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WTO's Engagement with National Law: Three Illustrations from India*

Engajamento da OMC com o Direito Nacional: três ilustrações da Índia

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Abstract

The World Trade Organization (WTO) seems to afford a useful context for looking into the interface between national law and the unfolding of the regime and processes of globalization. The WTO has significantly engaged with Indian law in at least three WTO contexts covering three covered agreements of the WTO. In the first case, the Indian executive's instructions were not accepted as corroborative of India's compliance on the ground that these created "a certain degree of legal insecurity" and were devoid of "sound legal basis" under Indian law. On the second occasion, the WTO did not accept the impact of the statement of an Indian official on an Indian Statutory Order as evidence of compliance with India's WTO obligation despite the fact that the statement had corroborated the Indian executive's exercise of the legislative discretion. And, finally, it was found immaterial for the WTO whether executive or legislature internalizes or domesticates international law but not whether it has a sufficient degree of normativity or bindingness for the purposes of admissibly affording an affirmative WTO defence despite the fact that the Indian executive took action pursuant to international instruments. These three subsets of a globalized regime of the WTO thus provide a useful method of studying how the interaction between domestic and multilateral law has impacted globalization. Thus, while these engagements of the WTO with Indian law are not without discernible contribution to its jurisprudence on engagement with national law, it would be hard to say that they are wholly without comparable measures of discernible divergence discernibly pointing to a progressive degree of deference to the state and away from globalization.

Keywords: means; sound legal basis; recognition; laws or regulations; normativity.

Resumo

A Organização Mundial do Comércio (OMC) parece oferecer um contexto útil para examinar a interface entre o direito nacional e os desdobramentos do regime e dos processos de globalização. A OMC se envolveu significativamente com a lei indiana em pelo menos três contextos da OMC, abrangendo três acordos abrangidos pela OMC. No primeiro caso, as instruções do executivo indiano não foram aceitas como corroborativas do cumpri-

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mento da Índia sob o argumento de que estas criavam "um certo grau de insegurança jurídica" e eram desprovidas de "base legal sólida" sob a lei indiana. Na segunda ocasião, a OMC não aceitou o impacto da declaração de um funcionário indiano em uma Ordem Estatutária da Índia como prova de cumprimento da obrigação da Índia na OMC, apesar de a declaração ter corroborado o exercício do poder legislativo indiano pelo executivo indiano. E, finalmente, foi considerado irrelevante para a OMC se o Executivo ou o Legislativo internaliza ou domestica o direito internacional, mas não se ele tem um grau suficiente de normatividade ou vinculação para fins de admissivelmente oferecer uma defesa afirmativa da OMC, apesar do fato de o executivo indiano ter assumido ação de acordo com os instrumentos internacionais. Esses três subconjuntos de um regime globalizado da OMC fornecem, portanto, um método útil para estudar como a interação entre o direito interno e o multilateral tem impactado a globalização. Assim, embora esses compromissos da OMC com a lei indiana não sejam sem contribuição discernível para sua jurisprudência sobre o envolvimento com a lei nacional, seria difícil dizer que eles são totalmente sem medidas comparáveis de divergência discernível que apontam para um grau progressivo de deferência a Estado e longe da globalização.

Palavras-chave: meios; base legal sólida; reconhecimento; leis ou regulamentos; normatividade.

1 Introduction

India has been a party to fifty-six WTO disputes.[1] The engagement of the WTO with Indian law offers some useful insights into the understanding of the treatment by international law of municipal law and, consequently, for an understanding of the unfolding of globalization. To this end, the paper seeks to understand the WTO's engagement with Indian law by studying three representative Indian cases which have afforded the WTO dispute settlement system of an opportunity to engage with Indian law in three WTO contexts covering three WTO agreements, namely the TRIPS Agreement, the SPS Agreement and the GATT, and in *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* (DS50),[2] *India – Measures Concerning the Importation of Certain Agricultural Products* (DS430)[3] and *India – Certain Measures Relating to Solar Cells and Solar Modules* (DS456).[4] The first of these cases afforded the WTO of its first opportunity to interpret provisions of the TRIPS Agreement with a view to determining a "means" under Indian law for filing of patent applications, the second was the first occasion when the WTO had to examine Indian law for determining whether or not India had complied with its regionalization obligation under the SPS Agreement, and the third concerned a WTO examination of laws or regulations in India under the General Exceptions to the GATT. Accordingly, the next three parts of the paper will discuss each of these WTO engagements with Indian law. Studying three different normative regimes within a common and globalized regime of the WTO provides a useful methodology for understanding how the interface between national and international has impacted globalization. It will be seen at the end of each of these that there is a growing deference to the state and away from globalization as represented by the WTO. Part five concludes.

2 WTO "means" under Indian law

The WTO's first engagement with Indian law stemmed from the case *India – Patent Protection* which arose as the result of a complaint filed by the United States against India, alleging violation by India mainly of the WTO Agreement on Trade-Related Aspects of the Intellectual Property Rights (TRIPS Agreement). The TRIPS Agreement is one of the WTO agreements which came to be concluded at the end of the Uruguay round of multilateral trade negotiations which commenced in 1986. It was not merely an addition to the then existing globalized regime of international trade but also substantively expanded its scope in that the protection of intellectual property came within its fold insofar as intellectual property could be held to be trade-related.[5] Below we take up for discussion the context

[1] As of 1 May 2021. Further, visit: https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm.

[2] For documents, visit: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds50_e.htm.

[3] For documents, visit: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds430_e.htm.

[4] For documents, visit: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds456_e.htm.

[5] Further, see generally Zutshi, B. K. Bringing TRIPS into the multilateral trading system. In: Bhagwati, Jagdish; Hirsch, Mathias

of the WTO's engagement with Indian law and the existence or non-existence in India of a "means" to preserve novelty and priority of patent applications.

2.1 Context of the WTO engagement with Indian law

As soon as trade-related intellectual property came to be protected under the globalized regime of the WTO by entry into force of the TRIPS Agreement, the ground was laid for generation of a greater interest in the protection of trade-related intellectual property globally, including by patents and particularly in the high investment-requiring pharmaceutical sector and companies located in the global North. The United States therefore specifically alleged violation by India of Article 70.8(a) of the TRIPS Agreement,[6] which states in the relevant part:

> Where a Member does not make available as of the date of entry into force of the WTO Agreement patent protection for pharmaceutical and agricultural chemical products commensurate with its obligations under Article 27, that Member shall:
>
> (a) notwithstanding the provisions of Part VI, provide as from the date of entry into force of the WTO Agreement a means by which applications for patents for such inventions can be filed.

Thus, while Article 27 of the TRIPS Agreement required patent protection in all fields of technology as from the entry into force of the WTO Agreement, Article 70.8(a) allowed India to only establish a "means", i.e. a mechanism to preserve novelty and priortiy of patent application in the field of pharmaceutical and agricultural chemical products until the end of the 10 years exemption for providing for patent protection. The critical question therefore was whether India had established such a "means" or not.

2.2 Existence or non-existence in India of a "means" to preserve novelty and priority of patent applications

Since India was a WTO Member which did not make available, as of the date of entry into force of the WTO Agreement, patent protection for pharmaceutical and agricultural chemical products commensurate with its obligations under Article 27, it argued that it had in place "a means" for the filing of applications.[7] India also submitted that, since the patent applications were not referred to the patents examiner, the possibility of their rejection did not arise.[8] The United States contested India's claims.[9] The issue thus came up for consideration before the Panel and the Appellate Body (AB) which we will discuss below in turn.

2.2.1 Panel examination

A WTO panel is established after WTO consultations between parties to a WTO dispute fail to resolve the dispute and before the WTO Appellate Body (AB) may hear appeal from the decision of the WTO panel. The Panel in this case held that Article 70.8(a) requires the WTO Members in question to establish a means that

> not only appropriately allows for the entitlement to file mailbox applications and the allocation of filing and priority dates to them, but also provides a sound legal basis to preserve novelty and priority as of those dates, so as to eliminate any reasonable doubts regarding whether mailbox applications and eventual patents based on them could be rejected or invalidated because, at the filing or priority date, the matter for which protection was sought was unpatentable[10]

in India. The Panel did "not agree with India that the transitional arrangements of the TRIPS Agreement necessarily relieve India of the obligation to make legislative changes in its patent regime during the first five years of operation of the Agreement."[11] The Panel thus considered that it was up to India to decide how to implement its obligations under Article 70.8 and found that "the mere fact that India relies on an administrative practice to receive mailbox applications without legislative changes does not in itself constitute a violation

(ed.). The Uruguay round and beyond: essays in honour of Arthur Dunkel. Heidelberg: Springer, 1998. p. 37.; Beier, Friedrich-Karl; Schricker, Gerhard (ed.). *From GATT to TRIPS:* the agreement on trade-related aspects of intellectual property rights. Weinheim: VCH, 1996.; Watal, Jayashree. *Intellectual property rights in the WTO and developing countries*. London: OUP, 2001.; Gervais, Daniel. *The TRIPS Agreement:* drafting history and analysis. London: Sweet & Maxwell, 2003.; Correa, Carlos M. *Trade related aspects of intellectual property rights*. London: OUP, 2007.

