
State Transformation and the Role of Lawyers: The WTO, India, and Transnational Legal Ordering

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This article explains the impact of India's engagement with the law of the World Trade Organization (WTO) on both the Indian state and on the WTO itself. In each case, it explains the role of Indian lawyers within the larger transnational context. In engaging with globalization and the WTO, India has transformed itself. The Indian state has moved toward a new developmental state model involving a stronger emphasis on trade, greater government transparency, and the development of public-private coordination mechanisms in which the government plays a steering role. The analysis shows that it has done so not as an autonomous policy choice, but rather in light of the global context in which the WTO and WTO law form an integral part. Reciprocally, the article displays the ways that India has built legal capacity to attempt to shape the construction, interpretation, and practice of the trade legal order. Indian private lawyers play increasing roles, although they remain on tap, not on top.

This article looks simultaneously at the Indian state in the context of the World Trade Organization (WTO), and at the WTO in the context of India. In each case, we explain the new role of Indian lawyers. The normative stakes are significant: how does a large developing country become not only a rule taker but also a rule shaper in a transnational legal order (TLO), including to preserve its policy space. The theoretical stakes are equally important and are twofold: first, what is the impact of the trade legal order on the Indian state; and second, how autonomous is the WTO, including from Indian influence?

First, unlike those who contend that the world is moving toward a postnational order where the state has been weakened (Strange 1996), we show that the enmeshment of India in

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transnational legal ordering has spurred the strengthening of new state capacities through the state's greater engagement with private stakeholders and professionals to mediate between international legal constraints and the pursuit of development strategies, while at the same time the position of the private sector and private professionals have been enhanced. The state taps into new expertise that private actors provide, while aiming to steer the process as it pursues its economic policies. The developmental state is not a casualty of globalization, but rather responds to it in new ways.

Second, we show how the WTO is not an autonomous, neoliberal power, but is rather, in large part, what states and stakeholders make of it, both in the negotiation of the rules and in their interpretation and practice. The United States (U.S.) and European Union (E.U.) were the most influential in setting WTO rules. Yet emerging economies increasingly have built new legal capacity, engaging both foreign and domestic lawyers, with the aim to shape the rules through negotiation, interpretation, and practice.

This case study of India complements others on Brazil (Shaffer, Ratton, and Rosenberg 2008), and China (Shaffer and Gao 2015) as part of a larger scale project on emerging economies and transnational legal ordering. The Indian case study is central, since India is gaining greater prominence on the global stage as a prominent member of the G-20, and it represents a rival development model to that of China in having a democratic parliamentary system and a highly competitive services sector, especially in information technology. Moreover, India is known for its emphasis on self-reliance and its resistance to external influence, and is thus a "least likely" case for assessing the WTO's impact.

In terms of methodology, we respectively have conducted fieldwork on Indian trade law and policy for over a decade, from 2003 to 2014. The article builds from this extensive field research, which includes over 150 semistructured interviews with Indian officials and stakeholders. The interviewees included former Ambassadors and members of the WTO Mission in Geneva, members of the Indian bureaucracy in New Delhi, private lawyers, private trade association and industry representatives, officials of international organizations, researchers in think tanks, academics, representatives of non-governmental organizations (NGOs), and news reporters. The interviews began with an open-ended question regarding the development of Indian legal infrastructure and capacity and the challenges the country faces and then covered a list of questions, although the interviews were conducted in a relaxed, conversational style. The interviews lasted from 1 to 2 hours each. We asked similar questions to

actors with different interests to check and make sure that we received consistent information. We complemented the interviews with observation in Geneva and in New Delhi. One of the authors (Shaffer) was a three-month visitor inside the WTO's premises on a research grant and another (Nedumpara) periodically worked for the Indian government on trade issues both as an independent consultant and through a major UNCTAD project. We have, wherever possible, cross-checked and corroborated information gleaned from interviews in other primary and secondary sources, including government documents and policy reports. We also compiled quantitative data on the use of experts and interaction with the private sector.

The article is in four parts. Part I grounds our study in three sets of theoretical arguments regarding TLOs, the new developmental state, and the building of trade-related legal capacity to recursively shape TLOs. Part II provides background on the pre-WTO, inward-looking Indian developmental state and the catalysts of change. Part III addresses the transformation of Indian trade institutions and bureaucracy and the building of public-private coordination mechanisms that include private lawyers. Part IV assesses the new role of Indian lawyers in three areas: (1) in trade negotiations, litigation, and domestic implementation of WTO obligations generally, (2) in antidumping and other import relief laws in light of WTO agreements, and (3) in patent regulation in connection with the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs).

