discussion also focused on the examination of various aspects of the different policy options under the EU CBAM Regulation. The discussion also highlighted the possible implications of the EU CBAM Regulation for producers and exporters of developing countries and LDCs, and whether such regulatory requirements raise newer concerns, specifically with respect to the WTO law.



INBA 10th Annual Virtual International Conference titled “72nd Constitution Day”

CTIL in collaboration with Indian National Bar Association conducted the 10th Annual Virtual International Conference on the 72nd Constitution Day on November 26, 2021 and November 27, 2021 at the Constitution Club, New Delhi. The conference saw discussion on varied contemporary topics, such as, data and privacy laws; online litigation and arbitration post COVID-19 pandemic; effects of the pandemic on contractual obligations; the growing use of technology in the legal industry. Prof. (Dr.) James Nedumpara was keynote speaker and discussed on the issue of Alternate Dispute Resolution and International Economic Disputes Resolution after COVID-19 pandemic.



Conference on “Australia-India Free Trade Agreement”

CTIL co-organised a virtual conference on Australia-India Free Trade Agreement with the Transnational Law and Policy Centre, University of Wollongong, Australia; Centre for India Australia Studies, O.P. Jindal Global University, India; Asia Pacific Research Centre, University of Newcastle, Australia; and SAILEN on November 23, 2021 and November 24, 2021. This conference brought together policy makers, academicians, and other stakeholders from Australia, India and beyond to explore the development of the Australia-India Free Trade Agreement. Panellists and keynote speakers discussed and deliberated on a range of trade negotiation issues, such as services, migration, climate, gender, digital trade, financial services, electronic commerce, intellectual property, education, investment, and dispute settlement under the Australia - India Free Trade Agreement.



Prof. Giorgio Sacerdoti



Prof. David A. Gantz

Conference on “Dispute Settlement in International Trade Agreements: Prospective Pathways”

CTIL and the Centre for Alternative Dispute Resolution, RGNUL, Punjab organised a virtual conference on Dispute Settlement in International Trade Agreements: Prospective Pathways on February 10, 2022, and February 11, 2022. The conference saw participation by renowned speakers from across the globe, discussing challenges as well as the possible direction in which dispute settlement could evolve under the FTAs and at the WTO.



Amb. Dennis C. Shea



Webinar on “Sanctions: Why Their Regulation Matters - The Case of Russia and Beyond”

CTIL in partnership with the University of Portsmouth's Democratic Citizenship Theme and King's Law College, London co-organised a webinar on April 26, 2022, on the topic “Sanctions: Why Their Regulation Matters - The Case of Russia and Beyond”. From a politico-legal and longitudinal perspective, the webinar's aim was to explore the legality of international sanctions and to better understand what they are, what they are not and as well as how they can legally backfire. Prof. Leila Choukroune, Prof. Holger Herstermeyer, Prof. Takis Tridimas, and Prof. (Dr.) James Nedumpara discussed the interdisciplinary global perspectives with respect to sanctions.



Conference on “International Arbitration: An Indian Perspective”

CTIL in collaboration with the Services Export Promotion Council conducted a conference on 14 May 2022 on the topic “International Arbitration: An Indian Perspective” at Vigyan Bhawan, New Delhi. The theme of the conference was based around international arbitration, which is of contemporary importance for policy makers as well as legal luminaries. The event depicted and showcased several connecting issues of international arbitration relating to India on the global front. The event provided insights into strengthening the proactive growth of the legal service sector in handling, managing and implementing international arbitration processes.



First Corporate Lawyers Legal Summit 2022

CTIL in collaboration with the Federation of Indian Corporate Lawyers conducted the first Corporate Lawyers Legal Summit 2022 on May 27, 2022 at Hotel Taj Palace, New Delhi. The theme of the Summit was “The New Normal – Challenges and Opportunities for Indian Legal Sector and Corporate Lawyers in the COVID-era and way forward.” The summit focused on: (1) how general counsel can improve their business value beyond just managing risk; (2) how they can lead with impact; and (3) what should be on their agendas going forward. Prof. (Dr.) James Nedumpara delivered a special address on Trade Agreements and Liberalisation of the Legal Profession.



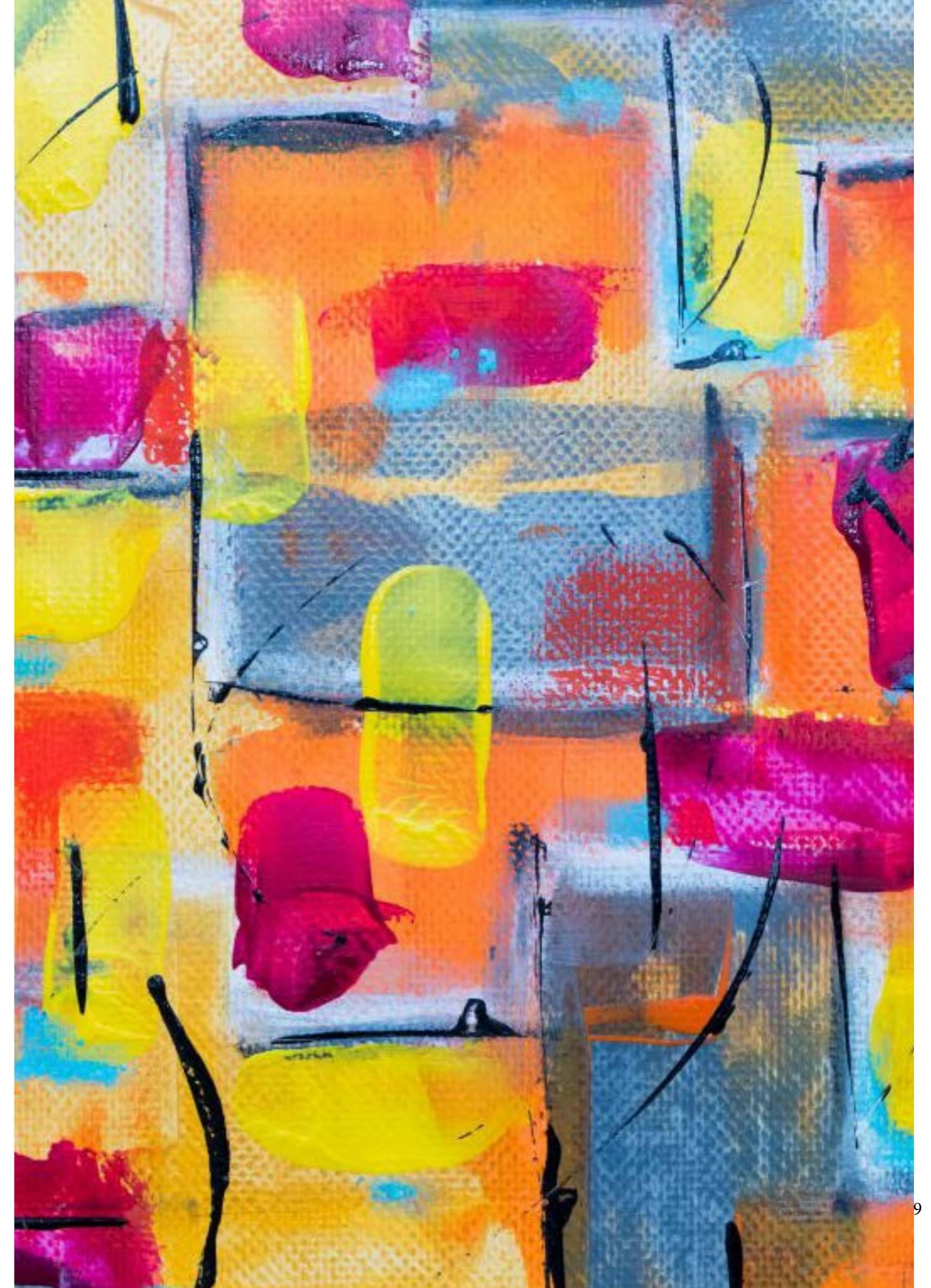
Signing Ceremony of MoU between Permanent Mission of India to the WTO, Centre for Trade and Investment Law and Centre for Trade and Economic Integration, Graduate Institute

The signing ceremony of the MoU between the Permanent Mission of India to the WTO, Centre for Trade and Investment Law and Centre for Trade and Economic Integration, Graduate Institute held on 26 November 2021 at The Graduate Institute, Geneva.



Launch of the book on International Economic Law: Text, Cases and Materials

'International Economic Law: Text, Cases and Materials' co-authored by Prof. Leïla Choukroune and Prof. James J. Nedumpara was launched on Friday, 25 February 2022 at Indian Society of International Law, New Delhi. The launch was launched by Shri. B. V. R. Subrahmanyam, Commerce Secretary, Govt of India in the presence of Shri. Dammu Ravi, Secretary (Economic Relations), Ministry of External Affairs, Govt of India.



CTIL Research Outputs

CTIL carries out a variety of research activities in addition to its work on legal queries raised by the governmental agencies. These studies are conducted on a variety of issues germane to domestic and international trade and investment law, and seeks to answer questions that are currently under-explored. A snapshot of recent CTIL studies is given below.

Special Economic Zones in India

CTIL was requested to undertake a series of studies by different SEZ Development Commissioners to identify the legal, infrastructural and regulatory challenges specific to each SEZ and to suggest remedial actions. The reports were aimed at informing the offices of the Development Commissioners about the prevailing concerns faced by the units established in these zones. Some common elements of the terms of reference for these studies included highlighting the available central and state level incentives; identifying potential sectors for SEZ authorities to seek more investments; infrastructural and operational deficiencies that the SEZ authorities can resolve at their level, etc. During 2021-2022, CTIL has undertaken studies on Falta SEZ, Vishakhapatnam SEZ, Cochin SEZ and Santa Cruz Electronic Export Processing Zone SEZ. The research plan for these reports comprised of three stages: (a) collecting literature about the SEZ and the policies of other successful SEZs in India and around the world,

to provide an interim report if required; (b) interviewing or collecting responses from the units on availing fiscal and monetary benefits available for the dominant sectors present in the SEZ, infrastructural and logistics facilities and ease of doing business in the SEZ; (c) interviews and discussions with the Office of the Development Commissioner; (d) site visit to the zone to take an account of the infrastructure and to conduct further interviews with units. A brief description of the findings and outcomes of these reports is provided.



Study on Falta SEZ

CTIL undertook a study on the functioning of the Special Economic Zone at Falta, South 24 Parganas, West Bengal (FSEZ) to identify infrastructural and administrative deficiencies and suggest ways to upgrade the existing infrastructure and improve the ease of conducting business within the FSEZ to ultimately promote growth and investment. The Report suggests that the possibility of extension of incentives provided at the State level under the West Bengal Industrial Policy to the units in FSEZ, may be explored. Further, there is a need to raise awareness and provide information to units regarding existing Central Government schemes and incentives by organizing workshops, webinars

and interactive sessions. Another recommendation was to integrate the FSEZ website with West Bengal's Single Window Clearance System to improve the ease of doing business in the zone. For improving transport and logistics infrastructure, specific recommendations regarding clearing encroachments, renovating and operationalizing the FSEZ Jetty for better connectivity etc were made. Further, it was suggested that the FSEZ can undertake promotional activities and collaborate with Export Promotion Councils to explore expansion and diversification of the units.

Study on Visakhapatnam SEZ

CTIL examined the key features of Visakhapatnam Special Economic Zone (VSEZ), highlighted issues indicated by units in the zone, as well as operational concerns, and suggested possible scope and priority sectors for diversification and attracting investment, taking into consideration the export performances of different units, stakeholder consultations, examination of the existing policy framework, and recent schemes rolled out by the Government of India, as well as by the Governments of Andhra Pradesh and Telangana. Key recommendations included streamlining coordination with State Government for subsidies granted under the state SEZ policies; development of infrastructure and common facilities like public transportation, renovating and upkeep of buildings etc; reduction in rent; integration with local economy; improving single window clearances for permits and approvals relating to environment and labour compliances; access to better banking facilities, etc.



Study on Cochin SEZ

This study examined the functioning of Cochin SEZ (CSEZ), the sectors of focus, the legal framework and the incentives available to the units at both the central and state levels.

The Report identified and highlighted the concerns and challenges faced by the units in CSEZ, based on multiple stakeholder consultations undertaken by the CTIL team, and accordingly provided recommendations to be considered by the SEZ Authority and the Government of India. Some of the identified concerns were availability of benefit under the Remission of Duties and Taxes on Export Products Scheme; import restriction on some products; lack of clarity on available government incentive schemes; lack of basic amenities like courier services; lack of incinerators, etc. With this

backdrop, the recommendations are development of infrastructure and common facilities; nodal contact point to advise on regulatory norms; and freeing up space occupied by sick units.

Study on Santacruz Electronic Export Processing Zone

This Study focused on identifying issues in the Santacruz Electronic Export Processing Zone (SEEPZ). Post identifying issues faced by the units operating within SEEPZ, CTIL provided recommendations to enhance the performance of the SEZ. This Study focuses closely on examining the functioning and business performances of SEEPZ and outlines its key features. The Study further examines SEEPZ's performance over the past few years, the facilities and governmental support available, as well as the obstacles it faces for its further growth and expansion. The Study concludes with recommendations to this effect.



DISCUSSION PAPERS

1
**Director General of the WTO:
 The Past, Present and Future**
 By James J. Nedumpara, Rishabha Meena
 and Siddharth S. Aatreya

2
FDI in India: A Bird's Eye View
 By James J. Nedumpara and Akshaya
 Venkataraman

3
**Government Procurement:
 A Multilateral Perspective in
 Goods and Services Trade**
 By Sandeep Thomas Chandy and Anupal
 Dasgupta

4
**The Crisis in the WTO Appellate
 Body: Implications for India and
 the Multilateral Trading System**
 By James J. Nedumpara and Prakhar
 Bardwaj

5
**Domestic Regulation and Visa
 Regimes: An unsustainable
 interaction**
 By Shiny Pradeep and Sunanda Tewari

6
**The Proposed Investment
 Facilitaiton Agreement at the
 WTO**
 by James J. Nedumpara and Sandeep
 Thomas Chandy

CTIL Academic Partners

CTIL maintains partnerships with leading law schools in India and globally, in order to cultivate a knowledge for international trade and investment law within law students. The Centre co-organises a series of conferences, symposia, essay writing competitions and trade law moots with national law schools in India. Apart from this, the Centre regularly hosts interns from various law schools, as well as coordinates with the Department of Commerce flagship internship programme.

Research Fellows in the Centre are also extensively involved with undergraduate and postgraduate students, by mentoring them during internships, participating as judges and coaches for a variety of trade and investment law related moot court competitions, and by encouraging the participation of students in the Centre's events. An important stand-along academic collaboration in this regard, CTIL's TradeLab Projects.



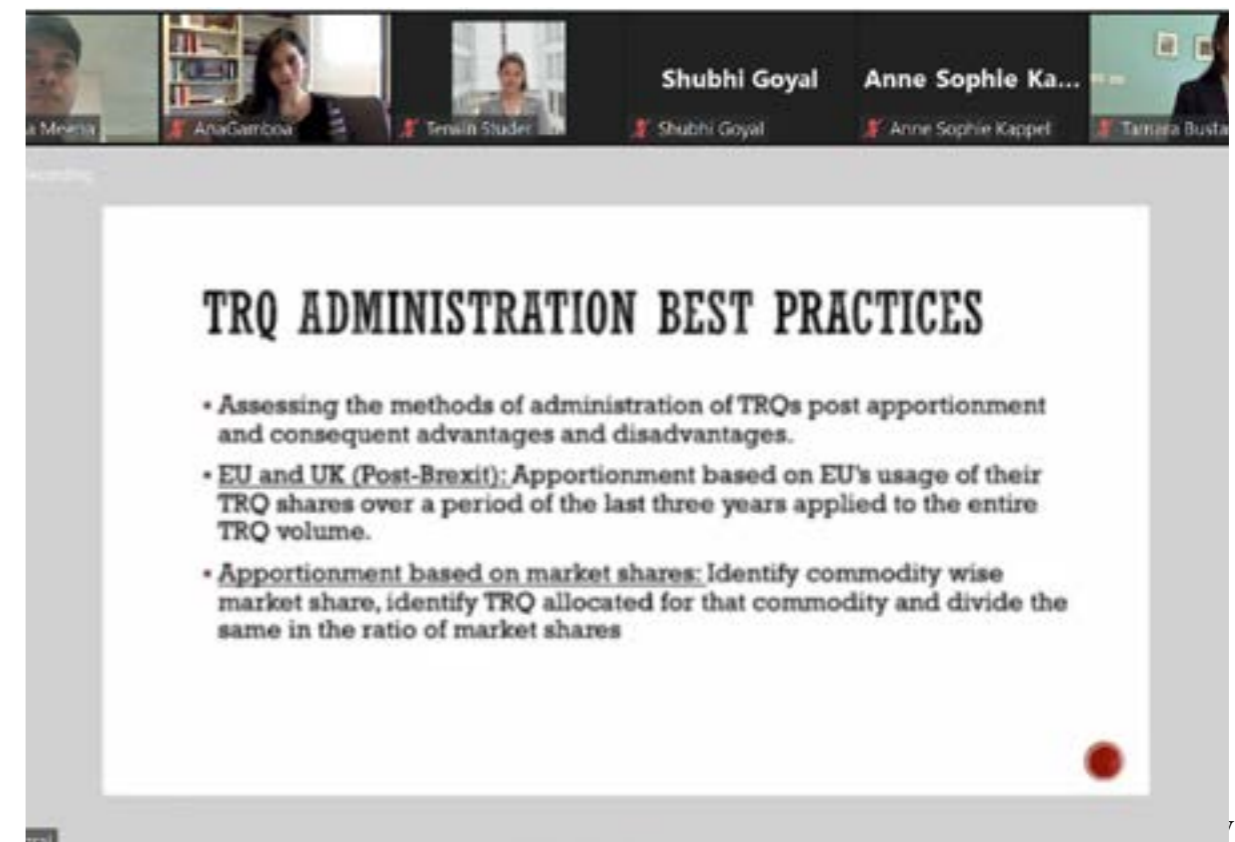


With the objective of imparting clinical legal education in India, specifically in the field of international trade law, CTIL conducts the TradeLab law clinics across three Indian law schools viz. National Law University, Jodhpur (NLU Jodhpur); Gujarat National Law University (GNLU); and Gujarat Maritime University (GMU). In a hub-and-spoke model, CTIL acts as an intermediary and coordinates with the beneficiary (i.e. an entity seeking legal assistance concerning issues of international trade on one hand) and the students of these law schools selected to work at the CTIL-TradeLab clinics during the course of the semester. As of now, CTIL has conducted three law clinics at NLU Jodhpur – during the Fall 2020 semester, Spring 2021 semester, and Fall 2021 semester, and one law clinic at GNLU during Fall 2021 semester. Currently, projects at NLU Jodhpur, GNLU and GMU for the Spring 2022 semester are at the final stage. The details of the projects concluded in the previous semesters and the ongoing projects are as follows:

Projects concluded in Fall 2021

National Law University, Jodhpur

The project at NLU Jodhpur was conducted for the International Centre for Alternative Dispute Resolution. The absence of a quorum at the Appellate Body (AB) has resulted in an ‘appeal to the void’, thereby resulting in the WTO Members’ incapacity to challenge the Panel’s ruling. In the backdrop of the defunct AB, the project analyses the viability of the arbitration mechanism as a solution to the AB crisis. The project undertakes an analysis of options that could serve as an alternative to the functioning of the AB, specifically taking recourse to options under Article 5 and Article 25 of the WTO Understanding on Rules and Procedures governing the Settlement of Disputes (DSU). Owing to the limitations of the viability of Article 5 and Article 25 respectively, the project suggests that the AB crisis would be better addressed by a uniform, comprehensive and binding agreement, such as the Multi-Party Interim Arbitration (MPIA). Finally, the project concludes that the MPIA



has the potential of addressing certain criticisms of the United States and it will provide a fertile ground for Members to suggest other reformative measures for enhancing the efficiency of the AB.

Gujarat National Law University

The beneficiary for the project was confidential. The research problem for this project delved into a quite complex area of WTO law i.e., agricultural trade. It is important to note that in the case of the customs union (CU), a combined WTO Schedule of Concessions is notified to the WTO. In this context, the project sought to analyse the implications of the WTO Schedule of Concessions when a country leaves a customs union. Specifically, it focuses on two aspects – (1) Bound Total Aggregate Measure of Support (BTAMS) and (2) Tariff Rate Quotas (TRQs); along with the issue of currency conversion. First, concerning Bound Total AMS, the project assesses three options concerning the apportionment of BTAMS viz. (i) having an empty schedule, (ii) applying de minimis level of AMS, and (iii) dividing the BTAMS of the CU on pro-rata basis. Second, with respect to TRQ, the project highlights that the CU would not want to retain the same TRQs after losing the exiting state’s market share. The withdrawing state would not want to get a high share of TRQs since high TRQs could overwhelm its domestic agricultural market. Therefore, the project recommends negotiations with interested Members under Article XXVIII of GATT 1994 to modify or withdraw the certified schedule. Third, with respect to the issue of currency, two solutions are provided i.e. first, choosing the base period as 1986-1988, which is the base period chosen by most Members to calculate the relative value of their national currencies; and second, choosing a recent period before the exit of the country from the CU.

It is important to highlight that the GNLU Team’s project has been selected for presentation before the Virtual Student Showcase will take place on 20 July 2022.

Ongoing projects in Spring 2022

National Law University, Jodhpur

The beneficiary for this project is confidential. Against the backdrop that India is a major source for traditional medicines, such as Unani, Siddha,

Sowa-Rigpa, etc, and noting its importance in enhancing India’s export, the project explores the nuances concerning the traditional medical products and the practitioners administering them, and their interplay with the WTO agreements to strategize India’s roadmap concerning traditional medical products in the ongoing FTA negotiations. In this context, one of the major obstructions in the negotiation is navigating the legal regulations of such products and the administration of such products by traditional medical practitioners. The report seeks to explore the domestic legal regime concerning these aspects in the European Union, the United Kingdom, Australia, Canada and the United States. Currently, the project is at the final stage of conclusion.

Gujarat National Law University

The project is based on the issue of circumvention of the liberalized commitments in the case of trade in services. Since the project involves an important area of concern for India’s ongoing FTA negotiations, the beneficiary of the project is confidential. In the case of FTAs, which are premised on the fact that the restrictions under them cannot be higher than the WTO restrictions, the countries exclude the Mode 4 supply of services from the ‘Trade in Services’ chapter, and cover Mode 4 supply in a separate chapter or Annex to the FTA. Resultantly, the obligations undertaken under Trade in Services chapter to liberalize services may not apply to the chapter dealing with Mode-4 type services. In this context, the Report seeks to analyse various ways for circumvention of commitments undertaken concerning trade in services, and then seeks to identify policy recommendations.