[6] *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, Report of the Panel, WT/DS50/R, para. 3.1 (hereafter the India – Patent (US) Panel Report).

[7] *India – Patent (US)* Panel Report, n. 6, para. 3.2 *et seq*.

[8] *India – Patent (US)* Panel Report, n. 6, para. 4.2.

[9] *India – Patent (US)* Panel Report, n. 6, para. 4.3 *et seq*.

[10] *India – Patent (US)* Panel Report, n. 6, para. 7.31.

[11] *India – Patent (US)* Panel Report, n. 6, para. 7.31.

of India's obligations under subparagraph (a) of Article 70.8."[12] The Panel however was not without significantly adding that

> economic operators in this case, potential patent applicants, are influenced by the legal insecurity created by the continued existence of mandatory legislation that requires the rejection of product patent applications in respect of pharmaceutical and agricultural chemical products.[13]

The Panel thus found that India failed to implement its obligations of providing a "means" for filing of patent applications for pharmaceutical and agricultural chemical products under subparagraph (a) of Article 70.8.

2.2.2 Appellate review

A WTO appeal is the Uruguay round innovation introduced in the global trade regulation and is limited to the issues of law and legal interpretations developed by a WTO panel. The AB characterized the issue as: "what precisely is the 'means' for filing mailbox applications that is contemplated and required by Article 70.8(a)?"[14] The AB did "*not* agree with the Panel that Article 70.8(a) requires a Member to establish a means so as to eliminate any reasonable doubts regarding whether mailbox applications and eventual patents based on them could be rejected or invalidated."[15] However, the AB clarified that India is "obliged, by Article 70.8(a), to provide a legal mechanism for the filing of mailbox applications that provides a sound legal basis."[16] To India's assertion that it had issued administrative instructions that provides a sound legal basis for mailbox applications, the AB noted that "India has not provided any text of these 'administrative instructions'".[17] The AB was not convinced that India's administrative instructions would withstand a legal scrutiny[18] and, consequently, was not convinced that those instructions provide a sound legal basis to preserve novelty of inventions and priority of applications.[19] The AB thus agreed with the Panel that India failed to provide for a "means" as required by Article 70.8(a) of the TRIPS Agreement of the WTO.

2.2.3 EC Complaint, DS79

Later, in *India – Patents (EC)*,[20] India argued that the Panel was not called upon to determine whether the means that India had established was consistent with Indian law but whether India, in applying Indian law, was acting in conformity with Article 70.8 of the TRIPS Agreement.[21] India further submitted whether interpretations of municipal law were correct was to be determined by domestic Courts. India submitted that if the logic applied by the Panel to Article 70.9 was correct, then all the transitional provisions under the WTO Agreement imposing an obligation as from a future date or event would have to be interpreted to comprise the additional obligation to change the domestic law in anticipation of the future date or event.[22]

The Panel noted that the new arguments submitted by India to the Panel

> reach a conclusion which is different from that reached by patent experts when they recommended the amendment of the Patents Act in late 1994, a course of action then attempted by India…[23] when it promulgated in December 1994 the Patents (Amendment) Ordinance, setting out details for the grant of exclusive marketing rights.[24]

[12] *India – Patent (US)* Panel Report, n. 6, para. 7.33.
[13] *India – Patent (US)* Panel Report, n. 6, para. 7.35.
[14] *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, Report of the Panel, WT/DS50/AB/R, para. 54 (hereafter the India – Patent AB Report).
[15] *India – Patent (US)* AB Report, n. 14, para. 54 (Italics in the original).
[16] *India – Patent (US)* AB Report, n. 14, para. 58.
[17] *India – Patent (US)* AB Report, n. 14, para. 61.
[18] *India – Patent (US)* AB Report, n. 14, para. 70.
[19] *India – Patent (US)* AB Report, n. 14, para. 70.
[20] India – Patent Protection for Pharmaceutical and Agricultural Chemical Products (Complaint by the European Communities), DS79.
[21] *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, Report of the Panel, WT/DS79/R, para. 4.11 (hereafter the India – Patent (EC) Panel Report).
[22] *India – Patent (EC)* Panel Report, n. 21, para. 4.22.
[23] *India – Patent (EC)* Panel Report, n. 21, para. 7.51.
[24] *India – Patent (EC)* Panel Report, n. 21, para. 7.71. On 31 December 1994, the President of India promulgated the Patents (Amendment) Ordinance, 1994, to amend the Patents Act to provide a means in the Act for the filing and handling of patent applications for pharmaceutical or agricultural chemical products and for the grant of exclusive marketing rights with respects to the products that are the subject of such patent applications. The Ordinance became effective on 1 January 1995 and lapsed on 26 March 1995. Further, see Article 123 of the Constitution of India, https://legislative.gov.in/constitution-of-india (visited 27 May 2021).

The Panel therefore extended the findings of the earlier panel, as modified by the AB, to the EC.[25]

2.3 Assessment

The WTO requires the conformity of its Members' laws, regulations and procedures with their WTO obligations.[26] We recall[27] that the Indian Patents Act did not provide for patents for pharmaceutical and agricultural chemical products at the time of the establishment of the Panel on *India – Patents (US)*;[28] that the Patents (Amendment) Bill 1995 was still being debated to permanently give effect to India's TRIPS obligations; that between 1 January 1995 and 15 February 1997, 1339 applications for such products had been received and registered (and not one of which had been rejected or invalidated),[29] while no request for the grant of exclusive marketing rights[30] had been submitted to the Indian authorities; and that "the Indian executive authorities had instructed the patent offices to continue to receive patent applications for such products and to store them for processing as and when the change in the Indian law to make such products patentable would take effect."[31] In coming to the conclusion that India did not have a "means" by which patent applications for pharmaceutical and agricultural chemical products could be filed, the Panel reasoned:

> [T]he current administrative practice creates a certain degree of legal insecurity in that it requires Indian officials to ignore certain mandatory provisions of the Patents Act…. *India is entitled to retain this mandatory legislation until 1 January 2005 by virtue of Article 65.4 of the TRIPS Agreement*… However, in the absence of clear assurance that applications for pharmaceutical and agricultural chemical product patents will not be rejected and that novelty and priority will be preserved despite the wording of the Patents Act, the legal insecurity remains (Italics added).[32]

Confirming the Panel's finding, the AB observed:

> [W]e are not persuaded that India's "administrative instructions" would survive a legal challenge under the Patents Act. And, consequently, we are not persuaded that India's "administrative instructions" provide a *sound legal basis* to preserve novelty of inventions and priority of applications as of the relevant filing and priority dates.[33]

Thus, despite its disagreeing with the Panel that Article 70.8 (a) required India to establish a "means" so as to eliminate any reasonable doubts regarding whether mailbox applications and eventual patents based on them could be rejected or invalidated,[34] the AB seems to have upheld the Panel reasoning of "sound legal basis", essentially devised to eliminate nothing but those doubts about the protection of "legitimate expectations", a protection expressly excluded at that point of time under the TRIPS Agreement.[35] India's emphasis on a prior fulfilment of the Article 70.9 conditions for the existence of its obligation with respect to the grant of exclusive marketing rights appears to have been premised on the fact that a finding of inconsistency in the absence thereof would inevitably and impermissibly be a non-violation finding. But India's admission of the necessity of legislation for the grant of exclusive marketing rights removed all doubts about a prior existence of its obligation to grant exclusive marketing rights.

The Panel, while considering that a mere absence of legislation did not mean that there was a lack of means for filing patent applications[36] and that the assurance that patent applications will not be rejected to be consequential,[37] did not take India's administrative instructions for that assurance despite the fact that these instructions were issued by and in the name of the Indian executive which is representative of the Indian

[25] *India – Patent (EC)* Panel Report, n. 21, para. 9.1.

