

The Challenges and Opportunities of a Rules-based Order: India and the WTO

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As India celebrates the seventy-fifth anniversary of her independence in August 2022, it is time to look at India's role in creating the structures of global governance that emerged more than a century ago, to assess her interests in strengthening the principle of international cooperation that underpins the functioning of these institutions, and their impact on the transformation of India.

Although a British colony, India was a founder-member, on par with the four British Dominions, of the League of Nations after the First World War. The League was created by the Treaty of Versailles in June, 1919 on the foundations of the military victories by the allied powers, including 1.2 million Indian volunteer soldiers fighting as part of the British Indian army across Europe, Asia and Africa. The failure of the League to prevent the outbreak of the Second World War led to initiatives to strengthen structures of international cooperation to "secure" and "sustain" the peace after the war ended.

The Creation of Institutions of Global Governance (1942-47)

The most important of these initiatives was taken by President Franklin Delano Roosevelt of the United States, who coined the term "United Nations". He hosted the January 1942 Washington Conference that issued a "Declaration by United Nations". India was invited by President Roosevelt as one of the twenty-six Allied countries to the Conference, having contributed 2.5 million

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volunteer troops to fight as part of the Allied armies in the Second World War.

While the United Nations and its Security Council were meant to “secure” the peace after the war, three institutions were conceptualized under the process to “sustain” the peace. These institutions would focus on effective international cooperation in regulating economic activity, currency convertibility, and international trade. The first two of these institutions, the International Monetary Fund (IMF) and the World Bank, were established by the United Nations Monetary and Financial Conference held at Bretton Woods, New Hampshire (United States) in July, 1944.

India was one of 44 participating nations in the negotiations, with Sir R. K. Shanmukham Chetty, who would be appointed independent India’s first Finance Minister (1947-48), credited with raising the interests of “economically backward countries” at the meeting. Other Indians in the delegation included Sir C. D. Deshmukh, the first Indian Governor of the Reserve Bank of India (who would subsequently become Finance Minister of independent India in 1950); and the banker-economist A. D. Shroff (the author of the “Bombay Plan”).

The third institution was meant to remove the frictions caused by protectionist barriers to international trade, including preferential trading arrangements, as between the United States and the UK over the latter’s Imperial Preferences. The task of establishing an “International Trade Organization” (ITO) was entrusted to the newly formed United Nations.

At its First Session in 1946, the Economic and Social Council (ECOSOC) of the UN, presided over by India’s Sir A. Ramaswami Mudaliar (who signed the UN Charter for India in June, 1945), mandated negotiations for creating an ITO through a Preparatory Committee of nineteen countries. India was one of the only two developing countries represented in the Preparatory Committee. The Republic of China was the other. Eventually, on 22 August, 1947, barely a week after India became independent of British colonial rule, the negotiators from fifty-three countries who had assembled in Havana agreed on a draft Charter for the ITO. The Havana Charter was signed in March, 1948.

While the text of the Havana Charter for an ITO was being negotiated, a “Multilateral Trade Agreement Embodying Tariff Concessions” was proposed in November 1946 by the United States to focus on the reduction of tariffs. These negotiations were launched on 8 April, 1947 in Geneva, which housed the United Nations Office in Europe.

India was a participant in these negotiations, which resulted in an agreement signed by twenty-three countries as “Contracting Parties” on 30

October, 1947 for a General Agreement on Tariffs and Trade (GATT). Two core principles of the GATT are Most-Favoured-Nation (MFN or non-discrimination) and National Treatment (equal treatment of foreign and national goods/services in the domestic market).

The first impact of the GATT was on about \$10 billion in international trade through 45,000 tariff concessions. The GATT, under Article XXIX:2 of the Agreement, was provisionally applied by its members to come into effect from 1 January, 1948, pending the finalization of the ITO Charter. As a founder-member of the GATT, India signed the Protocol of Provisional Application of the GATT on 8 July 1948.

Why did newly independent India join the GATT? In the words of Indian diplomat Sir N. R. Pillai, ICS, who participated in the GATT negotiations in Geneva, and served as the Indian Republic's first Cabinet Secretary (1950-1953), the "Government of India nevertheless decided to join the GATT, not only because they recognized the value and soundness of the basic principles of the GATT but also because they felt that, as a nation which had just come into its own, they would, by so doing, be making their own contribution to the peace and prosperity of the world". Speaking of the three main objectives of the GATT as India saw them, he enumerated these as "firstly to reduce discrimination, secondly to lay down rules of fair trading, and thirdly to promote the growth of international trade by removing impediments to it."