Gujarat Maritime University

Trade remedy measures are established for replacing

existing limitations and overcoming economic distraught, as cheap imports hamper the business of organizations, especially MSMEs of the importing country. To prevent a loss in business, it is important to simplify the Anti-dumping/Countervailing duty (AD/CVD) procedures so that these organizations can avail the benefits of trade remedial measures. The Report attempts to identify the barriers faced by Micro, Small and Medium Enterprises (MSMEs), especially regarding procedures of AD/CVD rules and how to address these concerns. The report attempts to suggest reform regarding the AD/CVD procedure in India, by considering the practices followed across several countries to tackle informality in providing support to MSMEs. The project has identified several recommendations to provide a comprehensive policy and actionable approach for strengthening procedural law enforcement, administrative enforcement, and improving general business practices by removing the ambiguity for MSMEs in terms of utilizing the AD/CVD regulatory framework.

Interview with Mr. Amit Yadav



Mr. Amit Yadav is currently serving as Additional Secretary at the Department of Commerce, Government of India. He is an officer of the 1991-batch of Indian Administrative Service. He looks after India's multilateral trade policy issues, and has extensive experience in negotiating free trade agreements. He was the chief negotiator for the Comprehensive Economic Cooperation Agreement between India and Australia. He has previously served in the Ministry of Communications as well as the Ministry of Finance.

Having negotiated both bilateral as well as multilateral trade agreements, what according to you are the most important differences between the two? Which would you say is more challenging, and how do you calibrate your approach?

The WTO consists of 164 Members with varying interests, levels of development, and policy priorities. Therefore, the approach towards negotiating an outcome at the WTO is very different from that adopted for a bilateral trade agreement. In a bilateral negotiation, there is greater clarity and understanding of the economic development, trade interests, and policy concerns. It is easy to identify our own strengths or areas of interests, as well as the trade partner's expectations based on past trends in trade of goods or services. On the other hand, negotiations and policy stances at the WTO usually move in issue-based coalitions of like-minded Members in different subject-matters or topics. Depending on the area or issue, we may have to work in a coalition of LDCs, other developing countries or even developed country Members. That warrants a different strategy. In fact, in my view, they are two entirely different approaches.

The 12th WTO Ministerial Conference concluded recently. India played a very active role in the negotiations on many important issues – Fisheries, Response to Pandemic, Decision on World Food Programme, and emerged as a voice for the

MC 12 Outcomes and India - Australia ECTA

developing countries. What stands out in your recollection as the most interesting aspect of these negotiations?

The Ministerial Conference at Geneva led to outcomes on a number of issues, such as food security, fisheries subsidies, response to pandemic which contained the outcome on the TRIPS waiver. Added to these, the outcome document which sets the course for future work needed on reforms was an important achievement. So, a large number of issues were addressed which is indicative of the very interesting work done in the lead up to, and during the Ministerial Conference. All these areas had their own challenges. India worked closely with different groups on different areas – with developed Member countries on the Appellate Body reforms; while on issues that focused on special and differential treatment, India worked with other developing Member countries. So, India engaged on a wide range of issues across different groupings to arrive at the outcomes.

Considering the outcomes that we were able to achieve in the 12th WTO Ministerial Conference, how do you think, going forward, India should approach multilateral negotiations? What role do you see India playing in future?

India has always played an important role, not only in advancing developing country interests, but also putting across the interests and concerns of a very large population. Positions taken at the WTO are based on several considerations. One perspective is that India is

the sixth largest economy in the world. Another perspective is that India's per capita income is still lower than USD 2000. A third perspective might consider the number of poor people in the country. India has a large number of farmers or workforce dependent on rural incomes is another important consideration. Therefore, India has to work within these challenges and find its stance on important issues at the WTO. This is particularly true for agriculture issues, where India largely has defensive interests. Issues of self-sufficiency in food crops and adequate food security reserves were thrown into sharp relief in last couple of years due to the Covid pandemic. However, seeing that agriculture exports are growing every year, India is starting to slowly develop certain offensive interests as well. Therefore, India's stance is evolving in these issues.

Aside from agriculture, which issues, in

“WTO is a multilateral body, and issues taken up at the WTO have to adhere to its core principles of consensus-based decision making.”



@Twitter/ Piyush Goyal

your view, would prove to be particularly important or critical to India's interests in the future?

The development in WTO reform issues, particularly, the Joint Initiative form of negotiations and outcomes would have to be closely followed as they are going to be critical. The WTO reforms agenda presents a very wide canvas which would have to accommodate numerous perspectives on what needs reform, and the most appropriate manner to address the reform action. Resolving these issues would be very important as we move into the next phase of the WTO's evolution. As it moves ahead, India would have to work on the WTO reform issues to ensure its concerns and interests are properly articulated and reflected in any reform outcome. It would have to ensure that principles of multi-lateral trading system, such as inclusivity, fairness, and consensus-based decision making remain fundamental

to the WTO, while at the same, ensure that the organisation moves forward.

India maintains a strong position at the WTO with respect to the new issues being addressed under Joint Initiatives. However, these issues are starting to feature in India's recent FTAs. Do you see a dichotomy in India's position?

India's position on these issues is very clear. WTO is a multilateral body, and issues taken up at the WTO have to adhere to its core principles of consensus-based decision making. Therefore, I do not see a dichotomy. It's a principled position taken to ensure that the sanctity of the forum's founding principle it is maintained in any process.

As the Chief Negotiator for the India – Australia CECA agreement, what has been your biggest challenge in negotiating and

bringing such a modern FTA with one of India's leading trade partners to a close?

The India – Australia trade agreement was primarily based on mutual trust. The whole process was focused on outcomes and deliverables, while at the same time, being mindful of each other's concerns and sensitivities. We drew up our respective wishlists and discussed them threadbare. We approached it with a mindset to find ways to address or resolve each other's concerns. For instance, Australia requested access for wine, which would have been a no-go area a year back. However, we were able to meet their request. Similarly, Australia accommodated India's requests on services, including visa issues. Australia also understood India's sensitivities in the dairy sector. So, it was the positive and result-oriented mindset, understanding of each other's sensitivities, etc., that resulted in a successful closure of the deal.



In negotiating with a developed economy like Australia, what in your experience has been the main challenge for India? How can India maintain a balance between protecting its sensitive industries and realising effective market access?

In negotiating a trade agreement with any partner, whether developed or developing, it is important to identify our own offensive interests and defensive interests across different areas. It is also important to understand that there will be a give-and-take involved. Which means, India would have to be ready to agree to some of the FTA partner's asks and requests in order to get its own demands and requirements met. This helps in striking a balance in the overall trade agreement. Factors beyond trade, such friendly relations or geopolitical situations also play a role. However, I must also caution that geopolitical situations and alliances change over time while these trade agreements continue to apply in perpetuity. In fact, trade agreements tend to stay frozen in time. Although there are review mechanisms, it is usually very challenging to move from the agreed commitments to commitments in newer areas or deeper market access commitments. Therefore, it is very important to keep a longer-term horizon when negotiating such trade agreements.

Do you see India's experience with Australia marking a shift in its FTA approach and the pace for FTA negotiations going forward?

The India – Australia CECA, in a sense, has become a template for some of India's other bilateral negotiations. Since India's agreement with Japan and Korea, this is the first comprehensive agreement with a developed country. It is likely to set prospective trade partners' expectations at certain levels. They may ask for the same level of liberalisation. However, it is equally important to keep in mind that every bilateral trade negotiation is unique. Each negotiation or agreement has a specific context, whether in terms of history of the bilateral trade, geopolitical context or even social or cultural relations. Therefore, it is not possible to simply replicate the terms and offers from the India – Australia Agreement in other negotiations. Therefore, outcomes in each bilateral trade agreement have to be based on the concerned FTA partner's interests, level of economic development, ambition, sensitivities, etc. That said, India – Australia Agreement can offer a good starting point for other negotiations. This was an interim agreement. It will be followed by a more comprehensive trade agreement which will further deepen the engagement between the two countries.

What lessons do you think India can learn from these negotiations in developing a strong and experienced negotiating team?

In my view, before taking up any negotiations, an in-depth study needs to be undertaken of the prospective FTA partner to understand the trends and pattern in bilateral trade and to identify possible areas of interests.

It is imperative to prepare, in consultation with stakeholders and relevant Ministries and Departments, before formally launching the negotiations. The planning and preparatory work done prior to the actual launch of negotiations of the Agreement is key to a successful outcome.

The Centre for Trade and Investment Law has been active in providing legal and research support to the Government of India in its preparation for the MC12 as well as its FTAs. How do you think centres like CTIL can more effectively contribute to the Government, going forward?

The three CRIT Centres were established with very different functional roles, which have now blurred to a great extent. The intention behind establishing three different centres was to assign each an area for specialisation and expertise. The Centre for WTO Studies largely deals with WTO matters, but is getting increasingly involved in bilateral trade negotiations. The Centre for Regional Trade undertakes evidence-based studies of India's economic engagements. CTIL is advising on legal matters whether in respect of bilateral trade agreements or the WTO. It helps in preparing legal texts, provide inputs on WTO Members' or FTA partners' text proposals and oversee legal scrubbing related matters. It needs to build its strength on investment matters.

Interview With Prof. Gregory Shaffer



Professor Gregory Shaffer is Chancellor's Professor of Law and Political Science at the University of California, Irvine. He is also President of the American Society of International Law.

His recent book [Emerging Powers and the World Trading System: The Past and Future of International Economic Law \(CUP 2021\)](#) won the 2022 Chadwick F. Alger Prize of the International Studies Association.

Thank you, Professor Shaffer for taking time out to speak with us today. Congratulations on your book! Can we start with understanding the themes covered in your new book?

The book addresses the major challenges that the world trading system faces with the rise of China and other emerging powers. It does so in a unique way by focusing on how three emerging powers, India, China and Brazil, invested in developing trade law capacity. Legal capacity in this field involves the trade law know-how necessary to engage fully with the trading system as it became legalized and judicialized under the World Trade Organization. In developing trade law capacity over time, these countries became much more proficient in negotiations, monitoring other countries' compliance with their obligations, and litigation. They were able to bring major cases against the United States and the European Union, in particular. This led to a shift in power in the trading system, when previously most of the know-how regarding trade law was found predominantly in the United States and in Europe, within government and the private sector. This broad-based legal capacity enabled U.S. and European companies to work with private lawyers, who in turn would work with government officials on international trade law matters.

It was fascinating to study how India, Brazil, and China enhanced trade law capacity so they could go lawyer-to-lawyer against the United States and Europe. The result was a remarkable feat in many ways under

Discussing 'Emerging Powers and the World Trading System: The Past and Future of International Economic Law'

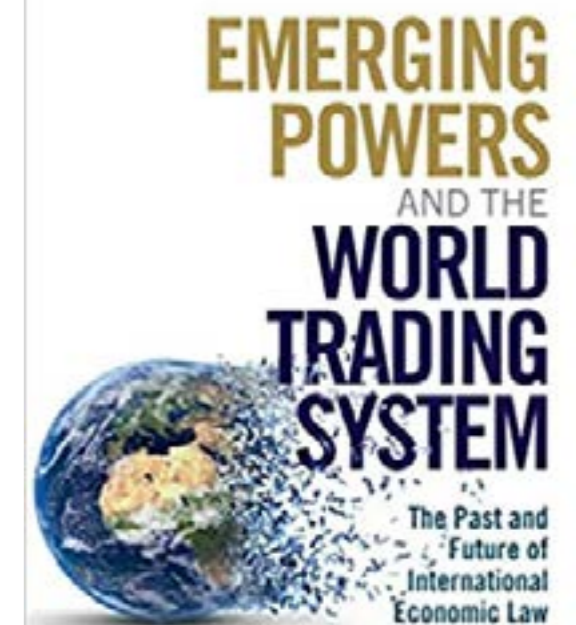
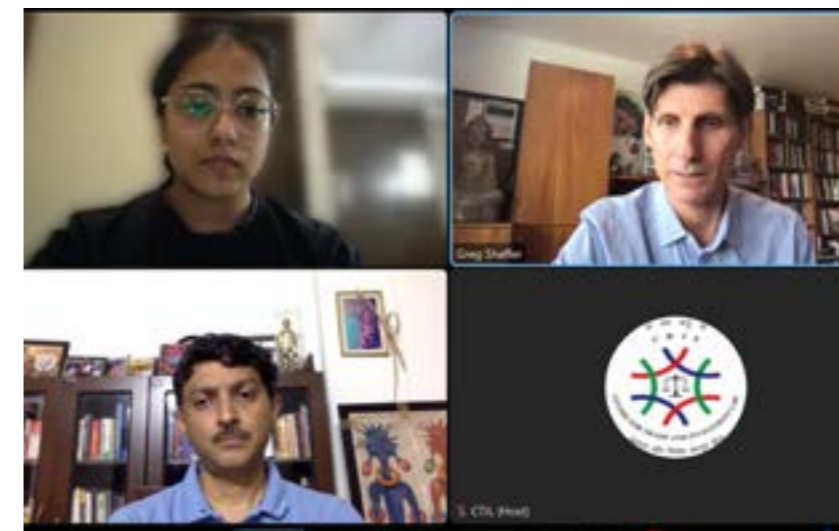
the WTO system. Now there were major countries who could resolve their disputes through a dispute settlement system that was neutral and binding, with an appellate mechanism. However, this success eventually led to disenchantment in the United States in particular. As we know, the United States responded by neutering the WTO Appellate Body, so that today we have no binding world trade dispute settlement process.

I think this is one of the most empirically grounded studies on the development of legal capacity in the three countries you mentioned. Can you give us some insight on how you went about doing that?

This book culminates about 20 years of work, in which I built networks of contacts within these three countries and in Geneva. In each case, I worked with a renowned specialist in the country in question. I worked with

Professor James Nedumpara in India, with Professor Henry Gao in China, and Professor Michelle Raton Sanchez Badin in Brazil. We discussed with a broad array of public and private representatives the challenges faced by these countries, and how they responded to these challenges. The legal system in question, at the WTO, involves around 20 agreements, with over 20,000 pages of text (when we include schedules of commitments), and almost 100,000 pages of jurisprudence, developed in the over two decades of the WTO's existence. In response to the complexities of this legal system, we discussed the challenges these countries faced generally and in specific contexts and situations, and the strategies they considered to build legal capacity to be able to defend their interests.

We spoke with private lawyers, trade associations, NGOs, and government representatives, both in the nation's capitals and major cities, as well as in Gene-



va. We spoke with lawyers from the United States and Europe, members of the WTO Secretariat, Members of the Appellate Body, and current and former government officials.

What was interesting was that in these interviews, there was space for open discussion and discovery. Our interviewees reflected openly on their strategies and their challenges and successes with us. This technique involves a form of para-ethnography. This involves investigating the culture of the international trade law system, and doing so with experts and people at the top of their profession. It involves problem solving regarding difficult questions for which there are no easy answers.

Are there any standout examples of the impact that the development of legal capacity had for a particular country?

I will give you three examples, one involving China and two with respect to India. China was able to work with Chinese law firms, in each case together with a US or European law firm, to challenge high tariffs that the United States or Europe imposed against Chinese products, following countervailing duty and anti-dumping investigations. China challenged different methodologies that they adopted in calculating those tariffs and was successful in some key cases in showing that the methodologies used were unfair.

Here are two examples from India. India used a slightly different strategy compared to China as it worked only

with Indian law firms, following its earlier work with the Advisory Centre on WTO Law in Geneva. India was the first to challenge the methodology of zeroing adopted by the European Union, which led to high anti-dumping rates. This case set the ground work for subsequent cases brought by others.

A second example involved the transport of Indian generic pharmaceuticals around the world, which were blocked in the European Union at airports. India challenged these measures under WTO law, but it did not have to litigate the case to completion. In this instance, India used Indian lawyers, together with a U.S. law professor, to build the legal argumentation to challenge the EU, which settled the case, thus ensuring the generic drugs could be transported abroad.

I think among the key conflicts that the book raises is the role of the US in the international trade order. Why do you think that the US has ‘lost faith’ in the system that it aided in establishing?

The United States is different compared to the European Union, in that it has always been much more reticent about being told by an international institution that its laws are not compliant with its commitments. Despite its rhetoric regarding the importance of having a rules-based system, and thus being able to bring challenges against third countries under those rules, when third countries bring successful challenges against the US, there are factions in the US that feel threatened. The U.S. reaction differs from Europe, which despite losing major cases, has believed that there was a greater good

with the overall system.

In the US, the election of President Trump, a nationalist and populist leader, played off on this underlying reaction, especially in light of rising US economic concerns regarding China. The US blamed some of its problems in dealing with China on the WTO Appellate Body, claiming that the litigation system had become untrustworthy and too intrusive. The US was able to exercise its power to terminate the Appellate Body by refusing to appoint new members after existing members’ terms expired. The US has a different administration now, which is more committed to multilateralism. Despite this, underlying politics still raise challenges in the United States. Thus, it is still an open question as to whether and what type of binding trade dispute settlement at the WTO the United States under the Biden administration will eventually agree to rejoin.

In contrast to the US, developing countries including India, Brazil, and China, have emerged as defenders of the multilateral system. What role do you envisage for these countries in the future?

With India and other countries that have developed legal capacity, there comes a question as to what sort of initiatives they will support at the WTO. It is important to have an international dispute settlement system that resolves conflicts, since it fosters international peace and cooperation. It will be interesting to see if this can be restored, in the current context of increased conflict among countries, and with the increased use of trade

as a weapon to exercise leverage over other countries. Therefore, it is to be seen what countries like India will do, and whether they put forth proposals to bring back a binding, neutral dispute settlement mechanism at the WTO. It remains an open question as to how much intellectual capital they will expend to resolve the current situation.

In your view, how do transnational legal orders emerge, specifically in trade and investment law?

The term “transnational legal orders” involves a framework that I have developed to address how legal norms change, settle, and unsettle transnationally. For norms to actually have an impact, we must look beyond the international level. Ultimately, legal norms must become institutionalized at the national level, including in actual legal practice, involving a form of normative settlement. There are certain ways, for example, to treat foreign investment disputes in that field. Or, for example, in the area of trade law, there are certain legitimate means to investigate alleged dumping of foreign products. From the perspective of transnational legal ordering, this involves not just international rules, but also national regulations and everyday legal practice. When these practices become settled across multiple countries, one can speak of a transnational legal order. In practice, there will often be pushback and resistance, and these processes also can lead to the erosion of normative settlement. When that occurs, then you have the fraying or the unravelling of a transnational legal order.

Interview With Prof. Nicolas Lamp



Prof. Nicolas Lamp is an Associate Professor at Queen's University, Canada. Prior to this, he worked as a Dispute Settlement Lawyer at the Appellate Body Secretariat of the World Trade Organization, advising the Members of the Appellate Body on legal issues. His book, "Six Faces of Globalization: Who Wins, Who Loses and Why it Matters" co-authored with Prof. Anthea Roberts, Australian National University was published by Harvard University Press in 2021.

Thank you Prof. Lamp, thank you for joining us today! Congratulations on your new book with Professor Roberts! It may be useful to start off with what is globalization?

We do not start out with a definition of globalization in the book, because the entire purpose of the book is to show globalization from different sides. The different narratives that we present in the book focus on different aspects of globalization - trade, migration, or investment and financial flows. The general common denominator is that globalization connotes the relatively free flow of goods, services, capital, and data across borders. A key message of the book is that globalization is an incredibly complex phenomenon that we can only really understand if we see it from many different sides. As a result, looking at different narratives about globalization is one way of getting a sense of that complexity. Each narrative highlights different aspects of globalization and provides a different view of whether there were positive or negative developments.

Thank you! I realise that it is difficult to define globalization, since there are so many aspects to it. Your book focuses on its six faces. What are these?

The narratives that are represented in the title are mostly ones that are present in Western debates, which is the focus of the book. There are many different narratives

Discussing 'Six Faces of Globalisation'

in the global South, some of which we address later in the book.

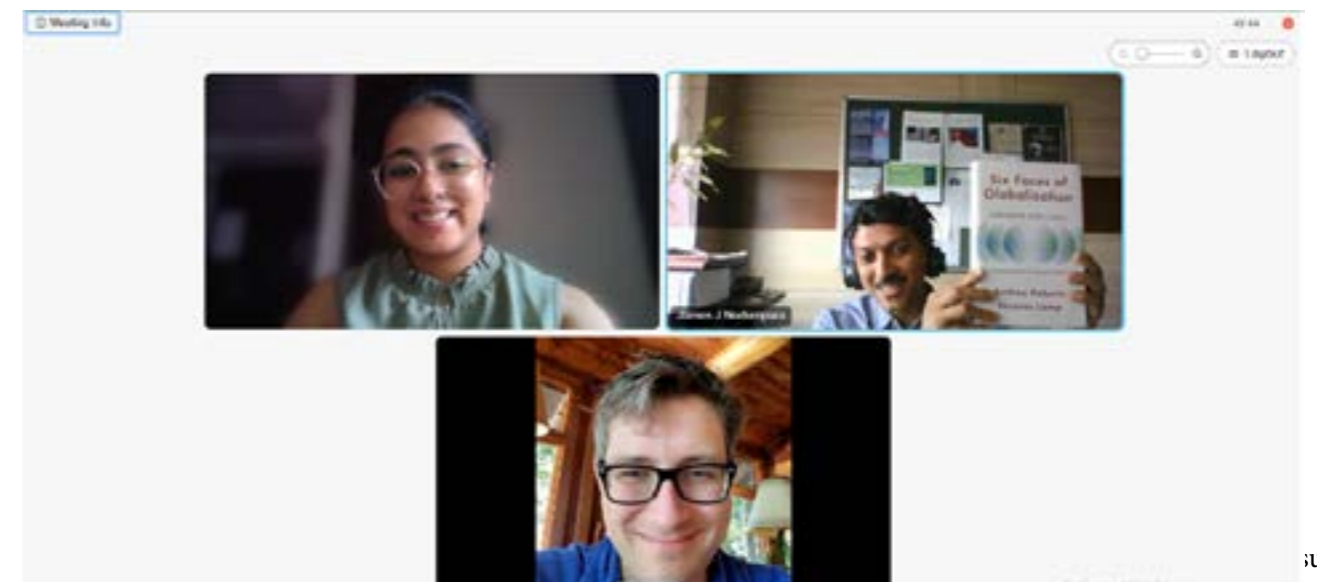
The first narrative that we explore, is what we call the 'Establishment Narrative', which has been popular in the Global South as well. This is the idea that globalization is a positive force that has allowed us to create wealth and has enabled us to become more prosperous. This has also helped us become more peaceful and have more interconnections. Despite the fact that there may be people who lose temporarily from globalization, because they lose their jobs, for example, in the long term, everybody will be better off, because there will be more money that can be distributed. This view has been dominant for the past thirty years, since the end of the Cold War, and this is the view that is behind the World Trade Organization and other free trade agreements.