Theoretical Argument and Terrain of Debate

A large body of literature contends that with the intensity, extensity, and velocity of economic and cultural globalization (Held et al. 1999), law and societies can no longer be viewed in purely national terms, but rather should be viewed transnationally (Calliess and Zumbansen 2010; Darian-Smith 2013; Dezalay and Garth 2002; Halliday and Shaffer 2015; Santos 2003; Sassen 2006; Twining 2009). In this vein, we investigate the impact of a particular body of international law—that of the WTO—on India, and the reciprocal implications of India's practices on that body of law. We argue that the WTO and Indian trade law and policy are best viewed as forming part of a TLO, as opposed to a purely international one.

Terence Halliday and Gregory Shaffer (2015) define a TLO as “a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions.” The concept has

three elements: the production of *order* in an issue area that relevant actors construe as a “problem”; the use of *legal* mechanisms to address the problem; and the *transnational* scope of ordering that transcends and permeates nation states. These orders involve the enmeshment of domestic institutions with international and transnational organizations and networks involving the recursive interplay of international, transnational, and domestic lawmaking, interpretation, and practice. They are not static but dynamic; they are not uniform, but vary in concordance of law at the international, national, and local levels.

The TLO lens differs from a traditional international law one in that it empirically focuses simultaneously on changes in law, institutions, professions, networks, and norms within nation states, and on international institutions and substantive law, such as the WTO and WTO law, which develop over time through engagement with these very same national and local institutions, professions, and practices (Shaffer 2013). TLO theory and research thus does not look solely at the international level—the traditional approaches of much of international law, law and economics, and international relations scholarship on the WTO. Rather, it assesses how legal norm making at the international, national, and local levels enmeshes and interacts recursively over time. From the perspective of TLO theory, states participate in their own transformations in engaging with international institutions, and state and civil society responses to international requirements can feed back into revisions and revised understandings of those requirements, including through their formal interpretation and informal practice.

The WTO is a central part of the trade TLO since it was created to reduce trade barriers and to resolve trade conflicts among nations, and thus establish order through law. Yet, to be effective, the WTO legal order must reach within states affecting institutional, professional, and normative decision making. The WTO legal order, however, is not static, but is subject to contestation over the norms’ meaning, both within states and between them. The meaning of the norms develops and is shaped by nation state and stakeholder engagement.

We assess the institutional and professional implications within India of engaging with economic globalization and the TLO of which the WTO forms a part, with the Indian government and stakeholders reciprocally aiming to shape understandings of the meaning of WTO law. The formation of India’s positions has been highly contested within India, including within business, civil society, and the bureaucracy. These contests shape its positions at the international level and its implementing practices at the national and local ones.

Earlier work assesses how international legal norms are adapted, hybridized, and localized by local actors in developing countries, assessing these actors' agency in light of local contexts, including local cultures and power dynamics (Dezalay and Garth 2002; Merry 2006; Acharya 2004). We confirm such adaptation, contestation, and localization in the Indian trade law context. Yet, we go further, showing how India also aims to reform its national institutions so as to more effectively shape the transnational trade legal order.

Given the implications of transnational legal ordering on nation states, this article contributes to a second body of theory regarding the trajectory of the *developmental state* (Stubbs 2011; Trubek et al. 2013). Starting in the 1940s and 1950s, during the heyday of the classic developmental state, developmental theorists argued for state intervention to jumpstart growth and industrialization (Rosenstein-Rodan 1943). This dominant view was reflected in the developmental states of India and other developing countries that were inward-looking and focused on import substitution industrialization and state-directed policies. While Gandhi and Nehru differed in their views on modernization, with Gandhi calling for indigenous development through textile crafts, and Nehru pushing for industrialization of the new postcolonial Indian state, they were similar in their inward focus, which was not surprising for a country emerging from an oppressive colonial heritage.

By the 1980s, state corruption and inefficiencies fueled a backlash against the developmental state. An onslaught of public-choice critiques contended that state bureaucrats pursue their own self-interest rather than the public good (Levi 1988), which in turn affected development theory. International financial institutions and leading development theorists increasingly advocated privatization, state downsizing, and the unleashing of market forces—known as the “Washington Consensus” (Williamson 1990). International Monetary Fund (IMF) structural adjustment programs and Article IV surveillance, and IMF and World Bank technical assistance, reflected this neoliberal approach. The Asian financial crisis of 1997 and the global financial crisis of 2008, however, catalyzed severe challenges to it, and raised to greater prominence the developmental state models behind the East Asian economic miracles (Amsden 2001; Evans 1995; Johnson 1999; Wade 2003).