[26] Art. XVI:4 of the WTO Agreement, *Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* (Geneva: GATT Secretariat, 1994), 17.

[27] Ch. IV, s. 7.

[28] Section 5 of the Indian Patents Act, 1970.

[29] *India – Patents (EC)* Panel Report, n. 21, para. 4.14.

[30] Further, with reference to India, see Sahu, Sunil K. Globalization, WTO, and the indian pharmaceutical industry. *Asian Affairs:* An American Review, v. 41, p. 196, 2014.

[31] *India – Patents (US)* Panel Report, n. 6, para. 2.6.

[32] *India – Patents (US)* Panel Report, n. 6, para. 7.35 (emphasis added).

[33] AB Report, n. 14, para. 70 (emphasis added). However, earlier at para. 58, the AB did not agree with the Panel that "…Article 70.8(a) requires the Members in question to establish a means that not only appropriately allows for the entitlement to file mailbox applications and the allocation of filing and priority dates to them, but also provides a sound legal basis to preserve novelty and priority as of those dates*, so as to eliminate any reasonable doubts regarding whether mailbox applications and eventual patents based on them could be rejected or invalidated*…." *India – Patents (US)* Panel Report, n. 6, para 7.31 (emphasis added).

[34] See also Carmody, Chios. A theory of WTO law. *Journal of International Economic Law*, v. 11, p. 527, 2008.; Chase, Claude. Norm conflict between WTO covered agreements: real, apparent or avoided?. *International & Comparative Law Quarterly*, v. 61, p. 791, 2012.

[35] TRIPS Agreement, Article 64.2.

[36] *India – Patents (US)* Panel Report, n. 6, para. 7.33.

[37] *India – Patents (US)* Panel Report, n. 6, para. 7.35.

state on the international plane.[38] It is however not without significance that the Panel underscored "India's right to choose how to implement the TRIPS Agreement pursuant to its Article 1.1."[39] Thus, even if it is accepted that India was found by the WTO to provide a sound legal basis for providing a "means", soundness of the legal basis may have to be left to the operation of the Indian legal system.[40] In response to India's assertion that its administrative instructions had provided a sound legal basis for preserving novelty of the invention and priority of application, the AB replied that India had not provided any text of those instructions. But this was appropriately more of a question of fact rather than that of law. And, in any case, the AB was not prevented from asking India with or without a timeframe to provide a text of those instructions as it had specifically relied on their non-availability to it, especially when it was specifically authorised to seek information under Article 13 of the DSU.[41] The absence of a text would hardly seem to be the necessary or conclusive absence of a sound legal basis. And, if so, then it was not as simple or clear as the AB would have us believe that the Panel was not interpreting the Indian law "as such".[42] The AB noted that these "administrative instructions" were not the initial "means",[43] but that these necessarily derogated from India's choice under Article 1.1 of the TRIPS Agreement is nothing but a hard construction.[44] Nothing new emerged from the *India – Patents (EC)* Panel, except perhaps a reminder that adjudication in a rules-based system follows the established rules as much as it establishes them by adjudication, no matter how tenuous should be the doctrine of precedent[45] in the system and how different should be the aim of its remedial regime.

3 "[R]ecognition of pest or disease free areas" by India

The WTO next significantly engaged with Indian law in *India – Agricultural Products*,[46] which arose as the result of a complaint by the United States that India had failed to comply with its regional adaptation obligation contained in Article 6.2 of the WTO Agreement on Sanitary and Phytosanitary Measures (SPS Agreement). The SPS Agreement is one of the WTO agreements which was concluded in the Uruguay round of multilateral trade negotiations which started in 1986. The SPS Agreement sets out the basic rules on food safety and animal and plant health standards. While it allows countries to set their own standards, it does not permit them to arbitrarily discriminate between countries and encourages them to use international standards.[47] Below we first discuss the context of the WTO engagement with Indian law and before the treatment of Indian law by the Panel and the Appellate Body.

[38] "There was a flaw in the Appellate Body's statement." Fei, Xiuyan. A critical analysis of WTO tribunals' characterization of national law interpretation. *US-China Law Review*, v. 14, p. 403, 2017. Further, see generally *Certain German Interests in Polish Upper Silesia (Germany* v. *Poland)*, 1926 P.C.I.J. (ser. A) No. 7; Davey, William J. Has the WTO dispute settlement exceeded its authority? a consideration of deference shown by the system to member government decisions and its use of issue-avoidance techniques. *Journal of International Economic Law*, v. 6, p. 79, 2001.

[39] *India – Patents (US)* Panel Report, n. 6, para. 7.65.

[40] A point seems to have been underscored by the AB in a later case. See below, section 4.

[41] Further, on this aspect, see in particular *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, WT/DS58/AB/R, para. 102, *et seq*.

[42] India – Patent AB Report, n. 14, para. 66. However, see United States – Section 211 Omnibus Appropriations Act of 1998, Report of the WTO Appellate Body, WT/DS176/AB/R, para. 105; United States – Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan, Report of the WTO Appellate Body, WT/DS184/AB/R, para. 200; EC – Definitive Antidumping Measures on Certain Iron or Steel Fasteners from China, Report of the WTO Appellate Body, WT/DS397/AB/R, para. 295.

[43] India – Patent AB Report, n. 14, para. 62.

[44] On the AB's priority of text in its interpretive approach, see Suttle, Oisin. Rules and values in international adjudication: the case of the WTO appellate body. *International & Comparative Law Quarterly*, v. 68, p. 399, 2019. Further, see generally Bond, Eric W.; Saggi, Kamal. Patent protection in developing countries and global welfare: WTO obligations and flexibilities. *Journal of International Economics*, v. 122, p. 1, 2020.

[45] Further, on the doctrine, see Sacerdoti, Georgio. Precedent in the settlement of international economic disputes: the WTO and investment arbitration models. *In:* Rovine, Arthur W. (ed.). *Contemporary issues in international arbitration and mediation:* the Fordham papers. The Hague: Brill, 2010. v. 4. p. 225.

[46] India – Measures Concerning the Importation of Certain Agricultural Products, Report of the WTO Panel, WT/DS430/R (hereafter the India – Agricultural Products Panel Report).

[47] Further, see generally Rigod, Boris. The purpose of the WTO agreement on the application of sanitary and phytosanitary measures. *European Journal of International Law*, v. 24, p. 503, 2013.; Echols, Marsha. *Food safety and the WTO:* the interplay of culture, science, and technology. New York: Kluwer Law International, 2001.; Marceau, Gabrielle; Trachtman, Joel P. A map of the World Trade Organization law of domestic regulation: the technical barriers to trade agreement, the sanitary and phytosanitary measures agreement, and the general agreement on tariffs and trade. *Journal of World Trade*, v. 48, p. 351, 2014.

3.1 Context of the WTO engagement with Indian law

The United States challenged India's measures that prohibit the importation of various agricultural products into India from countries reporting certain types of avian influenza (AI).[48] India maintained its AI measures mainly through the Livestock Importation Act, as amended (Livestock Act) 2001, and the Statutory Order 1663(E)(S.O. 1663(E)).[49] The key WTO provision involved was Article 6.2 of the SPS Agreement, which states:

> Article 6
>
> Adaptation to Regional Conditions, Including Pest- or Disease-Free Areas
>
> and Areas of Low Pest or Disease Prevalence
>
> […]
>
> 2.Members shall, in particular, recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence. Determination of such areas shall be based on factors such as geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary or phytosanitary controls.

Thus, the question before the WTO was whether India's measures complied with its obligation contained in Article 6.2 of the SPS Agreement which in turn involved the WTO's engagement with Indian law.

3.2 Overview of Indian law

Indian law involved was the Livestock Act 2001 and the Statutory Order 1663E. Section 3 (1) of Section 3 of the Livestock Act provides:

> The Central Government may, by notification in the Official Gazette, regulate, restrict or prohibit in such a manner and to such extent as it may think fit, [the import] into [India] or any specified place therein, of any live-stock which may be liable to be affected by infectious or contagious disorders, [...][50]

In addition, Section 3A of the Livestock Act provides:

> The Central Government may, by notification in the Official Gazette, regulate, restrict or prohibit in such manner and to such extent as it may think fit, the import into the territories to which this Act extends, of any live-stock product, which may be liable to affect human or animal health.[51]

India's Department of Animal Husbandry, Dairying and Fisheries (DAHD) is tasked with regulating the importation of livestock and livestock products under Sections 3(1) and 3A of the Livestock Act. A notification under Section 3(1) or Section 3A of the Livestock Act operates as a customs notification under Indian law, and constitutes delegated legislation.[52] Such notifications are assigned a statutory order (S.O.) number and published in the Official Gazette of India.[53] On 19 July 2011, DAHD issued S.O. 1663(E) the preamble and Section 1 of which read in the relevant part:

> [T]he Central Government hereby prohibits,…:
>
> […]
>
> (ii) the import into India from the countries reporting Notifiable Avian Influenza (both Highly Pathogenic Notifiable Avian Influenza and Low Pathogenic Notifiable Avian Influenza), the following livestock and livestock products,…:
>
> […]
>
> Provided that the Central Government may allow the import of processed poultry meat after satisfactory conformity assessment of the exporting country.[54]

It is these provisions of the Indian law that came to be examined by a WTO Panel and the AB.