Then we look at some left-wing critiques of that view. One of them is the 'Left-wing Populist Narrative', which points out that the wealth created by globalization is

unequally distributed, and that as a result, a majority of people don't benefit from it. This narrative draws attention to the domestic economic structures that are often rigged in a way that channels most of the gains from trade to the top 1%, or maybe 10% of the population.

The next is a 'Corporate Power Narrative', which says that the real winners from globalization are corporations. Opening-up world trade and investment flows allows corporations to play everyone else off of each other - they can play workers off each other with the threat of moving to another country if they do not accept lower wages; and they can play governments off each other, if they do not lower taxes, with the same threat. From this perspective, it is the corporations who win, and everybody else loses.

Next, we have the 'Right-Wing Populist' narrative, which argues that whatever gains of globalisation exist, in terms of cheaper products, is not worth what is lost, which is meaningful employment, in manufacturing in particular. Not only are jobs lost, the communities sus-



tained by these jobs are lost too. In the United States, this is seen in the striking phenomenon of ‘deaths of despair,’ where people who die by suicide, alcohol or drugs, have a strong correlation to place and communities where manufacturing jobs have disappeared. This narrative attempts to refocus attention from cheap products that we have access to due to globalization, to the jobs that are lost and the communities that unravel.

There is also a security-focused narrative, which has come to the fore in the last couple of years. This is what called the ‘Geo-economic Narrative.’ It has been particularly prominent in the context of the US-China relationship, and also in the context of Russia’s war against Ukraine. For instance, the relationship between Russia and the West is now mostly seen through this narrative. This narrative states that interdependence is acceptable, if you trust whom you’re interdependent with. However, if the country that you end up being interdependent with cannot be trusted, or is strategic competitor or foe, this interdependence only creates vulnerabilities that could be dangerous. This requires a re-examining of trade and investment ties.

The final narrative is the ‘Global Threats Narrative,’ which essentially says that if we continue globalization on its current path and with the current economic model, we are going to lose. This may be because we are driving carbon emissions through the roof, or because we are creating fragile supply chains that are not resilient or sustainable. As soon as global threats rise, such as the climate crisis or the COVID-19 pandemic, we are all on

the losing side of the battle.

When looking at the six narratives together, we can see that there is the old traditional win-win narrative (the Establishment Narrative), which had a very positive view. Then we have four narratives in the middle, which are win-lose, with some people winning and some losing. At the bottom, we have that lose-lose narrative, which says we all actually losing out if we don’t change our ways.

Thank you, that was an extremely useful overview of the entire book, I think you mentioned earlier that there are some narratives that the book doesn’t cover, specifically relating to developing countries. Could you illustrate one of these narratives?

The book has a chapter called ‘Blind Spots and Biases,’ which tries to outline some narratives that are not represented in the western debates. The most prominent one is what we call the ‘Neo-colonial Narrative,’ which was one of the main critiques of globalization before the Western backlash started in earnest in the past decade. This narrative is also prominently represented in India. It views international economic institutions as a continuation of colonial domination by other means. To give an example, we may look at how the World Trade Organization came about, and in particular, the TRIPS Agreement, which covers intellectual property rights. The developed countries created a situation in which developing coun-

tries either had to sign on to this agreement or to remain outside the multilateral trading system. It was clear that countries such as India and Brazil would not have agreed to these agreements if they had had a real choice. The developed countries therefore created a situation in which developing countries either had to sign on to this agreement or had to remain entirely outside the multilateral trading system. They achieved this by creating a new organization – the World Trade Organization – and by making all the new agreements an integral part of that organization. For the neocolonial narrative, this is an illustration where a form of economic coercion was employed in order to get countries like India and Brazil to accept international legal obligations, which they would not have freely assumed if they had had that option. This neocolonial critique of globalisation, namely, that it serves mainly Western interests, is largely absent from Western debates.

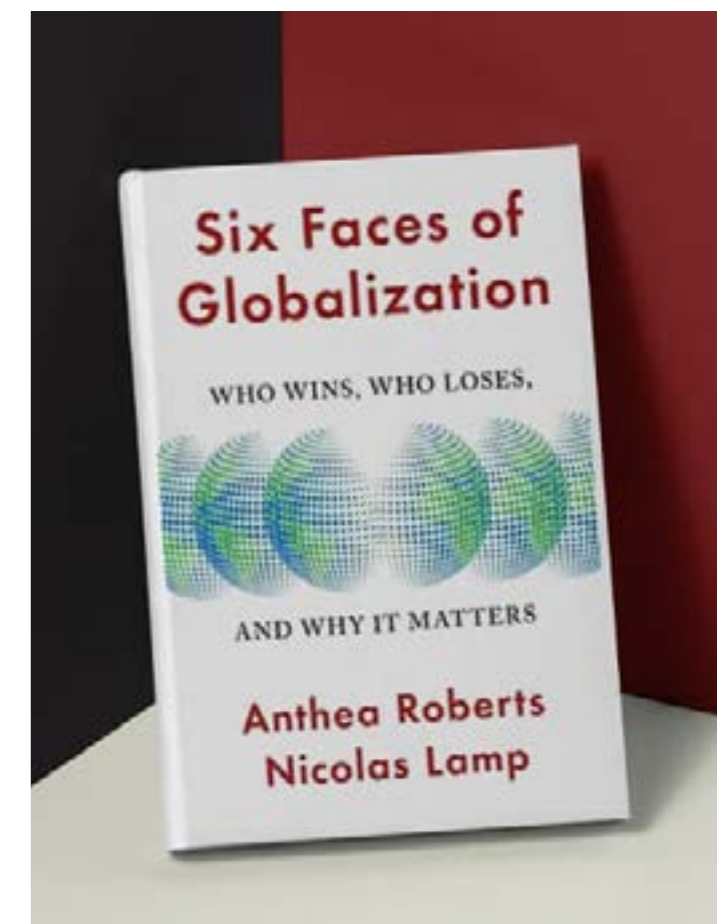
When you discuss the six narratives of globalization, a number of conflicts between different stakeholders or groups arise. Does the book suggest a way forward to resolve any of these conflicts?

It was fascinating to see that though the narratives are different, there are interesting overlaps between different narratives, which are sometimes unexpected. For example, there are often intriguing overlaps between the left and the right-wing critiques of globalization. In the United States, for example, trade policy is one of the areas where the left and the right largely agree, in particu-

lar on trade policy vis-a-vis China.

What we do in the final chapters of the book is show some overlaps between different narratives and the potential for alliances between different narratives.

The proponents of different narratives may not always agree on the reasons why they advocate a particular policy. However, there are definitely overlaps in outcome. To illustrate, from the trade context, during the renegotiation of the North America Free Trade Agreement (NAFTA) to the new United States Mexico Canada Agreement (USMCA), President Trump wanted to bring manufacturing jobs back to the Unit-



ed States. So, his trade representative were trying to use rules of origin to require high US content, especially in cars. The US Democrats wanted to help workers. These two interests were brought together, via rules of origin, in order to require high wages to be paid to workers. As a result, to export a car duty-free into a NAFTA country, a certain percentage of that car has to be made by workers making at least USD 16 an hour. This is an example of an interest where an overlap between different narratives (such as strengthening worker rights and bringing manufacturing jobs back to the United States) created a new legal rule which was not seen before. Going forward, though the narratives are conflicted, we do hope that there is room for more creative alliances.

Thank you Prof. Lamp, for taking the time out to provide us with an overview of your new book!



Development of SOE Disciplines



State enterprises or State-Owned enterprises (SOEs) have left an indelible print on the international economy. These entities enjoy a distinct advantage when operating in the market on account of their governmental ownership. As a result, international law has attempted to discipline the activities of SOEs to ensure fair competition in trade.

The primary source of international obligations governing the conduct and operation of SOEs is Article XVII of the General Agreement on Tariffs and Trade 1994 (GATT) on 'State Trading Enterprises' (STEs). STEs comprise of governmental and non-governmental enterprises, including marketing boards, which have been granted exclusive or special rights or privileges, including statutory or constitutional powers, in the exercise of which, they influence the level or direction

of imports or exports through their purchases or sales. These entities, in their purchases or sales involving either imports or exports, are required to act in a manner consistent with the general principles of non-discriminatory treatment prescribed in the GATT. In other words, Members cannot use STEs to discriminate in ways that would be prohibited if undertaken directly by Members.¹ STEs are also required to make purchases or sales solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale. Activities of STEs involving import of products for immediate or ultimate consumption in governmental use, i.e., government procurement are excluded from the application of Article XVII.

Besides Article XVII, the GATT contains a number of

In Modern FTAs

complementary requirements to address other ways in which STEs could be used by Member countries to circumvent the rules prescribed therein.² The Note Ad Articles XI, XII, XIII, XIV and XVIII provides that throughout these provisions, the terms 'import restrictions' or 'export restrictions' include restrictions made effective through state-trading operations.

In services trade, Article VIII of the General Agreement on Trade in Services (GATS) on 'Monopoly and Exclusive Service Suppliers' governs the activities of an SOE insofar as it is authorized or established by a Member as the sole supplier of a service in a market. Similar to the GATT, SOEs which are monopoly or exclusive service suppliers of a Member are required to act consistently with the Member's obligations under Article II (Most-Favoured Nation Treatment) and specific commitments (Market Access, National Treatment and Additional Commitments). Aside from the core obligation on non-discrimination, both the GATT and the GATS contain transparency requirements with respect to SOEs and their activities.

The approach to the SOE disciplines in bilateral or free trade agreements (FTAs) is fairly diverse. FTAs broadly adopt three different approaches to structure SOE obligations: first, where minimal commitments at WTO levels form a part of the chapter on Trade in Goods; second, the EU approach where the SOEs disciplines form a part of the chapter on Competition Policy, primarily to ensure competitive neutrality; and third, the approach adopted in Comprehensive and Progressive Agreement for Trans-Pacific Partnership

(CPTPP), which comprises of a standalone SOE chapter equipped with lengthy and detailed provisions.³ The article examines the broad elements of two such models i.e., the CPTPP approach and the EU approach, which handpicks specific elements from the CPTPP approach.

The foundational element in any SOE chapter is the definition of an SOE itself. It dictates the scope of the chapter and the expanse of the disciplines. The CPTPP provides an ownership and control-based definition of SOEs which covers enterprises or entities principally engaged in commercial activities in which a Party has majority share capital, control through majority voting rights or power to appoint a majority of Board members.⁴

The definition, while broad, presents several issues that require conceptual clarity. Can a company's organisational structure be so arranged that a Party can appoint the majority of Board members without owning majority of share capital or controlling majority of the voting rights? There is little guidance on what constitutes 'principally engaged' in commercial activities in the SOE definition. This definition emerged from the CPTPP and has been used in almost all subsequent FTAs with dedicated chapters on SOEs. The EU approach on SOE definition is substantially similar to the CPTPP approach.

Another important element is the obligation on 'Non-Discriminatory Treatment and Commercial Considerations', which is at the core of the SOE chapter. On account of their very nature and ownership

structure, SOEs risk distorting the market for other players not only as suppliers but also as buyers of goods or services.⁵ The non-discrimination provision in an SOE chapter under the CPTPP approach regulates this behaviour of SOEs and typically follows two primary WTO obligations - non-discriminatory treatment, and commercial considerations under GATT and GATS. The CPTPP requires SOEs to take into account commercial considerations in the sale or purchase of goods or services, except when acting under a government mandate to provide services to the general public. While this obligation is based on Article XVII of the GATT 1994, it is WTO Plus insofar as it requires decisions regarding purchase or sale of services to be based on commercial considerations, which is beyond the scope of GATS.

This also begs the question whether a monopoly service supplier can be required to sell services on the basis of commercial considerations? In the absence of competition and consequently, a comparative price or quality in the relevant service industry, it may not only be impracticable, but also unreasonable to require that they operate in accordance with commercial considerations given the definition of 'monopoly' and 'designated monopoly' in these chapters. Further, Parties are mandated to ensure that SOEs act in accordance with National Treatment and Most Favoured Nation (MFN) principles in their purchase or sale of goods or services to enterprises and investments.

The EU approach varies from the CPTPP approach with respect to certain elements. For instance, the non-

- discrimination obligation in this approach includes national treatment and MFN obligation with respect to the enterprises and investments of the other Party or non-Party in sales and purchases made by SOEs, as well as an obligation to act in accordance with commercial considerations.⁶ This approach varies further depending on the FTA partner. For instance, the EU - MERCOSUR In-Principle Agreement does not contain a non-discrimination obligation.⁷ The EU - Singapore FTA contains only one provision on SOEs under the chapter on Competition, which only requires ensuring that SOEs act in accordance with commercial considerations in their purchase or sale of goods or services.⁸ The EU - South Korea FTA, in a brief and low ambition SOEs section of the Competition chapter, mandates Parties to ensure that only state monopolies comply with national treatment obligation in their sales and purchases of goods or services.⁹

A difference also lies in the focus of the SOEs chapters, which ranges from those covering only non-discrimination-related obligations, to those that govern both aspects of government intervention, i.e, non-discrimination and non-commercial assistance (NCA). The CPTPP defines NCA as assistance to SOEs by virtue of SOE's government ownership or control, where assistance is limited to direct transfer of funds as understood under Article 1.1(a)(1)(i) of the SCM Agreement. Essentially, Parties are to ensure that NCA does not result in adverse effect to the interests of another Party or injury to its domestic industry. Additionally, the Parties are also to ensure that SOEs do not cause adverse effect to the interest of other party through the use of NCA.

The chapter reveals multiple linkages with the SCM Agreement, including the concept of NCA which is based on the SCM Agreement, suitably modified for their application to SOEs. For instance, the concept of adverse effect is closely associated with Articles 5 and 6 of the SCM Agreement.¹⁰ However, these provisions in the SCM Agreement were drafted in the context of goods trade. The SOE chapter applies these goods-specific concepts to trade in services as well. It remains to be seen how adverse effect is computed in services trade, specifically when Article XV of GATS leaves the door open for divergence in the manner in which service subsidies are treated and evaluated. The chapter in CPTPP applies the goods-based evaluation of adverse effects to services, without changing the indicators as may be required for services subsidies. To the contrary, the obligation to not cause injury to the domestic industry is limited to production and sales of goods.¹¹

On the other hand, the EU approach opts out of addressing the effects of government intervention through financial assistance to SOEs, i.e., NCAs. Unlike the CPTPP model, its focus remains limited to the discriminatory behaviour of the SOEs.

Conclusion

Most emerging economies continue to rely heavily on the participation of the State in industry and trade. SOEs serve to fulfil public policy objectives like providing public services, to operate and prevent abuse of natural monopolies and to secure strategic national interests. SOEs may take up governmental functions na

through their commercial transactions in accordance with the development needs of a country. This is particularly true for India, which has over 300 SOEs at the central level alone, operating as extended arms of the welfare state practically in all sectors, including agriculture, mining and exploration, transportation, telecommunication, power generation and transmission, as well as financial services.¹²

Owing to its significance and contribution to the economy, developing countries must exercise caution in taking on international obligations that affect the operations of their public sector enterprises. While WTO law remains the primary source of international obligations governing the conduct and operation of SOEs, various new models on SOE disciplines have emerged from recent FTAs. The CPTPP has offered the first model, and one of the most comprehensive disciplines on SOEs. It continues to act as an important reference point for subsequent FTAs which look to govern SOEs. Notwithstanding, the CPTPP and related models suffer from legal ambiguities that would have to be resolved in order to have a clear and workable model for SOE disciplines in future negotiations.

1 Appellate Body Report, Canada - Wheat Exports and Grain Imports, para. 97.

2 Panel Report, India - Quantitative Restrictions, para. 5.134.

3 See the UK - Japan CEPA, Chapter 13 on 'State-Owned Enterprises, Enterprises Granted Special Rights or Privileges and Designated Monopolies'; UK - Australia FTA, Chapter 18 on 'State-Owned Enterprises and Designated Monopolies';

UK – New Zealand FTA, Chapter 19 on ‘State-Owned Enterprises and Designated Monopolies’, etc. See EU – Canada CETA, Chapter 18 on ‘State Enterprises, Monopolies, and Enterprises Granted Special Rights or Privileges’; Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Chapter 17 on ‘State-Owned Enterprises and Designated Monopolies’; the Canada-United States-Mexico Agreement, Chapter 22 on ‘State-Owned Enterprises and Designated Monopolies’ etc.

4 See Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Article 17.1.

5 Jaemin Lee, Trade Agreements’ New Frontier – Regulation of State-Owned Enterprises and Outstanding Systemic Challenges, *Asia Journal of WTO & International Health Law and Policy*, Vol. 14, No. 1, pp 33-76, March 2019 at page 42-43.

6 EU – Japan FTA, Article 13.5; Modernization of Trade Part of the EU – Mexico Global Agreement (without prejudice), Article 6; EU – New Zealand FTA (Ongoing negotiations), Chapter 17, Article X.6; EU – Vietnam FTA, Article 11.4 (also contains an elaborate annex with specific rules (and carve outs) for Vietnamese SOEs.

7 EU – MERCOSUR Agreement, Article 4.

8 EU – Singapore FTA, Article 11.3.4.

9 EU – South Korea FTA, Article 11.5.

10 Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Article 17.6.3, Article 17.7 and Article 17.8. United States – Mexico – Canada Agreement, Article 22.6.3, Article 22.7 and Article 22.8.

11 Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Article 17.6.3 and Article 17.8. United States – Mexico – Canada Agreement, Article 22.6.3 and Article 22.8.

12 See Public Sector Enterprises Survey, Report 2020-21, Volume I, Department of Public Enterprises, Ministry of Finance, Government of India, available at https://dpe.gov.in/sites/default/files/PES_English_Vol%201_2020-21_Website_7_4_2022_0.pdf, paras 1.3 – 1.4.



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Interview with Dr. J. Balaji



Dr. J. Balaji is currently serving as the Joint Secretary (Marine Fisheries) at the Department of Fisheries under the Ministry of Fisheries, Animal Husbandry & Dairying, Government of India. He is an officer of 2001-batch of the Indian Administrative Service. He has worked extensively for the promotion of start-ups in the Fisheries and Aquaculture Sector. He also played an important role in the WTO Agreement on Fisheries Subsidies recently concluded at the 12th Ministerial Conference.

You were involved with the negotiations of the WTO Agreement on Fisheries Subsidies adopted at the 12th Ministerial Conference in Geneva. The Agreement is considered a milestone for the protection of global fish stock. Can you provide a background of how this issue arose?

In the 1950s after World War II, naval technology migrated to the fishing sector. Post-war Europe faced many issues with resources, and fish offered a cheap source of protein. Large countries, thus, used their big fishing vessels to travel around the world to capture fish. Therefore, the 1960s and 1970s witnessed huge exploitation of the global fish stock.

Before the adoption of United Nations Convention on the Law of the Sea (UNCLOS), coastal countries fished within 12 nautical miles, where they exercised sovereignty. The UNCLOS recognizes the sovereign rights of coastal countries from 12 nautical miles to 200 nautical miles which would be considered as the Exclusive Economic Zone (EEZ). Once the UNCLOS was adopted in 1982, countries began asserting their sovereign claim on their coastal waters.

The rights beyond 200 nautical miles can be used by anyone and every country has the right to fish in international waters. This right comes with some responsibilities that have to be complied with in the form of non-binding voluntary agreements. The philosophy of the regulation of international waters is that a precau-

Fisheries Subsidies Agreement at MC12



tionary approach should be followed. Certain fishes like tuna migrate between the EEZ and international waters. Certain species of fish are managed by Members who fish in the area through Regional Fishing Management Organizations (RFMOs). The understanding is that these migratory fishes are shared resources and therefore, their conservation should be undertaken by adopting a holistic approach. There are two types of RFMOs - generalized RFMOs are for all types of fishes and specialized RFMOs, like the Indian Ocean Tuna RFMO caters to the needs of tuna management.

In 1995, the Food and Agricultural Organization (FAO) came out with a Code of Conduct for Responsible Fisheries. There are four international plans of actions under the Code of Conduct – (i) the conservation and

management of sharks; (ii) reduction of incidental catch of seabirds in longline fisheries; (iii) management of fishing capacity; and (iv) prevention, deterrence, and elimination of illegal, unreported, and unregulated fishing. The plan of action to prevent, deter and eliminate illegal, unreported, and unregulated fishing, is explicitly provided in the new Agreement on Fisheries Subsidies.

Negotiations on the Agreement on Fisheries Subsidies began more than 20 years ago. Can you provide an overview of the significance of the Agreement? Can you also highlight some of India's key concerns with the Agreement?

Unlike other WTO Agreements, the Agreement on

Fisheries Subsidies is aimed at sustainability. However, the underlying issue of trade is still present. Trade in fish is valued at over 160 billion USD and fish is one of the most traded food commodities in the world. With respect to fishing, there are two main areas – aquaculture and capture fishing. The Fisheries Agreement that has been negotiated over the years is concerned only with capture fishing. Globally, in the last 20 years there has been a fall in fish stock because of capture fishing.

After 25 years there is now finally an Agreement on Fisheries Subsidies. The Agreement deals with IUU (Illegal, Unregulated and Unreported) and overfished stocks, but overfishing and fishing capacity will be negotiated in the future. The issue with the Fisheries Agreement is that it only prevents additional support for vessels that may deplete fish stocks. Instead, more focus should be provided on imposing a temporal stay on fishing for sustainability purposes, so that an adult fish can have the time to replenish their population leading to maximum sustainability. Deep sea fishing is akin to an expedition rather than an agricultural activity, as the fish stocks are captured in nature.

Reports published in the public domain show that long distance fishing is not profitable unless the government provides subsidies. It takes immense fuel to go deep sea fishing, which is why fuel subsidies are provided. The narrative now, as well as in Doha, was that only specific subsidies should be addressed. This is in sync with the SCM Agreement. However, since the Fisheries Agreement seeks to achieve sustainability, India has argued that fuel subsidies and specific subsidies should be treated the same as they both have the same

impact. Out of the total fisheries subsidies provided globally, 22% of them are fuel subsidies. We learnt during the Uruguay rounds that many countries provide non-specific subsidies. Developing countries like India only provide specific subsidies, thus they will be at a disadvantage. Some countries, particularly in the West, do not want to bring in non-specific subsidies as this may penalize their other sectors. The other issue is how a specific subsidy should be distinguished from a non-specific subsidy.