More recently, a new revisionist account has emerged that highlights the revival of the state despite economic globalization (Stubbs 2011; Trubek et al. 2013). Under a new developmental state model, greater reliance is given to the private sector for investment and trade, with a stronger emphasis on exports and a

relative openness to imports.² The state plays a steering, and not a direct, role. The steering involves greater state transparency, substantial collaboration and communication between the public and private sectors, investment in professional and technical expertise, and a greater role for business law. The state encourages the private sector to develop innovation and entrepreneurship so as to be competitive on domestic and global markets, including through subsidies. It develops mechanisms to monitor, evaluate, and adapt its various industrial policy initiatives (Hausmann, Rodrik, and Sabel 2008). New developmental state advocates favor public private partnerships generally because neither the state nor the private sector alone has the knowledge to pick the right path for growth (Trubek et al. 2013), especially in light of the rise of global production networks and value chains (Gereffi 2014). Sean Riain (2004) calls this model a “network developmental state” which involves new coordination mechanisms among government officials, professionals, and business actors.

We confirm core conclusions of this literature, while contending that the rise of this particular development model cannot be understood outside of the global context, including that of the WTO and WTO law. Confirming the new developmental state literature, we show the Indian state’s shift to an outward orientation and its development of public-private coordination mechanisms with the state playing a steering role. Yet, we argue that this shift is not simply autonomous and home-grown, but rather is also a product of the global economic and legal context. Thus, just as the new developmental state model advocates public-private partnerships for innovation and growth, we show the necessary development of complementary public-private coordination mechanisms to address the transnational challenges of WTO law in which the government aims to fashion strategies to cope with, mediate, resist, and leverage global forces, including by enhancing transparency and relying to a greater extent on the private sector, professionals such as lawyers and economists, and NGOs.

This article thus links the new developmental state literature with that on transnational legal ordering by contending that *the WTO itself provides impetus* for the enhancement of state and

² We use the terms classic developmental state, neoliberal state, and new developmental state as ideal types. The new developmental state (Trubek et al. 2013) has antecedents with previous developmental state models in East Asia but differs in that the state is less dominant and is pressed to become more open and transparent. The new developmental state literature also addresses social welfare, redistributive programs, which similarly can be viewed in TLO terms (Halliday and Shaffer 2015), but these programs are not addressed here.

private professional expertise, and in particular legal expertise. WTO law creates legal obligations to liberalize markets and constrain subsidies and performance requirements that can constrain the new developmental state model. To mediate between WTO rules and state development strategies, state officials harness private sector input because the government alone does not hold sufficient expertise to address the demands of WTO law, and yet it cannot rely on the private sector and private lawyers alone to advance state priorities. State bureaucracies operate within institutional heritages and path dependencies that limit what the state can do, while transnationally connected private actors offer expertise that can enhance state competencies. We argue that state officials, lawyers, and economists thus come together because of, not in spite of economic globalization and its institutionalization in the WTO (Sinha 2007). The Indian state has not withdrawn from global and transnational influences (per the developmental state model of the 1950s). The WTO, rather, helps catalyze the building of new state capacity through public-private coordination mechanisms, including legal and regulatory capacity, even though its *raison d'être* is oriented toward freeing markets and liberalizing trade among nations.

Third, we assess the demand for increased legal capacity through the assistance of transnationally connected lawyers in order for the new developmental state to effectively participate in and respond to processes of transnational legal ordering. The WTO and WTO law have spurred the Indian developmental state to enhance its legal infrastructure in relation to international economic law by expanding coordinated linkages with the private sector and professionals offering particular expertise, and in particular legal expertise. Transnational legal ordering involves particular types of expertise not widely diffused in the state bureaucracy, and much of that expertise involves Western, and more particularly U.S., expertise (Dezalay and Garth 2010), what can be viewed as globalized localisms (Santos 2003).

The question becomes how is this U.S. specialized legal expertise, such as regarding WTO litigation, antidumping law, and patent law, enrolled and adapted (which we address in Part IV). By trade-related *legal capacity* we mean, broadly, the ability of a country to use law to engage proactively in the advancement of its international and domestic trade and trade-implicated policies (Shaffer et al. 2008). Such capacity is critical in at least four ways: for the negotiation and drafting of international legal agreements; for the monitoring of foreign compliance with these commitments and as leverage in informal dispute settlement; for the development of legal arguments and interpretation of legal texts in formal international litigation; and for the tailoring of domestic

regulatory policy in light of the agreements' flexibilities and constraints, raising the need for what Alvaro Santos (2012) calls "developmental legal capacity" to protect policy space.