The GATT Years (1948-1994)

Following the decision of the United States Senate in 1950 not to ratify the Havana Charter of the ITO, the GATT became the *de facto* international platform for regulating international trade in goods until the establishment in 1995 of the World Trade Organization (WTO). This resulted in separating the GATT from the United Nations legal framework, making it a stand-alone multilateral legal entity. From 1 February, 1955, the Director-General to the Contracting Parties of the GATT became the depository of the legal decisions taken by the GATT. The first three "trade liberalization rounds" of negotiations of the GATT (Annecy, France, 1949); Torquay (UK) 1951; and Geneva (1956-64) gradually reduced tariffs as trade barriers, covering almost 20,000 tariff concessions.

India became one of the major champions of the interests of developing countries in the GATT during the 1960s, after the creation in June, 1964 of the Group of 77 (G-77) developing countries. India called for the reduction

of tariffs on an MFN basis to create market access in developed country markets. At the same time, India supported trade measures under Article XXVIII of the GATT that was used by governments for economic development, including import restrictions for balance-of-payments reasons, which had been applied by several European countries after 1945. In 1965, the GATT responded to calls for supporting developing countries by adding Chapter IV to the Agreement titled "Trade and Development", which provided scope for introducing special and differential treatment for developing countries participating in international trade.

The G-77's priorities were encapsulated in the Charter of Algiers, adopted after the First G-77 Ministerial Meeting in Algiers in 1967. From 1974 onwards, during the Tokyo round of trade liberalization negotiations, India became prominent in targeting non-tariff barriers like the arbitrary quotas imposed through the Multifibre arrangement by the "Quad" (the United States, European Community, Canada, and Japan) on imports of textiles and clothing from developing country exporters, including India.

A major success for India and other G-77 countries that were Contracting Parties of the GATT came on 28 November 1979, when the GATT unanimously adopted the "Enabling Clause for Developing Countries". This decision allowed derogations to the most-favoured-nation (non-discrimination) treatment in favour of developing countries, such as the Generalized System of Preferences scheme of fifteen countries including the United States and the EU.

The convergence of trade in goods liberalization through reduction of tariff barriers; disciplining of non-tariff barriers like quotas; the increased role of trade in services in international trade; and the dominant interest of corporates in protecting their technologies and investments abroad, including for patented intellectual property rights, created the framework for the launch of the GATT's Uruguay Round in 1986 at Punta del Este (Uruguay).

India's role in the negotiations of the Uruguay Round had a dual track. On the one hand, India stood firm with developing countries in the GATT in seeking to prioritize market access for exports of goods that generated employment, like textiles and clothing, by removing or reducing tariff and non-tariff barriers and looking for opportunities to institutionalize market access provisions in favour of developing countries. On the other hand, India led many G-77 countries in resisting the unrestricted opening of their domestic markets to unrestricted investments by major corporations headquartered in developed countries.

The Bhopal Gas Tragedy in December 1984 caused by Union Carbide, in which tens of thousands of workers and their families were killed, and more than half-a-million people affected by the leak of methyl isocyanate gas, influenced India's position on investment flows under the GATT's negotiations on market access negotiations. The result was a conscious effort by India with the support of other developing countries to integrate "Special and Differential Treatment" provisions into each area of negotiations in the Uruguay Round. The objective of these provisions was to provide support for the market access of developing countries; to give flexibility to these countries in meeting their obligations under the negotiated agreements; and to enhance their ability to participate effectively in a rules-based international trading system.

An area of negotiations in which India played an "out of the box" role in the Uruguay Round occurred during the closing phase of the negotiations when the framework of the proposed General Agreement on Trade in Services (GATS) was conceptualized and negotiated. Analysts have highlighted the role of negotiators like Richard Self of the United States, Jonathon Scheele of the EC, and B. K. Zutshi, India's Ambassador to the GATT, in agreeing on the GATS text, which was included by the GATT Director General Arthur Dunkel, and adopted by the Contracting Parties at the conclusion of the Uruguay Round at Marrakesh in April, 1994.

