TALLINN UNIVERSITY OF TECHNOLOGY
School of Business and Governance
Department of Law

Ekaterina Kliushina

LEGAL AND POLITICAL EFFECTS OF THE WTO DISPUTE SETTLEMENT MECHANISM ON REGIONAL TRADE AGREEMENTS OF THE REPUBLIC OF INDIA

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Supervisor: Ton Notermans, PhD

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Ekaterina Kliushina ……
(signature, date)
Student code: 177196TASM
Student e-mail address: k.jekaterina9@gmail.com

Supervisor: Ton Notermans, PhD:
The paper conforms to requirements in force

……
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ABSTRACT

The number of regional trade agreements (RTAs) India has concluded is growing exponentially decade by decade, and most of those RTAs contain a separate clause on dispute settlement which raises a special scholarly interest in light of the arduous criticism by the Republic of India against the WTO. Why does India sign so many RTAs? The research question derives from the hypothesis that via RTAs India attempts to find an alternative way to make its legal and political commitments as a result of its dissatisfaction with the WTO Dispute Settlement Mechanism (DSM). Using the three main categories of such mechanisms, namely political, quasi-judicial and judicial, the thesis provides a classification of all dispute settlement mechanisms (DSMs) in the RTAs India concluded.

The analysis reveals that dispute settlement mechanisms in RTAs show strong similarities with the WTO DSM, sometimes being the exact copy of the WTO provisions, while some RTAs offer an alternative coverage of trade-related issues. Thus, it rejects the original hypothesis that India's drive to sign RTAs can be explained primarily by its wish to find an alternative means of trade dispute settlement. Through interviews with Indian legal and political elites, the thesis shows that India signs so many RTAs because of several political and legal considerations. They create the occasion for states to negotiate and have a talk while India gets the opportunity to present its geopolitical interests. RTAs serve as a trade promotion device chosen by the government to enhance its export capacity and prospects as a part of the overarching agenda *Make in India*. Through RTAs, India channels the interests of all industries, be it small or large ones, to reflect them in the RTA while in the WTO framework, it is hard to do so due to the complexity of the latter. RTAs are flexible in their design and content and while in the WTO, India feels bulldozed by major powers, in the framework of the RTA it can include or omit any commitments. Finally, any dispute under the RTAs brings about lower litigation costs which is of particular significance to developing economies.

Keywords: WTO, India, regional trade agreements, developing economies, dispute settlement mechanism, international trade

LIST OF ABBREVIATIONS

AB	Appellate Body (WTO Dispute Settlement)
ADR	Alternative Dispute Resolution
APTA	Asia Pacific Trade Agreement
ASEAN	Association of Southeast Asian Nations
BOP	Balance of Payments
CECA	Comprehensive Economic Cooperation Agreement
CEPA	Comprehensive Economic Partnership Agreement
COE	Committee of Experts
DSB	Dispute Settlement Body
DSM	Dispute Settlement Mechanism
DSS	Dispute Settlement System
DSU	Dispute Settlement Understanding (Understanding of Rules and Procedures Governing the Settlement of Disputes, Annex 2 of the WTO Agreement)
EU	European Union
FTAs	Free Trade Agreements
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GSP	Generalised System of Preferences
ICSID	International Centre for Settlement of Investment Disputes
IMF	International Monetary Fund
LDCs	Least-developed countries
MERCOSUR	Mercado Común del Sur (Southern Common Market)
MFN	Most favoured nation
MICECA	Malaysia-India Comprehensive Economic Cooperation Agreement
MOCI	Ministry of Commerce and Industry
NGOs	Non-government organisations
PEDSM	Protocol for Enhanced Dispute Settlement Mechanism
PTA	Preferential Trade Agreement
RCEP	Regional Comprehensive Economic Partnership
RTA	Regional Trade Agreement
SAARC	South Asian Association for Regional Cooperation

SAFTA	South Asian Free Trade Area
SAPTA	SAARC Preferential Trading Arrangement
SEOM	Senior Economic Officials Meeting
SIAC	Singapore International Arbitration Centre
SPS	Agreement on the Application of Sanitary and Phytosanitary Measures
TBT	Agreement on Technical Barriers to Trade
TISA	Trade in Services Agreement
TPP	Trans-Pacific Partnership
TTIP	Transatlantic Trade and Investment Partnership
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
USA	United States of America
WTO DSM	World Trade Organization's Dispute Settlement Mechanism
WTO	World Trade Organisation

INTRODUCTION

In the past twenty years, the Republic of India (official name: *Bhārat Gaṇarājya*, or *Bharat*) has become increasingly involved in signing RTAs[1] making it an indispensable feature of its trade interactions with other states and an integral part of its market liberalization strategy. From the 2000s onwards, the number of signed RTAs has risen fivefold, which led researchers into thinking that it augured a new trend in regionalism – creation of trade blocs (Baldwin, Seghezza 2010; Haveman, Hummels 1998; Valdés, McCann 2016) to set a multilateral trade structure, an alternative to the World Trade Organization (WTO), since almost 50% of those agreements have been signed between developing states – the most avid critiques of the WTO (Hudec 2010; Joseph 2011).

Bharat has been long known as one of the most active users of the WTO Dispute Settlement Mechanism (WTO DSM) and one of the most vocal critics of the WTO institutional set-up. As Indian scholars posit, India displayed its discontent with the unfair trade dispositions offered by the system that seemed to be designed only for developed economies by arguing that developing states should enjoy differential treatment (Jha 2003, 303). More importantly, despite many WTO provisions on differential treatment, there is a lack of its adequate application as, for example, the technical assistance provided to developing economies does not meet their real economic situation (Saqib 2003, 272).

Also, from the financial point of view, for emerging economies, the cost of contesting an inappropriate trade measure is too high and small industries in particular fall short of funds to bear full costs of even bringing the case, let alone to cover the costs of litigation that may last for years (Taslim 2010, 240). In developing countries like Bangladesh, Venezuela, India, it is typical of industries to stay behind the dispute and finance the activity of law firms, hence only those companies with high per capita stakes who expect to recover their loss with profits from lower tariffs may initiate the dispute (Shaffer 2003, 14). Equally, Bown (2005, 16) highlights that, apart from the bias in the initiation of disputes, participation in the WTO for LDCs is characterised by inadequate power for trade retaliation, or ability to withdraw concessions, incapacity to absorb

[1] The term *RTA* is used as an encompassing term that includes preferential trade agreements (PTA), free trade agreements (FTA) as defining the term RTA is not a subject of this thesis.

litigation costs, and other RTAs that it is engaged into with the potential respondent country because developing states are in need of bilateral assistance.

Although attempts to resort to alternative dispute resolution (ADR) mechanisms with more developed countries show that other states seeking alternative DSM do not stay dormant[2], the intentions of the Indian government to move away from the WTO DSM have not received enough of scholarly attention. Given the vast influence of the WTO DSM on RTAs and trade relations (Haftel 2007; Pevehouse, Buhr 2005), it is imperative to find what motivations the Republic of India holds when it signs agreements with other trade partners and what its expectations are as to the outcome of utilizing this tool. Against the common argument that developing economies favour RTAs because they want to expand and/or divert trade, it is argued that there are legal and political effects coming first, and not economic ones, that influence state's decision to sign an RTA. This thesis is aimed at exploring the motivations and expectations of India behind its strategic choice of concluding an RTA with other states. Why does India sign so many RTAs? The research question derives from the author's hypothesis that via RTAs India attempts to find an alternative way to make its legal and political commitments as a result of its dissatisfaction with the WTO Dispute Settlement Mechanism (DSM). Therefore, it was decided to examine why India is so active in negotiating them if those RTAs are so similar in its dispute settlement solution and given how vocal is Indian critique against the WTO DSM? What drives India to sign so many RTAs? More specifically, what are its motivations and expectations with regards to RTAs' legal and political instrumentarium?

India's dissatisfaction as well as pro-activeness in raising and responding to WTO disputes and its openness to new regional trade agreements containing clauses about DSMs provided good reasons to hypothesize that India is so active in signing those RTAs because of its misgivings with the WTO DSM. Since the 2000s, India signed 15 agreements, a majority of which contained a dispute settlement clause, and now it is in massive negotiations on other mega-RTAs like Regional Comprehensive Economic Partnership (RCEP) with the ASEAN and Asia-Pacific states, including Korea, Japan, China, New Zealand, Australia. To test this hypothesis, the author analysed the WTO

[2] In 2006, Colombia, which placed the ADR in the centre of its trade policy, initiated a trade dispute against the European Union and requested to use the Art. 3.12 of the Dispute Settlement Understanding (DSU) which allowed for asking for the good offices of the Director-General to help solve the dispute. Southern Common Market, or MERCOSUR, also served as an alternative forum for trade disputes in Latin America as the case Argentina – Poultry Anti-Dumping Duties between Brazil and Argentina was first brought to the MERCOSUR Panel in the form of an *ad hoc* tribunal, and then later on was taken by the WTO (DS241).

cases involving India as a respondent and a complainant. Then, an examination of the DSM clauses in all RTAs that the Republic of India has signed was conducted to eventually reject this hypothesis because legal and political analysis of models of such RTAs based on its content revealed that clauses in RTAs are designed mainly like the WTO DSM.

To provide a deeper insight into this matter, the thesis will open with a chapter on the current challenges of the Republic of India when using the WTO DSM for trade disputes and the basis of its critique to analyse what creates the platform for frustration with the WTO dispute resolution process. It will be explained how the WTO DSM works and what problems India faced. The second chapter will cover the content analysis of the main RTAs and alternative DSMs offered to examine potentially substituting tools for trade litigation, their applicability and empirical value. The author will reveal how similar the DSM in those RTAs is to the WTO DSM by comparing those provisions and will ask why, in case of so many similarities, India still includes them. Furthermore, due to a lack of research in this area and the need to glean qualitative data, it was imperative to conduct semi-structured interviews with political and legal elites of the Republic of India to find out the motivations and expectations of the Indian government and policy advisors in its quest for alternative dispute settlement tools. Five interviews were conducted from the 1st of April to the 9th of April, 2019; they took place in New Delhi and Chandigarh, with each lasting between 30 minutes and two hours. Some interviews were organized via Skype while additional questions were asked via Gmail. The summary and information provided by state employees, lawyers, heads of foreign trade institutions and policy experts formed the third part of this thesis. Interviews will confirm that it is not economic reasons that drive India to sign so many RTAs but a rather perplexing combination of various political and legal goals that Indian public institutions' elites and policy makers pursue.

The author gratefully acknowledges the consent of interviewees and their availability to spare their time to contribute to this research. Namely, the opinion of a WTO legal expert and a Joint Partner Bhargav Mansatta from the leading firm Lakshmikumaran & Sridharan that consulted the Indian state in the WTO cases DS206 and DS428, and Professor, Foreign Trade expert and Head of the Indian Institute of a Foreign Trade, Dr Manoj Pant. Other experts and politicians preferred to remain anonymous.

1. CHALLENGES OF THE REPUBLIC OF INDIA IN THE WTO AND THE USE OF A DISPUTE SETTLEMENT MECHANISM

1.1. Overview of WTO trade disputes involving the Republic of India

Since its accession, India has been an active participant in the WTO Dispute Settlement System, both as a complainant and a respondent. Partially, it can be explained by the dormant nature of its economy in the last 1980s as from the very beginning, Bharat followed an inward-oriented and autarkic strategy hostile to any trade liberalization (Bhagwati, Panagariya 2013, 44–45). Although being always more diverse and pluralistic in its approaches and strategies, it rarely was in favour of export collaboration with other states. Rather, it employed an import-substitution strategy for decades with an aim to achieve a higher level of self-reliance (Panagariya 2008). It was under the pressure of major global crises when an urgent need for structural reforms of 1999–2000 became egregiously clear – this understanding consequently led to the late (if compared with other WTO member states) implementation of tax, industrial, and financial policy reforms designed to attract foreign investments to the Indian economy[3].

During all those years of its involvement in DSM litigations, Bharat faced serious challenges due to such problems as inadequate domestic legal capacity (Shaffer *et al.* 2015) in the sphere of international trade law (the state did not have enough law specialists trained in this particular area), a lack of effective coordination links among trade policy experts, lawyers and industrial interest groups (Das *et al.* 2017, 2), and an inconsistency of technical and financial support. In total, as of March 2019, there were 207 cases involving the Republic of India as a third party, respondent or complainant. Regardless of the highlighted problems, India has been actively involved in disputes as shown in the map below (*cf.* there are 231 cases involving China and 424 cases involving the USA):

[3] Other probable cause of it might be that the DSM radically changed in character in the transition from GATT to WTO. According to Sinha (2016, 108), India was staggeringly protective in the areas of patents and health policies trying to maintain its autonomy in those areas. The TRIPS agreement triggered a massive political debate in the country, and there was a number of street protests by farmers against implementing intellectual property rights. Those social and political processes essentially slowed down the process of reforms and constrained politicians in their trade policy choices.