There are two degrees of compliance – reduction and elimination, out of which elimination is a more stringent form of compliance. There is global consensus in terms of not supporting Illegal, Unregulated and Unreported (IUU) fishing, which India also agrees with. At the same time, India believes that the three components of IUU fishing should be treated as distinct, as they each require different degrees of compliance however, globally they are treated the same. Illegal fishing should be completely eliminated and India did not seek any transition period for the same. Reporting requirements need a different degree of compliance.

To address the reporting requirements, India needed time and asked for a 7-year transition period. This was never a hard position during negotiations. Eventually negotiations led to flexibility being provided for reporting. In Article 3 of the Fisheries Agreement, which handles IUU subsidies, determination as to whether a vessel or operator is considered to be engaged in IUU fishing cannot be publicized. A footnote in the text further states that a country cannot be compelled to stop subsidies. What we understood is that there is no

compulsion to eliminate subsidies, which is what India wanted.

The second issue, is the overlapping jurisdiction of RFMOs like the Indian Ocean Tuna Commission (IOTC) with the sovereign rights of countries. But even the IOTC recognizes the sovereign rights of coastal countries. The IOTC will not interfere with a country's ability to use the economic resources in their EEZ. In Article 11.4 of the Agreement, we brought in similar language to ensure that the RMFO do not interfere with the sovereignty of coastal countries.

Under the Indian Constitution, the regulation of fishing within 12 nautical miles is in the State List, and regulation from 12 to 200 nautical miles would fall within the Union List. But beyond 12 nautical miles, there is no national law. The Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976 provides that there is no need for a license to fish in the EEZ. However, a registration is necessary as per the Merchant Shipping Act, 1958. Universal licensing also applies only within 12 nautical miles. By law, there is no need for a license within 200 nautical miles. The Plan of Action on Illegal Fishing also states that illegal fishing is based on national laws, so India can decide when fishing may be considered illegal. India already has domestic framework for sustainability such as, prohibiting fishing for 60 days. Still, we asked for a two-year time period to implement institutional frameworks. The point here is that all fishermen will learn eventually, but certain time is required.

India has taken an active role during the

“*India has domestic frameworks for sustainability such as, prohibiting fishing for 60 days. Still, we asked for two years time to implement institutional frameworks. The point here is that all fishermen will learn eventually, but certain time is required.*”



negotiations of the Fisheries Subsidies Agreement, particularly with respect to protecting the interests of low-income fishermen in developing countries. What are your views on this?

We will continue to work on our 25 years demand for prohibition on overfishing subsidies in the future. We will continue to fight for developing countries. India has taken the lead by becoming the voice for developing countries during these negotiations. India has been arguing for polluters pay principle along with common and differential responsibility. The subsidies provided by India and other developing countries are very meagre when compared to the subsidies provided by the developed countries.

Additionally, subsidies provided by India has nothing to do with trade. Independent sources put our subsidies at only 277 million USD, but even these independent calculations show that the subsidies provided are minimal. Subsidies need to be examined from the perspective of their purpose; we have millions of fishermen who rely on the access of fishing. This is a humanitarian problem. Developed countries can provide alternate occupation but we cannot do the same. At the macro level we have sustainable practices. We continue to fulfill the notification requirements for transparency. We also continue to notify at the IOTC.

How in your view did India account for the divergent standpoints of countries during negotiation of the Fisheries Subsidies Agreement?

In general, there were many countries that were voiceless at the WTO. India is a large nation that has enormous negotiating capital. The narrative in the last 21 years has been based on specific subsidies. It is admitted that the Fisheries Agreement does not directly promote sustainability, but it still addresses something. When we attempted to bring in non-specific subsidies, polluters pay principle, common and differential treatment, a number of developed countries were against India. No reliable data is available on the subsidies provided. The only data that is available is the self-reported data of countries. National data and the data provided by research papers often differ. There is no empirical evidence to show that the prohibition on subsidies will lead to sustainable fishing, it is only a theoretical outcome. Maybe in the next 10 years we can see the fish stocks improving after the subsidies have been removed. Negotiations have been difficult considering they have been going on for more than 20 years. Views are quite diverse, especially for over-fishing and capacity. While, American and South African countries want disciplines on IUU, certain countries have taken a hard stance and do not want to provide any concession on IUU.

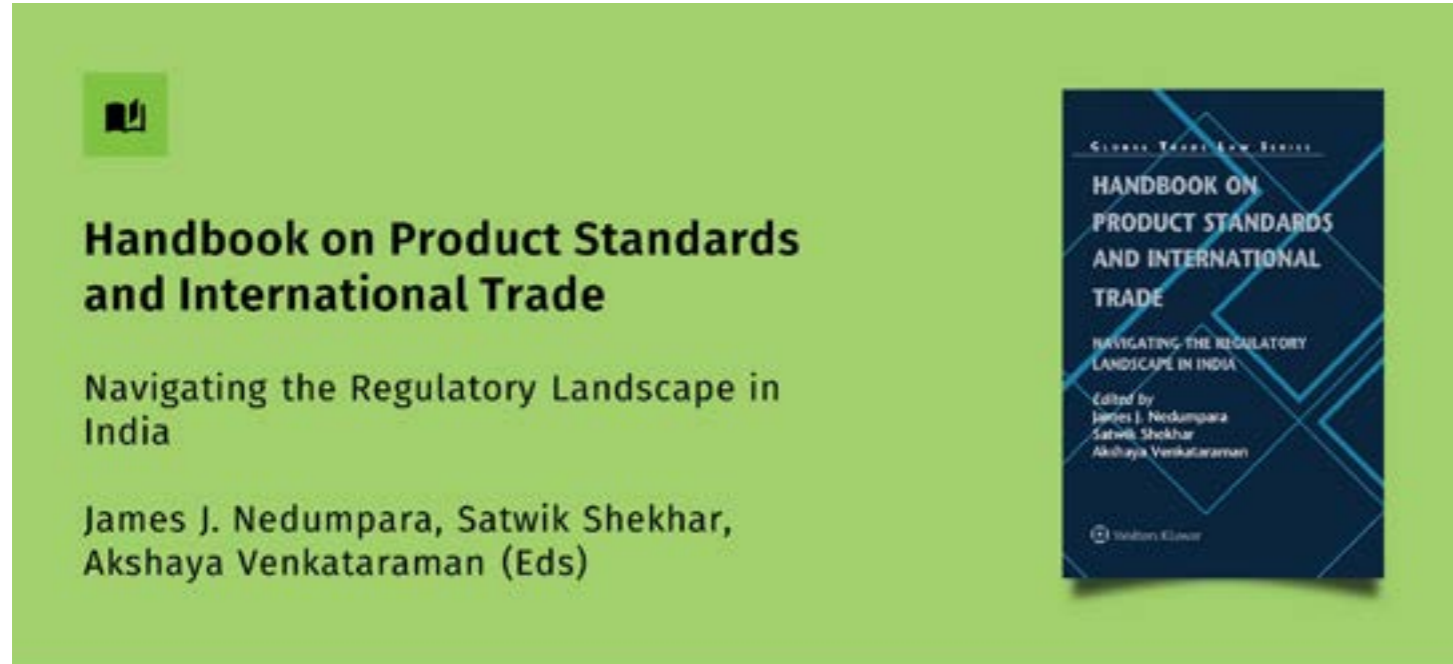
The issue of over-fishing as an idea only arose 7 years ago when negotiations on a fisheries Agreement were well under way. India sees itself as not a blocker to the Agreement, but only a country that wishes to put forth its views. The losses that India will incur will be far greater if no regulations on IUU is implemented. In anticipation of the IUU requirement, India has been working for the last three years to institutionalise the

required systems. With the COVID-19 pandemic, we were given an additional year and the Agreement has provided two more years. For overfished stocks, we got the text we wanted. When a stock is considered over-fished, it can only be decided by that country's authority. For the purpose of disputes, we ensured that only a country's notification can be relied upon for compliance. The international perception is that India seeks to promote sustainability. India is also perceived to take a standpoint which is not difficult, and we can continue to promote our view point through further negotiations.

Do you think India's future FTAs will have a comprehensive fisheries subsidies chapter?

The Fisheries Subsidies Agreement is an indication that multilateralism is still relevant, which is a point India has strongly supported. India has also recently been engaging in FTA negotiations and bilateral trade again. India's recent FTA negotiations started before the Fisheries Subsidies Agreement was concluded. Perhaps, the Department of Commerce will account for India's standpoint following the Fisheries Agreement for future FTA negotiations. But the inclusion of a section on fisheries subsidies will depend on what India receives bilaterally from the other country, which will vary from case to case. If India has decided to implement the standpoint taken during negotiations in the Fisheries Subsidies Agreement in FTAs, then this may improve India's bargaining power and place us in a better position in terms of being seen as a partner with respect to sustainability.

Handbook on Products Standards and International Trade



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On January 1, 2022, an email in the inbox had the subject “Congratulations! You can start promoting your book Handbook on Product Standards and International Trade: Navigating the Regulatory Landscape in India”. After months of hard work and cumulative efforts of all the contributors and the editors, the Centre was able to see and feel the fruits of the labour as the Handbook was officially published by Kluwer Law International under their prestigious Global Trade Law Series. The idea behind the handbook on standards was to extensively describe the nature of standard-setting processes in India and the key agencies involved with this task, together with an analysis of legislations, procedures and case decisions at the WTO on SPS and TBT matters. India maintains a particularly complex regulatory system with diverse standard-setting bod-

ies, regulators, accreditation and certification bodies, inspection agencies, as well as several state-level regulators. But before understanding this regulatory mesh of the standards ecosystem, it is important to highlight the importance of standards.

Standards apply to almost every product we come across in our daily lives – from the clothes we wear to the houses we live in, from the packaged juice we drink to the food served in a restaurant, and so on. Standards ensure safety, quality and functionality in virtually every aspect of our lives. The objective of the developers of standards is typically to build a ‘norm’ of quality and safety to ensure protection of human life and health, animal life and health and the preservation of environment. The prevalence of these norms facilitates trust among consumers and induces confidence in the

An Insight

products that they buy. Product standards also ensure greater product liability. Conversely, manufacturers traders are also able to assure product specification, performance and stated operability of their products.

While it is easy to discuss the importance of standards for ensuring the quality of modern life, the origins of these standards – who develops them, who tests them and who enforces them – is somewhat complicated. Standards are generally set by governments, autonomous standard-setting bodies, or private industries. Standards take the form of government regulations, voluntary certifications, practices enforced by industry associations, or guidelines and rules issued by technical bodies. Across the world, standards are a result of extensive consultations and deliberations. Given the inter-connectedness of the various processes involved in standard setting and conformity assessment and the number of entities operating in the area, it is crucial for industries, exporters, manufacturers, policymakers and regulators to be aware of these standards and the policy framework in which various standard-setting bodies function.

In the World Trade Report for the year 2012 (WTR12), the WTO highlighted the proliferation and impact of non-tariff measures like standards, technical regulations and SPS measures on global trade. The WTR12 notes that due to the diversity and complexity of such non-tariff measures in services and goods trade, a deeper understanding of the standards and their effects is ‘crucial not only for a sound policy strategy but also from the perspective of international cooperation.’¹

There is a complex network of bodies involved in standards and conformity assessment processes in most countries. Their primary interlinkages and relationships with international and regional organizations is seemingly complex. The aim of the book is to explore the nature of this relationship. While numerous governmental agencies in India like the Ministry of Science and Technology, the Ministry of Agriculture and Family Welfare, and the Ministry of Consumer Affairs, Food and Public Distribution (and their relevant departments) at the federal level are responsible for setting standards, statutory bodies like the Bureau of Indian Standards (BIS) and Food Safety and Standards authority of India (FSSAI) create standards drawing their powers from their parent legislations. While India has a number of national accreditation and registration boards (for e.g., NABL, NABCB, NRBPT housed under the Quality Council of India (QCI)), there are also a number of private certification bodies registered under these boards. Any product which is placed in the Indian territory for either commercial use or final consumption is required to meet the technical regulations and standards as set by the above stakeholders. These requirements may be mandatory or voluntary. Several private companies also develop their testing capabilities which can be accepted, provided they meet the legitimate policy objectives of consumer interests, public health and safety, environment preservation, protecting human, plant and animal life, among others.

The aforesaid discussion merely provides a snapshot of the various bodies involved in the process standard-setting in India. Important questions arise in this regard. How do BIS and FSSAI interact while formulating stan-

dards in the food industry? What is the role of APEDA in this? What is the difference between certification and accreditation? How does the QCI coordinate with NABL, NABCB, NRBPT etc.? There are several questions at the heart of the standard-setting process. Given the ever-expanding relevance of standards to international trade, there is a need for a complete examination of the functions, responsibilities, and the nature of tasks assigned to these bodies. Given the broad ambitions of the book, details of the processes as well as the various bodies involved is a vital piece of information necessary for all stakeholders – from policymakers to manufacturers and traders. The Handbook is intended to serve this purpose.

With the first Indian National Standards Conclave in 2014, India began the mammoth task of harmonizing, modernizing and streamlining its legal regime for standardization. Since then, the Indian regulatory regime has grown leaps and bounds – with the implementation of the Bureau of Indian Standards Act of 2016 and the introduction of the Indian National Strategy for Standardization. India's 7th WTO Trade Policy Review of 2021 (India TPR 2021) notes that as of 2018, of the 19,294 Indian Standards in force, over 27% have already been harmonized with International Standards. In addition to the revamped role of the BIS, the regulatory regime has also seen a push towards the formal recognition of specialized regulators and private institutions that prepare sector-specific standards. The BIS operates a scheme for the recognition of such standards development organizations (SDOs) bringing them within the fold of the 'One Nation One Standard' paradigm identified by the Indian Government, and ensuring that

these SDOs follow the WTO's Code of Good Practices for standardization. This period has also seen marked increase in India's engagement with the WTO transparency and accountability system for standards and technical regulation. While India's Trade Policy Review of 2015 (India TPR 2015) noted that between 2011 and 2015 India notified 11 new technical regulations, the India TPR 2021 notes that between 2015 and 2020, 102 new technical regulations were notified to the WTO by India – a nearly ten-fold increase.

These statistics and developments point to a change in the Indian landscape – a change towards integrating better with the global economy, and towards facilitating trade and ease of doing business. With contributions from academicians, practitioners and experts from various legal and practical domains of standards development, the Handbook attempts to contextualize the Indian standardization framework within the global governance of this process and to identify potential areas of growth and further development. While some chapters lay the groundwork on the processes, explaining the network of rules and regulations and regulators in distinct sectors, other chapters take a critical look at some of the persisting issues in harmonizing Indian standards globally and how these challenges may be addressed.

Essentially, the Handbook undertakes the task of untangling and explaining both the broad and specific concepts of standard-setting in all the key sectors of the economy. This challenging task is made further complex and exciting because of the fast-evolving developments in India's legal ecosystem. Between the com-

mencement of the Handbook and its completion, for instance, BIS formally implemented its SDO Recognition Scheme by recognizing Indian Railways' Research Design and Standards Organization (RDSO) as India's first BIS recognized sectoral SDO and in the process, streamlined RDSO's working to bring it in conformity with WTO Code of Good Practices. In other words, standards are bound to emerge and proliferate in various sectors of the economy.

Lucid contributions from experienced practitioners, policymakers and regulators with first-hand experience in formulating and advising on issues related to standards in international trade help the book to disentangle the web of laws, regulations, operations, and functions of India's standard setters in governmental, non-governmental, and industry contexts. The chapters describe how standards apply to crucial trade and regulatory aspects with an emphasis on issues which include conformity assessment practice and procedure; environmental, ethical, social, and safety issues; import bans and import licensing; certification and labelling measures; mutual recognition agreements; food safety; and standardisation of the digital economy.

The Handbook begins with outlining the international perspectives relevant to standards development by introducing how broad concepts such as standards, technical regulations and allied terms are legally and internationally understood, and highlighting key legal principles of the Agreements of the WTO which govern standards and technical regulations globally. A critical examination of the jurisprudence of the WTO Agreement on Technical Barriers to Trade (TBT Agreement)

highlights the rules and principles which policymakers and other SDOs must take into consideration. While the Handbook provides an insightful commentary on the ability of the TBT Agreement to meaningfully govern the vastly expanding and changing landscape of standards and technical regulations, it also looks at the role of free trade agreements in product regulation. It explores four issues relating to standards and technical regulations, i.e., international standardizing bodies, sectoral annexes, trans-governmental network of regulators, and language barriers faced by developing countries in particular. It provides insights into how India, in its future trade engagements, could leverage FTAs to design more development-friendly and equitable norms.

After laying down the international rules and laws on standard-setting, the Handbook focuses on India's domestic standards landscape. It looks at the history of standardization in India, and unravels the web of regulatory bodies involved in the process of standard-setting and conformity assessment. MRAs are an important tool for achieving harmonization of conformity assessment procedures. Therefore, the Handbook also highlights the WTO norms applicable to bilateral MRAs and the trends seen internationally as well as in India on the proliferation and utility of MRAs. The book also includes sector-specific coverage – food-safety ecosystem of India, sanitary and phytosanitary regulations, pesticide residue in food products and MRLs – as well as sectors where standards are emerging.

While product standards are already ubiquitous, the

massive growth of the services sector globally has warranted the development of standards in this sector as well. The Handbook provides guidance for the service sectors where such standards are already becoming prevalent and also outlines the areas where the reader can expect standards in the near future. Closely connected to services in the digital sector. With a particular focus on India, the Handbook explores the intricacies of why and how standard-setting for digital services is unique, and how various concerns such as privacy, security and interoperability are accounted for in this process.

To summarize, the Handbook features a detailed enquiry into the multifaceted dimensions of standards-setting, implementation and compliance, with specific reference to India. With contributions from practitioners, academicians, experts and regulators, it attempts to simplify complex concepts, processes, and regulations and aims to be a one-stop-shop for the key stakeholders in the standards ecosystem – industry and businesses as well as policymakers and academia. The aim is to examine and lay out the functions, powers, mandates and relationships between Central/State Governments, regulatory bodies, certification agencies, non-governmental entities and other stakeholders in the standard-setting process. The book identifies the relevant legislations from which the above entities draw their powers, and attempts to provide clarity on the overlaps in the functions of different entities, the regulatory gaps and uncertainty in laws, and the coordination and cooperation among various entities in formulation of technical regulations and standards.

1 WTO, World Trade Report 2012 Trade and Public Policies: A Closer Look at Non-Tariff Measures in the 21st Century, at page 37, available at https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report12_e.pdf

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Trade and Sustainable Development in FTAs



Picture Courtesy @ Gerd Altmann

Sustainability is fast becoming a key aspect of Free Trade Agreements (FTAs) worldwide. The North American Free Trade Agreement (“NAFTA”) was one of the first agreements that addressed environmental and labour issues in a binding trade agreement. The EU also sought obligations with respect to labour and environmental standards in the EU-CARIFORUM Economic Partnership Agreement (2008)¹ and the EU-Korea FTA (2011). Chapters with such provisions have become an integral part of trade agreements by the US, Canada and the EU including mega-regionals such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and United States-Mexico-Canada Agreement (USMCA).² India, however, is yet to take any substantial commitments on labour or environment in any

of its FTAs. However, the inclusion of such provisions have implications for developing countries like India. First, an obligation that is ubiquitously seen in the trade and sustainable development (TSD) chapters of the EU, and the labour and environment chapters in agreements like NAFTA and USMCA (collectively hereinafter TSD Chapters), is the obligation of non-derogation.³ Non-derogation provisions essentially require States to not lower their already committed environmental or labour protection provisions under the FTAs to encourage trade or investment in a manner affecting trade or investment between them. The argument for the inclusion of such a provision is to ensure that environmental or labour protections are not reduced with the objective of increasing trade or investment.⁴ As an illustration, a developing country relaxes labour laws making it

easier for specific industries to procure labour during an economic crisis leading to more investment in those industries. These industries receiving the benefits of relaxed labour laws are exporting goods to a developed country with which the developing country has an FTA with TSD Chapters, where the parties have committed to labour protections and a non-derogation provision as explained above. The developed country can potentially claim that the developing country violated the non-derogation obligation by encouraging trade and investment in a manner affecting trade or investment between them.

A non-derogation obligation, if not drafted carefully, has the potential to restrict the policy space of States, especially developing countries, to provide regulatory assistance to augment and secure its economic interests. This has an effect of ratcheting the regulations related to sustainability, meaning new laws and regulations have to adhere to the levels prescribed in the agreement or higher. Adhering to such levels of protection involves new technology and added costs that developing countries can ill afford. Modifying or adopting new legislations by a State is done after due consideration of the needs the society, policy considerations, costs and various other factors that requires time and deliberations. Even so, the priorities of two different States can vary and the right of each state to decide what is appropriate for itself should remain sacrosanct. Further, the prohibition of regression solely on the basis of intent to encourage trade or investment without proving any effects or a violation of international commitments has far reaching implications.⁵

For example, many countries provide temporary or industry specific waivers or derogations from its labour laws during the COVID-19 pandemic. Multiple states in India also suspended certain labour laws to give more flexibility to businesses and employers in order to help curb the effects of the COVID-19.⁶ This highlights the need for caution while negotiating such clauses. Developing countries should specifically limit the scope or exclude measures from the scope of non-derogation to the extent of their requirement of policy space. A carefully drafted provision can aid countries to take policy action and not run afoul of a non-derogation obligation.

Additionally, establishing how lowering of labour or environmental protection actually “affects” trade or investment is also not clear. The dispute brought by the US against Guatemala under the Central America Free Trade Agreement (CAFTA) elucidates the problems in establishing this requirement.⁷ The US complained



that Guatemala did not effectively protect the rights of association, amongst others by failing to protect trade union leaders and members against violence. In the panel report of 2017, the panel ultimately found no infringement of CAFTA by Guatemala. The panel ruled that the US had not proven that Guatemala had failed to enforce its labour laws ‘in a manner affecting trade’ between the parties. However, the panel also did not formulate any test for determining such effect on trade. The panel opined that the US should have shown that Guatemala’s disputed practices had conferred “some competitive advantage on an employer or employers engaged in trade with the United States”.⁸ This lack of clarity in interpreting such a provision creates uncertainties for negotiating parties.