3.2.1 Panel examination of Indian law

The Panel first considered whether India's AI measures fall within the scope of the list of instruments in the second sentence of Annex A (1) of the SPS Agreement.[55] It recalled that India's AI measures are maintained through the Livestock Act and S.O. 1663(E). Both legal instruments thus qualified to the Panel as either "laws", "decrees" or "regulations" listed in the second sentence of Annex A.[56] It further noted from the text of Section 3A of the Livestock Act that it concerns the regulation of imports that may affect human or animal health, although Section 3A makes no specific mention of AI.[57]

The Panel observed that S.O. 1663(E) was issued by DAHD in the exercise of powers conferred by Sections

[48] *India – Agricultural Products* Panel Report, n. 46, para. 2.1 *et seq*.
[49] *India – Agricultural Products* Panel Report, n. 46, para. 2.22.
[50] *India – Agricultural Products* Panel Report, n. 46, para. 2.25.
[51] *India – Agricultural Products* Panel Report, n. 46, para. 2.27.
[52] *India – Agricultural Products* Panel Report, n. 46, para. 2.28.
[53] *India – Agricultural Products* Panel Report, n. 46, para. 2.28.
[54] *India – Agricultural Products* Panel Report, n. 46, para. 2.32.
[55] Annex A (1) of the SPS Agreement defines sanitary or phytosanitary measures.
[56] *India – Agricultural Products* Panel Report, n. 46, para. 7.141.
[57] *India – Agricultural Products* Panel Report, n. 46, para. 7.144.

3 and 3A of the Livestock Act. The Panel observed that the purpose of S.O. 1663(E) is purportedly to protect human and animal health from the ingress of AI and to ensure food safety, which falls squarely within the definitions in Annex A(1)(a) through (c).[58]

However, the Panel noted that S.O. 1663(E) prohibits the importation of the relevant products from countries reporting NAI, thus not allowing importation from NAI or HPNAI free zones or compartments, which is in contradiction with the product-specific recommendations of Chapter 10.4 of the Terrestrial Code of the World Organization for Animal Health. The Panel observed that India's AI measures amount to a "fundamental departure" [59] from the Terrestrial Code. The Panel also noted that the regime applied in the case of NAI outbreaks within India limits the movement of those poultry products that originate in the affected territory to within 10 km of the site of the infection (i.e. those within the surveillance zone). There are no restrictions on Indian products from outside the surveillance zone.[60] These contrasting limitations on the movement and sale of poultry products within India are probative of the fact that S.O. 1663(E) treats differently the products of India and of other WTO Members (e.g., the United States) in the event of an outbreak of NAI. [61] The Panel therefore concluded that India's AI measures treat imported products differently from domestic products, and are therefore discriminatory.[62]

3.2.2 Appellate review of Indian law

The AB observed that the Panel defined the measures at issue collectively and did not consider either the Livestock Act or S.O. 1663(E) as a discrete measure at issue.[63] On appeal, India did not challenge the Panel's characterization of the measures at issue.[64]

The AB recalled that "India's AI measures" are those that prohibit the importation of the relevant products, as maintained through the Livestock Act and S.O. 1663(E). The AB considered that, having defined the measures at issue collectively, the Panel could not have properly answered the question of whether India's AI measures "recognize" the concepts of AI-free or low AI prevalence areas with reference to the Livestock Act alone. Rather, answering this question required the Panel to scrutinize the AI measures as a whole, including the content of S.O. 1663(E). Moreover, the AB noted that examining the United States' claim without taking into account S.O. 1663(E) would overlook the implementing measure enacted by India that specifies the operational details of India's AI measures, including the circumstances in which the import prohibitions are imposed and the products that are subject to them. [65] While it is true that the Panel acknowledged the broad discretion inherent in the Livestock Act, the Panel eventually based its finding on what the AI measures actually do, rather than on what one of the instruments constituting such measures could potentially do. [66] The Panel, according to the AB, committed no error in adopting this approach, which ultimately led to its finding that "[t]aken together … India's AI measures do not recognize the concept of disease-free areas and areas of low disease prevalence with respect to AI." [67] The AB therefore disagreed with India's argument that, given that the parent legislation – Sections 3 and 3A of the Livestock Act – could recognize the concepts set out in the first sentence of Article 6.2, the Panel should not have based its conclusion on S.O. 1663(E), which is the delegated legislation.[68]

3.3 Assessment

Article 6 of the SPS Agreement is one of the few WTO provisions which contemplate region-based trade measures.[69] *India – Agricultural Products* was the first

[58] *India – Agricultural Products* Panel Report, n. 46, para. 7.146.
[59] *India – Agricultural Products* Panel Report, n. 46, para. 7.271.
[60] *India – Agricultural Products* Panel Report, n. 46, para. 7.411.
[61] *India – Agricultural Products* Panel Report, n. 46, para. 7.411.
[62] *India – Agricultural Products* Panel Report, n. 46, para. 7.411.
[63] *India – Measures Concerning the Importation of Certain Agricultural Products*, Report of the WTO Appellate Body, WT/DS430/AB/R (hereafter the India – Agricultural Products AB Report).
[64] *India – Agricultural* Products AB Report, n. 63, para. 5.165.
[65] *India – Agricultural* Products AB Report, n. 63, para. 5.170.
[66] *India – Agricultural* Products AB Report, n. 63, para. 5.170.
[67] *India – Agricultural* Products AB Report, n. 63, para. 5.170.
[68] *India – Agricultural* Products AB Report, n. 63, para. 5.170. The AB considered that, in making this contention, India is merely recasting two of its previous arguments with which it has already disagreed. The AB understood India to be arguing that, since "recognition" of the concepts under Article 6.2 does not require the implementation of such concepts, and given that S.O. 1663(E) is an implementing measure, the Panel should not have examined S.O. 1663(E). This, in the AB's view, is a recasting of India's argument that the Panel should have examined the United States' claim under Article 6.2 based on the Livestock Act alone. *India – Agricultural Products* AB Report, n. 63, para. 5.172.
[69] For its evolutionary recount, see Saika, Naoto Nelson. Seeds, trade, trust: regionalization commitments under the SPS agreement.

occasion when it was submitted for WTO adjudication. India submitted to the AB that a statement on the Panel record of its DAHD official made in a letter to the U.S. fulfilled its regional recognition obligation as it showed that India had exercised its legislative discretion to recognize the relevant concepts.[70] The U.S., on the other hand, submitted that the statement did not show that India had recognized the concepts of disease-free areas or areas of low disease prevalence with respect to AI.[71] The AB stated that, even if the statement could be understood as "recognition" of the concepts,[72] it had difficulty conceiving of how the statement could have any impact on the Panel's assessment of India's regulatory instrument S.O. 1663(E) which was *subsequently* issued under the Livestock Act.[73] For this reason, the AB did not accept that the statement could have had any impact on the Panel's assessment of S.O. 1663(E).[74]

Two points emerge from the AB's disposal of India's instant issue. First, the evidentiary weight of an official's statement relative to a regulatory instrument and, second, the acceptability of the statement issued for or on behalf of the executive as a means of fulfilment of the recognition obligation which was made before the adoption of the regulatory instrument.[75] While the AB did not prefer the statement to the regulatory instrument as evidence of the exercise of a relevant discretion,[76] India failed to convince the AB that it was so material evidence to its case that the Panel's failure to address it explicitly and rely upon it was not without an appreciable bearing on the objectivity of the Panel's factual assessment.[77] In other words, unless it is a high threshold case of no evidentiary basis, the AB would not find fault with the objectivity of Panel's factual assessment, particularly of its affirmative findings.[78]

Thus, what sets this case in contrast with *India – Patent* is that the WTO based its reasoning for finding India in violation despite the presence of a regulatory instrument while in the earlier case for the absence of a legislation in India. Further, in *India – Patents*, the AB found no record of administrative instructions which could have been taken for India's compliance despite a mandatory and WTO-inconsistent legislation,[79] in this case the AB found administrative statement but not without a subsequent and WTO-inconsistent regulatory instrument.[80]

4 "[L]aws or regulations" in India

The third significant engagement of the WTO with Indian law may be seen in *India – Solar Cells*[81] which arose when the United States complained against India's domestic content requirements concerning solar cells and solar modules India had imposed on certain entities selling electricity to government agencies under its National Solar Mission.[82] The United States claimed that these domestic content requirements were maintained by India through its Resolution,[83] Guidelines,[84]

Journal of International Economic Law, v. 20, p. 855, 2017.