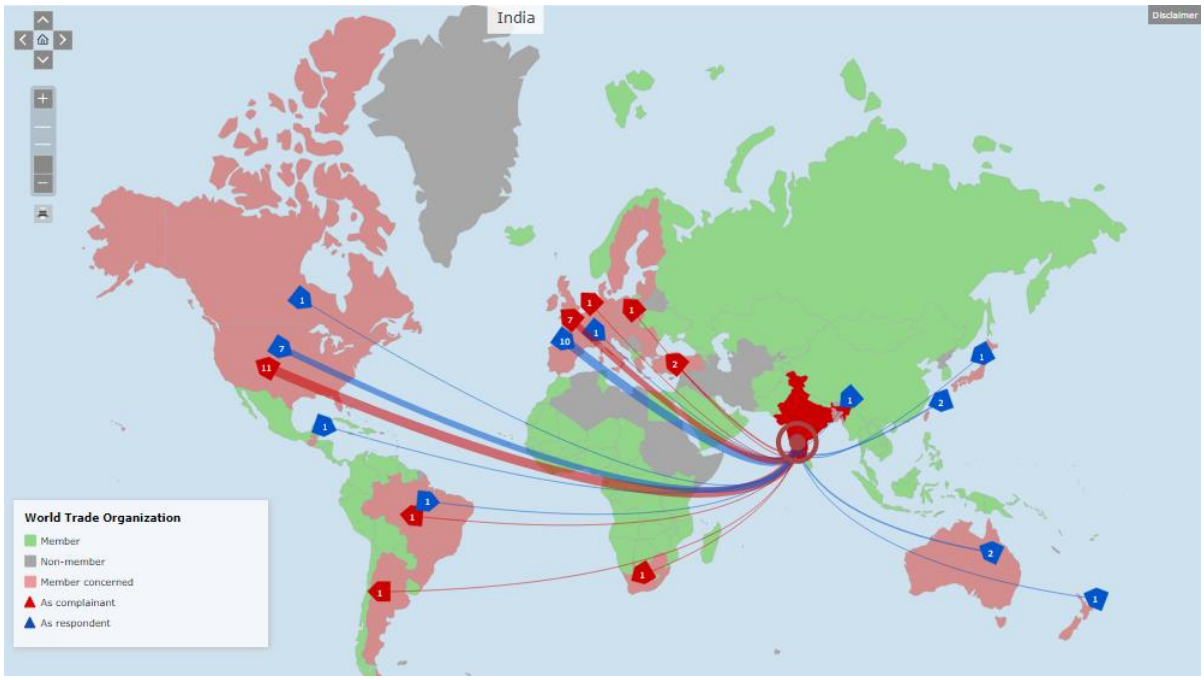

Figure 1. India's worldwide engagement in WTO disputes as a respondent, a complainant and a third party
Source: India in the WTO, WTO

Das *et al.*, among other researchers, also highlighted how the progress of Indian involvement in the WTO disputes has been unfolding year by year where a sharp upsurge can be noted in 2019 because in February and March 2019 three countries (Guatemala, Australia and Brazil) filed cases against India concerning sugar and sugarcane:

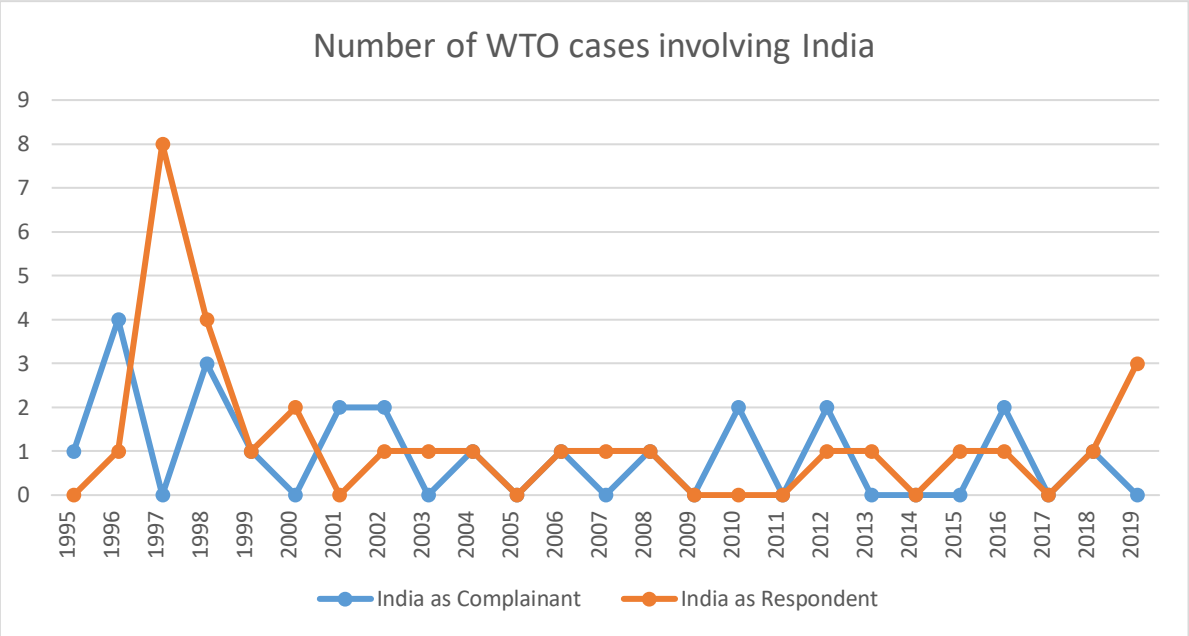

Figure 2. Number of cases involving India in WTO DSM year by year
Source: A revised and updated version of *Das et al.* 2017, 4

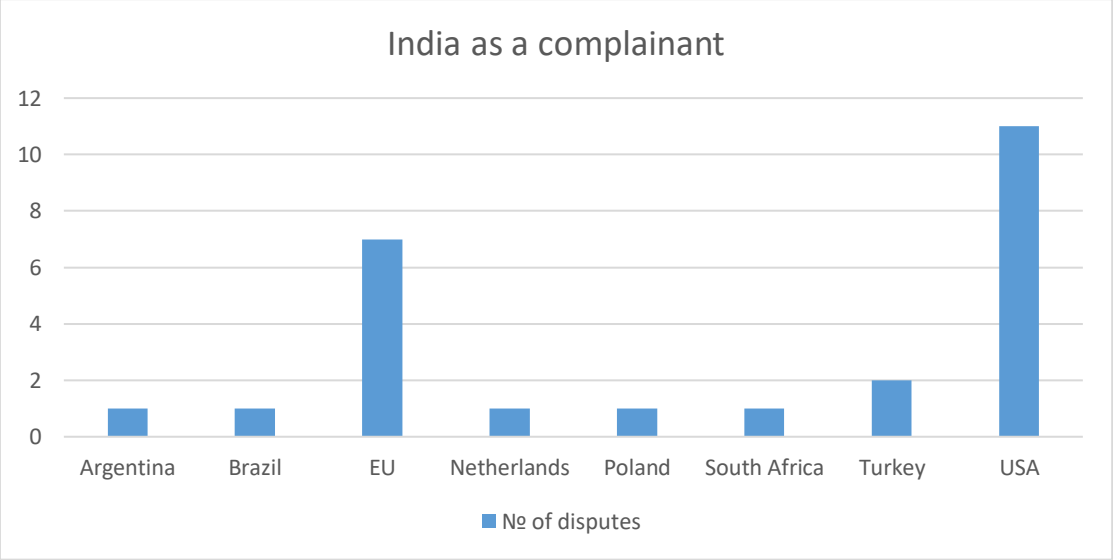

Figure 3. WTO members against whom India submitted a complaint. A revised and updated version of Das *et al.* 2017, 4
Source: WTO

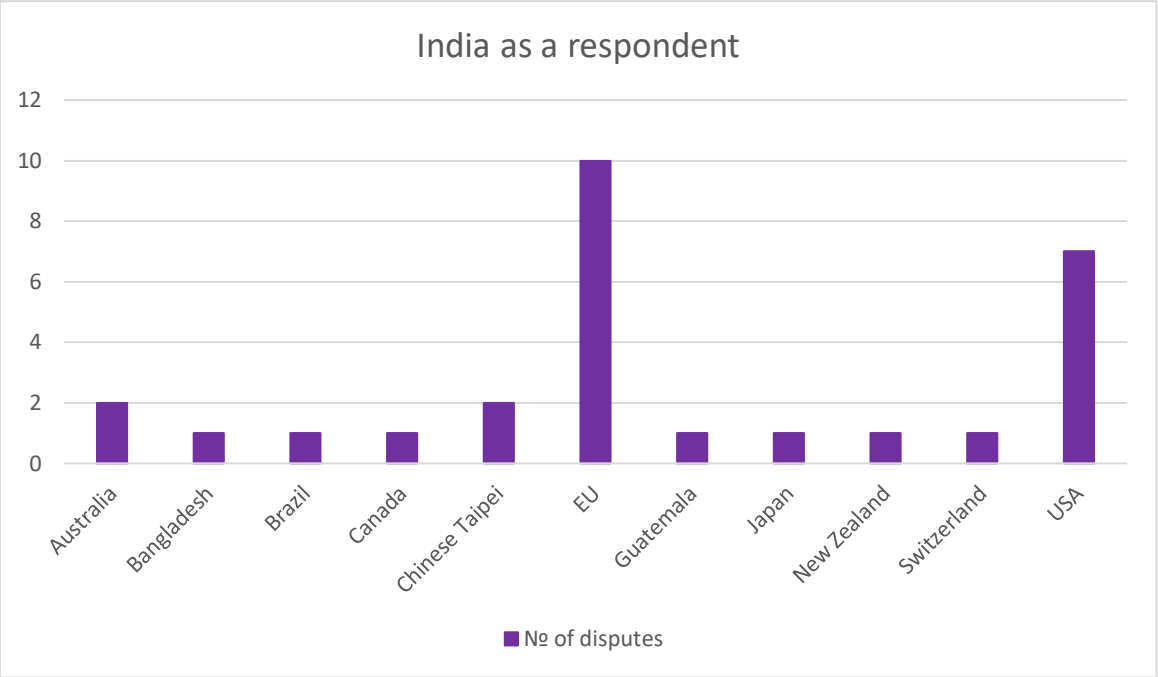

Figure 4. WTO members who submitted a complaint against India. A revised and updated version of Das *et al.* 2017, 4
Source: WTO

As can be deduced from the graphs, India has a staggering balance between acting equally as an active respondent and complainant in the WTO arena. Out of all 52 cases as of 2019 (please see the list of WTO cases used in this thesis in Appendix 1), it submitted a complaint 24 times while had to respond to 28 claims (*cf.* China was a complainant in 20 cases and as a respondent in 43). Figure 1 shows that each sequence of complaints against India is followed by a similar pattern of complaints from the Indian side after 2000. It also demonstrates that after 2000, India had to respond to claims almost every year but it started turning into an active complainant after 2010.

According to Figures 2 and 3, out of 52 cases, 35 disputes took place between India, the European Union (EU) and the USA where India is not passive on its side: it filed seven cases against the EU and served as a respondent to ten of them from the EU until 2008–2010 and complained against the USA eleven times and had to respond to its claims seven times. Several cases with the USA are ongoing and fresh, for example, DS503, DS510, DS541 and DS547. Next, regarding the scope of products affected, as Das *et al.* note (2017), Indian complaints seemed to target a specific category of products while USA and EU attempted to raise disputes against a broad category.

This tendency persists as in 2018, the USA rose dispute DS541 requesting to review the export-related measures while the latest cases of India against the USA concerned certain Measures on Steel and Aluminium Products (DS547), Certain Measures Relating to the Renewable Energy Sector (DS510). Finally, in the period between February and March 2019, three more cases were filed against India – DS579, DS580, DS581 – as Brazil, Guatemala and Australia lodged a complaint against Indian sugar subsidy regime, positing that its domestic support measures and alleged export subsidies are inconsistent with the WTO rules[4].

1.2. Legal incapacity as the main obstacle for the Republic of India in the WTO DSM

As a law-implementing institution, the WTO cannot be analysed without taking into account its potential to shape new norms and broaden the market demand; it is crucial to understand how it affects the activities of developing economies. Representatives of the Indian state have pushed forward the argument of the developing countries and least-developed countries (LDCs) by debating the legitimacy of the WTO DSM. It is claimed that the way the WTO implements and shapes legal norms has regularly resulted in multiple policy complications (Nobrega, Sinha 2008), among which there were food security complications and breaching farmers' rights due to a WTO patent regime under Trade-Related Aspects of Intellectual Property Rights (TRIPS) (Plahe 2009), welfare losses for pharmaceutical and agricultural chemical products (Watal 2000), competitiveness deprivation in other sectors (Reddy *et al.* 2009), and many more.

One of the main implications for Indian negotiators was revamping its legal capacity related to trade disputes as examined by Shaffer *et al*. (2015). According to Shaffer's research findings, legal capacity hereinafter means the ability of the Republic of India to utilize legal leverage with an aim to engage proactively in the processes of drafting, interpreting and defending its policy at the international and local levels (*ibid.,* 3). It plays a ground-breaking role in adoption of domestic laws and commitment of international obligations, and equally allows for effective participation in WTO disputes on a transnational level (Evans, Shaffer 2010, 346).

[4] It is equally worth noting that sugarcane is among the top determinants of the Indian relative export competitiveness in the area of agricultural commodities, according to 2019 statistics (Narayan, Bhattacharya 2019).

The other challenge that India faced along with other developing countries was the coordination problem that has been highlighted by three experts interviewed[5]. Semi-structured interviews with government officials, politicians, trade experts and think tank employees showcase the negative impact of institutional fragmentation on trade disputes in the WTO which presumably weakened India's stands. From the beginning of its international dispute history, Bharat suffered from the lack of inter-ministerial coordination as its institutional set-up did not imply the need to handle international law issues. Moreover, ministers aiming to maintain their integrity were reluctant to employ a more comprehensive and universal problem-solving approach. For example, in case of the dispute DS456 India – Solar Cells, new institutions' actions and rules pertinent to environment were not well-aligned with each other. Following this case, Indian Ministry of New and Renewable Energy was given a set of recommendations from the Ministry of Commerce and Industry (MOCI) asking them not to proceed with the LCR policy – a measure permitting the use of locally sourced goods in the manufacturing process – because it needed time to see whether it complied with the WTO rules; regardless of that, Ministry of New and Renewable Energy ignored this and proceeded further, which resulted in two different official documents from two different ministries (Jha 2017, 301).

Both issues, legal incapacity and inter-ministerial miscoordination, have shaped the legal approach of India to WTO conundrums. WTO members with more developed economies, as interviewees pointed out, prefer to set up disparate units for managing the litigation process, one for general WTO problems, for instance, a Ministry of Foreign Affairs, and one specializing in the legal process in particular, such as MOCI. This is not the case of developing countries as in India, due to lack of experts and coordination between those ministries, it was possible only to employ a mixed approach where the Ministry of Foreign Affairs, MOCI (and Ministry of Agriculture occasionally) share a joint responsibility for creating a focal point for WTO DSM cases (Plasai 2013, 4). This, as both scholars and ambassadors admit, keeps seriously impeding India's preparation for WTO disputes making the basis of its dissatisfaction with the WTO.

[5] Specifically, it was highlighted in a short conversation with the anonymous Ministry employee. As the interviewee admitted, sometimes the interviewee did not know "to whom to turn with questions" because there were too many people and too few available at the same time. M. Kumar, an Indian ambassador and one of the main negotiators at the GATT and WTO (2018, 166) delved into the similar issue. Probably, this can be the reason too why, during assigning the interviews, calling MOCI, emailing them, the author herself witnessed a poor response rate to emails, LinkedIn messages and phone calls. Finally, the lack of vertical coordination significantly affects small industries too, according to a legal expert Mr Bhargav Mansatta, as small industries facing trade problems cannot file any case because there is absolutely no formal mechanism for them to do so. For more details, please see Chapter 3.