Second, the provisions in TSD Chapters envisage “high levels of protection” for environment and labour.⁹ Such levels of protection tend to be more aligned with protections afforded in developed nations with a higher level of development and capability to implement such protections. Although environmental and labour laws in India afford significant protection, the level of such protection may not be equivalent to that of more developed countries. Therefore, developed countries will not find it difficult to implement such obligations, while developing countries may need to modify their existing laws or adopt new laws entirely to comply with such obligations.¹⁰ This indicates an imbalance in the premise of such high levels of protection envisaged in TSD Chapters. Such costs and drain of resources are may not be in the best interests of developing countries.

Third, FTAs with high levels of protection for environ-

mental and labour regulations tend to advocate a single level of standard of protection and regulations for the party States. All the obligations provided under the FTA are required to be complied by both the Parties equally.¹¹ The individual capabilities, priorities, levels of development and resources available to each State is rarely taken into consideration. Developing countries may decide on environmental or labour protections depending on its priorities, developmental agenda and available resources. A single high level of protection is always unfair on the developing country FTA partner due to the developmental advantage, resources and protections already existing in a developed country. The principle of Common But Differentiated Responsibilities and Respective Capabilities (CBDR-RC) enumerated in the Paris Agreement captures the spirit of such a differential mechanism for obligations for countries based on their level of development and priorities. Even though developed countries use MEAs like Paris Agreement to draw inspiration for the obligations under FTA chapters, however, these provisions appear to eschew the necessary special and differential treatment (S&DT) afforded to developing countries like, India.

Fourth, multilateral environmental agreements (MEAs) and multilateral labour agreements (MLAs) already provide a broad framework of obligations for all member states. International bodies like International Labour Organisation (ILO), United Nations Framework Convention on Climate Change (UNFCCC) etc., already provide detailed obligations for the Member States and mechanisms to monitor compliance of such obligations.¹² The multilateral agreements also contain special provisions that appreciate the technical, infra-

structural and financial imbalance that countries like India face and provides for mechanisms to remedy such an imbalance. For example, Kyoto Protocol recognizes the need for the Financial Mechanism to fund activities by developing country Parties¹³ while the Paris Agreement stipulate that developed countries shall provide financial resources to assist developing country Parties.¹⁴ FTAs on the other hand, include obligations that mandate high levels of protections without acknowledging or providing for mechanisms to address the practical inadequacies between the parties. These are the areas where developing countries may have to depart from the standard template of TSD chapters negotiated mainly by advanced countries.

Finally, the UN’s 2030 Agenda for Sustainable Development clarifies that actions for goals of poverty and hunger eradication, health and educational facilities go hand in hand with other goals such as climate change, decent work and responsible consumption. This suggests that goals for the protection of labour and environment cannot be in isolation from the other developmental goals that involve social and economic factors. The TSD Chapters in FTAs focus only on the labour and environmental aspects of sustainability while ignoring the socio-economic developmental goals. Such a myopic approach to sustainability will only result in lopsided results.

The fact of the matter remains that sustainable development is the key to securing the future of our society. But at the same time, it is necessary to question these provisions from a developing country’s perspective - what is the benefit of including such chapters in FTAs,

and more importantly, how can such costs be minimised so that both sides benefit? In other words, the benefit may be clear, but the cost to be borne by developing countries is disproportionate to their contribution to the urgency of climate action required. Therefore, it is necessary to address sustainability in FTAs reflecting this disparity. While the developed countries claim that the benefits of environmental protection and sustainable development reach all countries, it must be remembered that the biggest dangers posed to the environment, climate and biological resources, arise out of developed countries’ actions over the years. Therefore, it is only but fair that the larger share of responsibility is borne by the developed world. This does not mean that developing countries abdicate all forms of responsibility, nevertheless those responsibilities need to be balanced with their developmental prerogatives. Along with appropriate S&DT, it is crucial for the developing countries to get quick access to technology to fight climate change.

India’s ambitions for economic growth and prosperity through increased trade by concluding ambitious FTAs is understandable and necessary. However, in negotiating such FTAs India should advance a balanced approach towards sustainability. Firstly, obligations like non-derogation should be drafted carefully carving out regulatory space considering the unique policy requirements of the country. Secondly, the principle of CBDR-RC in terms of differentiated responsibilities and costs for developing countries like India, as affirmed multilaterally, should be a guiding principle in dictating the levels of protection. Finally, sustainability goals are universal and India should engage proactively in these

areas looking forward to the future - an approach that accounts for environmental and labour protections while not sacrificing policy space to pursue its own developmental priorities and goals. These FTAs provide an opportunity to all parties, especially India, to produce an outcome that is rooted in the spirit of sustainable development.

1 EU-CARIFORUM EPA, Chapter 5.

2 Velut, JB. et al., Comparative Analysis of Trade and Sustainable Development Provisions in Free Trade Agreements, London School of Economics, February 2020.

3 See, for example USMCA, art. 24.4 and EU-Korea FTA, art.13.7 (2).

4 Marco Bronckers and Giovanni Gruni, Retooling the Sustainability Standards in EU Free Trade Agreements, Journal of International Economic Law, 2021, 24, 25-51.

5 Id.

6 Suspension Of Labour Laws Amidst Covid-19, Mondaq available at <https://www.mondaq.com/india/employment-and-workforce-wellbeing/935398/suspension-of-labour-laws-amidst-covid-19> (May 2020).

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10 C. Russell Shearer, International Law and Development in Developing Nations: Agenda Setting, Articulation, and Institutional Participation, Tulane Environmental Law Journal Vol.7 No. 2, pp 391-422 (1994).

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13 Article 11, Kyoto Protocol to the United Nations Framework Convention on Climate Change, 16 March 1998, 37 I.L.M. 22.

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Interview with Mr. Darpan Jain



Mr. Darpan Jain is currently serving as a Joint Secretary at the Department of Commerce, Government of India. He is an officer of 2001-batch of Indian Administrative Service of the Karnataka Cadre. He oversees services and e-commerce issues in multilateral and bilateral platforms. Mr. Jain was conferred the Hon'ble Prime Minister's Award for Excellence in Administration for the year 2011-12 in the individual category for the initiative "Saving Open Spaces and Urban Lakes (SOUL) and Cultural Rejuvenation" in the twin city of Hubli-Dharwad. Prior to his present position as Joint Secretary, Mr. Jain has held various senior positions within the Government of

We understand that the services sector contributes to over 50% of India's GDP and that India was among the top ten ICT services exporter countries in 2020. In your opinion, what has contributed to India being such a leading exporter of services?

First, one of the major factors responsible for the growth of the Indian services sector is that we have a sizeable talent pool, which is diverse and one of the most competitive in the world. Second, India's policies for the last 30 years both at the centre and the state level have encouraged growth in services. I belong to the Karnataka cadre, where the Electronic City and software parks were started in the 1980s. Infrastructure and policy interventions, such as the IT policy of Karnataka, were brought out in the 1990s, envisioning the potential of IT services exports. Even the central Government came out with many interventions. Third, the enterprising nature and global outlook of our professionals, the IT giants, which did not exist before the 1990s, is one of the reasons for India's growth in trade in services.

Do you think that trade liberalisation had and continues to have a role to play in the growth and evolution of the services sector?

It is difficult to say with certainty the role that liberalisation has on the growth of services sector. However, there has been a significant increase in the contribution of services to the domestic economy and investment in

Negotiating Services in FTAs

services exports. It is important to note that the services sector does not require high capital investment and faces least issues with regulation. Additionally, the efforts with respect to ease of doing business has also worked in favour of the services sector's growth. Even prior to liberalisation, opportunities were available; but, I think the global market for services really expanded post the 1990s and India was in the right place to exploit those opportunities.

India is currently negotiating several FTAs. How, in your view, will these FTAs enhance India's services trade and how do you think liberalisation will benefit India?

The FTAs that we are currently negotiating will benefit our services trade. In these FTAs, we are negotiating obligations related to market access, national treatment, the regulatory architecture for services, etc. These commitments are being negotiated so that our services exporters do not face restrictions in accessing those markets. The commitments will bring certainty and our businesses will get a stable and predictable environment. This would mean that our service suppliers will now have a larger market to access, without facing any restrictions. These FTAs will help our services exporters in scaling up their operations. These are treaty commitments, which mean that they cannot be violated.

The services chapter in FTAs will also permit access to professional services. The barrier that professionals encounter is often related to the recognition of their qualifications. Professions of doctors, nurses, architects,

so that our professionals can deliver their services in these countries without undue hindrance and restrictions.

These FTAs also benefit the movement of natural persons (MoNP). The obligations related to the MoNP ensures that the service suppliers can move easily between the territories of the Parties, supply their services and return once they have delivered their services. Thus, Mode 4, or MoNP, is an important mechanism to deliver services not only in its own right, but also complements the other modes of delivering services as well. For example, in delivering software services through electronic mode or Mode 1, many clients also seek on-shoring of expert teams to help in their operations and maintenance. In this regard, the obligations related to categories of personnel, duration of stay, the processing of applications, etc, which are present in the MoNP Annex of the services chapter in the FTAs play an important role and is an area of gain for India.

Finally, it also relevant to note that FTAs bring in investment through Mode 3 or supply of service through commercial presence. Liberalised commitments in FTAs, ensure that foreign businesses find our regime more predictable, thereby enhancing the foreign direct investment (FDI) in our country.

You mentioned that how we are seeking MRAs in our FTAs. What do you think is the best way forward for MRAs, which are negotiated between industry bodies?

These agreements do take place between professional

bodies which regulate the profession. Suppose the Indian Nursing Council is regulating the nursing profession in India and the Nursing and Midwifery Council is doing the same in the UK, recognition will be between and chartered accountants are regulated in most countries. Through these FTAs, we are attempting to harmonise the regulations between the countries and evolve a framework for mutual recognition agreements (MRAs) is doing the same in the UK, recognition will be between the two Councils. Achieving full recognition is the ideal solution, because it would mean that a professional would not require any further process or mechanism to practice in the other country. However, we need to understand that the standard of education, certification and experience is different in different countries. Suppose we are negotiating an MRA on nursing with the UK, then it is crucial to understand their levels of qualification, certification mechanism and experience requirement. Following which, we will have to convince the other side that our domestic system is comparable to their system.

The two concerns that the professional bodies normally have is the equivalence of curriculums and, whether the procedures for testing and certifying the adequacy of qualification and experience are equally robust. If we can harmonise these aspects then negotiating a successful MRA should not be a problem. Professional bodies need to engage with each other and see whether there is a gap in curriculum and experience, certification requirement or language. We need to identify such gaps and how they can be addressed, so that our professionals can be recognised.

Certain processes are critical, for example, if a certification mechanism permits, then we can request for exams to be conducted online so that our professionals need not travel to other countries to get certified. These aspects need to be examined while keeping in mind the objective that professionals should be able to deliver their services easily, without restrictions, while ensuring that the quality of the services supplied are not compromised. India does not seek to compromise on standards. In fact, we want to align India's standards with international benchmarks, but while taking into consideration the relevant context.

You have identified some key regulatory barriers that we face in the professional

“Commitments are being negotiated so that our services exporters do not face restrictions in accessing these markets”

services sector and provided solutions on how to overcome the same. As a matter of strategy, have we identified specific service sectors where we want to pursue MRAs on priority? Do we receive requests from the industry bodies specifically, where they perhaps approach the DOC and ask for assistance in negotiating MRAs?

Yes, before FTA negotiations, we undertake consultations with all the professional bodies and ask about their interests and whether they would like to engage in MRAs. In some cases, we found that professional bodies engage in discussions over MRAs in any case as they are not dependent on an FTA. For instance, the Institute of Chartered Accountants of India (ICAI) have MRAs with many countries. First, we identify a prioritised list of sectors where we envisage MRAs. Second, once there is interest from the professional bodies, it is taken up with the other country for their engagement. We try and pursue negotiations for industry / professional bodies with interest.

With respect to India's recently concluded FTAs with the UAE and Australia, are there some provisions in the Chapter on Trade in Services that are of interest to our stakeholders?

Many important elements are present in both FTAs. The UAE is a very important market for us, it is the gateway to the Gulf region and some parts of Africa. In the India - UAE CEPA, we were able to secure commit-

ments on more than 100 sub-sectors of our interest. The UAE has made commitments in all key sectors of our interest and our service suppliers can supply services without facing major limitations on market access and national treatment. We have also been able to achieve certain obligations on the movement of our business persons to the UAE, which is an important destination for the Indian diaspora for delivering services.

India's FTA with Australia is also unique. Australia is strategically placed in the Oceania region and is part of many trade agreements. With Australia, we have been able to get commitments in a large number of sectors. In fact, almost all sectors of interest have been committed to by Australia and there are negligible limitations. Some unique commitments for our students have been secured for the first time. Indian students who are studying in Australia will be able to pursue work after their studies, for a period of two to four years. We have also been able to secure a quota for our yoga instructors and chefs, so they can deliver their services in Australia. Australia has also committed to resolve a long-standing issue over the taxation of IT services. Further, there has been a commitment from Australia to pursue MRAs in a time bound manner.

In the ongoing negotiations with the UK, Canada and the EU, what do you think are the challenges India faces when negotiating on services issues with these countries?

First, the primary focus of most developed countries is on Mode 3, the investment and delivery of services

through commercial presence, whereas India has interests in delivery of services through all modes of supply.

Second, is the issue of listing. Developed countries have almost entirely liberalised their services sectors, and have moved on to a negative list approach. In a negative list approach, they take on value-add commitments such as standstill and ratchet. However, India has not achieved this level of liberalisation. We are a developing country and are moving fast but we need time to catch up to their level of liberalisation.

We still need to retain our policy space to nurture our industries, to study the impact of liberalisation on different sectors of our economy and then calibrate our policies accordingly. At our level of economic development, a value-added commitment or liberalization to the extent seen in developed countries is not feasible. So, the manner of listing of commitments is an area of divergence. It is a challenge, which we have explained to our trading partners and most of the countries are accommodative of our position.

Third, India has high ambitions on the delivery of services through the movement of natural persons, but most of these countries are very sensitive since they equate the same with immigration, whereas Mode 4 only deals with the temporary movement of natural persons for the supply of services. We also have high ambitions with respect to professional services. We want expedited recognition pathways for our professionals to deliver their services, and such recognition pathways should be in the FTAs. However, developed countries are reluctant to make binding commitments on these issues, which are areas of interest to us.

I believe that the purpose of negotiations is to craft mechanisms to reconcile diverging ambitions.

With respect to investment, considering that investment and Mode 3 are closely related, how do you think they will be considered in future negotiations?

For long, we have been making Mode 3 investment commitments in our FTAs, and we can continue to do the same. As we are liberalising, our commitments may also become wider and deeper. Mode 3 commitments help in attracting FDI which our services sector require.

Investment obligations exist in two forms. First, those related to liberalisation in services, which remain in the Chapter on Trade in Services, and second, related to investment protection and other issues are dealt with under bilateral investment treaties (BITs) which are negotiated by the Department of Economic Affairs, Ministry of Finance.

You have been involved in multiparty negotiations, such as RCEP, and now you are involved with bilateral negotiations with the EU and the UK. What are the differences between the two types of negotiations?

First, a multiparty negotiation is more organised and streamlined. Bilateral negotiations are more flexible and lack the formal mechanisms that exist in a multiparty negotiation. Second, the key difference between the two

kinds of negotiations is the level of ambition, which always remains lower in multiparty negotiation. This is because in a bilateral negotiation, based on a country's sensitivities, countries can raise the level of ambition and take commitments with its partner country. However, in a multiparty negotiation, a country may not like to take an obligation on a particular matter with all the participating countries. Third, in a bilateral negotiation, the Parties can be very creative in designing the obligations and addressing the issues being faced by the two countries. Lastly, in a bilateral negotiation, the Parties can push for early outcomes, by intervening at different levels, which may be a challenge in a multiparty negotiation, as it is difficult to compress timelines and show flexibility on schedules.

Would you like to give some tips for future negotiators on how to prepare for an FTA negotiation process?

There can be no substitute to preparation for a negotiation. The negotiator should be on top of the text and the issues that they are handling. The level of preparation must be of very high quality to ensure that the negotiator knows the subject matter well. A negotiator must also be mindful of stakeholder concerns. Therefore, periodic consultation with the stakeholders, and understanding what challenges they are facing in that market are important, since the text that is being negotiated is ultimately for the benefit of stakeholders.

However, each negotiation is different, therefore, one should not have a template in mind.

As far as conduct during negotiations is concerned, a

negotiator should always be patient and polite, but at the same time remain tenacious with their area of interest. A negotiator should also be mindful of the developments happening in other tracks of the FTA, as trade-offs might take place across chapters and disciplines.

GM Trade on an Equal Footing



Photo Courtesy @Vectorjuice

Following agreements with the UAE and Australia, India is on an FTA-signing spree by actively negotiating with developed nations, such as the United Kingdom, Canada, European Union and Israel. While India's trade includes agricultural goods, it has been wary of exchanging concessions on agricultural products of modern biotechnology. The resultant products are referred to as genetically modified or engineered (GM) food crops. At present, Bt (*Bacillus thuringiensis*) cotton is the only approved GM food crop for commercial production in India.¹ To ensure that only non-GM food crops are imported into India, on 21 August 2020, the Food Safety and Standards Authority of India (FSSAI) made it mandatory for an exporting country to produce a 'Non-GM cum GM free certificate' issued by its Competent National Authority. This order included a list of twenty four food crops. The United States, Australia,

Brazil and some other nations objected to India's FSSAI order at the WTO on the ground that it would create an 'undue burden' on exporting countries.² In the ongoing or future negotiations, if India were to open its trade for GM food crops, what are the potential challenges that India should address before actually permitting trade in GM crops?

The fundamental difference in understanding 'GM crops'

In the first place, what is a GM food crop or GM food? Are the techniques used to produce these remain the same everywhere in the world? No, Countries differ in drawing the scope of GM products. The Indian Ministry of Environment, Forest and Climate Change has clarified that 'Genetically engineered (GE) plants are plants, in which the basic genetic material (DNA) has been altered using genetic engineering techniques. In most cases the aim is to introduce a new trait to the plant. GE plants are also referred to as genetically modified (GM) crops, transgenic plants or biotech crops.'³ These, in turn, may be used to produce GM food through (genetic engineering) modern biotechnology.⁴ However, the GM food crop is a resultant product of modern biotechnology, irrespective of the usage of GM organisms during the process. It should be highlighted that the foundation techniques do not include traditional plant breeding methods, which have long been used in Indian agriculture to obtain the desirable characteristics and might take several years for the result.⁵

Some countries, for example, the US and Canada,



Photo Courtesy @Vectorjuice

consider traditional breeding techniques within the ambit of agricultural biotechnology and categorise the resultants as GM food crops.⁶ Some others, for example, the European Union and New Zealand, identify the conventional counterparts as different from their GM crops, like in India.⁷ There is no harmonization in the scope of GM crops. Along with the former set of countries, India's understanding of GM (blue circle) will fall as a subset of the larger (yellow) circle, while, in the latter countries, the circles overlap evenly. Therefore, the difference in understanding 'GM crops' could be the first potential barrier before undertaking FTA obligations with respect to these goods with other countries.



Diagram illustrating the difference in understanding 'GM crops'

Regulatory framework

The 2021 Draft Food Safety and Standards (Genetically Modified or Engineered Foods) Regulations are already in place in India. The draft has been opposed by many, since analysis depicts that the regulations have weak norms, for example, those relating to infant food and labelling.⁸ The above FSSAI order was published pending the framing of regulations for GM food crops. Although the order expresses that the exporting country should produce a non-GM certificate, it was later clarified by the FSSAI that the tolerance limit for adventitious presence (AP) of GMOs at 1% is permissible in the imported food crop consignments.⁹ AP refers to the detection of the unintentional presence of GM crops that have not been approved in any country.¹⁰ This is different from Low Level Presence (LLP) of GM content that is permitted to a minimal percentage by many other countries. LLP refers to the detection of low levels of GM crops that have been approved in at least one country.¹¹ Contrary to the requirement of a non-GM certificate, there is a permissible limit of 1% GM content in the listed imported consignments in India. In the guise of showing zero tolerance for LLP or a complete 'no' to GM food crops, India has allowed 1% of GM content, if present in non-GM food crops.

Is the tolerance level the same in the other countries? Again, no. It differs from one domestic system to another. The LLP AP incidents in different countries are graphed out on the FAO's website.¹² The EU follows a zero threshold for non-approved GM products while

applying a 0.9% limit to approved GM products.¹³ Non-GMO products may contain up to 5% GM material without the requirement to state that it is a GM product, in the US, Canada, and Japan.¹⁴ Other countries, such as Australia, New Zealand, South Africa, Brazil and China have lower thresholds of 1%.¹⁵ The difference in whether a nation applied AP or LLP could be the next potential barrier. Next, based on its decision to apply AP or LLP, the difference in the permissible limit will make the food safety assessment of GM crops more difficult.

Balance of rights and government's duty

Keeping in mind the controversies surrounding the trade in GM food crops, India ought to make a beeline toward consumers' and farmers' rights and food security. It is imperative to have a balance at these three levels before India decides to trade in GM food crops. At the same time when India's GM Regulation is in the draft stage, a study conducted by the Centre for Science and Environment (CSE) found that GM food is already available in the domestic market, and that most of them are imported.¹⁶ Consumers have the right to know and choose GM or non-GM products. Since activists against GM food crops argue that health concerns exist and there is no scientific consensus on the safety of GM crops or food, governments bear the responsibility to differentiate them in the market.¹⁷ For this purpose, India is yet to implement a strict labelling guideline for the sale of GM food crops and products.

One cannot write about GM food crops without quot-

ing Dr. Vandana Shiva. Her constant opposition and fight against GM food crops and products will help us understand the farmers' sovereign right to own the seed. She always campaigned that the seeds should be in the hands of the farmers, as giant corporations are trying to take over the world's seed supply and bring in food totalitarianism.¹⁸ It will be expensive for Indian farmers to follow modern biotechnology methods and buy seeds from corporations. Lastly, being a developing country, India should be careful of food security issues for its population. However, trading in GM food crops and allowing their cultivation in significant quantities could not become the only solution to tackle food security.

Conclusion

For many years now, Indian farmers have been adopting traditional breeding techniques, like cross breeding, to improve agricultural productivity and achieve desirable characteristics for tolerance. The first step towards resolving the said challenges is to implement strict regulations for GM food crops that include mandatory labelling requirements and food safety assessments. During negotiations, the scope of GM food crops should be clearly outlined by the parties, since the understanding of GM is different. The decision to trade should be made by maintaining a balance of rights and the government's duty to protect against food security.