India is pressed to adapt to WTO legal norms, and at times uses them to facilitate policy reforms. But it also seeks to shape and modify the understanding of the rules for its own developmental purposes. To do so, it must build legal capacity, in particular through opening the state bureaucracy to engage with the private sector and private lawyers. India invests in the building of legal capacity involving public-private coordination to deploy, resist, and shape global rules, and to assess implementation alternatives to protect policy space and mediate tensions between development strategies and WTO rules. The building of legal capacity is thus closely linked with changes in state institutions and state-business and state-society relations as part of the TLO for trade. The enhanced role of lawyers is both dependent on such state transformations and, in turn, helps to embed them.

The Pre-WTO Indian Developmental State and the Catalysts of Change

India and the GATT Years; Little Role for Law or Lawyers

Until 1991, India was a closed economy, built on a socialist model of five-year plans, wary of international commitments in light of its colonial heritage, and erecting a centralized bureaucracy and administering what was known as the "License Raj." When India gained its independence and emerged from colonization in 1947, its leaders sought to build a developmental state that was autonomous and unconstrained by international law and transnational legal ordering. The developmental policy at the time can be viewed in transnational terms as a reflection of particular ideas, but it did not involve a TLO. Indian businesses' primary market was domestic and they were unable to compete internationally. As the development economist I.M.D. Little (1982: 61) wrote in a widely read text in the early 1980s, "developing countries never expected to be able to export manufacturers to the developed countries."

The government engaged in four forms of policy that left little room for trade and business lawyers. First, the government heavily regulated the private sector in terms of technology choices, location, and prices, while relying on the state-funded public sector for investment in capital goods. Second, it promoted small businesses with policies that were biased against capital development and investment. Third, it created an import

licensing system where government approval was needed to trade. And, finally, it adopted high tariffs and quantitative restrictions to segregate its internal market from international competition and manage its foreign exchange.

Neither the government nor the private sector nor lawyers had much of a focus on international trade, so that India paid little attention to the General Agreement on Tariffs and Trade (GATT), the predecessor to the WTO existing from 1948 (when India joined as an original member) until 1995. India made few legal commitments under the GATT. At the time that the Uruguay Round negotiations were in full swing in 1990–1991, India's maximum tariff rate was 355 percent and its simple average applied tariff rate was 125 percent (Sinha 2014). Only six percent of Indian tariff lines were bound, meaning that India could raise tariff rates for 94 percent of its tariff lines at any time. India complemented the tariff regime with different types of quantitative restrictions to help monitor its unfavorable balance-of-payments situation, which were administered through different forms of licenses.

The administrative system for import restrictions required a bureaucracy, creating delays, uncertainty, and opportunities for corruption (Sinha 2005). The bureaucracy was insular and non-transparent. Business lawyers did not play a role in seeking licenses, which rather involved public relations personnel within firms. India's "Grand Avocates" (Galanter and Robinson 2013) may have engaged in occasional *ex post* litigation to defend large businesses under the licensing system, but they had no expertise in trade law.

Business associations and companies likewise were insular, concerned more with domestic policy and domestic licenses than with international trade regimes (personal interview with a business association officer, January 2002). During the Uruguay round (1986–1994), industry did hardly any research or careful study of the WTO and its implications. A 1999 report of the Confederation of Indian Industry (CII) acknowledged that the Indian Industry was "not so much concerned with what was happening in the Uruguay round. It was not even fully aware of the items of agenda that were being negotiated" (Sinha 2014).

In such a closed, nontransparent system, trade law and trade lawyers played no role. During the 47 years of the GATT dispute settlement system, India was a party in just three minor cases, none of which resulted in a GATT panel decision. Because of India's lack of significant tariff commitments and legal engagement under the GATT, one could not speak of a transnational trade legal order permeating the Indian state, or the need to develop trade-related legal capacity.

Catalyst and Contestation over Change: India on the Defensive in the 1990s

The Indian economy, which grew at a rate of 4.1 percent during 1951–1965, declined to a rate of 2.3 percent from 1965–1975 at the same time as the population rate also grew at 2.3 percent per year—a net impact of zero percent per capita growth for that decade. This performance gave rise to the popular expression “Hindu rate of growth,” a growth rate that totaled just 3.5 percent per year between 1960 and 1985, and left a significant percentage of Indians in extreme poverty. The phrase captured a sense of inevitability, of predestination, a mix of sober acceptance and incapacitating despair (Bhagwati 1993).