The other example of the lack of legal capacity on behalf of India is the dilemma of the implementation of intellectual property rights law to pharmaceuticals. One of the immediate effects of the Agreement on TRIPS was a staggering price increase for drugs which would significantly affect poorer populations. To avoid and/or at least mitigate such consequences, a transition period has been set up for developing countries with a condition to strictly follow obligations described in Art. 70.8 and 70.9, forcing India to accept patent applications and assign priorities to the product which was subject of a patent application. Therefore, a mailbox mechanism was to be introduced. However, the Indian government relying on the Indian Patents Amendment to the Bill from 1995 put a strong focus on symptoms of prices' unaffordability and failed to comply with obligations set by TRIPS. Although a compromise has been found later on and the changes in the patent system were expected to be implemented in different intervals while some safeguard provisions were incorporated exceptionally, to patent monopoly in the public interest (Sreenivasulu 2013, 216), the topic of patents has turned into one of the most debated and unsettling ones for India.

Before TRIPS, India did not recognise any product patents because its law covered solely process patents which helped to produce and promote new inventions in the drug industry at cheaper prices in developed states (Agrawal, Saibaba 2001, 3787). To comply with TRIPS, the Indian government was challenged to change all its patent laws, and it made an attempt to file applications for pharmaceutical and agricultural chemical product patents through administrative instructions while appellate proceeding were ongoing, yet those attempts lapsed too. Despite the subsequent implementation of the Appellate Body (AB) reports, Indian executive branch still lacked enough administrative, legal and political potential to improve intellectual property protection, and until now, the case DS50 India – Patents (US) became a paramount example of how legal incapacity results in non-compliance from the side of a developing state.

Bahri (2018) asserts that paucity of capacity and challenges is deeply rooted in the domestic context of the developing state itself as it is the disorganization and lack of coordination that contributed to unaffordability of litigation at the WTO and noncompliance with its rulings. According to the scholar, those issues equally impede Indian policy-making at the government – industry level too. She describes the WTO DSM mechanism as a two-pronged tool: on the one hand, with the help of it, international adjudication takes place, on the other hand, there is a demand for a series of domestic actions to follow the judgement. Moreover, domestic actions go hand in hand with the private sector to respond to measures triggered by international fora. If parties whose

interests are tellingly affected cannot provide a prompt response to the WTO decision, this deficit of coordination between exporters, importers, trade unions, etc. may result in noncompliance with the existing judgement. As the case DS306 India – Bangladesh Batteries illustrates, it was the lack of coordination between exporters, business associations, commercial governmental bodies and industries in general that forestalled the India – Bangladesh trade back in 2010 (Pattanaik 2010).

Next, the other barrier that Bharat had to face is the lack of capacity-building opportunities and experts versed in the international WTO law. The former ambassador Mohan Kumar remembers that the Trade Policy Division used to rely on a handful of people who were involved in policy-making and accompanying the legal disputes (2018, 153) against hundreds of people employed in the EU and the USA[6]:

"…the author remembers the situation during the Uruguay Round negotiations in early nineties when the Mission in Geneva had an Ambassador and just two other diplomats to assist him during the Uruguay Round. At the Trade Policy Division in Delhi, there were just 2 or 4 persons dealing with WTO."

Historically, due to the closed nature of the Indian economy in the 1970s and 1980s and a burden of its colonial heritage, Indian companies did not require lawyers for getting subsidies for export or obtaining import licenses, and instead preferred to hire business consultants (Sinha 2005, 69). The 1991s reforms and active engagement in the Uruguay rounds catalysed Indian integration into a globalizing economy and thus increased the need for lawyers and legal experts. On an international level, however, this need emerged not internally but as a defensive reaction to WTO claims – India was acting as a respondent to 27 cases by 2019. Therefore, this deficiency is yet to be fixed.

Finally, the problem of the shortage of staff goes hand in hand with the fact that WTO disputes may last years. According to Kim (2017, 5), on average and with the appeal, it takes 706 days against the projected one year and three months. However, by contrast, according to Antell, Coleman (2011), there is no evidence justifying the fact that developing economies face significant strategic and political delays in litigation under the WTO DSM. By reviewing the days that each stage of the settlement takes both for the developing and developed member states, they found no

[6] The Office of the U.S. Trade Representative alone employs 265 people on a full-time basis, according to CNBC, as of January 2019 (Haigh 2019).

correlation between the level of income and the duration of the dispute in the WTO and that the delay in decision-making is explained by the lack of compliance from the side of developing states that do not comply with Article 21.3 providing the extension of litigation. For Sandhu (2016), the effective functioning of the WTO DSM is equally compromised when it comes to initiating a dispute under the WTO DSM. Also, proponents of the "participation costs hypothesis" argue that statistically, LDCs and low-income countries simply avoid using this mechanism due to high administration and litigation costs (Martin 2013; Welsh 2016).

1.3. Political backdrop – the negotiation resentment of India in the WTO

The above quick overview of India's involvement in the legal disagreement with major trade states allowed to categorize challenges that India faced, such as legal incapacity preventing its participation in WTO disputes and a coordination gridlock among departments. Those issues are closely intertwined in political barriers too, which are covered in the paragraph below, among them – questioning developing country's sovereignty; ineffectiveness of technical and financial assistance; institutional imbalance and inconsistency in applying legal terms which create the basis of a general *negotiation resentment* of the Republic of India in the WTO framework (Kumar 2018, 65) that, according to our hypothesis, creates the reason for Indian quest for engaging in more and more RTAs.

India has increasingly come to doubt the merit of the DSM for several reasons. First of all, anti-WTO advocates in India vividly pictured the requirements to impose the American model of law-making on developing economies as exclusive and non-democratic. Explicitly, the case DS90 India – Quantitative Restrictions challenged its invocation on the grounds of balance-of-payments for the tariff lines that Bharat failed to remove. In 1991, following a deep crisis of balance of payments, the Indian government agreed to a condition to introduce import licensing reforms and removed them for almost 2700 tariff lines (around 30% of the required number) to get the credit from the International Monetary Fund (IMF). Despite multiple requests from India to review the case in light of the findings of the parties involved, the AB relied on the opinion of the IMF in this matter. Hence, this case triggered the overall discontent of India and other developing states due to democratic deficit as the AB preferred to completely rely on the opinion of a monetary body and ignored the almost equally relevant expertise of other international institutions and bodies involved (Joseph 2011, 65).

The other reason was doubtful effectiveness of linkage to technical and financial assistance that the WTO members failed to provide. As the Art. 9 of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) stipulates, WTO members agree to provide technical assistance to emerging economies, which ranges from a mere advice to establishing national regulatory bodies and building infrastructure, with an aim to facilitate the process of building a compliance with export markets' requirements. Notwithstanding the fact that SPS Agreement was the next building block after the Agreement on Technical Barriers to Trade (TBT) to combat potential barriers to trade in a contentious field of food safety, Indian politicians and academics viewed the SPS requirements as a new impediment to trade and blamed the WTO dispute settlement system (DSS) for its emergence as a tool to legitimize protectionism from the developed countries' side (Das 2008, 982). As a result, the vast gap in financial, human and technical resources prevented India from complying with new certification regulations.

Sceptics note the case DS58 US – Shrimp between USA and India, Malaysia, Pakistan, Thailand was clearly an attempt of the developed country to impose trade sanctions unilaterally by using indeterminacy and ambiguity of the legal provisions of the SPS (Chimni 2002). Due to no solid WTO *acquis*, the USA enjoyed the flexibility of SPS regulations to set an embargo on all non-turtle-safe imports in 1996. Few years prior, the American Marine Fisheries Service developed a new technology allowing sea turtles to avoid or to escape from fishing nets called TED. Eventually, for the USA, other shrimp fishing methods without a valid certification were considered as the attempt to jeopardize the population of sea turtles. Developing economies denied this embargo (from WT/DS58/2, 10 January 1997) claiming that:

"…the Government of the United States fails to carry out its obligations and commitments under several provisions of the GATT and WTO Agreements, including but not limited to Article I, Article XI and Article XIII of the GATT, and that such failure is not justified by any provision of the said agreements, including the exceptions set forth in Article XX of the GATT."

According to India and other developing states, the American ban was unjustified and in inconsistency with existing WTO norms (Andersen, Raju 2016, 58). It upset the balance of rights and obligations between the major trading countries and developing economies by adding new obligations to the latter through the means of treaty interpretation because national law of the state did not make an integral part of the international law system, and as long as WTO members do not derogate from their obligations stated in WTO official documents, no embargo is legal. While the

USA government did not contest the claim that it violated Art. 9 of GATT General Agreement on Tariffs and Trade (GATT), the Panel highlighted the necessity to maintain the integrity of a multilateral trading system. It also posited that no disguised restriction to trade was a motive to impose such a measure but it was due to a set of environmental concerns.

Discrimination during the WTO disputes served as another reason of Indian dissatisfaction. The case DS246 dedicated to conditions granting tariff preferences to developing states was lodged by India against EC in 2002 following the same bias in interpretation (Shaffer, Apea 2005). Bharat challenged the European scheme for Generalised System of Preferences (GSP) claiming that its special arrangements to combat drug production and trafficking with 12 countries, including Indian's rivalry Pakistan, violated the basis of the WTO law – Most Favoured Nation (MFN) clause and Enabling Clauses, resulting in trade discrimination. The EU's system permitted various preferential regimes as the EU was following special arrangements under Lomé and Yaoundé documents. In the case of Pakistan, India claimed to suffer losses due to a trade diversion created by such special conditions. Despite the fact that the WTO Panel indeed found EU GSP inconsistent with Art. 1 GATT, it interpreted the word *non-discriminatory* the way that its notion did not prohibit developed countries to grant various tariff preferences to less competitive economies (Shaffer, Apea 2005, 982). Moreover, arguments of India containing interpretations from the United Nations Conference on Trade and Development (UNCTAD) texts were thoroughly refuted by the EU as well as other legal interpretations (from WT/DS246 in the WTO Documents Online, 32):

"India has nowhere addressed the EC's arguments regarding the object and purpose of the Enabling Clause. Instead, it persists in the error of interpreting the term 'nondiscriminatory' as if the 'protection of competitive opportunities' were the sole objective of the WTO Agreement."

Similarly, Chimni (2010, 247) examined three cases to conclude that in disputes with developing countries in particular, legal interpretation turns into a decisive factor to shift the political and legal balance of rights and obligations. In cases of India – Quantitative Restrictions, US – Shrimp, EC – Tariff Preferences, the Panel tended to favour major trading economies which later on affected the process of political bargaining. The case DS33 United States – Wool Shirts and Blouses from India, where the WTO Panel had to adopt the concept of burden of proof for the first time in 2005, had no formal procedure mentioning a burden of proof existed (Das 2017, 167). This non-WTO norm resulted in inconsistent use of burden of proof for cases with India like India – Autos, India

– Quantitative Restrictions, India – Additional Import Duties as for the first two cases the burden of proving was placed on the party raising the issue while in the case of India – Additional Import Duties it was rather India than the USA which raised the Art. 2 of GATT but the burden was with the U.S. (Grando 2009, 178–179).

Those arguments further contribute to the notion of the political and institutional imbalance within the WTO. Due to strict deadlines of adjudications and a consensus-based system of political negotiations, the political branch of the WTO frequently tends to settle with quicker yet authoritative interpretations. During the dispute DS90, India – Quantitative Restrictions, India justified its non-compliance with imposing trade restrictions by the GATT exceptional clause applicable to measures taken for the reason of maintaining the balance of payments. Two political powers, the General Council of the WTO and the Balance of Payments (BOP) Committee of the WTO, introduced their recommendations and interpretations of the Arts. 22 and 23 of GATT 1994. The first one stated that the member should proceed with recommendations and be in compliance with 1994 GATT obligations while BOP Committee was to propose alternative measures and the schedule to phase out the restrictions that were unjustified and inconsistent with 1994 GATT. The defendant party of India faced the jurisdiction panel by attempting to justify its balance of payments' measures with a footnote 1 of the BOP Understanding. The AB rejected it on the basis of insufficiency. Furthermore, India argued that competence of other bodies of the WTO should be equally taken into account to maintain the institutional balance but the AB rejected that too, stating that BOP Committee and Panel vary in their functions and that procedures of the DSM cannot equalize with that of BOP Committee. Hence, the WTO Panel extended its authority by reducing the power of other political bodies (Bartels 2004, 878).

1.4. Conclusion

All challenges combined have contributed to what a former Indian ambassador to the WTO Mr Kumar called *negotiation resentment* of the Indian government (Kumar 2018, 65). The Indian government after the outcomes of the Uruguay Round was persuaded of unfair and unbalanced nature of any negotiations in the WTO and WTO DSM. The reasons why India thought that the WTO DSM was biased were the following:

1. The lack of legal capacity from the Indian side as during the 1990s, there were no staff, hardly any legal experts specializing in the WTO and no institutional memory to face the

WTO conundrums. Moreover, this was deeply aggravated by both the vertical and horizontal miscoordination as, on the one hand, the ministries shared similar responsibilities, and bureaucracy prevented India from effective participation in the WTO disputes, and, on the other hand, industries had no formal mechanism to fight for their rights.

2. Democratic deficit in law-making, in law interpretation and solving the disputes seemed to be the other reason why India was not willing to comply with the WTO rules and AB reports. By using its political leverage, the WTO DSB seemed to take decisions that favoured major developed economies in the dispute and not India. Closed epistemology that the WTO Panel employs for solving and managing trade disputes objectively is perceived in the eyes of the Indian government as an attempt to exclude their economic, political and diplomatic interests.
3. Ineffectiveness of technical and financial assistance indoctrinated Bharat even more deeply against the WTO because it did not meet its expectations and was not tailored enough to help developing countries to overcome an overall imbalance within the system.

Issues with the WTO, eventually, pushed India to look for more inclusive, democratic alliances. As discussed during the interview with an anonymous Ministry worker, one of the key agenda topics of the Ministry of Commerce in the 2000s was to achieve the inclusiveness and trade promotion. The notion is supported by the claims of the Minister of Commerce and Industry, Suresh Prabhu: “We are preparing an agenda that does not exclude any country in the process of making the WTO better” (WTO should be modified…, 2018), accentuating the goal of statesmen in India to create strategic alliances.

Hence, the author hypothesizes that, given the combination of the problems with the WTO mentioned above, the RTAs may seem to India the way for more inclusiveness in its legal and political aspirations as it creates the incentive to solve trade disputes in an alternative, probably more tailored way. The next chapter will explore various RTAs and its political and legal aspects to prepare for further insights as to how the Republic of India attempts to present its interests via the trade agreements.