1 Approved Products (Genetic Engineering Appraisal Committee) <<https://geacindia.gov.in/approved-products.aspx>>

2 Amiti Sen, 'US, Australia, Brazil Question India's Proposal for Mandatory GM-Free Certification for Food Imports' (Business Line, 9 November 2020).

3 Question 1: What are Genetically Engineered (GE) Plants? 'Frequently Asked Questions about Genetically Engineered (GE) Plants' Ministry of Environment, Forest and Climate Change (2015) (MOEF FAQ) p 2.

4 Food Safety and Standards Act, 2006 (FSSA), s 22(2).

5 MOEF FAQ, Question 2: How are GE Plants different from those developed using traditional plant breeding techniques? and Question 8: Are GE Plants assessed differently from conventional plant varieties? pp 2 and 8.

6 'Agricultural Biotechnology Glossary' (US Department of Agriculture) <<https://www.usda.gov/topics/biotechnology/biotechnology-glossary>>; Health Canada, 'About Novel and Genetically-Modified (GM) Foods' (Government of Canada, 26 July 2004) <<https://www.canada.ca/en/health-canada/services/food-nutrition/genetically-modified-foods-other-novel-foods.html>>

7 'GMO | EFSA' (European Food Safety Authority) <<https://www.efsa.europa.eu/en/topics/topic/gmo>>; Ministry for Primary Industries, 'Genetically Modified Seeds and Nursery Stock | MPI - Ministry for Primary Industries, A New Zealand Government Department' (Ministry of Primary Industries) <<https://www.mpi.govt.nz/import/plants-flowers-seeds-plant-growing-products/seeds-for-sowing/genetically-modified-seeds-and-nursery-stock/>>

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9 FSSAI's Clarification order, 'Requirement of Non-GM

cum GM free certificate accompanied with the imported food consignment' (8 February 2021).

10 Biosafety Unit, 'Technical Tools and Guidance for the Detection and Identification of LMOs' (The Biosafety Clearing-House (BCH), 18 July 2014) <https://bch.cbd.int/protocol/cpb_detection/toolsandguidance/topic4.shtml>

11 *ibid.*

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13 Regulation (EC) No. 1830/2003.

14 Ramessar K, Capell T, Twyman RM, Christou P, 'Going to ridiculous lengths – European coexistence regulations for GM crops' 28 (2) Nat Biotechnol. (2010) 133-36.

15 USDA Agricultural Marketing Service, 'National bioengineered food disclosure standard' Fed Regist. (2018).

16 'UNLAWFUL ENTRY: Illegal GM in Our Food' (Centre for Science and Environment) <<https://www.cseindia.org/unlawful-entry-illegal-gm-in-our-food-8880>>

17 Angelika Hilbeck and others, 'No Scientific Consensus on GMO Safety' (2015) 27 Environmental Sciences Europe 4 <<https://enveurope.springeropen.com/articles/10.1186/s12302-014-0034-1>>

18 Michael Specter, 'Seeds of Doubt' [2014] The New Yorker <<http://www.newyorker.com/magazine/2014/08/25/seeds-of-doubt>>

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Liberalization of Legal Services in FTAs

The legal services sector has been reported as one of the fastest-growing areas in the Indian economy and registered a staggering threefold increase in size from 2004-05.¹

The sector reached an estimated worth of INR 33,412 crore (USD 6.11 billion) as of 2012-13 and continues to grow.² Many Free Trade Agreements (FTAs) have identified the potential of this service sector and have sought to include express provisions on legal services or undertake liberalisation to benefit from this continued growth. Despite having a robust legal services market, India has never undertaken commitments on legal services at the World Trade Organization (WTO) under the General Agreement on Trade in Services (GATS) or in all its previous FTAs or any of its FTAs.

Since India is currently negotiating FTAs with key trading partners, including some of the most developed nations of the world, the old debate of whether India should open up the legal services sector under the trade agreements comes back to life. In this context, this article discusses (i) the definition and scope of legal services in certain FTAs and (ii) evaluates India's domestic regime around the same, (iii) concluding that there is sufficient policy space for India to consider possible commitments in this sector under its future FTAs.

FTAs and Legal Services

The FTAs that have been examined for the purposes of our analysis include (i) the ones that have dedicated provisions on legal services and (ii) the ones that have provided market access by liberalising legal services through their list of non-conforming measures or



schedule of specific commitments.

Several FTAs that have emerged over the years that contain explicit provisions on trade in legal services.³ Notable examples include the EU-UK Trade Cooperation Agreement (EU-UK TCA), the UK-Australia (UK-AU) FTA, and the most recent UK-New Zealand (UK-NZ) FTA. These FTAs serve as a reference point for other countries that are in the process of developing international trade in legal services or may consider doing so in the future.

The EU-UK TCA, for instance, which emerged following the United Kingdom's (UK) exit from the European Union (EU), contains provisions related to legal services within Chapter 5 (Regulatory Framework) of Title II on Services and Investment of the EU-UK TCA. Section 7 of this Chapter deals with legal services and defines the terms 'designated legal services,' and 'legal

Takeways for India

services'

The definition of 'legal services' in the EU-UK TCA establishes the scope of services that falls therein and seeks to exclude certain types of legal services from the ambit of the agreement. Such a clear definition helps legal service providers and recipients of legal services to understand the nature of horizontal obligations undertaken with respect to such services. Further, the EU-UK TCA makes a distinction between 'designated legal services' and 'legal services,' wherein the former is limited to practice of home country law and public international law⁴ and the latter includes legal advisory services and legal arbitration, conciliation and mediation services.⁵ In addition to defining the scope of legal services covered under the Agreement, the EU-UK TCA, also includes an Article titled "Obligations"⁶ which specifies the Parties' positive commitments on allowing registration of foreign lawyers, establishment of branch offices etc.

Unlike the UK and EU Trade Agreements mentioned above, many mega-regional trade agreements such as United States-Mexico-Canada Agreement (USMCA), Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the Regional Comprehensive Economic Partnership (RCEP) do not have dedicated provisions addressing legal services. Instead, in such mega-regional FTAs, parties have undertaken commitments on legal services in their respective schedule of commitments or in the list of non-conforming measure, depending on whether they have followed a positive or negative list scheduling approach.⁷ For example, Vietnam in its Schedule of Specific Com-

mitments under the RCEP Agreement has allowed the participation of foreign lawyers in legal proceedings in the capacity of defenders or representatives of their clients before the Vietnamese courts, while also allowing foreign law firms to establish a commercial presence in Vietnam, subject to certain conditions.

As noted above, the liberalization of legal services undertaken by the EU and the UK only extends to practice of international law and home jurisdiction law. In some cases, commitments on legal services may cover legal arbitration, conciliation, and mediation services. We note that similar policy flexibility in terms of legal advice on foreign law and international law is also present in India. Accordingly, India may consider leveraging this flexibility in its future FTA negotiations. The following section seeks to discuss the regulatory framework with respect to legal services in India.

Regulation of Legal Services in India

As previously mentioned, India has not made any commitments on legal services under the GATS, or any of its FTAs. This is because the domestic legal service sector has concerns and India has sought to reserve its policy space around the same for a variety of reasons. For instance, the Advocates Act of 1961, which is the relevant law regulating the profession of an advocate, mandates that only Indian nationals can practice law in India.⁸

However, the Supreme Court of India in the *AK Balaji vs. Government of India* case discussed the contours of supply of legal services through foreign service suppliers in India.⁹ The Supreme Court, in this decision,



interpreted the provisions of the Advocates Act, to suggest that, foreign law firms and lawyers may not set up offices in India, while allowing them to visit India on a temporary basis for two purposes, viz. providing their advice on foreign law, and for participating in international commercial arbitrations. However, such visitations should not amount to “practice of law”, and it has been left up to the Bar Council of India (BCI) to frame rules for the same. The BCI regulates the legal profession in India and draws its authority from the Advocates Act, 1961, and as such, should naturally occupy a seat in negotiations pertaining to the possibilities of liberalizing legal services under a free trade agreement that India signs. As reiterated in the Balaji judgement, foreign lawyers can only come to India on a ‘fly in and fly out’ basis for providing a narrow range of legal

services. Though rules pertaining to this permissible ‘fly in and fly out’ mode of practice for foreign lawyers within Indian territory are yet to be framed by the BCI and the Government of India, foreign lawyers come to India and routinely engage in international commercial arbitration proceedings.¹⁰

As India continues to negotiate FTAs with other countries, the opportunity to revisit and re-evaluate the restrictions imposed by the Advocates Act, 1961 and the BCI rules, should not be missed as it provides sufficient leeway to liberalize legal services to certain extent. As discussed above, the EU and UK have dedicated text dealing with the legal services, which distinctly outlines the scope and obligations. India can also adopt a similar approach, or in the alternative consider liberalizing the sector by way of undertaking commitments under the services schedule of FTAs and adopt reservations against such commitments which ensure that liberalization is within the scope of the Balaji judgement. However, any such measure will only be possible if the Bar Council of India takes positive step towards the framing of rules on ‘fly in and fly out’ services and the participation of foreign lawyers in international commercial arbitrations, since in the absence of any such guidelines or rules, there is lack of clarity on the extent to which commitments can be undertaken in an FTA.

It is pertinent to note that besides the obvious benefit of introducing new opportunities for law graduates¹¹ and positively impacting the quality and sophistication of legal services,¹² liberalization of such a sensitive and key sector would allow India to avail more favorable market access offers during FTA negotiations.

Conclusion

As observed earlier, efforts to liberalize legal services in FTAs are well underway. However, the extent of this liberalization is limited; as in most cases lawyers are only allowed to practice home country law and international law in the territory of a foreign country and in some cases, such liberalization also extends to ‘designated legal services’ such as legal arbitration, conciliation and mediation. India may take note of such practices and in its future FTA negotiations consider leveraging its policy space and use it to achieve more ambitious gains in sectors of its own interests from FTA partner countries.

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4 Article 193(g) of EU-UK TCA.

5 Article 193(a) of EU-UK TCA.

6 Article 194 of EU-UK TCA.

7 LEILA CHOUKROUNE & JAMES NEDUMPURA, *INTERNATIONAL ECONOMIC LAW 365* (Cambridge University Press, 1st ed. 2022).

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Interview with Dr. Srikar Reddy



Mr. Srikar K Reddy is currently a Joint Secretary in the Department of Commerce at the level of Joint Secretary. He is an officer of 2001-batch of Indian Foreign Service. He oversees four divisions, namely the Foreign Trade (Africa) division, which covers the Sub-Saharan Africa region; the Foreign Trade (WANA) division, which covers West Asia and North Africa region; the Exports Promotion (Engineering) division, which promotes the export of engineering products; and of the Trade Negotiations Bilateral (Goods) division. He also spearheaded the negotiations for India - UAE CEPA and India - Mauritius CECPA.

India has negotiated its first modern FTA with UAE after a considerable period of time. Could you explain the motivation behind choosing the UAE as a trading partner for the FTA and the scope of the Agreement? How do we see this as a doorway to greater trade engagement with the West Africa, North Africa and Middle East region?

We have chosen the UAE as a partner country to negotiate a Comprehensive Economic Partnership Agreement (CEPA), as India and the UAE have a long-standing, close relationship that had been elevated to the level of Comprehensive Strategic Partnership in 2017. The relationship has grown strong in recent years with exchanges at the highest level; between the businesses of both nations; and also, at the people-to-people level. The UAE is a key trading partner of India, where one-third of its population is of Indian origin. In terms of our export destinations, it is our second-largest trading partner, and when exports and imports are combined, it is our third-largest trade partner. In the financial year 2021-2022, our total bilateral trade was roughly 72.8 billion USD, with 28.04 billion USD in exports and 44.83 billion USD in imports. Also, India is UAE's top export market. The UAE has already made close to 18 billion USD in investments in India.

What is India's vision with respect to trade engagement with the region as a

India - UAE CEPA

whole, i.e. the GCC countries?

The UAE is one of the important members of the GCC Customs Union. Out of our total exports to the GCC region, over 70% have their destination as the UAE. So, the UAE already acts as a gateway for India, to reach out to the entire Middle East and North Africa region, to Africa, and also to certain areas of Central Asia. This was also one of the reasons for us to enter into a comprehensive agreement with the UAE. This is the most comprehensive agreement India has ever signed with any country in terms of exchange of concessions in goods and services. We also concluded chapters in new areas like the digital trade, government procurement, small and medium enterprises (SMEs), and also investment facilitation, which had never been part of our earlier FTAs. We are also currently in discussions with the GCC for the conclusion of a free trade agreement.

The new issues, which you just highlighted, such as SMEs, digital trade, obviously, investment facilitation as well. Can you elucidate the reasons for the change in India's viewpoint with respect to these new issues, since India is not actively engaging on these issues at the WTO?

I think on any trade-related matter, we can have a different position at the WTO vis-à-vis our position bilaterally with a single or group of countries, since we approach FTAs with partner countries from a different perspective. For instance, in assessing gains and losses at the WTO level, we have to take commitments with



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164 members, which is different from bilateral engagements. So, when it comes to negotiating an FTA with friendly countries like the UAE, we took a call to be open to discuss anything on the table, while at the same time safeguarding our interests. We held extensive consultations with various stakeholders from industry and line Ministries to formulate our position on new areas during the CEPA negotiations with the UAE. We have taken commitments on newer areas mostly on a best endeavor basis. From the experience gained by negotiating with the UAE in these newer areas, I think we will be in a better position to engage with our partners in the ongoing FTA negotiations.

As you mentioned that most of the provisions are on a best endeavor basis when it comes to these new chapters. You also mentioned discussions with stakeholders. Now that the Agreement has been signed, what could be the first steps,

“ Post conclusion of the India-UAE CEPA, we have been flooded with requests for trade agreements. We are already engaging with the UK, Canada and the EU and these agreements are in different stages of negotiations ”

either at the level of government or businesses, to make sure that the vision is materialized and we can see positive results of this Agreement?

The Agreement has entered into force from the 1st of May this year. Businesses on both the sides are already taking benefits from the Agreement.

First, we are reaching out to the stakeholders through virtual and physical outreach events to sensitize our exporting community regarding the opportunities which arise from this Agreement. The Department of Commerce has held physical outreach events in various important cities, namely Hyderabad, Bangalore, Chennai, Mumbai, Surat, and Agra. Secondly, we are working with the Export Promotion Councils to organize business delegations to Dubai and Abu Dhabi. The Indian Embassy in Abu Dhabi and the Consulate in Dubai are organizing Business-to-Business (B2B) meetings to en-

hance exports of various products, especially in labour intensive sectors such as gems and jewellery, textiles, leather, and engineering products. As gems and jewellery export contributes over one-third of our exports to the UAE, the Gems and Jewelry Export Promotion Council (GJEPC) has set up the first of its kind Indian Jewelry Exposition Centre (IJEC) in Dubai. This is a 3000-square feet area Centre, which will enable MSMEs in the gems and jewellery sector to exhibit their products and reach out to more buyers from the UAE, other Middle East countries, and also from other neighboring countries. We have already seen a 16 % exports growth in this sector in the first two months (May- June 2022), since the entry into force of the Agreement. The UAE side also led a Ministerial level business delegation to India in May 2022. They visited Delhi and Mumbai for business interactions and organised events to publicize the benefits of this Agreement. We are hopeful that whatever gains that we had envisaged for India when we entered into the agreement, will be achieved in the next 5 years.

Clearly, there is an attempt to integrate the MSMEs under the Agreement. Have there been any discussions where the domestic capacities and needs of India's domestic industry can be augmented and fulfilled through the provisions or discussions under the CEPA. How can we see this help in improving the domestic capacities of our industries?

As the UAE offered India zero market access on over 97% of the tariff lines and 99% of our exports in value



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terms, our entrepreneurs or exporters can export more because their products would become more competitive in the UAE market. They can enhance the overall production or manufacturing capacity of that product. Second, in certain sectors, there will be creation of regional value chains. For example, for the plastic industry, we are allowing input materials like polyethylene and polypropylene to come into India from the UAE at a concessional rate, which will serve as input materials. These cheaper input materials would make the finished plastic products competitive, which can be re-exported to the UAE at zero duty and also to other markets. Third, the UAE has promised to invest about 75 billion USD in India. At the Commerce Ministerial level - exchanges held during the months of March and May this year, showed that the industries in both the countries were exuberant about the investment oppor-

tunities. These are the ways we envisage that the Agreement would benefit the growth of the manufacturing industry.

Focusing now on the services sector, the UAE has a thriving financial services sector. India has progressed by leaps and bounds, especially with the advent of Unified Payments Interface (UPI). Can you please highlight some aspects in the services commitments, where India's offensive interests have been prioritized?

In trade in services, both the countries have taken broader and deeper commitments when compared to their previously concluded FTAs, both in terms of sectors and also the modes of services. For instance, India has offered around 100 sub-sectors to the UAE

similarly, the UAE has offered around 111 sub-sectors to India. India is expected to gain substantially in computer-related, audiovisual, education, healthcare, travel and tourism, professional and other business services. To reiterate, one-third of the population of the UAE is of Indian origin, who are engaged in all kinds of professional services. I think the employment opportunities that will be created in this service sector will benefit the Indian community in the UAE and more Indians will get employment opportunities in the UAE. This will also contribute to enhance the remittances to India. At present, Indians residing in the UAE send around 20 billion USD per annum in remittances.

Can you throw some light on the approach towards scheduling services commitments under this Agreement, whether India adopted the positive list approach or the negative list approach for scheduling commitments? Has there been a different approach towards making commitments in the services sectors?

Both the sides followed the positive list approach. According to figures from the World Bank, 47.7% of the Indian GDP in 2021 came from the services sector and the UAE services sector accounts for 58.2% of their GDP. This gives enormous opportunity in all the area of services. In financial services, the UAE has committed market access to India in insurance, insurance-related services, banking and other financial services.

Are there avenues through which busi-

ness-to-business engagements between Indian and the UAE businesses, have been facilitated through this Agreement? How does the Agreement facilitate greater interaction between the businesses in the two countries?

As I mentioned, for the first time we have a chapter on small and medium enterprises. There is a framework for cooperation between the MSMEs of both the countries. We also have the usual high-level Joint Task Force on Investment, at the ministerial level. So, there is a framework for cooperation in all the areas of economical and commercial interests to the two countries. Separately, we are using the services of the diplomatic missions and business associations in both the countries for organizing B2B events to facilitate MSMEs for the better utilization of concessions provided under the Agreement.

There have been reports about stringent Rules of Origin provisions in the Agreement. Or perhaps this might not be the case. Can you please explain India's position in having such provisions? What is India's approach towards Rules of Origin under this Agreement?

The UAE is the entry port to most of the countries in the Middle East and Africa, and this was taken into consideration when we engaged with the UAE. We have product-specific rules of origin (PSRs). These rules of origin are not too stringent in the strictest sense.

They are meant to prevent trade diversion, but at the same time facilitate free and fair trade. We have wholly obtained criteria for certain products. For other products, we have Rules of Origin for ensuring substantial transformation with change in the tariff classification at four-digit or six-digit plus a value addition up to 40 to 45%. For some products, the value addition requirement is less. For example, under the gems and jewellery segment, the value addition requirement is only 3 to 6 percent. The Certificate of Origin has to be issued by the UAE's Ministry of Economy. For India, we have various government agencies that will be issuing the Preferential Certificate of Origin under the Agreement. In addition, to take care of any trade diversion or related matters, we have trade remedy measures. For the first time, we have negotiated for permanent safeguard measures under this Agreement, unlike in our previous agreements, where these bilateral safeguard measures were transitional. This will help our industry if there is an unexpected surge.

In this respect, there must have been interdepartmental discussions on adopting such approach. Can we see a similar approach with India's ongoing or future FTAs or is it dependent on the negotiation outcome of bilateral discussions?

Yes, all tariff concessions exchanged between the two countries along with the Rules of Origin were finalized in consultation with our stakeholders. Let me mention here about one of the important rules of origin criteria – “melt and pour”, which has been inserted at the

request of the steel industry. This is the first time we have incorporated such a criteria in any of our agreements; this criteria was later included in the India - Australia ECTA. The criteria states that the steel has to be produced in a blast furnace before it is poured into a solid form. This acts as a safeguard and prevents any trade diversion, if little value addition is happening for steel products in the partner country.

Now, there is a comprehensive agreement concluded by India with UAE. Because of this, has there been a change in perception about India by other countries who are seeking certain benefits or concessions from India and may become optimistic about getting these concessions?

Yes. Last year, I was part of the India - Mauritius CECPA that entered into force on 01 April, 2021. This year, I was fortunate to be part of the India-UAE CEPA. We have concluded a comprehensive agreement with the UAE in a record time of less than three months. This happened because of the mutual trust at the highest level, i.e., at the ministers' level, and at the level of the negotiators. Post conclusion of the India-UAE CEPA, we have been flooded with requests for trade agreements. We are already engaging with the UK, Canada and the EU and these agreements are in different stages of negotiations. We also held preliminary discussions for FTAs with the Gulf Cooperation Council (GCC) and Israel. We are also trying to proceed with a PTA with the Southern African

Customs Union (SACU). We are hoping to conclude some of these agreements by the end of this year.