[70] *India – Agricultural Products* AB Report, n. 63, para. 5.180.

[71] *India – Agricultural Products* AB Report, n. 63, para. 5.181.

[72] Further, see generally, Reich, Arie. The WTO as a law-harmonizing institution. *University of Pennsylvania Journal of International Economic Law*, v. 25, p. 321, 2004.

[73] *India – Agricultural Products* AB Report, n. 63, para. 5.184.

[74] *India – Agricultural Products* AB Report, n. 63, para. 5.184. See also Bown, Chad P.; Hillman, Jennifer A. Bird flue, the OIE, and the national regulation: the WTO's India: agricultural products dispute. *World Trade Review*, v. 15, p. 247, 2016.

[75] Further, see Pratap, Ravindra. The first WTO appellate body report on regional adaptation under the SPS agreement. *Manchester Journal of International Economic Law*, v. 13, p. 81, 2016.

[76] Further, see generally Trachtman, Joel P. International legal control of domestic administrative action. *Journal of International Economic Law*, v. 17, p. 753, 2014.

[77] Further, see Ehlermann, Claus-Dieter; Lockhart, Nikolas. Standard of review in WTO law. *Journal of International Economic Law*, v. 7, p. 491, 2004.

[78] For prior AB Reports relied on by the AB, see *India – Agricultural Products* AB Report, n. 63, footnotes 567–70.

[79] Further, see Kuyper, P. J. The law of GATT as a special field of international law: ignorance, further refinement or self-contained system of international law. *Netherlands Yearbook of International Law*, v. 25, p. 227, 1994.; Bhuyian, Sharif. Mandatory and discretionary legislation; the continues relevance of the distinction under the WTO. *Journal of International Economic Law*, v. 5, p. 571, 2002.; Sim, Kwan Kiat. Rethinking the mandatory/discretionary legislation distinction in WTO jurisprudence. *World Trade Review*, v. 2, p. 33, 2003.

[80] For a larger account of the AB review in this case, see Saggi, Kamal; Wu, Mark. Trade and agricultural disease: import restrictions in the wake of the India: agricultural products dispute. *World Trade Review*, v. 17, p. 279, 2017.

[81] *India – Certain Measures Relating to Solar Cells and Solar Modules* (DS 456).

[82] *India – Certain Measures Relating to Solar Cells and Solar* Modules, Report of the WTO Panel, WT/DS456/R, para. 2.1 (hereafter the *India – Solar Cells* Panel Report).

[83] Ministry of New and Renewable Energy, Resolution: Jawaharlal Nehru National Solar Mission, No. 5/14/2008 (January 2010), *India – Solar Cells* Panel Report, n. 82, para. 2.2.

[84] Ministry of New and Renewable Energy, Guidelines for Selection of New Grid Connected Solar Power Projects, Batch-I (July 2010) and Batch-II (August 2011); Ministry of New and Renewable Energy, Jawaharlal Nehru National Solar Mission Phase-II Guidelines for Implementation of Scheme for Setting up of 750 MW

Requests for Selection Document,[85] Power Purchase Agreements,[86] Policy Document,[87] Approval for Implementation,[88] Amendments[89] and Clarifications[90] (DCR Measures). We first discuss below the context of the WTO's engagement with Indian law and before taking up its consideration by the Panel and the AB.

4.1 Context of the WTO engagement with Indian law

The General Agreement on Tariffs and Trade (GATT) is one of the WTO agreements covering international trade in goods. One of the key provisions of GATT is Article XX, which allows countries to make specified exceptions to their GATT obligations and provided they do not arbitrarily or unjustifiably discriminate between countries and make disguised restrictions on international trade.[91]

4.1.1 GATT Article XX(d)

The most significant context of the WTO's engagement with Indian domestic law in this case was GATT Article XX(d), which establishes a general exception for measures: "[N]ecessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, […]".

Accordingly, we will first discuss below the WTO's consideration qua laws or regulations in India of the status of domestic instruments and before discussing its consideration qua laws or regulations in India of the status of international instruments.

4.2 WTO consideration qua laws or regulations in India of the status of domestic instruments

Under GATT Article XX (d), the WTO's consideration with respect to laws or regulations in India of the status of international instruments had entailed their examination by the Panel and the AB. Below we discuss each in turn.

4.2.1 Panel examination qua laws or regulations in India of the status of its domestic instruments

According to the Panel, under Article XX(d), the responding party's burden of demonstrating that a measure is designed to secure compliance with laws or regulations, which are not inconsistent with the GATT 1994, entails demonstrating that there are "laws or regulations".[92] It was India's position that it had adopted DCR measures to secure compliance with laws or regulations. While addressing India's energy security challenge and ensuring compliance with its obligations relating to climate change, India submitted that its domestic obligations to ensure ecologically sustainable growth

Grid-connected Solar PV Power Projects under Batch-I (October 25, 2013). *India – Solar Cells* Panel Report, n. 82, para. 2.2.

[85] National Thermal Power Company Vidyut Vyapar Nigam Limited, Request for Selection Document for New Grid Connected Solar Photo Voltaic Projects under Phase 1 of JNNSM (August 2010) and Batch II of JNNSM (August 2011); Ministry of New and Renewable Energy, Solar Energy Corporation of India, Request for Selection of Solar Power Developers for 750 MW Grid Connected Solar Photo Voltaic Projects under JNNSM PHASE-II: Batch-I, No.: SECI/2013/JNNSM/Ph-II, Batch-I/Solar PV/750MW (October 4, 2013); Solar Energy Corporation of India, Request for Selection (RfS) Document for 750 MW Grid Connected Solar Photovoltaic Projects Under JNNSM Phase II Batch-I (October 28, 2013). *India – Solar Cells* Panel Report, n. 82, para. 2.2.

[86] National Thermal Power Company Vidyut Vyapar Nigam Limited Draft Standard Power Purchase Agreement for Procurement of __ MW Solar Power on Long Term Basis (August 2010), (August 2011); Solar Energy Corporation of India, Draft Standard Power Purchase Agreement for Procurement of MW Solar Power on Long term Basis (November 30, 2013), (January 8, 2014). *India – Solar Cells* Panel Report, n. 82, para. 2.2.

[87] Ministry of New and Renewable Energy, Jawaharlal Nehru National Solar Mission Phase II Policy Document (December 2012). *India – Solar Cells* Panel Report, n. 82, para. 2.2.

[88] Ministry of New and Renewable Energy, Approval for Implementation of a Scheme for Setting up of 750 MW of Grid-connected Solar PV Power projects under Batch-I of Phase-II of Jawaharlal Nehru National Solar Mission with Viability Gap Funding support from National Clean Energy Fund (October 15, 2013). *India – Solar Cells* Panel Report, n. 82, para. 2.2.

[89] Solar Energy Corporation of India, Amendments in the RfS Document of JNNSM Phase-II, Batch-I, No.: SECI/JNNSM/SPV/P-2/B-1/RfS/102013 (November 29, 2013); (January 9, 2014). *India – Solar Cells* Panel Report, n. 82, para. 2.2.

[90] Solar Energy Corporation of India, Clarifications on the queries raised by various stakeholders (November 30, 2013). *India – Solar Cells* Panel Report, n. 82, para. 2.2.

[91] Further, see generally MAVROIDIS, Petros C. *The general agreement on tariffs and trade:* a commentary. London: OUP, 2005.; QURESHI, Asif H. *Interpreting WTO agreements*. Cambridge: CUP, 2015., Chapter 4; *European Communities – Measures Prohibiting Importation and Marketing of Seal Products*, Report of the WTO Appellate Body, WT/DS400/AB/R (22 May 2014); *Brazil – Measures Affecting Imports of Retreaded Tyres*, Report of the WTO Appellate Body, WT/DS332/AB/R (3 December 2007); *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the WTO Appellate Body, WT/DS58/AB/R (12 October 1998).