2. REGIONAL TRADE AGREEMENTS AND ALTERNATIVE DISPUTE SETTLEMENT MECHANISMS

2.1. Background

Up to the present, the Republic of India is a member of 18 (notified to the WTO) regional trade agreements, including ASEAN, Asia Pacific Trade Agreement (APTA), SAFTA, MERCOSUR and bilateral agreements with such countries as Bhutan, Japan, Sri Lanka, Singapore, etc. As scholars posit (Baldwin, Panagariya 2013; Kumar 2018; Mahrenbach 2013), the move towards regional cooperation instead of a global multilateral system offered by the WTO can be linked to an ocean of dissatisfaction with the way the WTO DSM works. Following the criticism of the WTO DSM and strengthening of cooperation and collaboration at regional levels, the proliferation of mega-regional agreements, as Bown discussed (2017), among major economies (USA, EU, Japan) made a paradigmatic shift in international trade. A quick examination of the text of such RTAs shows that many RTAs include procedures to resolve disputes between states. After the failure of Doha Round, WTO negotiations failed to lead to any renewal of the procedures and rules established back in 1990s. With new interests and areas appearing, RTAs started taking their place to promote trade disciplines that developing countries would agree to.

Those negotiations have resulted in the introduction of new dispute settlement rules as previously, RTA members used to go back to the WTO DSM to resolve disputes between them at a multilateral level, and the WTO still served as an authorized trade institution to accommodate interests of transparency and non-discrimination of all signatory states through effective dispute settlement mechanisms. For example, the mega-regional agreements, by contrast, like the Transatlantic Trade and Investment Partnership (TTIP), offer a more transparent way of settling investment-related issues empowering the investors with an opportunity to bring cases directly against foreign states for arbitration (Bown 2017, 4).

Historically, India's commitment to the WTO heavily reflected its colonial heritage – immature markets with unprepared economic agents and hostility of its bureaucratic system combined with

general distrust of and dissatisfaction with the international economic system. Unsurprisingly, after the fall of the British rule, it showed an ambivalent attitude towards world trade perceiving it more as a threat to its economic self-sufficiency rather than as an opportunity. However, the fall of the Soviet Union and the rise of China made India look East to fight for its influence within the Asian region by signing more bilateral and multilateral agreements with ASEAN countries as well as entering into partnerships with the USA and the EU as main trade destinations. Although it was becoming a prominent player in the world markets, particularly in pharmaceutics and software, India denied implementation of policy changes during the Uruguay and Doha rounds expressing its protectionist stands in the agricultural sector (Srinivasan, Tendulkar 2003).

Since the late 1980s, India has been actively involved in multiple layers of an international trade system. Unlike with the WTO DSM where the MOCI took the lead in policy-making and in the WTO environment, it was the Ministry of External Affairs that played a central role in enhancing its trade opportunities. In 2003 and 2004, India has become a member of RTAs designed by the Association of Southeast Asian Nations (ASEAN) and MERCOSUR, thus alleviating its import/export burden with Indonesia, Malaysia, Singapore and mainly Brazil. Those regional trade agreements resulted in a large upsurge of Indian imports to Singapore as it became part of CECA, or Comprehensive Economic Cooperation Agreement, in the middle of the 2000s. While in 2002 the bilateral trade between India and Singapore was 1.5 bln dollars, in 2004 it was 6.65 bln dollars, then, in 2015, it totalled 20 bln dollars according to High Commission of India in Singapore (India – Singapore Bilateral Trade 2019).

Equally, in 2004, Bharat government joined SAFTA, or the South Asian Free Trade Area, an ambitious attempt to give an impetus to further trade liberalization in the region. According to Rodríguez-Delgado (2007, 5), India was a major contributor to its aims. It reduced the average tariff by 20% during a decade and generally improved its tax productivity or the extent to which tax revenues are received[7], by engaging with other SAFTA trade members, such as the Maldives, Bhutan and Bangladesh.

Another major free agreement among South Asian Association for Regional Cooperation (SAARC) served as a second initiative of the Republic of India in 2006 which Bharat signed together with its neighbours Bangladesh and Pakistan and other regional partners and which

[7] According to Poirson (2006, 10), it is the ratio of effective tax rate to a statutory one.

became a continuation of its strategic intentions. Commercial relations have been established to re-channel increasing trade flows to regional locations, and also to counterweight similar regional projects. However, given the lack of advanced infrastructure and reluctance of Pakistan to grant India the MFN status, these asymmetries brought about slow progress of this RTA, with its members preferring to rather opt for bilateral commitments (Kelegama 2016, 31).

The 2010s were marked by signing FTAs between India and major powers in the ASEAN region – South Korea (2009) within a framework of CEPA, or Comprehensive Economic Partnership Agreement, Japan and Malaysia in 2011 within frameworks of CEPA and CECA respectively, as well with ASEAN states – in 2010, the liberalization of goods has been agreed upon and in 2015, a similar strategy was applied to investment and services. The scope of CEPA and CECA agreements included investment, competition, cooperation in the fields of education and technology as well as dispute settlement of trade issues.

The dynamics of the Indian engagement into regional agreements in goods and services is displayed below:

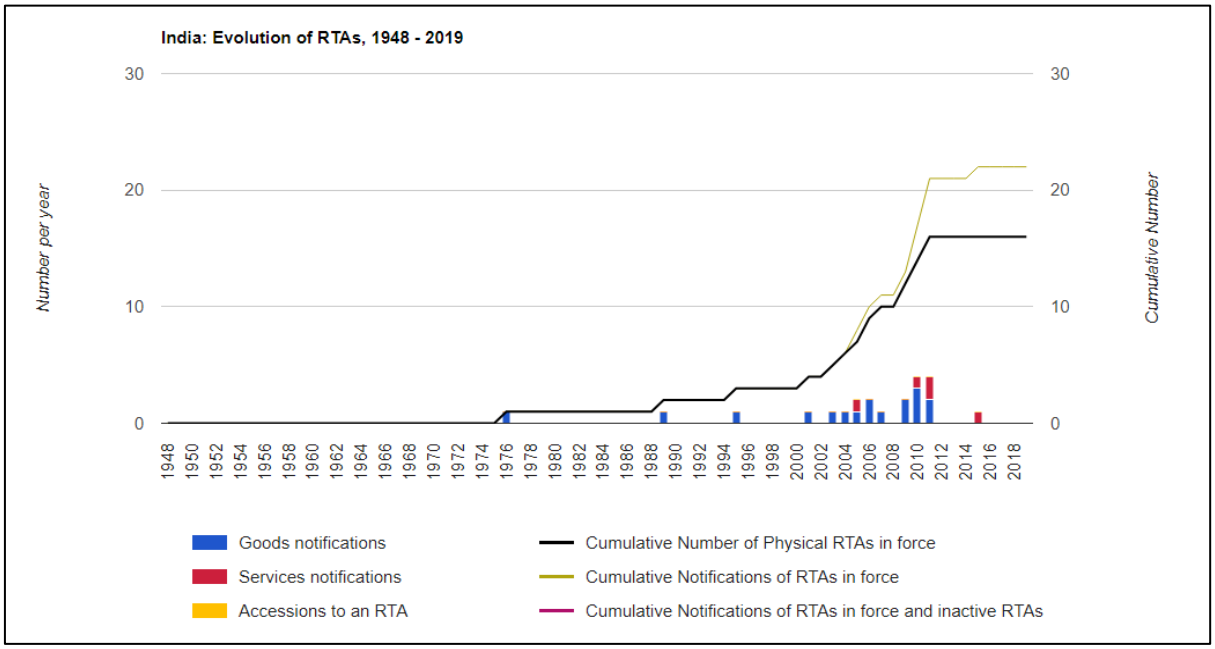

Figure 5. The number of RTAs signed by the Republic of India yearly from 1958 to 2018
Source: WTO

New zeal for multilateral trade agreements has been pioneered with the project for the RCEP agreement. In 2013, this super-RTA RCEP, or the ASEAN+6, has been proposed to open a new

chapter in trade relations between India and ASEAN. Based on the WTO-plus approach, it is aimed at enhancing the WTO norms and restrictions by applying new rules and procedures in the domain of intellectual property, competition, the environment, labour standards, human rights – those most contentious topics on which the WTO leaders and Asian countries still cannot find an agreement (Panda 2014, 52).

2.2. Research design for analysing RTAs

According to scholars, the WTO DSM and the DSM included in the RTAs reflected two parallel trends in international trade system of the end of the century – a movement towards legalism, or law enforcement through impartial third parties (Jo, Namgung 2012; Smith 2000, 137), and institutionalization as a concomitant process to economic integration (Peters 2012). Proponents of a functionalist theory in political studies argue that, based on the assumption that international trade actors are rational, they solve their collective action problems with an aim to increase gains from trade via creating relevant institutions (Peters 2012, 61).

The new dispute resolution mechanism introduced under the WTO marked a remarkable departure from the GATT-led trade practice – while under the GATT Council, each stage of decision-making required a consensus that could be vetoed by the defendant, including the adoption of the panel report, and the right for establishing a Panel was recognized in the Art. 6 of the DSU (in the GATT, it required a consensus too), thus marking a pathway towards more legalisation. Development of the international trade system essentially brought about enhancement of its dispute settlement system. In parallel to the progress of the WTO DSM, the RTA participants developed their own mechanisms frequently following the design of the WTO DSM. The first classification of the DSM was offered by Smith (2000) who examined RTAs in terms of their spectrum, stretching from diplomatic to legalistic ones. According to the level of legalism determined by an explicit right of a third party review, by the fact whether the result is binding and by types of remedies in RTA-DSMs along this continuum, Smith (2000, 139) describes those levels as “none”, “low”, “medium”, “high”, and “very high”, where the highest level of legalism is embodied in the institutionalization, and “none” refers to no third party review.

A more recent insight into RTA DSMs by Jo and Namgung (2012) based on more than 220 RTAs offers a narrower classification, where three categories can be highlighted based on similar factors,

i.e. whether the third party review is permitted, whether the result is binding, whether there are any institutions to implement and/or supervise the implementation. RTAs with a low level of legalism rarely offer any third-party adjudication and the result brings about no binding legal effects. RTAs with a medium level of legalism accept a third party and their result is binding while those with a high level of legalism have permanently set institutionalized courts and tribunals.

Finally, Chase *et al.* (2013, 25) attempted to embrace the previous classification and offer three broad categories of RTAs's legalism – political (diplomatic) DSMs, quasi-judicial, judicial. RTAs providing for the dispute resolution in the form of consultations constitute a political, or quasi-judicial model. RTAs that have no DSM at all, or only provide for a negotiation between the signatories and/or contain a referral of a dispute to a political body for settling the trade dispute, in other words, RTAs without a third party review and a low or zero level of legalism are characterized as political ones (*cf.* Art. 21 APTA which reads as follows: "Any dispute that may arise among Participating States <…> shall be amicably settled by an agreement between the parties concerned"). All other RTAs that follow judicial model, according to Chase *et al.,* allow for judicial and institutionalized DSMs (see Table 2 and Appendix 3).

Hence, following the rationale described above, the author will further analyse the legal and political aspects of the RTA DSMs that India is a part of, by three criteria:
1) extent of *legalism*, or the possibility to ask the third party to participate in the review of the dispute to avoid any bias;
2) legal effect of the decisions made using the RTA DSM, or its *bindingness*;
3) extent of *institutionalization*, as it will be examined whether there is any institution to implement the decision made via RTA DSM (Jo, Namrung 2012, 1044–1045).

2.3. RTAs of the Republic of India and their taxonomy

2.3.1. Legalism of the RTA DSMs with India

The latest studies have shifted their focus from effects on the trade and investment of RTAs to their long-term implications for the balance of powers and setting the rules in such fields as rules of origin, public procurement, regulatory policies (Woolcock 2014, 13). More scholars tend to view RTAs as alternative fora for resolving trade disputes: while highlighting that in general, RTAs contain dispute settlement mechanisms moulded in a form similar to the WTO DSM, researchers

believe that they do differ in various respects as RTA DSMs provide political incentives too (Jo, Namgung 2012, 1043).

The extent to which RTA DSMs are formalized differs among various legal arrangements (see Appendix 2 for a synthesis of RTAs involving India and its DSMs). While for certain RTAs solely political means (without a third party review and of a minimum level of legalism) is considered the best way to solve disputes (India – Nepal FTA, India – Afghanistan, India – Bhutan RTA[8]), a third party is an important player in many RTAs which the Republic of India has signed. Following the model of the WTO DSM, Art. 8 of the ASEAN – India DSM agreement specifies that any party which displays a substantial interest in taking part in a dispute may have a chance to make written submissions.

[8] India – Bhutan agreement contains no dispute settlement notion at all, the Art. 10 only provides a vague suggestion: "The two Governments agree to enter into immediate consultations with each other at the request of either side in order to overcome such difficulties as may arise in the implementation of this Agreement satisfactorily and speedily".

Table 1. List of RTA DSMs of India

Trade agreement name	Year of signing	Type	DSM
Asia Pacific Trade Agreement	1975	Goods	Yes, via the body - Standing Committee
India-Afghanistan PTA	2003	Goods	Yes, via the body Arbitral Tribunal
India-ASEAN	2010; 2015	Goods, services, investment	Yes, a separate DSM clause + special Protocol on the Dispute Settlement
India-Bhutan	2006	Goods	No
India-Chile	2006	Goods	Yes Consultations, Arbitral Panels, Committee, WTO DSM
India-Japan	2011	CEPA	Yes, Consultations, Arbitral Panels, Committee, ICSID, WTO DSM
India-Korea	2009	CEPA	Yes, Panels, WTO DSM
India-Malaysia	2011	CECA	Consultations, Committee, Arbitral Panels, WTO DSM
India-Maldives	1993	Goods	No, or SAARC Arbitration Council
India-MERCOSUR	2004	Goods	Negotiations, Joint Committee, WTO DSM
India-Nepal	2002	Goods	No
India-Pakistan	1993	Goods	SAARC Arbitration Council
India-Singapore	2005	CECA	Yes Consultations, Arbitral tribunals
India-Sri Lanka	1998	Goods	Yes, negotiations, Joint Committee, Arbitral Tribunals
SAARC	1993	Goods	Yes SAARC Arbitration Council
SAFTA	2004	Goods	Yes, COE and BOP
SATIS	2010	Services	SAARC Arbitration Council
India-Thailand	2003	Goods	WTO DSM

Source: Ministry of Commerce and Industry, India, author's compilation

As Table 1 shows, one of the most important ramifications of the RTAs for India is that the text of the RTA can be designed in a way agreed between two parties, thus providing for a more tailored DSM design. The willingness of India to conclude an RTA is tinted with the aim to influence other states politically because the specifically designed RTA DSM can provide for a better balance between commitment and flexibility (Jo, Namgung, *ibid.*). On the one hand, it helps deepen the

commitment in a way parties want it, i.e. in a way different from the universal WTO DSM, while on the other hand, the level of autonomy to be given up can be also adjusted as per the expectations of member states. Therefore, this suggests another motive for India and other developing countries to conclude RTAs – with a goal to tailor it to their political needs.