The significance for India of the GATS can be gauged by the fact that 44% of the negotiating proposals (forty-two out of ninety-five) on trade in services during the Uruguay Round had been made by just four delegations – the United States, European Communities, Brazil and India. India's contributions in the final text of the GATS on increased participation of developing countries (Art IV) and progressive liberalization (Art XIX) served the interests of developing countries like India in becoming active participants in the growing global trade in services after 1995.

Bilateralism and Multilateralism in International Trade

The WTO contained most of the areas that had been discussed in the ill-fated Havana Charter of the ITO in 1948. The agreement establishing the WTO bore the imprint of behind-the-scenes negotiations between the "Quad" (the United States, European Communities, Japan, and Canada) and two developing country delegations (India and Brazil).

The WTO treaty covered sixty areas, including trade in goods (GATT 1994, which is legally distinct from GATT-1947), trade in services (GATS),

trade-related intellectual property rights (TRIPS), a trade policy review mechanism, a limited set of trade-related investment measures (TRIMS), in addition to trade and development. Second, the WTO Agreement included a unique Dispute Settlement Understanding (DSU), which provided the new organization with “real teeth” to regulate and enforce the rules of international trade that had been negotiated and agreed upon between WTO members. Under Article XVI:6 of the WTO Agreement, this international treaty was registered with the United Nations in keeping with Article 102 of the UN Charter.

India saw three major opportunities from its membership in the WTO. These were to use the WTO’s unique multilateral dispute settlement mechanism as an option to avoid being enmeshed in unequal bilateral trade disputes with major trading countries, especially when threatened by the application of provisions like “Super 301” by the United States. Secondly, the integration of special and differential treatment provisions in favour of developing countries in the WTO Agreement provided India with scope for advocating a phased approach to trade liberalization for the vast majority of WTO members to sustain the benefits of trade liberalization. This created a “constituency” for India’s prominent role in WTO activities. Third, the WTO, especially its new architecture on trade in services provided by the GATS, became an important reference point and an anchor to sustain major India’s domestic economic reforms during the turbulent years following the creation of the WTO.

International Trade and the Transformation of India

As we look back at India’s membership of the WTO and ask how it has benefited India, some broad indicators provide part of the answer. In 1996, India’s external trade contributed 23.93 percent of India’s GDP of US\$ 392 billion. In 2019, India’s external trade contributed about 40 percent of her GDP (US\$ 2.8 trillion), while today that figure is about 44 percent. From a weighted average tariff of 23.7 percent in 1996, India’s average weighted tariffs dropped to 6.6 percent in 2019, as India integrated into the global market. Two areas that illustrate the benefit to India of WTO membership are global trade in services and exports of textiles and clothing, particularly apparel. As a consequence of the integration of the GATS into the WTO, India’s exports of services have grown exponentially from US\$ 7 billion in 1996 to US\$ 214 billion in 2019. Today, India is the eighth largest exporter of commercial services in the world, with this sector contributing over 12 percent of India’s GDP in 2019, compared with its contribution of 4.6 percent in 1996.

After the textiles and clothing trade was integrated into the WTO in 2005, India's global exports of textiles and clothing products rose from US\$ 19 billion in 2006 to US\$ 37 billion in 2018. For a labour-intensive sector employing 45 million people (second only to the number of people employed in the agriculture sector), this represented a major gain from the tough battle fought by India during the Uruguay Round to bring the textiles/clothing trade into the WTO rules-based order.

India's financial services and telecoms services sector benefited from the impact of WTO negotiations during 1995-1997 to emerge as the primary catalysts for the emergence of India on the global stage as a knowledge-based digital economy. The financial sector reforms initiated in 1991 were anchored by India's commitments during the WTO negotiations on financial services, resulting in a robustly regulated banking sector with twelve public sector banks, twenty-two private sector banks, and forty-six foreign banks in the Indian market today. The combined assets of these banks were valued at US\$ 2.48 trillion in 2021.

Similarly, the decision by India to allow the entry of new telecom technologies driving mobile telephony during the final stages of the WTO negotiations on telecoms in February 1997 has given impressive results. Today, India is the world's second-largest telecommunications market with a proactive regulatory framework. With a broadband subscriber base of 792 million out of a subscriber base of 1.18 billion in 2021, India has been able to converge her WTO commitments in the financial and telecoms services sector to innovate a new paradigm of people-centric development that uses digital technology for trade, development, and empowerment.