The Indian development model, however, changed in the 1990s. With the fall of the Berlin Wall in 1989 and the Soviet and socialist models (at the time) discredited, Indian officials eyed with envy the rise of East Asian economies with their export-oriented growth models. While East Asia grew, India in 1991 was struck by a severe economic crisis from the Gulf War oil shock and India’s dependence on petroleum imports. The government went to the IMF for emergency credits of US \$2.3 billion dollars, and, to its shame, even exported gold to the vaults of Great Britain as the value of the rupee plunged and the country could not meet its debts (Joshi and Little 1996).

As a condition to IMF financing (a conditionality, in the IMF’s terms), the IMF called for reforms of the Indian system, including an opening to foreign trade. Under duress, the Indian government of Prime Minister Narasimha Rao and its Finance Minister Manmohan Singh responded. They spun these reforms as home-grown, known as the “1991 reforms,” which is how the reforms are conventionally discussed within India to this day. Yet the reforms were part of a transnational context. As a former high-level member of the Indian Administrative Service (IAS) told us, “the IMF and international institutions helped to provide an excuse to do what otherwise was more difficult to do politically, as change was otherwise very difficult to obtain” (personal interview January 16, 2012).

Internally, the Ministry of Finance supported the reforms in interministerial struggles against the Ministry of Commerce, and worked with the IMF. This key group of economists and technocrats within the Ministry of Finance included Finance Minister Singh, Finance Secretary Montek Singh Ahluwalia, who came on deputation from the IMF, and Deepak Nayyar, who was Chief Economic Advisor of India after receiving his PhD at Oxford and teaching in England and India. When the U.S. challenged India’s trade restrictions on balance-of payments-grounds in 1997, the Ministry of Finance even helped undercut the Department of

Commerce's position before the WTO by deliberately writing a letter to the IMF confirming that India faced no balance-of-payments crisis (Sinha 2014, chapter 3).

These officials had close intellectual ties with leading Indian economists abroad, as Indian economic expertise looked increasingly toward the United States (Mukherji 2014). A number of Indian economists held positions in elite U.S. universities, such as Jagdish Bhagwati at Columbia and T.N. Srinivasan at Yale. Others held major research posts at the World Bank, GATT and WTO, such as Aditya Matoo, Arvind Subramanian (who became India's Chief Economic Advisor in 2014), and Arvind Panagariya (who became head of the government's policy commission in 2014 as part of the reforms of the new Modi administration). The international and the national were enmeshed.

The reforms of the early 1990s and India's subsequent WTO commitments nonetheless sparked protests in India. India's vibrant civil society includes many NGOs that vociferously contested economic globalization and the WTO (Rajagopal 2003), including such global figures as Vandana Shiva and Arundhati Roy. Many business elites likewise strongly opposed trade liberalization. This opposition, however, lost steam after 2000–2002 and the domestic liberalization reforms generally became accepted (Sinha 2014). The reforms altered business incentives and empowered traders and exporters that formed new linkages with state officials concerning trade policy (Sinha 2014).

This transnational legal ordering in India involved both facilitating circumstances and a precipitating event (Halliday and Shaffer 2015). The particular timing of the collapse of the Soviet model and the success of East Asian export-oriented growth models facilitated the creation of the WTO. Countries changed their development policies toward emphasizing exports, and were more receptive to ideas of trade liberalism through reciprocal trade concessions. Within India, the 1991 economic crisis, and the need to go to the IMF for financing, provided a specific opportunity for those advocating reforms.

The reforms had a significant impact in reorienting the Indian economy toward trade. The proportion of trade (imports and exports) to India's GDP was 8 percent in 1970, but expanded almost sevenfold to 53 percent by 2013, a proportion slightly higher than China's (Sinha 2014). With the growth in imports and exports, and the accompanying increases in Indian inbound and outbound investment and capital flows, new opportunities and challenges arose for business, giving rise to new opportunities for lawyers.

The Uruguay Round negotiations and the resulting WTO agreements that became effective on January 1, 1995 were broad

Table 1. India's Relative Openness to Trade under the GATT and WTO

	% of Bound Tariffs	Average Applied Tariff	Trade (Imports + Exports as % of GDP)
1970	6%	125%	8%
2014	74.9%	13%	53%

in their coverage, affecting manufacturing, agriculture, textiles, intellectual property, services, and investment measures. India bound almost 74.9 percent of its tariff lines, and in practice, lowered its applied tariff rates much beyond its actual commitments to an average of around 13.0 percent (and 9.5 percent for non-agricultural products) by 2014 (WTO 2015). India also made market access commitments regarding services for the first time under the General Agreement on Trade in Services (GATS), involving 33 services sectors. Table 1 summarizes the shift in relative openness of the Indian economy to trade.