[92] *India – Solar Cells* Panel Report, n. 82, para. 7.267.

are embodied in the Electricity Act read with the National Electricity Policy, the National Electricity Plan, and the National Action Plan on Climate Change.[93] India argued that each of these instruments would qualify as laws or regulations for the purposes of Article XX(d).[94]

The Panel noted that India had identified Section 3 of the Electricity Act of 2003 as the relevant provision of this instrument, which mandates the development of a National Electricity Policy and a National Electricity Plan and thus establishes the legal basis for the development of the Policy and the Plan.[95] The Panel considered that it does not address the content or substance of either the National Electricity Policy or the National Electricity Plan, other than to state that the Policy to be prepared from time to time will be based on optimal utilization of resources such as coal, natural gas, nuclear substances or materials, hydro and renewable sources of energy.[96] The Panel concluded that the terms "laws or regulations" refer to legally enforceable rules of conduct under the domestic legal system of the WTO Member concerned and do not include general objectives.[97] The Panel therefore found that Section 3 of the Electricity Act is a "law" within the meaning of Article XX(d) and that the National Electricity Policy, the National Electricity Plan, and the National Action Plan on Climate Change are not "laws or regulations" within the meaning of Article XX(d) of the GATT 1994.[98]

4.2.2 Appellate review qua laws or regulations in India of the status of its domestic instruments

India argued before the AB that the Panel erred, first, in finding that three of the domestic instruments identified by India, namely, the National Electricity Policy, the National Electricity Plan, and the National Action Plan on Climate Change, do not constitute "laws or regulations"; and, second, by consequently focusing its analysis on a fourth domestic instrument, namely, Section 3 of India's Electricity Act of 2003, in isolation of those three other instruments.[99]

Unlike the Panel, the AB did not consider that the scope of "laws or regulations" is limited to instruments that are legally enforceable or that are accompanied by penalties and sanctions to be applied in situations of non-compliance.[100] To the AB, the text of Article XX(d) does not exclude from the scope of "laws or regulations" rules, obligations or requirements that are not contained in a single domestic instrument.[101] However, according to the AB, a respondent who seeks to rely on a rule deriving from several instruments would still bear the burden of establishing that the instruments it identifies actually set out the alleged rule.[102] The AB summed up its interpretive approach:

> [I]n determining whether a responding party has identified a rule that falls within the scope of "laws or regulations" under Article XX(d) of the GATT 1994, … it may be relevant for a panel to consider, among others: (i) the degree of normativity of the instrument and the extent to which the instrument operates to set out a rule of conduct or course of action that is to be observed within the domestic legal system of a Member; (ii) the degree of specificity of the relevant rule; (iii) whether the rule is legally enforceable, including, e.g. before a court of law; (iv) whether the rule has been adopted or recognized by a competent authority possessing the necessary powers under the domestic legal system of a Member; (v) the form and title given to any instrument or instruments containing the rule under the domestic legal system of a Member; and (vi) the penalties or sanctions that may accompany the relevant rule.[103]

The AB failed to see how the National Electricity Policy, the National Electricity Plan, and the National Action Plan on Climate Change, taken together, could be read to set out a rule to ensure ecologically sustainable growth that India alleged.[104] While admitting that Section 3 of the Electricity Act set out the legal basis and authority for the development of the National Electricity Policy and the National Electricity Plan, it was "not clear to [the AB] how Section 3 of the Electricity Act, 2003 would have the effect of adding to the degree of

[93] India's first written submission, para. 240, *India – Solar Cells* Panel Report, n. 82, para. 7.275.
[94] India's response to Panel question No. 68, para. 84, *India – Solar Cells* Panel Report, n. 82, para. 7.303.
[95] *India – Solar Cells* Panel Report, n. 82, para. 7.276.
[96] *India – Solar Cells* Panel Report, n. 82, para. 7.276.
[97] *India – Solar Cells* Panel Report, n. 82, para. 7.311.
[98] *India – Solar Cells* Panel Report, n. 82, para. 7.318.
[99] India's appellant's submission, paras. 164–167 and 171, *India – Certain Measures Relating to Solar Cells and Solar* Modules, Report of the WTO Appellate Body, WT/DS456/AB/R, para. 5.92 (hereafter the *India – Solar Cells* AB Report).
[100] *India – Solar Cells* AB Report, n. 99, para. 5.109.
[101] *India – Solar Cells* AB Report, n. 99, para. 5.111.
[102] *India – Solar Cells* AB Report, n. 99, para. 5.111.
[103] *India – Solar Cells* AB Report, n. 99, para. 5.113.
[104] *India – Solar Cells* AB Report, n. 99, para. 5.133.

normativity of these otherwise "non-binding" domestic instruments."[105] The AB too therefore concluded that India's instruments other than its Electricity Act are not laws or regulations under GATT Article XX(d).

4.3 WTO consideration qua laws or regulations in India of the status of international instruments

Under GATT Article XX(d), the WTO's consideration with respect to laws or regulations in India of the status of international instruments had entailed their examination by the Panel and the AB. Below we discuss each in turn.

4.3.1 Panel examination qua laws or regulations in India of the status of international instruments

India submitted that its international law obligations are embodied in the preamble of the WTO Agreement, the United Nations Framework Convention on Climate Change, the Rio Declaration on Environment and Development and the United Nations General Assembly Resolution adopting the Rio+20 Document: The Future We Want in 2012.[106] According to India, these international instruments have direct effect in the domestic legal system of India[107] and rules of international law are accommodated into domestic law without express legislative sanction provided they do not conflict with laws enacted by the Parliament.[108]

According to the Panel, international agreements may constitute "laws or regulations" only insofar as they have been incorporated or have direct effect in a Member's domestic legal system.[109] The Panel accepted India's explanation that the executive branch may take implementing actions to secure compliance with India's international law obligations under these instruments and without express sanction by the legislative branch provided those implementing actions do not conflict with laws enacted by the Parliament.[110] To the Panel these obligations do not have "direct effect" if only either the executive branch and/or the legislative branch, as appropriate, must take "implementing actions".[111] And India's argument that Supreme Court has held that principles of international environmental law, and the concept of sustainable development are fundamental to the environmental and developmental governance in India and is a part of customary international law" did not address to the Panel the question of whether international obligations are automatically incorporated into domestic law and have "direct effect" in India.[112] The Panel therefore did not consider international instruments identified by India to be "laws or regulations" within the meaning of Article XX(d).[113]

4.3.2 AB review qua laws or regulations in India of the status of international instruments

Before the AB, India claimed that the Panel erred in its interpretation and application of Article XX(d) in finding that the international instruments identified by India do not have direct effect in India and are therefore not "laws or regulations" within the meaning of Article XX(d).[114] Relying on *Mexico – Soft Drinks*,[115] the AB stated that rules deriving from international agreements may become part of the domestic legal system of a Member in at least two ways: by incorporation of such rules through domestic legislative or executive acts for implementation of an international agreement and by direct effect within the domestic legal systems and without specific domestic action for their implementation.[116] The AB clarified:

> Subject to the domestic legal system of a Member, there may well be other ways in which international instruments or rules can become part of that domestic legal system.[117] [And] even if a particular international instrument can be said to form part

[105] *India – Solar Cells* AB Report, n. 99, para. 5.136.

[106] India's first written submission, para. 240; *India – Solar Cells* Panel Report, n. 82, para. 7.269.

[107] India's response to Panel question No. 35, *India – Solar Cells* Panel Report, n. 82, para. 7.285.

[108] India's first written submission, para. 180, *India – Solar Cells* Panel Report, n. 82, para. 7.285

[109] *India – Solar Cells* Panel Report, n. 82, para. 7.293. In reaching this conclusion, the Panel specifically relied on *Mexico – Tax Measures on Soft Drinks and Other Beverages*, Report of the WTO Appellate Body, WT/DS308/AB/R (hereafter the *Mexico – Soft Drinks* AB Report). On the proposition of incorporation, see the Indian Supreme Court Judgment in *State of Madras* v. *CG Menon* 1954 AIR SC 517.

[110] *India – Solar Cells* Panel Report, n. 82, para. 7.297.

[111] *India – Solar Cells* Panel Report, n. 82, para. 7.298.

[112] *India – Solar Cells* Panel Report, n. 82. para. 7.298.