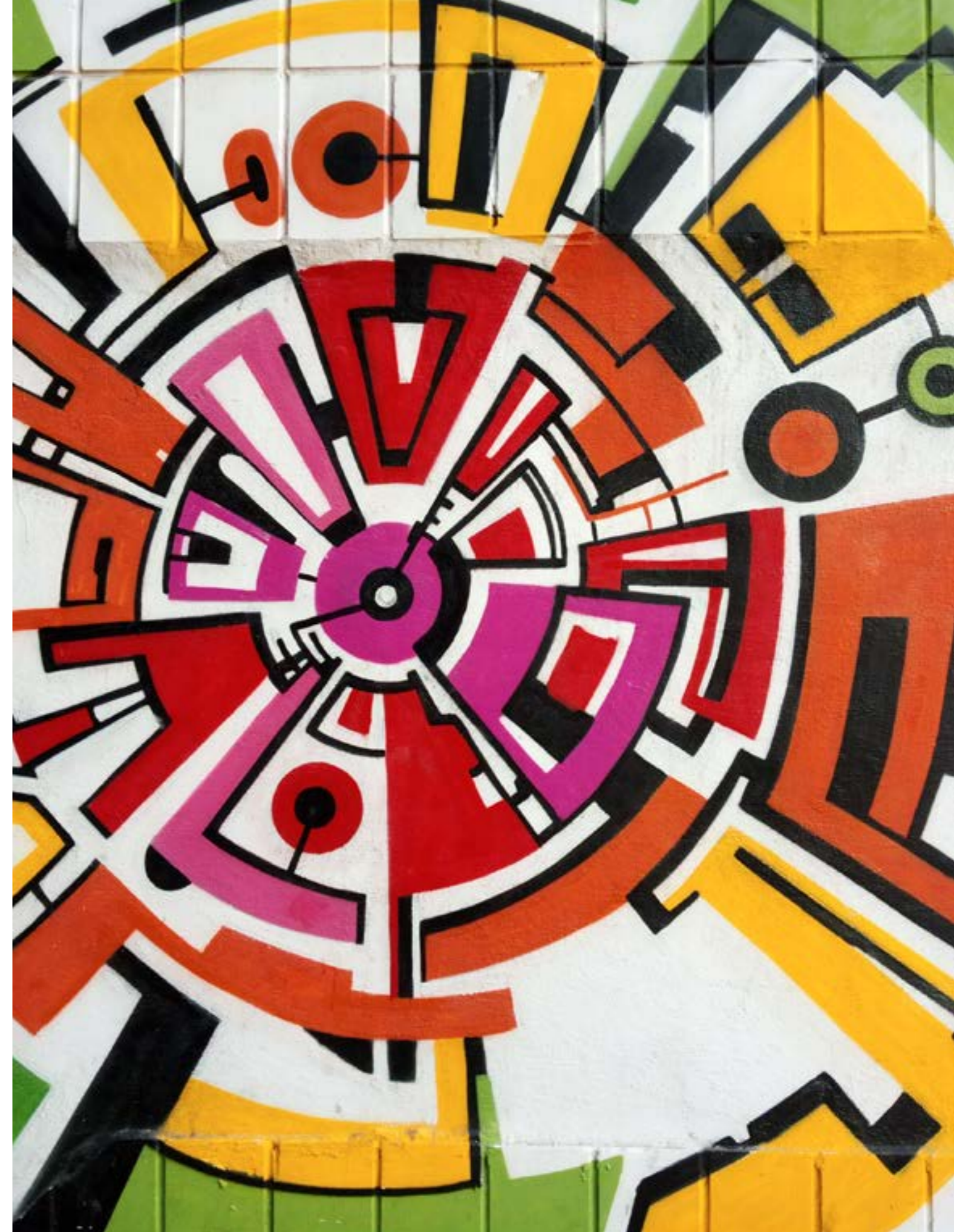
One criticism from the industry, concerning India's previous FTA experiences is that India has not been able to realize the market access commitments under its FTAs with Japan or Korea. There has been a common understanding that we have not gained much market access in their territory as opposed to these countries' market access gain in India. Are there lessons to be learned from the past experiences? Also, how can we approach the newer generation of FTAs in a more nuanced manner?

India has also benefited from the earlier FTAs. Analysis of the preferential trade data with the FTA partner countries shows that our exports have also increased significantly. For the ongoing FTA negotiations, we are following the whole of the government approach. This involves involving stakeholders at all stages of negotiation, in order to evaluate the benefits of the agreement. During the CEPA negotiations with the UAE, we have had intensive consultations with all the industry stakeholders and the concerned line Ministries. So, when we signed this comprehensive agreement with the UAE, all stakeholders were on board. Our Hon'ble Commerce and Industry Minister, Shri. Piyush Goyal also mentioned in a recent public event that since the signing of the Agreement with the UAE in February, we are yet to see any negative article criticizing the Agreement with

the UAE. And as I mentioned earlier, we are also doing outreach events to sensitise our industry stakeholders to take full advantage of the Agreement. We hope that the same will be reflected in the trade figures at the end of this year.

Can you please explain the role played by CTIL's in the UAE negotiations or generally with regard to working along with the Department of Commerce on a day-to-day basis?

CTIL played an important role in the conclusion of the agreement with the UAE, with its dedicated legal team under the able leadership of Prof. James Nedumpara. The members of the Center, including Prof. James, participated in almost all areas of negotiations, and provided sound research-based technical inputs. These inputs were quite useful in negotiating the full Agreement, including the new areas that we negotiated for the first time. I thank the CTIL team for their invaluable support during the negotiations and also doing the legal vetting of the Agreement in coordination with the Ministry of External Affairs. Overall, CTIL team played an significant role in concluding the Agreement in a record time of 88 days.



Discerning Partial Application of Dispute Settlement

There has been an increasing shift from multilateralism to bilateralism. Apart from focusing on market access, the modern free trade agreements (FTAs) focus on a wide-ranging array of topics including labour, competition, environment, gender, small-medium enterprises, etc.

Subjecting provisions of an FTA to the dispute settlement mechanism (DSM) optimizes the level of responsiveness regarding the commitment undertaken in the FTA.¹ However, in certain FTAs, various chapters such as government procurement, (e.g. Article 10.5, India-United Arab Emirates Comprehensive Economic Partnership Agreement), gender (e.g. Article 25.8, United Kingdom-New Zealand FTA), SMEs (e.g. Article 20.5, United Kingdom-Japan Comprehensive Economic Partnership Agreement), etc. are not subject to dispute settlement. Irrespective of the issues that the chapter of an FTA addresses, and regardless of whether it is a hard or a soft obligation, the non-availability of the dispute settlement procedures for such chapters questions their validity, since it may be argued that the FTA partner does not face any consequences upon its breach.²

Against this background, the present Article focuses on the benefit conferred on chapters in an FTA that are not subject to the dispute settlement mechanism.

Identifying the Reasons for Non-Application of Dispute Settlement

1. Discretion of countries regarding the

application of dispute settlement

One of the fundamental reasons behind the non-application of dispute settlement in certain chapters is to allow the FTA parties to have discretion over the 'content of obligation'.³ Tadeusz Gruchalla opines that such discretion over the content of the obligation is not unlimited. After a limit, such chapters contain an objective element which is enforceable through non-legal sanctions which are generally political in nature.⁴

2. Objective of cooperation rather than enforcement

In such chapters, some commitments are also mandatory in nature. For instance, Article 14.2 of Canada - Israel (Information Sharing) imposes a mandatory obligation on the Parties to establish a publicly accessible website containing information of relevance to the SMEs. Other commitments under such chapters are in the nature of recognition, acknowledgement, co-operation and co-ordination. The importance of these chapters lie in the fact that they play a vital role in creating opportunities for institutional ties between the relevant domestic agencies of the FTA parties dealing with those issues. And allows them to learn from each other's domestic policies. Additionally, subjecting these chapters to the dispute settlement may not be an effective way to address the issues as the instrumentality lies in co-operation and co-ordination.⁵

3. Commitment in the domestic sphere

Domestic laws on certain issues (e.g. competition) vary across FTA partners. Taking commitment on these

Mechanism under the FTAs

issues, may impose administrative as well as economic burden on the FTA partner due to the differences in their respective domestic regimes. Therefore, when these chapters are incorporated in the FTA, they create binding commitments for the FTA partner - to be implemented in their domestic regime.⁶ For instance, Article 17.1 of the Competition Chapter in the UK-Australia FTA requires FTA partners to have competition laws (a) proscribing anti-competitive agreements, and anti-competitive practices by entities that have substantial market power; and (b) addressing mergers with substantial anti-competitive effects. The non-application of dispute settlement ensures that the domestic position of a country is not overturned by an adjudicatory body established pursuant to the agreement, which is primarily concerned with trade liberalization. Consequently, it allows the parties to accommodate their socio-economic interests and effectively deal with the uncertainties in the application of these provisions.

4. Reputation and branding effect

Despite the non-application of dispute settlement provisions on these chapters, the mere presence of these chapters in an FTA have a symbolic meaning. This signals reputational and branding effect as to the importance of these issues to a country's policy-making.⁷ In other words, it highlights the government's views on such policies and thereby indicates that the government is committed to taking reformative measures on these issues.⁸

5. Paving the way for a multilateral agreement

The absence of a mandatory dispute resolution mechanism for certain provisions of the FTAs makes them soft law.⁹ Inter alia, soft law fulfils basic functions such as providing simplicity, adaptability, speed and flexibility, making it relevant in international law.¹⁰ Consequentially, the inclusion of these politically sensitive issues in soft form lends credibility to the international trade regime and gives equal consideration to non-trade issues like gender, SMEs, etc.^{11 12} The proliferation of these issues in the FTAs also motivates the countries to pursue such issues at the multilateral level. For instance, now gender is not only an issue limited at the bilateral level. Certain WTO Members have issued Joint Declaration on Trade and Women's Economic Empowerment on the Occasion of the WTO Ministerial Conference in Buenos Aires in December 2017. Further, at MC12, the WTO Members issued another statement on gender and a draft Ministerial Declaration to address challenges faced by the MSMEs. To summarize, addressing these issues in the FTAs have the possibility of such issues being brought to multilateral discourse.¹³

6. Resolution of deadlock during the negotiation

Another important reason behind the non-application of the dispute settlement provision in the FTAs is to resolve the deadlock on these issues that emerge during their negotiations and thereby allowing parties to reach a consensus.¹⁴

Conclusion

The dispute settlement provisions in an FTA estab-

lishes a framework to enforce compliance with the obligations under the FTA. However, it is observed that certain chapters under the FTAs are not subjected to the dispute settlement mechanism. As discussed above, there are a number of factors guiding the decision as to the application or non-application of the DSM to certain chapters. As a policy matter, the inclusion of chapters, which are beyond the application of the DSM, promotes reforms at the domestic level, and cooperation among the FTA parties. The benefits incurred by the inclusion of these chapters outweigh the necessity of strict compliance and enforceability. The resources of the FTA parties may be utilised in capacity-building, enhanced cooperation at the bilateral level or at the multilateral level.

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Government Procurement in FTAs



The lucrative opportunities available in public procurement markets have created a need for fair competition, transparency, and integrity in national procurement policy frameworks. However, some governments, particularly developing nations, use procurement to promote domestic policy goals and uplift sensitive local industries and social groups. There is a perceived conflict between developing and developed countries over the liberalization and transparency requirements of government procurement (GP). The analysis of this paper will focus on India's engagement with GP in free trade negotiations, with an emphasis on the divergences from the 2012 Government Procurement Agreement (GPA) which largely represents the interest of developed countries.

Presently, India has only one comprehensive GP chapter in its FTAs - concluded under the India-UAE Comprehensive Economic Partnership Agreement (CEPA).¹ The India-UAE CEPA represents India's intention to liberalize its GP market while also ensuring that GP continues to be a tool to promote socio-economic empowerment. We will focus on two key divergences – the usage and transparency requirements of electronic procurements and the inclusion of offset which is generally defined as a condition for procurement relating to local content requirement, technology transfer, preference to domestic suppliers, etc.² This essay seeks to argue that India should continue to seek reservations in these two areas to protect its policy space and account for the limited availability of resources.

An Indian Experience

Friction between Developing and Developed Countries

Discussions on general non-discriminatory provisions on government procurement were first raised by the United States (US) during International Trade Organisation (ITO) negotiations. However, this proposal failed to find traction. Ironically, the US actively practiced offset through the Buy American Act, introduced in 1933. This rule pre-dated the General Agreement on Tariffs and Trade (GATT) and was thus grandfathered when the GATT was signed. Thereafter, the OECD undertook efforts to re-introduce rules on government procurement. The framework developed by the OECD is an amalgamation of the procedure and practices of the United States and the European Economic Community. Following this, the OECD draft framework was transferred to GATT negotiations in the Tokyo round. The first GPA, the Tokyo Round Code on Government Procurement (Code), was largely based on the OECD framework. The 1996 GPA succeeded the Code and came into force on 1 January 1996 in the WTO. WTO Members continued to expand the coverage of GP and renegotiated a revised GPA which was signed in 2012.³

While the 2012 GPA was drafted to provide indiscriminate access to procurement markets, developed countries' continues to provide preference to local suppliers in a manner which is outside the scope of GPA. As seen with the UK's social value system, social criteria such as local employment, among others, are applied over and above the financial value criterion wherein, such criteria would put additional financial burden on Indian

suppliers. Thus, GPA rules favours developed countries to enter into the procurement market of developing countries.

Since its inception, discussion on GP have largely been dictated by the interests of developed nations. Developing countries have expressed concerns over a multilateral GPA as early as 1999, when India, Egypt, Indonesia and Pakistan expressed the importance of GP as a tool for developing countries to undertake 'social and development objectives'.⁴ Given these concerns, a multilateral GPA that accounted for the concerns of developing countries seemed unlikely. Thus, only a plurilateral arrangement was agreed upon in the form of the 2012 GPA, which was mostly signed by developed nations.⁵

The 2012 GPA primarily addresses the concerns of developed countries, focusing on robust transparency and extensive liberalisation of market access, while only providing a temporary solution for developing countries in the form of a transition period. Thus, concerns over the dilution of government procurement as a tool for achieving social and development objectives were left unaddressed. Some of the concerns important to India, that were unaddressed, for instance, is the preferential treatment provided to Micro, Small and Medium Enterprises (MSMEs), Khadi and Village Enterprises (KVEs) and other minority groups with respect to government procurement. Additionally, domestic suppliers in developing countries lack the capacity to compete in foreign markets, leading to increased market access disproportionately benefitting suppliers in developed countries that are free to exploit lucrative markets in

developing countries.⁶

Some scholars have pointed to the immense cost of complying with the obligations under the 2012 GPA. Particularly, with respect to obligations on transparency, and the establishment of an independent domestic review system to address grievances under the GPA.⁷ Additionally, the current scholarship has expressed concern that India may be unable to efficiently utilize the carve out for critical sectors under the 2012 GPA due to the lack of reliable data on the total value of procurement.⁸

Burdensome Requirement for E-Auctioning and Maintenance of Statistics

The 2012 GPA assumes that parties have the resources to conduct either most or all of their procurements electronically and includes a mandatory obligation with respect to how these e-procurements will be conducted. The requirement for conducting the e-procurement mandates burdensome transparency standards such as the traceability of data that shows the conduct of the electronic procurement.⁹ This may be contrasted with the India – UAE CEPA, in which this obligation has been undertaken on an ‘endeavour’ basis, with respect to the promotion of e-procurement.¹⁰ The India-UAE CEPA recognises the inability of procuring entities to adopt an e-procurement system for all sectors, thus only imposing a soft obligation to promote its usage.

India has made active efforts towards the promotion of e-procurement, via the National e-Governance Plan (NeGP) in 2006 which sought to promote e-governance in India, including the increased usage of e-procure-

ment. However, an Apex Committee Meeting on 29th June 2010 highlighted the lack of implementation of e-procurement in India since the launch of the NeGP.¹¹ The primary problem arising with the implementation of e-procurement is the decentralised nature of government procurement in India, the cost of establishing the necessary IT infrastructure and the technical training required by officers to manage the system. To this date, there continues to be difficulty with respect to implementing an effective e-procurement system in all sectors. Thus, even with the three-year transition period for developing countries in the 2012 GPA, India would have immense difficulty fulfilling the 2012 GPA's traceability and transparency requirements.

The India-UAE CEPA contains no provisions regarding the collection and maintenance of statistics. The 2012 GPA on the other hand mandates members to report statistics on areas such as the total value of procurement, breakdown of the total value of procurement as per an internationally recognised classification system and the methodology used for data collection.¹² Such an obligation would be unfeasible due to the lack of reliable data collection with respect to procurement in India.

Onerous requirement to remove offsets

The 2012 GPA prohibits offsets but provides an exception for developing countries during the transition period, provided that the notice of intended procurement states that the offset will be applied non-discriminatory.¹³ Thus, these offsets can be used for the qualification to participate in the procurement process and not be a

criteria to award contracts.¹⁴

The temporary and limited nature of the exception for offsets fails to account how developing countries utilise offset to enhance income, employment and assistance to vulnerable industries exposed to globalisation.¹⁵ In India, the MSME sector is the second largest employer while also contributing to inclusive and sustainable economic growth.¹⁶ The Indian government used schemes like the Public Procurement Policy for Micro and Small Enterprises (MSEs) Order, 2018 to promote the employment of marginalised groups.

The India-UAE CEPA acknowledge the same and provides for preferential treatment in addition to facilitating the participation of the MSME sector, thereby promoting stable employment.¹⁷ By not prohibiting the offset(s), India-UAE CEPA also provides policy space to the parties to use procurement to assist their development goals.

Conclusion

Since most developing countries are not part of the 2012 GPA, government procurement has become a key issue in bilateral FTAs between developed countries and developing countries, where developed countries would not enter into an FTA unless there is a GP Chapter in such Agreements. FTAs have become the only avenue for developed countries to access government procurement markets in developing countries.¹⁸

Keeping the same in mind, the GP chapter in the India-UAE CEPA shows India's willingness to liberalize its government procurement regime, while ensuring

that it retains policy space to align with its developmental and domestic policy goals.

1 Previous negotiations between India and EU began talks of including a GP chapter 9 years ago in the trade agreement. With India rekindling negotiations with the EU, there is a strong certainty that EU will repeat its previous demand for a GP chapter.

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14 Ibid, Article XIV (b)

15 Public Procurement (Preference to Make in India) Order; Public Procurement Policy for Micro and Small Enterprises (MSEs) Order, 2018.

16 Ministry of Micro, Small and Medium Enterprises, Annual Report 2020-21.

17 Article 10.22, India-UAE CEPA.

18 Martin Khor, 'Government Procurement in FTAs: An examination of the issues'



Pushkar Reddy and Imjot Kaur are Research Fellows at the Centre for Trade and Investment Law. Views expressed are personal.





DEVELOPMENT

Internship



OPPORTUNITY



EXPERIENCES



PMI-CTEI-CTIL Internship



On November 26, 2021, the Centre for Trade and Investment Law signed a historical tripartite Memorandum of Understanding (MOU) with the Permanent Mission of India to the WTO, Geneva (PMI) and Centre for Trade and Economic Integration at The Graduate Institute, Geneva (CTEI). The MOU consisted of five cooperation elements between CTEI and CTIL, one of which included internship opportunities provided by CTIL to the students from CTEI.

As a flagship programme under the MOU, CTIL created an internship programme exclusively for the students from The Graduate Institute, jointly selected by CTEI and CTIL. Given the high number of Indian students studying at The Graduate Institute and an ardent interest shown by them in this opportunity, the PMI-CTEI-CTIL Internship Programme began the first batch in March 2022 and runs the programme for a duration of 3-4 months with an expected work requirement of 20 hours per week per intern. Through the PMI-CTEI-CTIL Internship Programme, the students obtain a unique exposure towards the contemporary, practical and highly relevant issues being discussed in the realm of international trade. The faculty at CTIL act as mentors to the CTEI interns with a structured chain of command and flexible communication channels created. Since the students continue pursuing their ac-

ademic courses in Geneva while interning with CTIL, the flexibility of remote-internship is not only afforded, but also promoted. This ensures that the students are able to balance between their academic commitments and their internship tasks. While the interns are able to work on research-based assignments allotted by their Mentors at CTIL, they also get an opportunity to meet and interact with the officials of the PMI in Geneva.

This exposure has catered to the research-interests of students as they get to work on tasks designated to them by the PMI as well. The PMI assignments are especially important for the students, since it requires them to be updated with and contribute to the discourse taking place in Geneva – at the WTO as well as among the Permanent Missions. At the end of their internships, the interns are required to prepare a report of their work done and get them approved by the Mentors. Once the Mentors approve the report and the students present their contributions to the representatives from CTIL, CTEI and PMI, their internship is considered to have been successfully concluded and they are awarded with a Certificate jointly signed by the three signatories of the MOU. On special considerations and recommendations from the Mentors, the students may be granted an extension of their internship.

PMI-CTEI-CTIL Interns



Himanil Raina

Himanil Raina is a PhD candidate working on the topic of National Security and International Law at the Geneva Graduate Institute (IHEID), under the supervision of Professor Andrew Clapham. He also works as a Teaching Assistant at the Graduate Institute and is a Legal Assistant at the International Law Commission. Prior to completing his Master in International Law at IHEID, he worked at the National Maritime Foundation and attained his B.A., LL.B. (Hons.) from the NALSAR University of Law.

Shambhavi Pandey

Shambhavi is currently pursuing the LL.M. in International Dispute Settlement (MIDS) in Geneva, Switzerland. Her areas of interest include international trade law and investment arbitration, with a focus on the co-existence of the rights and obligations under the WTO agreements and free trade agreements. Shambhavi completed her B.A., LL.B. (Hons.) degree from the National Law School of India University (NLSIU), Bangalore, with an exchange semester at the University of Zurich as a Heyning-Roelli Foundation Scholar.



Sanjana Sharma

Sanjana Sharma has been practising dispute resolution since 2014 after her graduation from National Law University, Jodhpur and holds an LL.M. in International Dispute Settlement (MIDS), Geneva. She has actively advised and represented State and private entities in complex litigations and arbitrations, across industries ranging from foreign investment, electricity, mining, construction and infrastructure.



Interview with Mr. Ashish Chandorkar



Mr. Ashish Chandorkar is a Counsellor in India's PMI to the WTO at the Director level. Mr. Chandorkar is the first private individual to be appointed as Counsellor to the PMI. Mr. Chandorkar took part in key negotiations at MC12 in Geneva, such as permanent solution to PSH, removal of export restriction for food aid to the WFP, the Fisheries Subsidies Agreement, moratorium on E-Commerce and the TRIPS waiver.

Prior to joining the PMI, Mr. Chandorkar was a director of the Smahi Foundation of Policy and Research, a Bangalore based policy think tank which he co-founded. Mr. Chandorkar has over 21 years of experience working in global firms and technology transformation projects.

Greetings Mr. Chandorkar, thank you for taking the time to talk about the MoU between the Permanent Mission of India to the WTO (PMI), Centre for Trade and Investment Law (CTIL) and the Centre for Trade and Economic Integration at the Graduate Institute (CTEI). Can you give us a brief background of yourself and what you do at the PMI?

I am the counsellor for the non-agriculture market access or the NAMA area at the PMI. I also look at e-commerce and the environment. NAMA focuses on the trade monitoring aspect of the WTO. E-commerce and environment are two areas that are constantly evolving and may have significant roles to play in the coming years.

Before working at the PMI, I was in the private sector, specifically consulting and banking for 21 years. I'm the first person from the private sector to be appointed to the PMI as a counsellor. It's been exciting to work with the government and contribute to India's perception at a time when things are very agile and fluid at the WTO.

You have witnessed how smaller missions from other countries have engaged with external non-national experts. How do you determine the form of capacity building required in your work with the PMI and based on your interactions with the missions from other countries? How



do you see the need for capacity building amongst young trade policy aspirants to be fruitful for India's trade interests?