This is illustrated by the role of India as a global exporter of Information Technology Enabled Services (ITES), with annual revenues from this sector in 2020 worth about US\$ 150 billion. Despite current concerns about the impact of the WTO's Information Technology Agreement (ITA) on the growth of India's information technology manufacturing sector, it is a fact that membership of the first WTO ITA enabled large numbers of Indian software professionals to use computers and peripherals imported at zero tariffs to significantly augment the export of Indian software to the world market at the turn of the century. It is estimated that between 2000 and 2021, almost US\$ 80 billion of investments into India's information technology sector occurred because of India's membership in the WTO's ITA, generating employment for over four million people.

India and the WTO's Dispute Settlement Understanding (DSU)

India has been among the most active countries using the WTO's DSU to uphold the rules-based system of the WTO, ranking fifth in the consolidated list of complainants and respondents (after the United States, EU, China, and Canada, and ahead of Brazil, Japan, and South Korea). This is despite India's share of global trade being 1.7 percent for trade in goods, and 3.8 percent for trade in services in 2019.

The pattern and logic of India's use of WTO dispute settlement are marked by two major objectives:

- a) Its interest in ensuring sustained market access in its major trading partners, which in turn is linked with the employment of millions of Indians; and
- b) The use of WTO dispute settlement decisions to calibrate and anchor economic reform measures in India through legislation.

Central to India's interest in the WTO is the continued functioning of an efficient WTO dispute settlement mechanism, that provides predictability and stability to the rules-based international trading system. The GATT had not been able to enforce decisions of its dispute settlement panels due to "positive" consensus which allowed even parties to a dispute to block panel decisions. The WTO introduced the concept of "negative" consensus, i.e., any member opposing a decision has to get all other members to support it or remain passive. This has not happened so far in the WTO, ensuring that all the decisions adopted by the Dispute Settlement Body have been accepted for compliance by WTO members.

The WTO dispute settlement process is deliberately time-bound to deliver effective relief within approximately two years from the initiation of the dispute, following a two-month consultation period. The dispute settlement panel has nine months to produce its report, which can be appealed against the Appellate Body (AB) within the next two months. The AB has three months to give its decision. Decisions are implementable within fifteen months. If not implemented, the WTO has the right to allow retaliation by the aggrieved member, including cross-retaliation as the 17-year-long dispute involving the United States (Boeing) and European Union (Airbus) illustrated.

The fact that even the most powerful economy which is a member of the WTO abides by the WTO dispute settlement decisions has validated the creation of this unique multilateral mechanism. In its first year of operation, the WTO witnessed two high-profile disputes initiated against the United States by Venezuela and Brazil (regarding measures introduced by the United States on

gasoline) and Costa Rica (regarding import restrictions on clothing). Both disputes resulted in WTO decisions asking the United States to withdraw its trade measures, which were found to be inconsistent with the obligations of the United States under the WTO Agreement. The United States complied.

India's experience has followed a similar trajectory. Important export sectors for India like textiles and clothing and marine products, which were targeted by trade restrictions by the United States during 1995-1998, as well as restrictions on textile exports imposed by Turkey on behalf of the European Communities, were taken by India to the WTO dispute settlement mechanism. The decisions of the WTO against the trade measures of the United States and Turkey (on behalf of the European Communities) resulted in the withdrawal of these measures.

On the other hand, missing provisions in Indian legislation for protecting patents on trade-related intellectual property rights in the pharmaceutical sector, and India's continuation with its "licence raj" import restrictions on the balance of payments grounds despite the success of its economic reforms, were specifically targeted by India's major trading partners like the United States and the European Communities. The WTO ruling against India resulted in major legislative amendments to Indian laws to bring India's trade measures in conformity with its WTO obligations. This provided vindication of India's strong support for the integrity of the WTO dispute settlement system.

In addition to providing a neutral platform for resolving trade disputes, the WTO has proactively supported developing countries in using its dispute settlement mechanism to protect or project their economic interests. Article 27.2 of the WTO DSU provides legal assistance by the WTO Secretariat to developing countries, that may require such help. During the highly publicized "Bananas" dispute between a group of African and Latin American countries against the European Communities, the WTO Appellate Body decided in 1997 to allow private lawyers to come to the assistance of government representatives during dispute settlement proceedings, to augment the capacity of these developing countries. In 2001, a ground of twenty-nine countries established an intergovernmental Advisory Centre on WTO Law to help developing countries at discounted rates in litigating their WTO disputes.