[113] *India – Solar Cells* Panel Report, n. 82, para. 7.301.

[114] India's appellant's submission, paras. 166 and 170–173, *India – Solar Cells* AB Report, n. 99, para. 5.92.

[115] *India – Solar Cells* AB Report, n. 99, paras. 69–71.

[116] *India – Solar Cells* AB Report, n. 99, para. 5.140.

[117] *India – Solar Cells* AB Report, n. 99, para. 5.140.

> of the domestic legal system of a Member, this does not, in and of itself, establish the existence of a rule, obligation, or requirement within the domestic legal system of the Member that falls within the scope of a "law or regulation" under Article XX(d).[118] While these Decisions and observations by the Supreme Court may serve to highlight the relevance of the international instruments and rules identified by India for purposes of interpreting provisions of India's domestic law, as well as for guiding the exercise of the decision-making power of the executive branch of the Central Government, we do not consider that this is sufficient to demonstrate that the international instruments India identified… fall within the scope of "laws or regulations" under Article XX(d).[119]

So the WTO discernibly seems willing, at least in principle, to concede to states an appreciable meaure of autonomy in determining how international instruments become part of their legal system although it alone would determine it on facts in any contested cases, such as in this case.

4.4 Assessment

The WTO test of necessity under GATT Article XX has not escaped a critical assessment.[120] Nor has public international law been alien to the concept of general defences.[121] The AB had noted that there is no single relevant consideration of determining whether domestic instruments are "laws or regulations" and that adoption of domestic instruments by a competent authority, the form, specificity and the title of those domestic instruments are relevant considerations in making that determination. It seems that the AB has accorded each of these considerations an equal degree of normativity. If so, it remains less than clear that this should be the case. Consequently, the manner in which the AB has affirmed and applied its interpretative approach to determining whether India's domestic instruments were "laws or regulations" seems to be less than fully or clearly satisfying its criteria for making such a determination.

Further, the Indian Directive Principles of State Policy do include references to international law in Article 51 of the Constitution of India, but by that alone international law does not become a rule, obligation or requirement.[122] The AB seems to be saying that an international instrument as part of domestic law and an international instrument as binding under domestic law are not always or necessarily one and the same thing. In other words, an international instrument binding under domestic law is obviously part of domestic law but not that an international instrument part of domestic law is necessarily or always binding under domestic law. Further, for the AB, it is immaterial whether executive or legislature internalizes international law but not whether it is having a sufficient degree of normativity or bindingness for the purposes of GATT Article XX(d). This understanding of the AB seems in accord with the current understanding of the Indian constitutional law under which the executive power is coterminous with the legislative power in the matters of internalization/domestication of international law except when it derogates from domestic law and constitutionally requires an exercise of legislative power.[123]

India appears to have advanced two arguments to support its claim that certain international instruments have direct effect in India: First, because the executive branch of the Central Government can take actions to "implement" or "execute" these international instruments without the need for the legislature to enact a domestic law incorporating those international instruments.[124] And, second, "the principles of sustainable development under international environmental law have been recognized by the Supreme Court of India to

[118] *India – Solar Cells* AB Report, n. 99, para. 5.141. The AB noted that "the degree of normativity of an international instrument or rule under the domestic legal system of a Member may be different from the degree of normativity of such an instrument or rule under public international law." *India – Solar Cells* AB Report, n. 99, footnote 386.

[119] *India – Solar Cells* AB Report, n. 99, para. 5.148.

[120] See, for instance, Regan, Donald H. The meaning of necessary in GATT Article XX and GATS Article XIV: the myth of cost-benefit balancing. *World Trade Review*, v. 6, p. 347, 2007.; Fontanelli, Fillippo. Necessity killed the GATT: Art XX GATT and the misleading rhetoric about weighing and balancing. *European Journal of Legal Studies*, v. 4, p. 39, 2012.

[121] For an overview, see Paddeu, Federica. *Justification and excuse in international law:* concept and theory of general defences. London: CUP, 2018.

[122] Further, see generally Shelton, Dinah (ed.). *International law and domestic legal systems:* incorporation, transformation, and persuasion. London: Oxford University Press, 2011.; Borchard, Edwin. Relation between international law and municipal law. *Virginia Law Review*, v. 27, p. 137, 1940.; Ferrari-Bravo, L. International and municipal law: the complementarity of legal systems. *In:* MacDonald, R. St.; Johnston, D. M. (ed.). *The structure and process of international law.* The Hague: Brill, 1983. p. 715.; Burchardt, Dana. The functions of law and their challenges: the differentiated functionality of international law. *German Law Journal*, v. 20, p. 409, 2019.

[123] *Union of India* v. *Azadi Bachao Adolan*, Judgment of the Indian Supreme Court, AIR 2004 SC 1107.

[124] India's appellant's submission, paras. 167–168.

be part of the environmental and developmental governance in India."[125] It does not seem necessary for India to have argued that those international instruments had direct effect in India.[126] The Constitution of India does not expressly make any distinction between treaties and other forms or sources of international law for their reception in the Indian municipal law.[127]

In the understanding of the AB, the doctrine of incorporation is not restricted for its manifestation to legislative acts alone. An executive act may, in this view, also incorporate international law into domestic law. Direct effect of international law in domestic law, according to the AB's understanding, would require no action on the part of the executive or legislature. It would therefore seem that the judiciary is competent to bring about a direct effect of international law on municipal plane. While acknowledging the relevance of the international instruments for the purposes of interpretation of India's domestic law, the AB did not consider them to be part of India's domestic law,[128] let alone considering them to be "laws or regulations" under GATT Article XX(d) despite the fact that the executive took action in their pursuance.[129] An instrument of interpretation, for instance, legislative history, is obviously not part of law.[130] India was apparently wrong to suppose that an instrument of interpretation (the international instruments identified by India) would be considered as "laws or regulations" under GATT Article XX(d). International law used as a tool of interpretation does not thereby become part of domestic law; international law may be part of domestic law but is not thereby necessarily binding under it; and non-binding national laws of a WTO member are not "laws or regulations" under GATT Article XX (d).

The AB seems to have exemplified two ways, incorporation and direct effect, for rules deriving from international agreements and becoming part of domestic law.[131] These do not however exhaust either the means of, or the organs for, internalization/domestication of international law.[132] In other words, while the legislature or executive was considered competent to incorporate international law into domestic law, only the judiciary was capable of giving international law direct effect in domestic law.[133] India was hardly right in arguing that international instruments, which are not inconsistent with laws enacted by Indian Parliament, have direct effect in India because they have been used for interpretation of domestic law.[134] India perhaps drew on direct applicability which talks about whether a supranational law needs a national parliament to enact legislation to make it law in a member state.[135] Direct effect, on the other hand,

[125] India's appellant's submission, para. 168. On the underlying policy argument, see Charnovitz, Steve; Fischer, Carolyn. Canada: renewable energy: implications for WTO law on green and not-so-green subsidies. *World Trade Review*, v. 14, p. 177, 2015.; Dröge, Susanne *et al.* National climate change policies and WTO Law: a case study of Germany's new policies. *World Trade Review*, v. 3, p. 161, 2004.; Green, Andrew. Climate change, regulatory policy and the WTO. *Journal of International Economic Law*, v. 8, p. 143, 2005.; MARÍN Durán, Gracia. Sheltering government support to 'green' electricity: the European Union and the World Trade Organization. *International & Comparative aw Quarterly*, v. 67, p. 129, 2018. Further, see generally Schermers, H. G. The role of domestic courts in effectuating international law. *Leiden Journal of International Law*, v. 3, p. 77, 1990.; Roberts, A. Comparative international law? the role of national courts in creating and enforcing international law. *International & Comparative Law Quarterly*, v. 60, p. 57, 2011.; Nollkaemper, André. *National courts and the international rule of law*. London: Oxford University Press, 2011.

[126] It has been argued that international persuasive authority varies from country to country. Slaughter, Anne-Marie Slaughter. A global community of courts. *Harvard international Law Journal*, v. 44, p. 201, 2003.

[127] For a historical recount, see Agrawala, S. K. Indian judicial reasoning and transnational law. *Archiv des Völkerrechts*, v. 22, p. 1, 1984. On domestic institutions and WTO disputes, see generally Betz, Timm. Domestic institutions, trade disputes, and the monitoring and enforcement of international law. *International Interactions*, v. 44, p. 631, 2018.

[128] *India – Solar Cells* AB Report, n. 99, para. 5.148.