Finally, the size of the trade partner and its regime are equally important variables for India. Bharat tends to sign trade agreements with states of s similar size, also, the probability of RTA formation is higher if there is a low difference in political regimes. It concerns not only the structure of the welfare system which is different for democracies and autocratic regimes but the more democratic judicial system (Pant, Paul 2018, 557):

"…India is more prone to sign RTA with those trading partners whose judicial institutional structures are similar. The difference between government effectiveness of India and its trading partner is weakly significant at 20 percent level."

The similar judicial system allows for greater flexibility in terms of the choice of the adjudication fora and deepness of the trade commitments, including its bindingness. A majority of the RTAs with India has a clause on the dispute resolution, yet there are few that are silent about it – MERCOSUR – India and Chile – India RTA where the parties are expected to agree on a single forum and if not possible, then the complaining party can choose the place of adjudication.

A minority of RTAs grants exclusivity to certain contentious issues between states in the terms of TBT. For India – Japan CEPA, the clause on dispute settlement works in terms of its non-application, i.e. it simply specifies that RTA DSM jurisdiction does not cover TBT-issues, hence the Party willing to resolve TBT-related problem will have to rather opt for the WTO DSM[9]. The same applies to Sanitary and Phytosanitary Measures – SPS and TBT measures are not covered by the India – Korea RTA (Art. 2.28).

Certain RTAs include a forum-choice clause that helps avoid the risk of conflicting rulings between the RTAs and WTO DSM. This clause does not allow parallel or subsequent proceedings in another forum but provides a choice of the place of adjudication leaving it up to the complaining party to decide what the third party can be in a dispute. In some RTAs, alternative fora are mentioned to

[9] India – Japan CEPA, Art. 133 provides as follows: "Nothing in this Chapter shall prejudice any right of the Parties to have recourse to dispute settlement procedures available under the WTO Agreement".

choose from, therefore, in India – Korea RTA (Art. 10.21) it is recommended to solve investment-related disputes with a third party tribunal, such as International Centre for Settlement of Investment Disputes (ICSID) or United Nations Commission on International Trade Law (UNCITRAL).

Next, India-Singapore CECA, in its Article 15 on the dispute settlement, specifies that disputes between those states shall be resolved by setting up other arbitral tribunals. These alternative means have put India among the top three countries that approach the Singapore International Arbitration Centre (SIAC) for dispute settlement[10], the other two were the USA and China, and a third of the cases were dedicated to trade-related issues. In the case of Singapore, India preferred another legal form of dispute settlement – a mediation which does not include any third party to control the outcome. It was of particular importance to Bharat because CECA agreement covered a wide range of issues, including the intellectual property rights and competition policy as well as investment protection provisions (Inbavijayan, Jayakumar 2013, 47)[11]. From this perspective, the shape of the DSM can equally contribute to the comprehensiveness of the RTA.

Malaysia – India Comprehensive Economic Cooperation Agreement (MICECA) follows a similar path but provides both states with better flexibility because states are not just free to select a particular forum to settle the trade dispute among them (Art. 14.3 of MICECA). Also, it contains a specific clause of the time frame (Art. 14.13) according to which Parties can reduce, extend or waive time frames by mutual agreement. The same clause can be found in an RTA with Singapore (Art. 15.10), which renders both RTAs more flexible than the WTO DSM.

2.3.2. Bindingness of the RTA DSM

Bindingness of the RTA DSMs is another contentious issue of such agreements as it brings about the compliance review. ASEAN – India DSM agreement highlights the importance of the final report so the decision included in it is final and binding (Art. 13) on all the parties in a trade dispute. The binding decision also should be publicly available. However, unlike in the WTO DSM where

[10] In 2017, India topped the geographical list of users of SIAC according to SIAC's Annual Report 2017.

[11] Since 2010, India has become such a frequent user of a foreign arbitration in Singapore that it even caused controversy. In 2014, the case of Addhar Mercantile Private Limited v. Shree Jagdamba Agrico Exports Pvt. Ltd. showed that both Indian companies wanted to choose the foreign law of Singapore to resolve their dispute instead of a domestic forum. In Indian law does not specify whether Indian companies can do it without a domestic court involvement. The Supreme Court of India found a foreign element in the dispute (a contract where one of the company's parties was registered in Hong Kong) and hence did not object that, yet it showed the tendency of Indian companies to opt for alternative, mainly Singapore-based courts instead of their local ones.

Third Party's report "shall be reflected in the panel report" (Art. 10 WTO DSU), ASEAN – India DSM can easily exclude it from their report and the opinion of the third party is of less value. There is no appeal procedure specified in the ASEAN – India DSM agreement either. And in case of non-compliance, it envisages a compensation and the suspension of concessions or benefits just like the WTO DSM.

Table 2. The type of RTAs as per the type of their DSMs

Trade agreement name	DSM	DSM Type
Asia Pacific Trade Agreement	Yes, via the body - Standing Committee	Political
India-Afghanistan PTA	Yes, via the body Arbitral Tribunal	Political
India-ASEAN	Yes, a separate DSM clause + special Protocol on the Dispute Settlement	Judicial
India-Bhutan	No	Political
India-Chile	Yes Consultations, Arbitral Panels, Committee, WTO DSM	Judicial
India-Japan	Yes, Consultations, Arbitral Panels, Committee, ICSID, WTO DSM	Judicial
India-Korea	Yes, Panels, WTO DSM	Judicial
India-Malaysia	Consultations, Committee, Arbitral Panels, WTO DSM	Judicial
India-Maldives	No, or SAARC Arbitration Council	Political
India-MERCOSUR	Negotiations, Joint Committee, WTO DSM	Quasi-judicial
India-Nepal	No	Political
India-Pakistan	SAARC Arbitration Council	Quasi-judicial
India-Singapore	Yes Consultations, Arbitral tribunals	Judicial
India-Sri Lanka	Yes, negotiations, Joint Committee, Arbitral Tribunals	Political
SAARC	Yes SAARC Arbitration Council	Judicial
SAFTA	Yes, COE and BOP	Quasi-judicial
SATIS	SAARC Arbitration Council	Judicial
India-Thailand	WTO DSM	Judicial

Source: Author's compilation

Less legalistic and less binding DSM is considered a political incentive to commitments that the RTA may bring. Bilateral RTA of India with the Maldives contains no notion of the DSM and only

Art. 10 implies some sort of consultations for effective implementation of the agreement[12]. According to the legal expert involved in the WTO disputes and RCEP negotiations [Int. 5, see in Chapter 3], the less legal nature of such RTAs can be explained by the ultimate goal of such agreements: "We do not have any trade problems with those countries, like, the South Korea, Thailand, moreover, such problems as TBT, SPS, those FTAs, PTA simply cannot cover".

2.3.3. Institutionalization level of the DSM in RTAs with India

According to Brown *et al*., institutionalization in the RTAs is essential for the DSM in the RTA to work for India (2009, 96). Large RTAs such as ASEAN – India DSM, Protocol for Enhanced Dispute Settlement Mechanism (PEDSM), SAARC, offer a set of institutionalized bodies to streamline the process of adjudication and further follow-up of the implementation of the decision.

Art. 20 of the Treaty of Agreement on SAARC Preferential Trading Arrangement (SAPTA) aims at a peaceful resolution of disputes. In case of a failure to reach any, it offers to set up a Committee of Participants to review the dispute and implement a solution for the trade partners. Nevertheless, the article is rather short and lacks any elaboration on the process of submitting an application to request to a Committee as well as detailed explanation of its work and procedures[13]. The trade dispute between Bangladesh and India demonstrated a serious deficiency of this approach when Bangladesh had to encounter anti-dumping duties imposed by Bharat. Following a qualificatory rescindment of preferential treatment in trade, the Minister of the Commerce of Bangladesh first decided to use the DSM offered by SAPTA. However, no correct response from India and failure to find an amicable solution compelled the complaining party to resort to the WTO DSM and submit an application there instead of a SAPTA DSM (Nath 2007, 339).

ASEAN RTA DSM, too, is characterized by a high level of institutionalization, however, to a large extent, it was modelled after the WTO DSM (Hsu 2015, 2). This RTA is said to be a result of

[12] Art. 10 provides as follows: "In order to facilitate the implementation of this Agreement, the two Governments shall consult each other as and when necessary".
[13] Art. 20 of the SAPTA goes as follows:

"Any dispute that may arise among the Contracting States regarding the interpretation and application of the provisions of this Agreement or any instrument adopted within its framework shall be amicably settled by agreement between the parties concerned. In the event of failure to settle a dispute, it may be referred to the Committee by a party to the dispute. The Committee shall review the matter and make a recommendation thereon within 120 days from the date on which the dispute was submitted to it. The Committee shall adopt appropriate rules for this purpose".

There is no further article or subparagraphs about it.

decades of formalizing legal rules and political arena for the sake of norm-setting in the Asian region, with a goal to create a rule-based regime to enhance the implementation of trade commitments of its members[14]. Yet, ASEAN PEDSM describes the dispute settlement system staggeringly similar to the WTO DSM as it implies the set-up of panels to resolve disputes, an appeal mechanism (Appellate Body), as well as other means of DS (good offices, conciliation and mediation). The enforcement mechanism is similar too but it omits any intellectual rights-related disputes, while the WTO DSU specifically mentions it.

Although functions of the DSB are similar, ASEAN PEDSM offers a significantly different timeline if compared to the WTO DSM (Hsu 2013, 388-389). While it can take up to one year until the first report is adopted, ASEAN DSM can offer the Report to be ready within five months in case of no appeal. The significantly shorter timeline for all stages of the dispute settlement was achieved in various ways. While both in the WTO and PEDSM consultations may take up to 60 days, PEDSM takes more time to establish the Panels by the Senior Economic Officials Meeting (SEOM), Art. 5 of the WTO DU is much more elaborated and contains 11 subparagraphs against five of the PEDSM[15]. However, PEDSM specifies the exact timeframe for establishing the Panels – 45 days while WTO DSM and Art. 6 specifies that the Panel establishes by the second DSB meeting, and since DSM meetings take place every month, it will be in practice done automatically when the request to establish a Panel is on the DSB's agenda. The report gets adopted with SEOM much faster than in the WTO – in 70 days maximum against nine months in the WTO (or three months in case of urgency) which reflects the main argument of developing states being unable to cover enormous costs of all review stages. In case of an appeal, its review takes equal time in both the WTO DSM and ASEAN DSM because those articles are almost identical:

[14] The Art. 2 of the ASEAN charter on its primary principles highlights the following:
d) reliance on peaceful settlement of disputes; <…>
n) adherence to multilateral trade rules and ASEAN's rules-based regimes for effective implementation of economic commitments and progressive reduction towards elimination of all barriers to regional economic integration, in a market-driven economy.

[15] Moreover, Art. 3(5) PEDSM and Art. 5(9) WTO DSU are absolutely identical: "In cases of urgency, including those which concern perishable goods, the parties to the dispute, panels and the Appellate Body shall make every effort to accelerate the proceedings to the greatest extent possible".
Overall, the text comparison of PEDSM and WTO DSU texts have demonstrated 27% in being identical when checked on copyleaks.com.

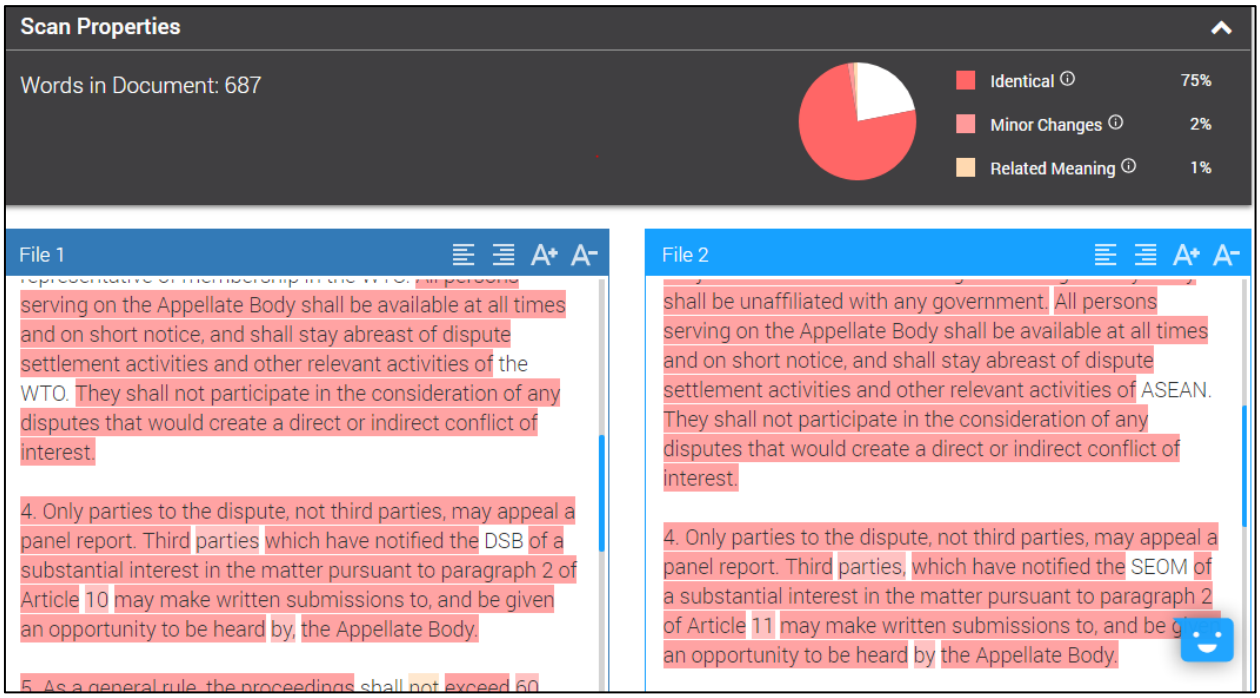

Figure 6. A textual comparison of Art. 17 WTO DSU (left column) and Art. 12 PEDSM (right column)
Source: Copyleaks 2019

Finally, implementation of findings and recommendations also takes a much shorter time in PEDSM than in WTO DSM as it is specified as 60 days in Art. 15 and Art. 16 while in the WTO DSM it is much vaguer – the implementation should take a "reasonable period of time", based on the proposals from the member states, arbitrator, etc. but it should not exceed 15 months as a WTO guideline says.

In case of no implementation, SEOM can also suspend concessions – both articles in the PEDSM and WTO DSM shared 72% of exact matches of the text. What was different was the replacement of the wording *reasonable period* with the exact period and days as shown in the screenshot below.