These WTO legal rules formed the framework for a transnational trade legal order one that can raise severe constraints on the new developmental state model. Yet the actual meaning of those rules would depend on their application and interpretation as Part IV shows. The Indian government and Indian business did not engage in legal capacity building immediately in response to the WTO's creation. Rather, they responded to the WTO law-in-action, and in particular to politically sensitive complaints brought against India by the U.S. in particular. What spurred India's development of legal capacity, as in the case of Brazil and China (Shaffer, Ratton Sanchez, and Rosenberg 2008; Shaffer and Gao 2015), was being placed on the defensive. The U.S. and E.U. brought a series of critical cases against India in the WTO's first years that pressed the Indian bureaucracy to develop new partnerships with the private sector and technical experts such as economists and lawyers.

There were three key cases that were highly reported in the Indian media that spurred this process. The U.S. and E.U. challenged India's implementation of the WTO TRIPs Agreement in *India-Patents* (AB 1997). The U.S. challenged India's use of quantitative restrictions on balance-of-payments grounds and thus India's License Raj in *India-QRs* (AB 1999). The U.S. likewise challenged Indian industrial policy to promote the development of a domestic auto sector in *India-Autos* (AB 2000).

The U.S. itself worked through public-private partnerships involving government and private U.S. lawyers in these cases (Shaffer 2003), and India followed suit. Brazil was the first to adapt to this model among developing countries (Shaffer et al. 2008) and India learned from and adapted it to its own institutional context. As we will see, the diffusion of these models of public-private

coordination in trade litigation exemplifies the domestic institutional adaptations that form part of transnational legal ordering.

In each of these disputes, India had to defend its system in a losing case, but, in the process, learned the importance of developing legal capacity to engage with WTO law, including for adapting domestic measures to protect its development strategies. These politically sensitive cases raised government, private sector, and civil society awareness about the implications of the WTO dispute settlement system. As Atul Kaushik, the lawyer in the government who handled WTO dispute settlement in Geneva from 2003–2006, states, “these disputes were of high visibility for India. The government felt it needed to build capacity regarding WTO law” (personal interview, July 9, 2010).

When WTO members launched the Doha Round in 2001 to cover a broad array of policy areas, the Indian government and business quickly realized that they needed to invest more resources. As a high-level representative of the Federation of Indian Chamber of Commerce and Industry (FICCI) told us, FICCI realized that it was “imperative” that business becomes more involved “because of our sense of failure to do so in the Uruguay Round” (personal interview, January 19, 2010). Although the Doha Round collapsed, trade negotiations remain active in bilateral and regional forums and continue within the WTO, representing new forms of competitive trade liberalization.

By late 2009, advocates of a “new India” touted the global shift of economic power away from the U.S. and E.U. toward emerging economies such as India. India’s share of global trade in goods and services (exports plus imports) quadrupled in the twenty years since the WTO was created, from around 0.66 percent in 1994 to 2.23 percent in 2013; its share of global foreign direct investment (outbound and inbound) increased fivefold from 0.20 percent in 1994 to 1.04 percent in 2014, and its share of global GDP (PPP) increased from 3.8 percent to 6.8 percent between 1994 and 2014, largely at the expense of the E.U. and U.S. (whose combined proportion declined from 45 to 32 percent during this period).³ Yet, to be a global leader in shaping and resisting transnational legal ordering, India needed to continue to enhance its legal infrastructure and capacity in the public and private sectors. While economists traditionally have been most important for Indian policymaking analysis within and outside of the government, and they continue to be so today, the bureaucratic establishment and economists were pressed to recognize

³ The trade statistics are our calculations from the UNCTADstat: World Statistical Database and the IMF Data Mapper.

the importance of law and lawyering (personal interview, January 18, 2010). Since legal capacity was not built into the traditional Indian government service, new methods were needed that could work with India's bureaucratic heritage.

The Turn to Technocrats, Outsourcing, and Public-Private Coordination: Transforming the Indian State as Part of a WTO Transnational Legal Order

The Indian government responded to the challenges of the WTO by investing in greater trade expertise in the Indian bureaucracy and government think tanks, and working with the private sector and private legal counsel. The government reformed state institutions where it could, investing in state capacity within the Ministry of Commerce and Industry (MoCI) as a node for trade policy. It opened the state bureaucracy to build and tap into new legal capacity in the private sector. In particular, it created a government think tank, the Centre for WTO Studies, to engage in policy relevant research and act as a liaison between the Ministry of Commerce, the private sector, and private lawyers and consultants. In doing so, the Indian state significantly transformed itself in line with key aspects of a new developmental state model—one in which the state develops closer coordination with the private sector and professional expertise to defend and advance outwardly engaged state development strategies. It did so to enhance its capacity to engage with the transnational trade legal order.