[129] *India – Solar Cells* AB Report, n. 99, para. 5.148.

[130] See generally *Pepper (Inspector of Taxes)* v *Hart* [1993] 1 All E.R. 42; *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R (5 June 1998); Scalia, Antonin; Garner, Bryan A. *Reading law:* the interpretation of legal texts. St. Paul: Thomson/West, 2012. §66; Pratap, Ravindra. *Interpretation of statutes:* a reader. New Delhi: Manak, 2010. Chapter 12.

[131] *India – Solar Cells* AB Report, n. 99, para. 5.140.

[132] Further, with reference to treaties, see for instance Edgar, Andrew; Thwaites, Rayner. Implementing treaties in domestic law: translation, enforcement and administrative law. *Melbourne Journal of International Law*, v. 19, p. 24, 2018.

[133] On incorporation, see generally O'Keefe, Roger. The doctrine of incorporation revisited. *British Yearbook of International Law*, v. 79, p. 1, 2008.; Dickinson, Edwin D. Changing concepts and the doctrine of incorporation. *American Journal of International Law*, v. 26, p. 239, 1932. But see also Campbell, Tom. Incorporation through interpretation. *In:* Campbell, Tom; Ewing, K. D.; Tomkins, Adam (ed.). *Sceptical essays on human rights*. Oxford: Oxford University Press, 2001.

[134] Further, see generally Nollkaemper, André. *National courts and the international rule of law*. London: Oxford University Press, 2011.; Sandholtz, Wayne. How domestic courts use international law. *Fordham International Law Journal*, v. 38, p. 595, 2015.

[135] EU treaties and EU regulations are directly applicable. They do not need any other acts of parliament in the member state to make

refers to whether individuals can rely on a supranational law in domestic courts.[136] However, it is also persuasive that the AB also "fell short of explaining what the "direct effect" actually means, except to note that this was a situation not requiring domestic implementation".[137]

The WTO dispute settlement system's position on non-WTO obligations has long been uncertain.[138] But in this case, the AB's approach to the reception of international law in municipal law has been considered expansive than *Mexico – Taxes on Soft Drinks*[139] in which it confirmed a narrow approach by excluding international obligations from the scope of GATT Article XX(d).[140] While the AB seems to have given "considerable deference to national legal systems in accommodating international rules",[141] which the Panel in *US – Section 301 Trade Act*[142] had acknowledged, it did not do "as thorough an examination of the international instruments as it did for the domestic instruments."[143] If so, it is not without underscoring that when international courts definitively reflect on domestic laws made in the name of people, they raise the question in whose name they speak the law.[144]

The WTO thus seems to have travelled some discernible distance on the plane of deference to state from *India–Patents* to *India–Solar Cells*. If so, it is not without serving to underscore a measure of deglobalization or reversion to national sovereignty, at least in the limited economic sphere and with reference to the state of development of international economic relations.[145]

5 Conclusion

Each of the three engagements of the WTO with Indian law is an inseparable part of the thread that may serve to measure the degree of deglobalization or reversion to national sovereignty in a certain way. Initially, the Indian executive's instructions were not accepted as corroborative of India's compliance on the ground that these created "a certain degree of legal insecurity" and were devoid of "sound legal basis" under Indian law despite the fact that the executive organ is repre-

them into law.http://hum.port.ac.uk/europeanstudieshub/learning/module-3-governance-in-a-multi-level-europe/direct-effect-and-direct-applicability/

136 http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3Al14547. The direct effect of European law was pronounced by ECJ in the Judgment of *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos* v. *Netherlands Inland Revenue Administration*, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61962CJ0026&from=EN. Later, in 1982, in *Ursula Becker* v. *Finanzamt Münster-Innenstadt*, the ECJ rejected the direct effect where the countries have a margin of discretion, however minimal, regarding the implementation of the provision in question, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61981CJ0008&from=EN; And in 1987, *Meryem Demirel* v. *Stadt Schwäbisch Gmünd*, the Court of Justice recognized the direct effect of certain agreements in accordance with the same criteria identified in the Judgment *Van Gend en Loos*, https://eur-lex.europa.eu/resource.html?uri=cellar:0c24007e-e7b6-425a-8710-6121fdfc8eaf.0002.03/DOC_2&format=PDF. Further, see Betlem, G.; Nollkaemper, A. Giving effect to public international law and European Community law before domestic courts. *European Journal of International Law*, v. 14, p. 569, 2003.

137 Shadikhodjaev, Sherzod. India: certain measures relating to solar cells and solar modules. *AJIL*, v. 111, p. 145-46, 2017.

138 Mavroidis, Petros C. *Trade in goods*. Oxford: Oxford University Press, 2012. p. 342.

139 Andersen, Henrik. India: solar cells and Mexico: soft drinks: multilevel rule of law challenges in the interpretation of art. XX(D) of GATT 1994 in WTO case law. *Indian Journal of International Economic Law*, v. 10, p. 58, 2019. Further, see also Espa, Ilaria; MARÍN Durán, Gracia. Renewable energy subsidies and WTO law: time to rethink the case for reform beyond Canada: renewable energy/fit program. *Journal of International Economic Law*, v. 21, p. 621, 2018.

140 *Mexico – Soft Drinks* AB Report, n. 109, para. 8.163.

141 Shadikhodjaev, Sherzod. India: certain measures relating to solar cells and solar modules. *AJIL*, v. 111, p. 145-46, 2017. Further, see generally Mavroidis, Petros C. The gang that couldn't shoot straight: the not so magnificent seven of the WTO appellate body. *European Journal of International Law*, v. 27, p. 1107, 2016.; Henckels, Caroline. Permission to act: the legal character of general and security exceptions in international trade and investment law. *International & Comparative Law Quarterly*, v. 69, p. 557, 2020.

142 *US – Section 301-310 of the Trade Act of 1974*, Report of the WTO Panel, WT/DS152/R.

143 Kartunnen, Marianna; Moore, Michael O. India: solar cells: trade rules, climate policy, and sustainable development goals. *World Trade Review*, v. 17, p. 215, 2018. Further, from a larger perspective, see also Weimer, Maria. Reconciling regulatory space with external accountability through WTO adjudication: trade, environment and development. *Leiden Journal of International Law*, v. 30, p. 901, 2017.

144 See for instance VON Bogdandy, Armin; Venzke, Ingo. In whose name?: an investigation of international courts' public authority and its democratic justification. *European Journal of International Law*, v. 23, p. 7, 2012. Further, see Cohee, James R. The WTO and domestic political disquiet: has legalization of the global trade regime gone too far?. *Indiana Journal of Global Legal Studies*, v. 15, p. 351, 2008.; Lydgate, Emily. Is it rational and consistent?: the WTO's surprising role in shaping domestic public policy. *Journal of International Economic Law*, v. 20, p. 561, 2017.; McMahon, Joseph A. National regulation and the WTO: one step forward, two steps back. *Law Context:* A Socio-Legal Journal, v. 21, p. 176, 2003.; McRae, Donald. GATT Article XX and the WTO appellate body. *In:* Bronckers, Marco; Quick, Reinhard (ed.). *New directions of international economic law*. The Hague: Kluwer, 2000. p. 219.

145 Further, see Henkin, Louis. The mythology of sovereignty. *In:* Macdonald, R. St. (ed.). *Essays in honour of Wang Tieya*. London: Nijhoff, 1993. p. 351.; Lauterpacht, E. Sovereignty: myth or reality?. *International Affairs*, v. 73, p. 137, 1973.

sentative of the state on the international plane and the Indian executive's power is co-terminus with that of its legislature simply because the nature of the Indian executive is parliamentary and not that the Parliament is the executive. Thus, the first engagement of the WTO with Indian law in the thick of globalization was hardly without its global judicial share if measured by the rise of an international judiciary and before the end of the last century. And what sets the second engagement of the WTO with India apart from the first that, while the WTO based its reasoning for finding India in violation on the absence of legislation in India, in the second case despite the presence of a legislation in India. It was, in other words, a difference of form in which a globalized authority of the WTO came to manifest itself and relative to the state. And, finally, it was immaterial for the WTO whether executive or legislature internalizes or domesticates international law but not whether it has a sufficient degree of normativity or bindingness. The WTO's treatment of the international instruments was itself discernible of its less than sufficient degree of their examination if and as compared to the degree of deference it has in principle accorded to domestic legal systems in internalizing or domesticating international instruments. Seen in this way, the WTO would seem to have travelled some significant distance away from globalization.

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