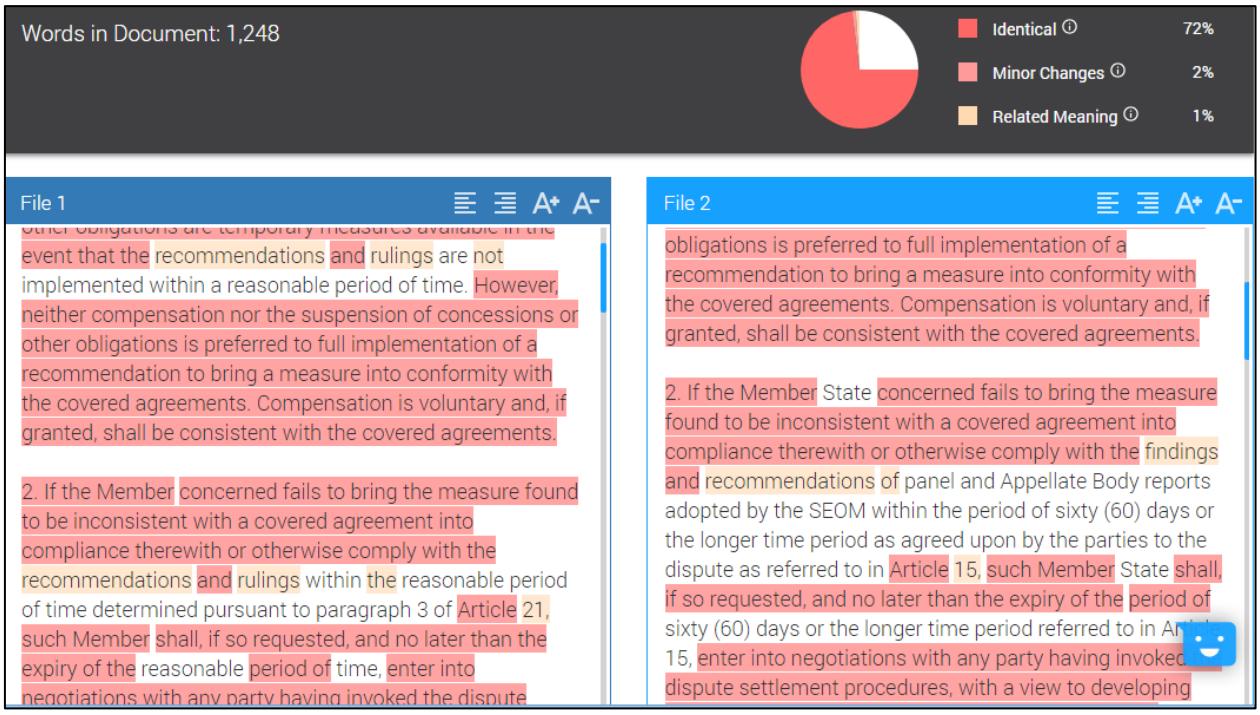

Figure 7. A textual comparison of Art. 22 WTO DSU (left column) and Art. 17 PEDSM (right column)
Source: Copyleaks 2019

The timeline of the PEDSM can be summarized as follows in the graph:

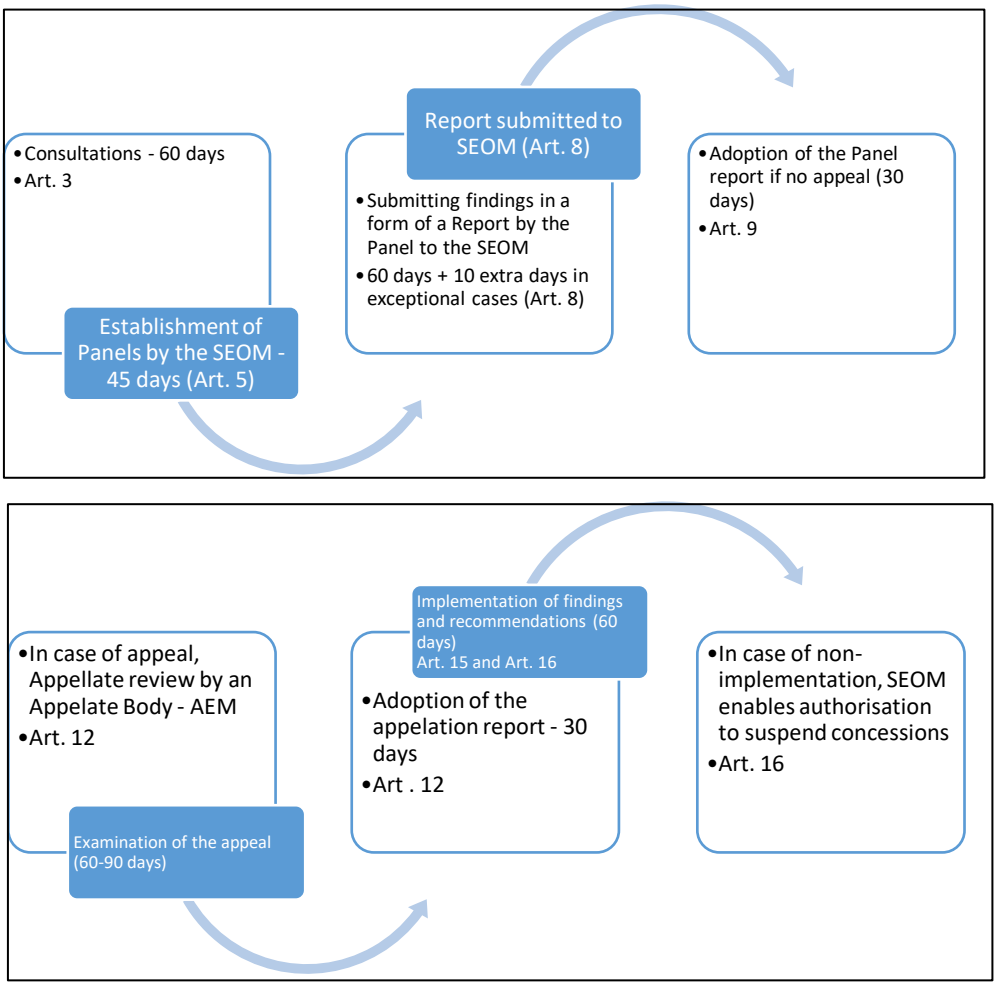

Figure 8. The ASEAN RTA DSM under PEDSM 2004
Source: Compiled by the author

The graph of the procedure is also available at the WTO website:

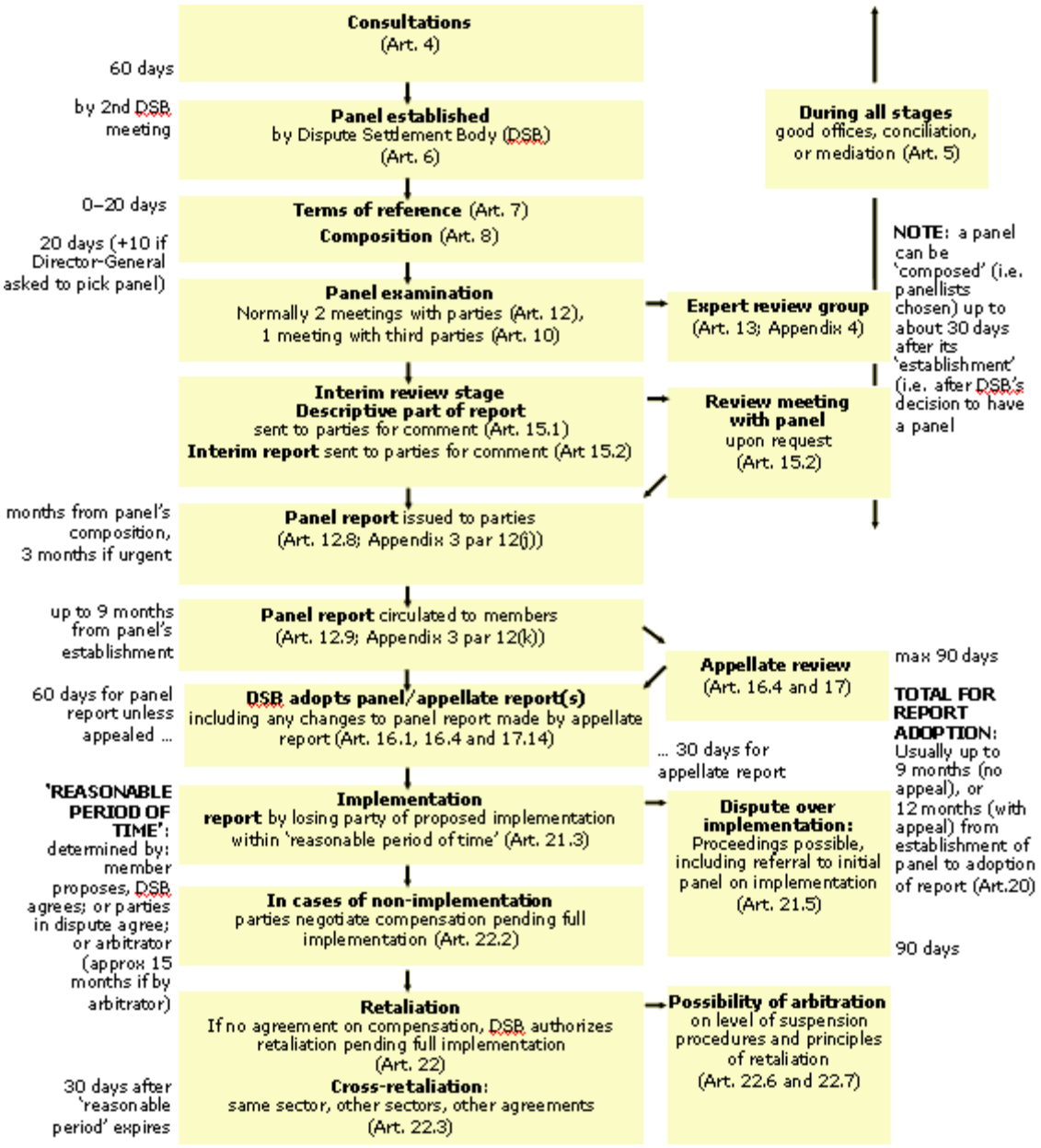

Figure 9. Timeline of the WTO dispute resolution process
Source: Panel Process of the WTO 2019

The other important notion of the PEDSM was the ASEAN DSM Fund. While in the WTO DSM any developing member state can ask the Advisory Centre on WTO Law in Geneva for legal assistance, under the PEDSM ASEAN members do not need to cover any costs of the Panels because they are supported by the ASEAN DSM Fund. However, this applies only to the costs of the Panels and Secretariat and in the ASEAN context, states do not receive any further legal

assistance, if compared to advisory bodies of the WTO. Once again, the ASEAN members cannot expect any legal assistance from the system nor technical support.

As for ASEAN – India DSM agreement, it shares even more similar features with the WTO DSM because the establishment of Arbitral Panels takes 60 days (Art. 6), and the maximum timeframe for this procedure is prolongated due to two types of the Report created – the interim one (Art. 12) and final one (Art. 13), so from the establishment of the Arbitral Panels to the presentation of the Report it takes 120 days. Each party covers its own costs, too. Just like in the WTO DSM, the Arbitral Panel shall determine a reasonable implementation period and no specific timeframe given[16].

Finally, other RTA, SAPTA, offers the Committee of Experts (COE) as the body to resolve disputes between SAARC member states. Since its DSM is aimed at offering a really cost-efficient and much less time-consuming alternative dispute resolution mechanism[17], its period for consultations is twice shorter – 30 days (Art. 20 of SAFTA). COE has roughly two months (60 days) to investigate the matter and file its recommendations[18].

2.4. Conclusion

The examination of Indian RTAs and dispute-resolving mechanisms offered in it has shown that those new RTAs do not introduce DSM innovations in terms of legal ways of solving trade disputes. It is quite the reverse that those RTAs do copy the WTO DSM, sometimes completely, or instead offer to resort to the WTO DSM in case of investment and/or intellectual property rights' issues. Some RTAs give a shorter timeline for the dispute settlement if compared with the WTO. A majority of the RTAs force the members to opt for more amicable ways of solving their trade disputes, such as consultations, good offices. Mediation and arbitration are indispensable for the ASEAN and CECA/CEPA, with the latest including the clause to go for the WTO DSM in case of

[16] It comes as no surprise that the ASEAN DSM was not used in the majority of the disputes. Despite its institutional capability and development of the dispute settlement mechanism, peer pressure plays important role here as for the ASEAN members the most frequent way to solve issues is still consultations, mediation and negotiations (Beckman 2016, 98).

[17] According to the SAARC website, "the Council has been able to establish itself as an efficient regional Alternate Dispute Resolution (ADR) mechanism, enabling the traders to resolve their disputes without having to go through a judicial process, which is both expensive and time-consuming." (SAARC 2018).

[18] In the framework of SAARC, there are also attempts to create tailor-made dispute settlement solutions which would be sector-driven. Thus, in the expert report by K. Lee (2017), it is suggested to create a DSM template applicable only to the energy sector.

the disagreements related to SPS and TTIP. The clauses, therefore, reduces the bindingness of the RTAs and their institutional potential. Also, being copied from the WTO DSM, the texts of such RTAs lack legalism.

When talking about misgivings that India held about the WTO, it can be deduced that low legalism and less binding nature of such RTAs help alleviate potential problems of legal incapacity. RTA participants deal with trade disputes on equal terms, i.e. attempting to solve issues via political means first in as many instances as possible, and use judicial means only as a last resort. This does not apply to more controversial areas of trade, such as TBT, SPS, intellectual rights, as well as to mega-regional RTAs like ASEAN where the DSM is designed partially or completely like the WTO DSM. A shorter timeline of the disputes, too, helps save money and human resources for litigation.

Coming back to the question why India signs them in case of so distinct similarities with the WTO, the significant characteristic of RTAs is their flexibility which confronts faintly elastic WTO agreements. They allow for greater malleability in its design in terms of commitments, timelines, clauses, parties and in the way the trade disputes can be solved by including and/excluding the WTO DSM. Its vast choice in the institutional setup and low level of bindingness seem to be a response to the WTO's intransigence leading to impasses which India frequently experienced. Low degree of legalism can also be juxtaposed against the legal intricacies of the WTO as long as RTAs frequently offer non-binding decisions and recommendations in a simple wording. Overall, the DSMs in those RTAs are rather of a complementary than of a substituting nature.