In 1996, the government reconstituted the small and powerless Trade Policy Division (TPD) to enhance its competence on trade matters and support India's mission to the WTO in Geneva. The ministry increased staff strength from nine to 40 officials within a few years (Sinha 2007). The status of trade positions increased so that officials increasingly sought them and the best officials began to be posted. Within MoCI, the government created three new specialized agencies to handle matters implicated by WTO law: a new Tariff Commission, a reorganized Directorate General of Antidumping and Allied Duties (DGAD), and an intellectual property rights administration within the Department of Industrial Policy and Promotion (Sinha 2007). In 1999, the government further created for the first time an interministerial group to coordinate India's positions before the WTO. It would help resolve conflicts among ministries, such as between the Agriculture and Commerce ministries regarding agricultural tariffs and import restrictions (Sinha 2014).

The government concurrently more than doubled the size of its mission in Geneva for WTO matters and enhanced coordination between the Geneva mission and the Commerce ministry in New Delhi. In 1995, when the WTO started, the Indian mission had one ambassador and three officers. By 2010, the Geneva mission had six to eight officers, including one dispute settlement specialist with legal training (personal interview, IAS official, January 19, 2010). By 2013 the government employed a total of around 46 trade policy officials (Sinha 2014), complemented by those in other ministries implicated by WTO issues. As a former Ambassador of India to the WTO noted, “in the old days, the Geneva mission received no meaningful inputs from the capital,” but now officials in New Delhi are closely and continuously engaged (personal interview, January 16, 2012).

Despite the relative growth in the capacity of trade officials in the Commerce ministry, the government still faced challenges, and thus needed to tap into expertise from outside government. The government obtained critical external support for this endeavor through a transnational capacity building project. The project was led by UNCTAD, an organ of the United Nations, and supported by India’s Commerce ministry and Britain’s Department for International Development (DFID). It was named “Strategies and Preparedness for Trade and Globalisation in India,” and it lasted 8 years, from January 2003 to December 2010. It was first led by Veena Jha, an Indian trade economist whose husband, Harsha Singh, was one of the four Deputy Director Generals at the WTO, exhibiting the links between transnational processes and state institutional change (personal interview with acting director, January 21, 2010).

These transnational links have been important for developing Indian WTO-related capacity. High-ranking Indian civil servants have held important posts in the WTO and GATT, including on the Appellate Body and in the secretariat. They include the current Chief Economic Advisor of India (Subramaniam) and the head of India’s Policy Commission (Panagariya). More recently, young Indian lawyers have joined the Appellate Body and Legal Affairs divisions of the WTO secretariat.

Aiming to strengthen institutional trade capacity, the UNCTAD project organized a series of broad-based and sector-specific stakeholder consultations around India. It hoped to mobilize organizations representing farmers, fishermen, and small producers to articulate their interests and concerns and inform the government’s approach to WTO and new free trade agreement negotiations for the first time. The UNCTAD project also helped to spur MoCI to work with various state governments to establish WTO departments—known as “WTO cells”—with the

responsibility of enhancing awareness of WTO law in the state government, and providing a liaison to MoCI for WTO matters.

To maintain the new networks following the UNCTAD project's expiration, and because of the difficulty of changing the bureaucracy from within, the Ministry outsourced research and the building of public-private collaboration to government-sponsored think tanks. MoCI created the Centre for WTO Studies in 1999, which is housed in the Indian Institute of Foreign Trade, a public management school in New Delhi. The last head of the UNCTAD project, Abhijit Das, became the government think tank's director, once more reflecting the transnational dimension.

The Centre has a threefold mission that reflects this article's key themes: (1) to conduct research for MoCI in order for MoCI to engage more effectively with the international trade legal order; (2) to act as a link between MoCI and industry and civil society; and (3) to assist in information diffusion and capacity building (including legal capacity) through organizing workshops and publishing newsletters and reports (personal interview with Centre director, January 18, 2010). As of December 2013, the Centre had eight members, one of whom is a lawyer.