There are three points to be kept in mind. First, Members have a great interest in India's position and government policies. One of the key functions at the PMI is to engage formally and informally with other WTO Members bilaterally. Capacity building should not be limited to just the government. There is also a need for sharing information on India's priorities and policies for trade.

Secondly, based on India's data and progress in the last few years, India will soon be a leading exporter of goods and services. As a large player at the WTO, there's a need to strengthen the economy and export quantum. Thus, there is an expectation that India will constructively participate in the WTO. We did that during MC 12. We precisely put forth the relevant facts and shaped conversations. This position will have to continue as our integration continues to strengthen because of our increased exports. This requires building capacity both with the government and domestic industry as the exporters continue to understand

the global trade architecture. Currently, the industry mostly focuses on domestic discussions such as tax policies, market challenges and opportunities. In other countries, they have used trade law to their advantage, especially the more technical areas like SPS or TBT. This knowledge has to permeate in the industry on a broader basis.

Thirdly, the capacity building cannot only be done by the government and must also be done with exporters. Exporters need to invest in building capacity such as by creating an association. Since many exporters are not big, a collection of exporters can work together to create industry associations, or they can approach experts that work in a specific domain. They need to understand these factors in a systematic way and not just when a problem arises. In some countries, when an issue arises, the industry reaches out to their government proactively to understand the opportunities and problems. Thus, training must not only occur in India but also outside India.

You have taken the reins at the PMI level on the tripartite MoU between PMI, CTIL and CTEI. What is your vision with respect to this MoU? Secondly, how do you see the PMI's role as a facilitative entity in this tripartite MoU to make sure that these visions are achieved?

The tripartite MoU that was signed between PMI, CTIL and CTEI was a fairly old idea. The MoU came at a time when India's own position is being appreciated in terms of its qualitative involvement. This reflects our

willingness to engage more constructively with external entities, especially here in Geneva which is a hub for international law. We realised that a number of Indian students come to Geneva to study international law as a part of their higher education. As the Hon'ble Prime Minister has been saying, every Indian student that is outside India is like an ambassador. This MoU helps to further that idea, by exposing these students to the practical side of trade negotiations such as the opportunities, constraints and the justification for policies. Which will aid them in understanding India's position.

The commentary on international trade policy lacks appreciation for India's position. This MoU will help in building an influential trade community that appreciates India's position. Of course, it's for each individual to interpret that in their professional life, but at least having that exposure is important. The one critical aspect which we will have to execute here in Geneva is to engage with the Graduate Institute more broadly. It is a very reputed and prestigious institute with a 100-year legacy and a strong alumni network. So, we hope to tap into those networks on a broader basis beyond the internship programme and convey our message in a more structured way. Now that the pressure of MC 12 has been lifted, discussions between CTIL and CTEI can be engaged more broadly. So, the internship is just the start. This year we had a good start with three interns for almost two and half months which I hope will continue in the coming years.

When you talk about engaging with the Graduate Institute beyond the disciplines provided in the MoU, what could be the

other areas that can be tapped into by the interdisciplinary approach provided by the Graduate Institute to Indian students?

The Graduate Institute appreciates the perspective of the developing world. But their programmes and professional networks usually stem from individuals in the West that have a certain lens towards global trade flow. This lens brands India as an obstructionist, which I would say is an unjustified view. This perception fails to understand India's position. However, that position is starting to change as seen with the recent commentaries on MC 12. Bodies like the Graduate Institute are the ideal place to impress upon our considerations and challenges. The vehicle of this objective will depend upon their acceptance and willingness to engage with our message. The messages communicated can revolve around the conflict between sovereignty and market access, digital trade and environment. These topics are critical from the perspective of developing countries and will open democratic systems and promote integrated global supply chains. This needs to be impressed upon the professionals working in Geneva and this MoU can pave a path for that, assuming that the Graduate Institute is open towards reciprocating these conversations.

Can you tell us what has been your experience with the first batch of CTEI interns? What type of projects have they worked on?

There have been three interns that we've had so far - Shambhavi Pandey, Himanil Raina and Sanjana

Sharma. They worked on two projects – one was with respect to providing inputs on the new chapters in the ongoing FTA negotiations and the approach taken by India's partners; the other is with respect to research on some evolving topic like carbon border taxes in some countries, and commentary on investment treaties. The research they conducted had a fairly broad coverage. We were also able to understand the perception of these topics externally because the interns would often engage with these topics with their peers from other countries. The broad picture, which includes the aspects I mentioned earlier like India's positions and considerations as a whole, I can say with some confidence has been useful to them. To understand trade as not just an isolated area but also an extension of government priorities. The larger sets of consideration such as sovereign interest and industrial policy come together along with trade as cogs in a wheel. I'm certain that they will transmit these ideas to their Indian peers and peers from other countries in a nuanced manner. This is the biggest takeaway and the primary objective of the internship programme which has been quite successful. The PMI looks forward to having more interns in the months to come.

The MoU is not limited to only students from a trade or law background but also includes students from an economics and international relations or diplomacy background. How could CTIL and PMI benefit from their expertise? How can we also tap into the experience of faculty from these backgrounds because we may potentially expand the MoU to include a faculty exc



ments. Understanding the hierarchy of importance for other countries and the emerging aspects of the WTO which requires more attention. This feedback has to flow in reverse so we can understand what other are saying and doing. I hope the MoU can contribute to this objective and the interns can help us after their internship in terms of providing feedback.

What would be the most effective strategy for creating a dialogue to create a narrative of an inclusive understanding of trade issues?

To be fair this question has to evolve as it has only been one batch of interns. I would love to see what strategies that would be practically deployed, and it is important that the interns don't feel lost in the system. A 5-year view of the internship should be taken when things are more stable. What is important is that there is an informal network of these interns who are in touch with each other and form a broad network. In 5 years, we

may see 100 members in a network that would strongly would strongly advocate for India's position. Thus, this network in 5 years could become an advisory or leadership body in the international trade forum for India. Leading a two communication between our trade partners and the government along with their stakeholders.

What advice do you have for the Graduate Institute students who are willing to join either the internship programme or at the joint research activities levels?

The first advice I can provide is that the internship will evolve and engage with various areas of work. The internship should not be seen as a means for specialisation and instead should be treated as a broad base to acquire generalised knowledge in the field of trade law and understanding the trade function within the government as a whole. Many of the applicants we interviewed specialised in investment treaty arbitration which is a common area for corporate work in India. But during the internship they realised that there's more to understanding trade as a concept. So, they need to keep an open mind and embrace the ambiguities in the field.

The second thing, which is a more difficult task is to read the literature which puts forth India's point of view and the criticism of India's point of view in an Indian context. As I have seen in the interviews, the formative views from the applicants were based on an external perspective shaped by people outside India. This is not to say that every policy needs to be endorsed, but that

the critique of the policy should be in the context of how the country functions. This context is missing which is natural, since there is lack of scholarship in this area. I hope that these aspects drive the interns to not just appreciate India's point of view but also to justify this view in their writing which in turn will benefit the next batch of applicants.

One of the elements of cooperation in the MoU is the TradeLab program. The Tradelab program is a pro bono program to bring together students and real-life beneficiaries that lack the resources to seek legal assistance. Can you share how the Tradelab program can assist non-governmental research organisations to gain a legal understanding of international trade?

It is not just research organisations, but also the industrial association that can benefit from the program. Trade law is a dynamic area and trade policy can impact all trading partners of a Member. The field requires a proactive understanding of the field rather than a reactive approach. This culture needs to permeate more deeply in research organisations and industries. Even if a subject does not become a law, simply by being a part of trade discussion entails that it is an area of policy concern. Tradelab can help in providing information on a proactive basis. This can be seen in the areas of digital trade and environment - which is my specialisation. Tradelab can engage on such forward looking problems or the concerns of tomorrow.

CTIL-DOC Internship

CTIL in association with the Department of Commerce (DoC), runs the Department of Commerce Flagship Internship program for law students from premier educational institutes in India. This programme began in 2017 and CTIL has offered internships to a number of students under this programme. The programme is open to LL.M students, fourth and fifth year students from five-year integrated law courses, and final year students from three-year LL.B. course. The selection process is competitive, with students who have experience working on issues of international trade & investment law being selected in order to hone their skills further.

The eligible students are placed with either CTIL or with government agencies such as the Directorate General of Trade Remedies (DGTR). The internship period varies, with most internships being between 1 and 6 months in duration. Students are also offered a monthly stipend, in order to compensate them for their hard work during the programme.

From the beginning of this programme, students from diverse backgrounds and studying at premier law schools in India have partici-

pated. The graph below gives a breakdown of the interns and their home institutions. Interns usually have an understanding of the workings of the WTO, as well as of international trade law. Since March 2021, these internships have taken place virtually. The internship is research intensive, and the interns are exposed to not just international law, but Indian laws and policies as well as the municipal law of other nations. It is a wonderful option for anyone looking to gain insight into international trade law, or international law in general. The internship experience is also valuable to those interested in policy -making, legal research or in strengthening their internship record to apply for graduate studies.

What CTIL Interns have to Say

I interned at the Centre for Trade and Investment Law in the month of June 2022. The internship was through the online mode and comprised of legal research in the areas of International Trade Law and Climate Change Law. The work given to me was challenging which helped me gain fresh perspective on different matters of Trade Law and helped me enhance my critical skills, knowledge and experience in the nuances of various topics within International Trade Law, thus boosting my confidence to pursue a career in the same. The mentors assigned to me were



Preetkiran Kaur,
5th Year, B.A.LL.B. (Hons.),
Rajiv Gandhi National University of Law,
Punjab

extremely helpful and guided me through the research with constructive feedback. I had a really enriching experience and I would like to thank CTIL for the opportunity.

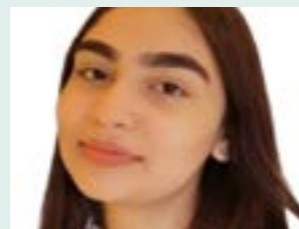
I interned at the Centre for Trade and Investment Law in June-July of 2022. The internship was through the online mode and comprised of legal research in the areas of International Trade Law. The work given to me was great and the same allowed me to gain a nuanced understanding of the interpretation of the WTO Agreements by the WTO Panels and the WTO Appellate Body. It gave me the opportunity to look into the foreign trade agree-



Siddharth Kumar,
1st Year, B.A. LL.B. (Hons.),
National Law School of India University,
Bengaluru, Karnataka

ments and analyse the nuances of the same.

I interned at the Centre for Trade and Investment Law in the month of June 2022. The internship mainly consisted of legal research on propositions related to International Trade Law and WTO Agreements. The work given to me was quite insightful and helped me enhance my knowledge in the domain of International Trade Law. I am grateful to my mentor, Ms. Amandeep Kaur Bajwa for being extremely helpful and guiding me throughout the course of my internship with her



Lishika Sahni,
1st Year, B.A. LL.B. (Hons.),
Dr. Ram Manohar Lohiya National Law

inputs and feedback. I had a really enriching experience and I would like to wholeheartedly thank CTIL for the opportunity.

I interned with CTIL for the month of June 2022, in a virtual mode. Having been passionate about International Trade and Investment Law, obtaining an internship with CTIL was extremely motivating for me, as I have always been inspired by the work here. The application was a hassle-free process, and I got all the help that I required. I had to make some changes with regard to the dates, which were effectively resolved by CTIL. My mentor was extremely nice and took out the time to explain the concepts to me before giving me the work, as I have not formally studied International Trade and Investment Law. I received really enriching work which made me understand the subject better, while getting a practical approach to how International Trade and Investment Law operates in the real world.



Aryan Tulsyan ,
2nd Year, BA LLB (Hons.),
Jindal Global Law School, Sonipat

I interned at the Centre for Trade and Investment Law in June 2022. The internship was online and comprised of legal research and drafting work in the areas of International Trade Law and Investment Law. The work given to me was exciting and engaging. It helped me enhance my knowledge and experience of various topics within International Trade Law, thus boosting my confidence to pursue a career in the field. I had an enriching experience, and I would like to thank CTIL for the opportunity.



Divyashree Rao,
5th Year, B. Sc. LL.B. (Hons),

I interned at the Centre for Trade and Investment Law in the month of May-June, 2022. The internship was virtual and comprised of economic research and drafting work in the areas of International Trade. The work given to me was really good and helped me enhance my knowledge and experience of various topics within International Trade and International Trade Law, thus boosting my confidence to pursue a career in the same. The mentors assigned to me were extremely helpful and guided me through the research with constructive feedback.



Pragati Aggarwal,
1st Year, MSc Economics, Sarla Anil
Modi's School of Economics, SVKM's
NMIMS (Deemed to be University),

In Conversation with



Ms. Akshaya Venkataraman



Ms. Trishna Menon



Ms. Sreelakshmi Kurup

Why did you want to work at CTIL? What does CTIL offer that you couldn't find in other law firms or organisations that specialize in trade law?

Trishna Menon: The one thing I tell anyone who generally asks me for advice on careers is that if you want to practice international law in India, the only place where you can do that productively is CTIL because I don't think anyone else does the kind of work that CTIL does. You don't get the chance to advise the government on various aspects, including negotiations which touch upon some aspect of international relations, disputes which is a very good subset of that

kind of work and ensuring domestic compliance with India's international obligations which is another aspect of how you practice international law. I don't think you get that mix of work anywhere else.

What are the chapters of the FTA negotiations that you were part of? What has been your experience with the FTA negotiations when you were at CTIL?

Trishna Menon: I have worked on the India-UAE CEPA negotiations. With respect to the India-UAE CEPA, I got the chance to work on trade in goods, dispute settlement and trade remedies, extensively.

FTA negotiations are a very different kind of work from anything that a lawyer does otherwise. Being part of FTA negotiations was my greatest experience at CTIL. This is not the kind of work that people our age get to do in law firms. It is interesting to look at the black letter of the law and see how you can work within the framework of that law to achieve the concessions that you want from the other party or signal certain things to the other party while still retaining those aspects that are of interest to your government.

According to you, how has CTIL contributed to the development of international trade law in India?

Akshaya Venkataraman: I will answer that in two parts. One, the role that I see for CTIL in trade law and policy making in general, and the other is its role for

CTIL Alumni

young people who are interested in international law and trade. Because of the work that I got to do in my two years at CTIL, under the guidance of Prof. James, I can say that there are not many organisations which do the kind of work undertaken at the Centre - not just specific to the field of trade, but generally in the context of being involved as lawyers in the law making in India. When I was at CTIL, I have had the opportunity to work on drafting the text of legislations that have gone out to the Ministry. I have drafted regulations and participated in delegation meetings between India and other countries, which was the European Union in my context. The fact that CTIL is so intrinsically involved in shaping policy and laws makes me believe that the Centre has an incredible role to play going forward.

In the two years that I was at CTIL, I saw, with every passing month, the amount of responsibility that the Ministry felt it could give to CTIL and how much they let CTIL take charge of the work that they do, which is a great reflection of the kind of trust that the government has in a pool of young lawyers who want to get involved and learn on the go. Therefore, I think, in terms of shaping trade law, CTIL is the place to be at. When you are in your early 20s and you get out of law school and international law is a field you generally want to be involved in, being able to sit in a meeting with the people who make the law, that alone as an opportunity that CTIL gives you, makes it all worth it. The advantage of being at a place like CTIL is not just that you are in the room, but you get to participate as well. It has been an invaluable experience. I can now sit down and have conversations with people and let them

know that I am aware about how things work from the perspective of the government.

Do you think your experience with engaging with FTA negotiations will help in your future endeavours?

Sreelakshmi Kurup: In my PhD, I have been reviewing different FTAs and RTAs to understand the gender-based commitments made by different countries. In negotiations you witness the practical side of how the agreements are finalised and the rigorous procedure behind it. With respect to gender in particular, I was not a part of negotiations but I was able to attend the meetings before the negotiations began.

But if I ever have the opportunity to work with the WTO, I am certain the experience of working on negotiations would help me.

Beyond your interest in the intersection gender and international trade which you are currently focusing on in your PhD. Are there any other areas of international trade law which interest you?

Sreelakshmi Kurup: My general interest has always been human rights and criminal law. So, when I chose to work in international trade law, I hoped to link international trade law with these two areas. During my time at CTIL, I had also found an interesting intersection between international trade law and health when I worked on issues concerning SPS and TBT. But

presently, my primary focusing is on the relationship between international trade law and gender. Even at the WTO there is now greater engagement with respect to gender and the international trade law regime.

How was your experience of working at CTIL?

Akshaya Venkataraman: I think I realise the value of a lot of the work that I did at CTIL only now that I am here in Geneva and I am able to have these conversations with people about what I did.

I have had courses which sort of discuss FTA law and policy and how you go about shaping the policy on FTAs and what are the considerations that go into it. So, to actually have that opportunity to see how policy translates into legal text, because when you are in undergrad law school, you see only the final text, but to be able to review small changes to the language and understand the perspective of policy makers, where they are coming from and what their concerns are and how that translates into legal language, is really fascinating and not the kind of experience one gets rather easily.

What advice would you give to people who want to work at CTIL, or anyone else who wants to work in international trade law?

Trishna Menon: For anyone who wants to work in the field of international trade law, I generally tell them to work at CTIL. For anyone who wants to work

at CTIL, I don't have any advice. However, you should make the most of the opportunities that you get at CTIL. CTIL gives you the work environment where you have a lot of autonomy over what you are doing, the mental space to think through or conduct research on the work that you are sending out and the most congenial colleagues in the world. It's a wonderful environment to work in.

Akshaya Venkataraman is presently pursuing her LLM in international law at the Graduate Institute in Geneva while also interning at the World Trade Organization. Prior to becoming a Senior Research Fellow at CTIL, Akshaya was an associate at Trilegal for 2 years.

Trishna Menon is an international dispute lawyer, she is currently pursuing her LLM in the MIDS program in Geneva. Prior to becoming a Senior Research Fellow at CTIL, Trishna worked in the trade law division in Clarus Law Associates for 2 years.

Sreelakshmi Kurup is presently pursuing her PhD at the University of Wollongong under the supervision of Professor Markus Wagner. Sreelakshmi has an LLM from National University of Advanced Legal Studies in Kochi.

Meet the CTIL Research Team



Prof. James J. Nedumpara, Professor and Head



Ms. Shiny Pradeep, Assistant Professor



Mr. Satwik Shekhar, Consultant (Legal)/Assistant Professor



Ms. Aparna Bhattacharya, Consultant (Legal)/Assistant Professor



Ms. Sunanda Tewari, Consultant (Legal)/Assistant Professor



Ms. Ronjini Ray, Consultant (Legal)/Assistant Professor



Ms. Manya Gupta, Senior Research Fellow



Ms. Smrithi Bhaskar, Senior Research Fellow



Mr. Ridhish Rajvanshi, Senior Research Fellow



Mr. Rishabha Meena, Senior Research Fellow



Ms. Amandeep Kaur, Senior Research Fellow



Mr. Achyuth Anil, Research Fellow

Meet the CTIL Research Team



Ms. Sathiabama S
Research Fellow



MS. Imjot Kaur
Research Fellow



Mr. Ritvik Rai
Research Fellow



Mr. Pushkar Reddy
Research Fellow



Ms. Sharona Mann
Research Fellow



Mr. Ashutosh Kashyap
Research Fellow



Mr. Jamshed Ahmad
Siddiqui
Research Fellow



Mr. Advaith Rao
Research Fellow



Ms. Shana Sharma
Research Fellow



Ms. Ayushi Singh
Research Fellow



Mr. Arnav Sharma
Research Fellow



Ms. Mahima Ahuja
Cost Accountant
(TRAC)

Meet the CTIL Administrative Team



Mr. Ratan Lal,
Administrative
Officer



Mr. Jitender Das,
Senior Administrative
Executive



Mr. Parmod Kumar,
Senior Finance
Executive



Mr. Sanjeet Kumar
Mishra,
Senior Administrative
Executive



Ms. Sita,
Finance Executive



Ms. Roohi Khan,
Senior Administrative
Assistant



Ms. Neha Bansal,
Administrative
Assistant



Mr. Vijay Kumar Rai,
Administrative
Assistant



Mr. Anil Kumar,
PA/Stenographer



Mr. Neeraj Kumar,
MTS



Mr. Arun Kumar,
MTS

Vision for Future

CTIL continues to strive towards influencing the national and international discourse on emerging issues of international economic law. In furtherance of its mission of creating enhanced awareness and capacity in this field, CTIL is proactively collaborating with governmental agencies, industry stakeholders and prestigious academic institutions. In fact, CTIL has been training law students in the advanced years of their graduation courses under the Department of Commerce mandated internship programme, as well as under CTIL's own internship programme. CTIL also organises and co-organises seminars, moots, colloquia and conferences regularly with various law schools in India and abroad. Apart from this, CTIL conducts capacity building and training programmes for various government departments on trade law, investment law, and treaty negotiation.

In the rather challenging and complex times in international trade arena, the overall objective of CTIL is to further India's aims of sustained economic growth, with a strong reliance on multilateralism. Moving forward, CTIL hopes to continue to be a central repository of expertise, research and resources for all trade and investment issues. CTIL aspires to become a global thought leader, with a view to influencing the regional and global discourse on international economic law and policy. To ensure this, CTIL has the following ongoing activities:

Training Programmes

CTIL hopes to continue conducting its annual executive training programme on investment treaties and investor state dispute settlement systems, as well as its

training programmes on FTAs, public international law, treaty law and treaty negotiation, dispute settlement, and related areas.

Disputes and WTO submissions

CTIL has played a role in aiding in the preparation of India's submissions for its WTO disputes, and is currently engaged in assisting India with respect to the ongoing disputes involving India, such as DS 579, DS 580, DS 581, DS 582, DS 584, DS 585, and DS 588. CTIL will continue to contribute to key WTO submissions made by India.

Trade Negotiations

CTIL is engaged to assist India in its various ongoing negotiations and treaty reviews, on diverse issues such as trade remedies, SPS and TBT, sustainability, intellectual property rights and so on. As a part of this, CTIL also plays a role in developing the structure, contours and scope of Indian FTAs, as well as assists in preparing scoping papers to this end.

Studies and Publications

CTIL conducts various studies on diverse themes, and is currently studying certain measures pertaining to carbon border adjustment expected to be imposed internationally, special economic zones in India, investment protection treaties, and plans to conduct research and engage with the legal fraternity on the emerging issues and challenges with respect to international trade and investment law. Apart from these, CTIL will continue to host seminars, moot courts, colloquia and conferences regularly with various partner law schools and think tanks.





Back Cover: Picture - Courtesy PIB Delhi.

**Vanija Bhawan the new home of
(Ministry of Commerce and Industry)**



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