Thus, it can be concluded that there must be something outside the scope of the legal and economic potential of such RTAs that drives India in its relentless conquest to conclude more and more trade agreements. Since the analysis found the majority of the DSMs in RTAs designed as the WTO DSM, with provisions entirely or partially copied from the WTO DSM, it leaves the question open as to why India keeps concluding those agreements in the presence of such a model that is so frequently copied and at the same time criticized to its new agreements word to word. What is it in those RTAs, in their quantity and quality, that seems to be so valuable to the state that it conducts so many negotiations to conclude them? To reveal that, in the next chapter, the first-hand information from the Indian specialists and experts in the WTO and competition and trade law will be utilized to find what motivations and expectations drive Bharat to conclude RTAs and include DSMs in it.

3. MOTIVATIONS AND EXPECTATIONS BEHIND RTAS AND ALTERNATIVE DSMS

In the previous chapter, it was established that alternative DSMs are unlikely to be the main driver of the Indian RTAs as they in fact share plenty of similarities with the WTO DSM. The frequency of political and quasi-judicial models among RTAs indicate that they should be analysed as an opportunity to introduce a new way of constructing political blocs for future multilateral negotiations, not necessarily trade-related ones. From this perspective, RTAs can serve as a political tool to ease the opposition of some politicians to trade liberalization because possible losses of producers are covered by gains of exporters. Empirical works of Pant, Paul (2018, 557) demonstrated that the variable that captures potential political influence is a core one in the process of an RTA formation. Secondly, their empirical model proved that India was more prone to sign RTAs with those states with whom it shares relatively similar judicial structures. Opening the market to its closest neighbours sharing relatively same religious, linguistic and cultural bonds and historical path was a part of an overarching *India's doctrine*, according to which the entire region of South Asia was perceived by Indian politicians as one strategic unit where Bharat plays the role of a guardian of security and stability, or simply a regional hegemon, to rival Pakistan in particular. From this perspective, RTAs turned into a governing factor enabling India's strategic goals (Kumar, Ahmed 2014, 82–84). Hence, on a domestic level, RTA plays the role of a political and strategic tool and not a trade-promoting device.

Bearing this in mind, in this chapter, explanations for the proliferation of RTAs from the India political and legal elites engaged in the RTA negotiations of India will be revealed.

3.1. Data collection method

A qualitative data collection method has been employed to reveal expectations and motivations of India behind its intensive process of concluding RTAs. Given the scarcity of the information on the RTAs for India, it was decided to get first-hand information directly from the political and legal elites via semi-structured interviews.

Two sets of contacts were chosen. In the first list, there were experts in Indian trade and academics specializing in the WTO DSM both from India and other countries. The second list included politicians and civil servants working in Ministries. There is one ministry dealing with the WTO matters in India – MOCI, and it has two Departments under it, i.e. the Department of Commerce and the Department of Industrial Policy and Promotion. Next, it is worth noting that all the policy decisions and the draft of trade policies start at the level of Joint Secretaries (Kumar 2018, 151–152) so two of their close employees (anonymous) were invited for an interview on a priority level. The trip to India was self-funded, and out of all 12 interviews scheduled, only the five of them took place due to time restrictions and other commitments of interviewees.

Hereinafter, the interviews will be coded as follows:

1. [Int. 1] – the interview with an anonymous employee of MOCI, the author managed to have a 30-minute talk. The talk was mostly in Hindi (all translated to English by the author). Date: the 1st of April, 2019.
2. [Int. 2] – the interview with a policy advisor and author of academic papers in Economics, specializing in the RTAs. Conducted via Skype. Date: the 2nd of April, 2019.
3. [Int. 3] – a conversation via email with an anonymous former ambassador involved in the WTO negotiations. Date: the 4th of April, 2019.
4. [Int. 4] – a discussion with an anonymous lawyer, expert in the WTO disputes and competition law. Date: the 5th of April, 2019.
5. [Int. 5] – a Skype talk with the leader of the WTO legal practice in India and Singapore. Date: the 9th of April, 2019.

Finally, all findings were cross-reviewed against primary and secondary documents mentioned in the list of references.

3.2. RTAs and DSMs – a view from the inside

3.2.1. Motivations of India to engage into RTAs

According to interviewees, DSMs in RTAs are in a quite dormant stage. Against the backdrop of the negotiation resentment created by the Doha and Uruguay Rounds, India's main motivation to get engaged with plenty of RTAs is to find an alternative space for negotiations and the role of those trade agreements is mainly instrumental. Several interviewees were of the view that RTAs

and their DSM are needed for "politically different" states [Int. 3], with different judicial systems [Int. 2, Int. 4], with different cultures [Int. 3] to get together to have a talk, it is "an extension of a diplomatic exercise to create a positive environment for trade talks" [Int. 5]. The strong legal document [Int. 2], as interviewees perceived those RTAs, allows to regulate the trade in terms of foreign investment (especially for commodities and services) and create at least the basis of some sort of legislation.

"Previously, politics was driving economics, now economics is driving politics" [Int. 2] was another major point in interviews. It was highlighted that RTAs were concluded mainly out of a motive for politicians to get votes from industries. Five interviewees mentioned the importance of interest groups and their mobilization during the discussion of RTAs. In Int. 2, more specifically, the role of political lobbying was highlighted because "the middle class and upper middle class in India is strong, they are really smart". Hence, it will be "politically dangerous" to conclude the RTA and include the DSM clause to the trade agreement with the UK after the Brexit and with China, in the framework with the RCEP, because India is interested in exporting its goods and especially services, and not in importing any. In Int. 5, too, it was mentioned that the case DS34 was introduced to the WTO only because it was a large industry able to initiate the case and lobby for it in an informal way while for many other cases, there is no "marriage" with the WTO because they have no mobilized interest groups that can channel their interests in a formal manner. The WTO DSM has financial and political barriers for smaller industries, who cannot pass through all coordination problems with the Ministry of India and pay the private firms to prepare the case to lobby a state-to-state dispute. In the RTA, by contrast, parties can choose better and more cost-effective forum and lawyers.

As Int. 1 argued, the RTAs and DSMs included in it are rather mirroring interest groups but not the government itself. Industries and trade associations are consulted at each level, including the state level, preventing the government from taking a not so popular decision. By including at least some legal way to solve the trade dispute, politicians keep the level of *visvas*, or faith and trust of voters in them [Int. 1]. The World Bank journalist Kathuria (2019) backs this point of view by asserting that it is the trust that leads to more trade between states, especially when they have territorial disputes, like India and Bangladesh, Pakistan, and consequently, it can bring about a more deepened and durable regional cooperation. The importance of *visvas* and trust was also mentioned by one of the interviewees when the author asked legal experts why India prefers to solve a majority of trade disputes under the RTA in Singapore and use their alternative

mechanisms: “They are neutral, geographically close, <…>, almost every international country in the world is there, it is a sort of a world’s trade offshore” [Int. 2]. For industries with lawyers educated and practising in Singapore, having numerous branches, vested politicians and a large Indian community in Singapore, this level of trust in Singaporean courts means more votes.

The other motivation of India, according to the Ministry employee [Int. 1], was geostrategic interests of the state because it is the services among the neighbourhood that will form the main plank of the Indian export future [Int. 3], [Int 4]. Not purely trade interests but the aspiration to implement the agenda of the *Make in India* project pioneered by the Prime Minister Modi’s coalition and thus, satisfy the industries and get the votes is the ultimate goal. However, several interviewees highlighted that Bharat aims to take on a leadership role in the services’ sector in the Asian region and be the link between developed and developing countries because of the Indian “global culture”, “diversity”, even “ability to converse in English unlike Japan”.

3.2.2. Expectations of India to engage into RTAs

When asked about Indian expectations, interviewees mentioned the first thing negotiations with RCEP, China and the EU, with expectations of a trade promotion. Int. 1 highlighted the omnipresence of RCEP negotiations and the need to underline the binding nature of RCEP commitments. Indeed, during the latest summits and meetings devoted to the RCEP, Minister of Commerce and Industry Suresh Prabhu pushed forward the importance of making “binding and commercially meaningful” commitments to simplify trade in information technology and business services (Suneja 2018).

Apart from geopolitical in the commitment, the Ministry employee highlighted the benefits of “trade promotion”, “trade gains” as the main economic incentives from the RTAs [Int. 1]. Yet, the opinion of policy advisors and legal experts was completely different. Policy advisor [Int. 2] noted that economic gains are absolutely minimal, insignificant, and in case of CECA and CEPA, no real increase in trade exports can be traced. To support this argument, the case of RCEP is frequently mentioned. Both legal and policy experts see no major economic gains in this megaregional as the expert involved in RCEP negotiations [Int. 5] said that the state is seeking advice from all parties and is very cautious about it because it is not about economics but politics. And indeed, according to the World Bank, the export to Singapore in 2005, at the time of signing an RTA, was 5.5 bln dollars, while in 2017 it was 11.5 bln dollars; with Japan – 5.5 bln dollars in 2011 (when CECA was signed) against 4.5 bln dollars in 2017; with South Korea – 3.7 bln dollars in 2011 against 4.3

bln in 2017; with South Asia – 11.1 bln dollars in 2010 against 20.2 bln dollars in 2017. Conversely, the top destinations where the dispute settlement system is needed, i.e. China, the USA, UAE, some EU states (UK, Germany) enjoy no negotiations on the RTA because it is "politically dangerous" to conclude as India is so global that it could take over.

Two participants across policy think tanks agreed that the idea of building export capacity in services first was the ultimate goal of India. On the question why India concludes RTAs and adds the notion of DSMs to it if it is of a little practical value, the answers were as follows:

1. Trade is "two-way street" [Int. 3], it is India's political imperative to find "a political consensus among RCEP negotiators" to include services in this agreement in exchange for its large market for imports.
2. Merchandise trade is at a standstill [Int. 2]. "India is pushing for services". In the framework of the WTO, it inevitably touches upon the problem of Intellectual Property Rights but among developing states, the RTA can take them on a separate track. The GATS posed a series of regulatory barriers to India, such as the market access, licensing, etc. RTA, on the contrary, give an opportunity to go beyond GATS commitments on a bilateral level in the field of services. In India–Sri Lanka RTA, both parties extended their commitments for providing each other a market excess in financial and communication services, tourism, health (Abeysinghe 2014, 325).

As interviewees [Int. 1; Int. 2; Int. 4] confessed, there was nothing clear and concise discussed regarding the scope and the depth of such commitments in terms of legal bindingness. They implied only political commitment for services and movement of professionals while the topic of the dispute settlement mechanism in the potential RCEP – India RTA has not been touched upon at all. Yet, the principle of flexibility and a good balance of outcomes for all participants, once again, lies at the core of those commitments according to Suresh Prabhu: "Commerce Minister defended India's interests effectively and secured maximum flexibilities. Both in STRACAP [Standards, Technical Regulations and Conformity Assessment Procedures] and SPS negotiations, India managed to obtain balanced outcomes in the application of the Dispute Settlement Mechanism. India showed flexibility on the principle of "consensus" in the Institutional Provisions Chapter which helped in its successful conclusion during the meeting" (Government of India's Press Release 2018). In its Guiding Principle document, it is mentioned that the main way of adjudication will be consultations, and no official body has been mentioned to implement the

dispute decision that must be taken via “the effective, efficient and transparent process” (ASEAN 2012).

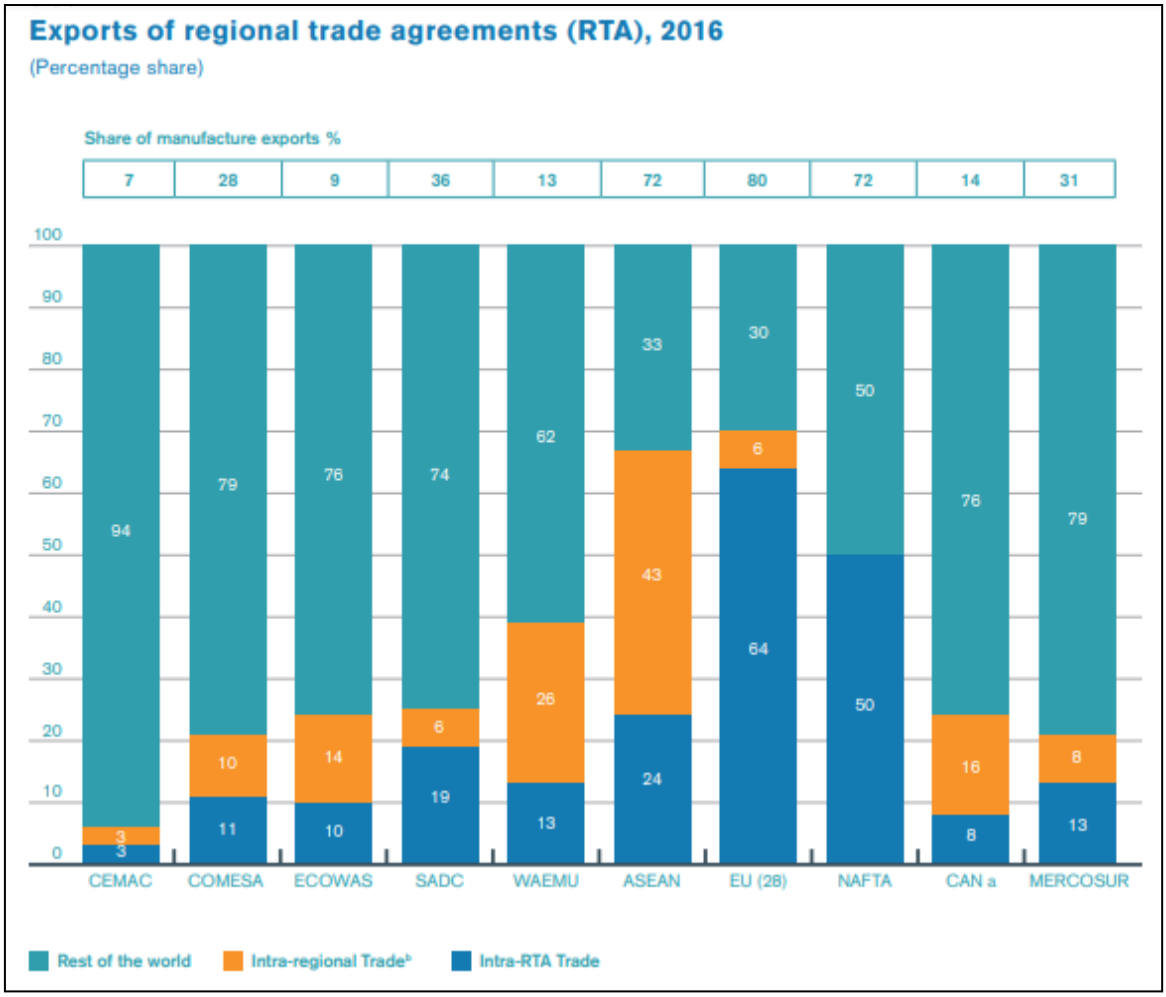

Figure 10. Volume of exports of regional trade agreements in 2016
Source: World Trade Statistical Review 2018, 74

Indeed, although ASEAN is leading in manufacture exports among other regional blocs, the share of India in it is very small and trade in services makes 11.3% of its GDP (cf. for China it is 5.5%; and it keeps on growing worldwide). According to the Int. 2, for instance, India is interested in offering its services in the IT field as well as in education “because we have many renowned universities”. Taking into account that India is not a part of the Trade in Services Agreement (TISA) while its main competitor Pakistan may be one day, the state is naturally not willing to lose preferential access to its largest export destinations, including the USA, Japan and Europe.