The Challenges Ahead

The biggest structural challenge facing the WTO today is the atrophy of the Appellate Body (AB) of the WTO dispute settlement system, due to the United States blocking consensus on appointments to the AB because of concerns that

individual members of the AB have gone much beyond their mandate to hear appeals only within the framework of the WTO Agreement. In response, several of India's major trading partners, including Australia, Brazil, China, the European Union, Mexico, Singapore and Switzerland, took initiative in March, 2020 to set up a "Multi-Party Interim Appeal Arbitration Arrangement" (MPIAAA), which would perform the role of the AB for the members of the MPIAAA, through arbitration under Article 25 of the WTO DSU. The indefinite continuation of the MPIAAA has implications for India, which is not a party to this arrangement, as it has the potential to fragment the integrity and effectiveness of the WTO dispute settlement mechanism negotiated during the Uruguay Round.

The decision at the 12th WTO Ministerial Conference held in Geneva between 12-17 June, 2022 to chart a course to reform the AB within the next two years is therefore of critical importance for India. India must play a proactive negotiating role to bridge the divergences between its biggest trading partners on this issue in its own interests.

Another challenge with implications for India's emergence as a \$5 trillion economy is the decision by the WTO Ministerial Conference in June 2022 to draw up an E-Commerce roadmap "including its development dimension". So far, India has not been active in participating in the discussions of the Joint Initiative of over eighty-six WTO members, including all the major trading partners of India, convened by Australia, Japan and Singapore, on the future framework for E-Commerce under the WTO. The impending launch of E-Commerce negotiations at the next Ministerial Conference of the WTO is a marker for India's ability and interests to become a leading player in the global digital economy.

A third "systemic" challenge confronting India and many developing country members of the WTO is the increased interest among developed country members like the United States in removing the special and differential treatment for developing countries. This challenge goes to the core of India's contributions to the GATT/WTO, and the gradual integration of developing countries as equal participants in a rules-based international trading order. It also poses a direct threat to India's "constituency" in the international trading system, nurtured over decades by India's proactive diplomacy. The decision of the June 2022 WTO Ministerial Conference to mandate a status report on how special and differential treatment provisions have worked on the ground will require a special role for India in this context.

Two issues dominated the media coverage of the WTO Ministerial Conference in Geneva in June, 2022. One was the fate of the India-South

Africa Covid Vaccine Waiver initiative. Despite the strong resistance of the EU, this initiative was partly successful, with a decision taken to waive the WTO trade-related intellectual rights provisions for the manufacture of such vaccines for a period of five years. However, the more controversial issue of including diagnostics and therapeutics for these vaccines was deferred for another six months, showing the strong protectionist sentiment within major developed countries.

The other issue was a new Agreement added to the WTO Agreement on subsidies in fisheries. The Agreement on Fisheries is unusual for one reason. In Article 12 of this Agreement, it contains the stipulation that within four years, WTO members must agree on “comprehensive disciplines” to address subsidies for fishing infrastructure, otherwise “this Agreement shall stand immediately terminated”. Countries like India, which have begun to build such infrastructure as part of their national priorities for a Blue Economy, which is an integral part of India’s SAGAR Indian Ocean policy, will need to draw upon their long tradition of bridging extreme positions on this sensitive issue in the WTO to reach constructive outcomes.

The silver lining in this broad overview of India and the WTO is the fact that despite all the Cassandras, the WTO was able to hold its Ministerial Conference in Geneva in June 2022, after a fairly long gap after the previous Conference held in Buenos Aires in December, 2017. In that sense, the WTO demonstrated that despite the larger challenges facing a rules-based multilateral order today, especially within the framework of the United Nations, the international community continues to have faith in multilateralism to bounce back from the setbacks of the pandemic and conflicts. If the new momentum in the WTO can be sustained, it is very likely that in 2024, the WTO will be able to launch a major round of trade liberalization negotiations. This will give a significant message at a time the world is being polarized by great power rivalries that have not hesitated to weaponize economic measures meant to “sustain” world peace.

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