Next, legal experts posit that it is the problem of horizontal and vertical coordination at various levels of policy-making that impedes the dealing with the WTO-related trade matters and encourages India to opt for the RTA-level agreements that can offer a less complex and expensive process. There are two types of coordination problems – a vertical one and a horizontal one. According to [Int. 5], there are no streamlined channels and institutions to maintain relations between the government and domestic stakeholders, which is emblematic for poorer states, but which is well-developed in the EU and USA. First of all, there is no legal department in the Trade Policy Division to deal with the WTO matters, it is outsourced with private companies which are more familiar with the law of developing, neighbouring states. India faces less obstacles with states it shares borders, like Nepal, Bangladesh, due to several similarities in the strictness of law implementation.

Secondly, there is no formal mechanism for industries to file their case. And if the large industry can use the indirect way of lobbying, small-scale industries cannot afford it. As Int. 5 confessed, he had a case of a small industry that faced issues with high duties. They literally begged MOCI: "Please do something, please help us", there was an informal meeting with the Ministry but as a small industry, it failed to reach the top politicians. Secondly, their concern was money, they wondered: what happens even if we [the industry] win? Do we get some restitution, some compensation? Because years of cases is years of losses as the same high duties apply, and the chance of getting the compensation is tiny. Hence, as the Int. 5 admitted, small industries prefer to go to the domestic courts, even to the foreign courts where they can get the compensation immediately. Apart from the horizontal miscoordination, there is a vertical one. Int. 5 as a legal and trade expert confessed that when it comes to Ministries, "sometimes I feel they do not connect, they do not talk". Six cases he used to work on just did not result in a formal dispute because of no adequate response from the Ministry.

Finally, as for strategic expectations, according to Int. 5, Bharat signs those agreements because it wants to employ a comprehensive approach to the trading hub of the ASEAN area while in the WTO, India wants only one thing – to be recognized as a developing state and treated like one. "When states like the USA, EU brings us to the court, India feels… <…> we are like bulldozed. Bulldozed by uneven terms. India cannot be judged there by the same rules, their methods are not efficient for developing economies. When it comes to IP [intellectual property], TBT, we are simply not able to satisfy those terms rigorously". Hence, recognition of the specifics of the

market, tailor-made solutions seem to be the important expectation of Bharat that it tries to fill in with RTAs.

3.3. Conclusion

It is evident that feeling excluded in the WTO system and major trade agreements with developed economies, the Republic of India, according to interviewees, is not solely interested in an expansion of its export destinations to sell them manufactured goods and possibly include services but it is also aiming at being talked to as an equal partner. The-most-inclusive-of-all WTO system seems to be limiting the access to justice, political and economic opportunities for emerging countries while new trade regional blocs like NAFTA or the EU are meant for developed states.

The interviews, therefore, proved the paramount importance of flexibility in the level of commitment that the RTA DSMs and RTAs in general can offer India allowing it to shape the agreement in trade the way it aspires to without too much peer pressure. While in the WTO DSM it stands as just developing country, in the Asian region, it attempts to take on a leadership role being a bit more equal among equals and set its own rules.

Overall, the Indian state's point of view differs from the opinion of policy advisors and legal experts interviewed. While the official representatives and politicians tend to underscore the economic incentives of regional trade agreements with neighbouring countries under a guise of trade promotion, liberalization and export opportunities, interviewees put forward such RTA potential benefits as finding the equal political footing among neighbouring countries to take on a leadership role for India, as well as promoting its services and pushing forward ideas politically beneficial for the country. In a nutshell, it is geopolitical aspirations that come in the forefront.

CONCLUSION

This thesis discussed why India is so pro-active in signing RTAs. It was born out of the hypothesis that India signs so many RTAs because it is dissatisfied with the WTO DSM and looking for alternative dispute resolution platforms. The main concerns of Bharat in the WTO were the lack of its legal capacity undermining its ability to give an informed response to the claims of more developed states, the biasedness of the WTO adjudication against less developed countries and the lack of financial resources to cover the high litigation costs. An overview of cases and its critical evaluation done by a plethora of other scholars showed to us that developing economies, including India, frequently suffered from the deficiency in the WTO system in terms of transparency and predictability of multinational and multilateral trade standards, which set India on a quest to find alternative fora to realize its potential in trade and politics.

It was observed that, provided that the WTO disciplines seemed to India inadequate, biased, ambiguous and restrictive, the adoption of RTAs with alternative dispute settlement solutions was triggered by the need to have a tailor-made trade agreement that can go beyond what the WTO can offer in terms of commitments, tariffs, coverage. A link between the WTO DSMs and RTA DSMs was found, where the former serves as a catalyst of filtering down India's expectations in terms of trade and exports and channelling its efforts to more flexible commitments in the form of RTAs. Less legal, less stringent, RTAs with its strategically important neighbours allow India to take a leading role and at the same time to be more equal among equals, to expand its export destinations, to improve its political environment, both internally and externally. RTAs and its DSMs provide India with a myriad of opportunities for trade the way it wants to see it. This tendency is likely to be further enhanced in the future, given that India has recently faced three cases lodged against it in the WTO as of March 2019.

A look at the RTAs with India, which were notified to the WTO, helped to analyse its content and legal potential according to three criteria (legalism, bindingness and institutionalization). The examination backed by a textual analysis revealed that DSMs in those RTAs are of secondary nature, frequently being an exact copy of the WTO DSM. To some extent, they varied in the timeline offering developing states a shorter and cost-efficient procedure and in the process by eliminating some stages known in the WTO. Frequently, RTAs provide more flexibility in the design and content of trade-related provisions and address some of the issues that Bharat has with the WTO DSM or going beyond that. While some of the RTA's concluded by India thus provide

for alternative and more flexible dispute settlement, the simultaneous presence of numerous agreements whose dispute settlement provisions closely shadow the WTO-DSM precluded interpreting India's drive for RTAs as primarily driven by a quest for an alternative to the WTO-DSM. Rather, it leads into thinking that there is a set of other reasons to conclude so many RTAs. Why then is India so active in signing those RTAs if they are of secondary legal and political value?

The findings can be summarised as follows:

1. Semi-structured interviews revealed a strong political potential of such agreements. Lawyers, policy advisors and ministry employees alike were very vocal in calling the RTAs *a political tool, a political instrument a way to align politically different interests, a consequence of political processes*. RTAs create an occasion for negotiations and serve as a result to combine several issues with one country in the form of the RTA. Each RTA is a political statement; hence, this explains the difference in coverage of its commitments relating to cooperation in trade and other areas and the lower importance of dispute resolution methods.

2. All interviewees pointed out the importance of RTAs as the place for political negotiations in trade, outside the stringent framework of the WTO, for them RTAs were a forum to talk among the equals. It was highlighted that India feels bulldozed in the framework by the WTO by developed countries due to their higher level of economic achievement, legal and technical expertise. Therefore, India concludes RTAs with developing countries which share similar understanding of law implementation, economic difficulties and development path.

3. Interviews also helped note the influential role of political lobby and in particular, of the middle class and upper middle class, industries and trade associations in India. It was their interests that came first to get mirrored in the RTAs. As interviewees highlighted, in India, now "economics are driving politics", and not vice versa, and RTAs are the only resort for small-scale industries in India whose voices are left unheard when it comes to WTO.

4. It is not trade interests *per se* but geopolitical aspirations to get the leadership role in the services' sector in the Asian region and to be a link between the South Asia and the developed world that drive India to conclude RTAs because export implications for it are minimal. The legal part is also neglected here because India has no desire to lead the legal

world, rather, it is more involved in a capacity building and is currently at the stage of creating an institutional memory in the field of international law.

Unquestionably, time and space restrictions limited the author in the scope of the research. Given a lack of scholarly attention to the topic and its paramount importance for the South Asia and developed world alike, the Indian approach to RTAs is a potential and prolific subject for future, a much deeper and multifaceted academic enquiry.

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APPENDICES

Appendix 1. A list of WTO cases observed

Case No.	Short title	Full case title
DS33	United States – Wool Shirts and Blouses	WTO Panel Report, United States — Measures Affecting Imports of Woven Wool Shirts and Blouses from India, WT/DS33/5, dated 27 May 1997
DS50	India — Patents (US)	WTO Panel Report, India — Patent Protection for Pharmaceutical and Agricultural Chemical Products, WT/DS50/R, dated 5 September 1997
DS58	US — Shrimp	WTO Panel Report, United States — Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/R, dated 15 May 1998 Request to Join Consultations, United States — Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/2, dated 30 October 1996
DS79	India — Patents (EC)	WTO Panel Report, India — Patent Protection for Pharmaceutical and Agricultural Chemical Products, WT/DS79/R, dated 24 August 1998
DS90	India – Quantitative Restrictions	WTO Panel Report, India — Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products, WT/DS90/R, dated 6 April 1999
DS146	India — Autos	WTO Panel Report, India — Measures Affecting the Automotive Sector, WT/DS175/R, dated 21 December 2001
DS241	Argentina — Poultry Anti-Dumping Duties	WTO Panel Report, Argentina — Poultry Anti-Dumping Duties, WT/DS241/R, dated 25 April 2003
DS246	EC — Tariff Preferences	WTO Panel Report, European Communities — Conditions for the

		Granting of Tariff Preferences to Developing Countries, WT/DS246/R, dated 1 December 2003
DS306	India – Bangladesh Batteries	WTO Request for Consultations by Bangladesh, India — Anti-Dumping Measure on Batteries from Bangladesh, WT/DS306/1, dated 2 February 2004
DS360	India — Additional Import Duties	WTO Panel Report, India — Additional and Extra-Additional Duties on Imports from the United States, WT/DS360/R, dated 9 June 2008
DS456	India — Solar Cells	WTO Panel Report, India — Certain Measures Relating to Solar Cells and Solar Modules, WT/DS456/R, dated 24 February 2016
DS503	India — US Visas	Request for consultations by India, United States — Measures Concerning Non-Immigrant Visas, WT/DS503/1, dated 08 March 2016
DS510	US — Renewable Energy	Communication from the Panel, United States — Certain Measures Relating to the Renewable Energy Sector, WT/DS510/4, dated 15 October 2018
DS541	India — Export Related Measures	Communication from the Panel, India — Export Related Measures, WT/DS541/6, dated 4 December 2018
DS547	US – Steel	Request for consultations by India, United States — Certain Measures on Steel and Aluminium Products, WT/DS547/1, dated 23 May 2018
DS579	India — Sugar (Brazil)	Request for consultations by Brazil, India — Measures Concerning Sugar and Sugarcane, WT/DS579/1, dated 05 March 2019
DS580	India — Sugar (Australia)	Request for consultations by Australia, India — Measures Concerning Sugar and Sugarcane, WT/DS580/1, dated 07 March 2019
DS581	India — Sugar (Guatemala)	Request for consultations by Guatemala, India — Measures Concerning Sugar and Sugarcane, WT/DS581/1, dated 25 March 2019

Appendix 2. Comprehensive list of Indian RTAs and its DSMs

Trade agreement name	Year of signing	Type	DSM
Asia Pacific Trade Agreement	1975	Goods	Yes, via the body - Standing Committee
India-Afghanistan PTA	2003	Goods	Yes, via the body Arbitral Tribunal
India-ASEAN	2010; 2015	Goods, services, investment	Yes, a separate DSM clause + special Protocol on the Dispute Settlement
India-Bhutan	2006	Goods	No
India-Chile	2006	Goods	Yes Consultations, Arbitral Panels, Committee, WTO DSM
India-Japan	2011	CEPA	Yes, Consultations, Arbitral Panels, Committee, ICSID, WTO DSM
India-Korea	2009	CEPA	Yes, Panels, WTO DSM
India-Malaysia	2011	CECA	Consultations, Committee, Arbitral Panels, WTO DSM
India-Maldives	1993	Goods	No, or SAARC Arbitration Council
India-MERCOSUR	2004	Goods	Negotiations, Joint Committee, WTO DSM
India-Nepal	2002	Goods	No
India-Pakistan	1993	Goods	SAARC Arbitration Council
India-Singapore	2005	CECA	Yes Consultations, Arbitral tribunals
India-Sri Lanka	1998	Goods	Yes, negotiations, Joint Committee, Arbitral Tribunals
SAARC	1993	Goods	Yes SAARC Arbitration Council
SAFTA	2004	Goods	Yes, COE and BOP
SATIS	2010	Services	SAARC Arbitration Council
India-Thailand	2003	Goods	WTO DSM

Source: Ministry of Commerce and Industry, India, author's compilation

Appendix 3. Type of Indian RTAs and its DSMs

Trade agreement name	DSM	DSM Type
Asia Pacific Trade Agreement	Yes, via the body - Standing Committee	Political
India-Afghanistan PTA	Yes, via the body Arbitral Tribunal	Political
India-ASEAN	Yes, a separate DSM clause + special Protocol on the Dispute Settlement	Judicial
India-Bhutan	No	Political
India-Chile	Yes Consultations, Arbitral Panels, Committee, WTO DSM	Judicial
India-Japan	Yes, Consultations, Arbitral Panels, Committee, ICSID, WTO DSM	Judicial
India-Korea	Yes, Panels, WTO DSM	Judicial
India-Malaysia	Consultations, Committee, Arbitral Panels, WTO DSM	Judicial
India-Maldives	No, or SAARC Arbitration Council	Political
India-MERCOSUR	Negotiations, Joint Committee, WTO DSM	Quasi-judicial
India-Nepal	No	Political
India-Pakistan	SAARC Arbitration Council	Quasi-judicial
India-Singapore	Yes Consultations, Arbitral tribunals	Judicial
India-Sri Lanka	Yes, negotiations, Joint Committee, Arbitral Tribunals	Political
SAARC	Yes SAARC Arbitration Council	Judicial
SAFTA	Yes, COE and BOP	Quasi-judicial
SATIS	SAARC Arbitration Council	Judicial
India-Thailand	WTO DSM	Judicial

Source: Author's compilation