The government has typically worked through the following mechanism. The Commerce ministry refers trade law and policy questions to the Centre for WTO Studies, whether relating to international trade negotiations, litigation, or domestic policy implicated by international trade law. The Centre then outsources much of this work to private contractors, such as private lawyers, thereby strengthening state capacity through tapping private expertise. This process has given rise to "a small industry of [legal] consultants growing around the Department of Commerce that helps to fill the government's needs" (personal interview, July 9, 2010). Today, for all major WTO dispute settlement rulings, the Commerce ministry tries to organize a session where a private consultant will make a presentation to the department and other ministries (personal interview with Joint Secretary, January 13, 2013.). For example, following the *China-Raw Materials* case, which has significant implications for a government's ability to apply export restrictions on critical raw materials, the Commerce ministry identified twenty affected Indian ministries and invited all of them to hear a presentation of the findings to "raise awareness" (personal interview, January 13, 2013).

The Indian system remains government-driven to oversee policy, and the government aims to steer the process so that the lawyers are on tap, and not on top. The private sector overall plays a much more limited role than in comparison with the United States. The change, nonetheless, constitutes a significant one in India. As Professor Bipin Kumar of the National Law

University Jodhpur, who formerly worked in the Centre, told us, “the new mantra in India is public-private partnerships. The old mentality regarding government is changing” (personal interview, January 9, 2012). These changes involving greater government transparency, public-private coordination, and outward engagement with the global economy reflect key aspects of the new developmental state model explained, in significant part, by India’s enmeshment with the TLO for trade.

Indian Lawyers in Transnational Legal Ordering and the New Developmental State

To participate in the negotiation of international trade rules, to shape the interpretation of rules, and to implement them in line with the government’s priorities, the government needed to tap into private expertise. The government did so in part because of the path dependence of the traditional government bureaucracy (which has a traditional diplomatic rotation system that does not involve lawyers and thus could not internally develop and retain the requisite expertise), in part because of the legal and technical demands of the WTO system, and in particular because harnessing private expertise would enhance government competence to form, defend, and justify its policy decisions domestically and internationally. The government began to foster the development of a small group of private professionals, and, in particular, transnationally connected Indian lawyers, who developed expertise in trade law and policy, reflecting both the opening of the state bureaucracy and the strengthening of state capacity. As Abhijit Das, the head of the Centre for WTO Studies, states, trade policy making as a consequence became more “participatory” and “based on stronger empirical foundations” (personal interview, January 21, 2010).

The Rise of New Expertise: Indian Trade Lawyers

The Indian private lawyers who work with the government on trade law matters are highly educated and are part of the rising professional classes that develop transnational social and educational connections, facilitating transnational legal ordering. Some are part of older elites, and can be viewed in terms of elites retooling themselves for the global economy (Dezalay and Garth 2002), while others reflect an expansion of the Indian professional classes in light of new economic opportunities. These lawyers often received graduate legal education in the U.S. or Europe. The first Indian lawyer to take a lead in WTO cases, Krishnan Venugopal, the son of one of India’s renowned litigators before

the Indian Supreme Court, went to Harvard Law School where he received an LLM and started an SJD, and practiced with the U.S. law firm, Paul Weiss. Suhail Nathani, who started the boutique firm Economic Laws Practice (ELP) based in Mumbai and Delhi, received a BA from Cambridge and an LLM from Duke Law School. Samir Gandhi, who was earlier with ELP, went to the London School of Economics for his LLM. R.V. Anuradha, who founded Clarus Law Associates, received a masters at SOAS at the University of London and was a global law scholar at NYU Law School. Moushami Joshi, a partner at Luthra & Luthra, received her LLM from George Washington University Law School. As Joshi says regarding her experience in the U.S., “I had an interest in international trade and it just got strengthened when I was in DC. And DC being an international place, you get to attend so many conferences; you are constantly going to all these meetings that think tanks have, which was great because I think it just opened up my mind to this whole new world of law and legal practice” (personal interview, January 20, 2010).

This new generation of highly skilled lawyers largely work within boutique firms, although such firms can have over one hundred attorneys overall. The largest elite law firms generally have not developed a major international trade law practice, although a partner in Luthra & Luthra (Moushami Joshi) worked on trade matters as part of her portfolio, and the founder of Clarus Law Associates (R.V. Anuradha), a small boutique firm, was formerly a partner at India’s largest law firm, Amarchand & Mangaldas & Suresh A Shroff & Co. The total number of these lawyers remains relatively small in light of the primarily intergovernmental nature of the WTO legal system.

The government facilitated the rise of these professionals through its investment in the development of highly selective national law schools, which reflects a new developmental state model since the state helped to catalyze the development of this expertise. In 1996, just after the WTO’s creation, the government funded a WTO Chair at the leading Indian law school, the National Law School of India University (NLSIU) in Bangalore. The government’s funding of a specific chair in trade law signaled its view of the growing importance of the subject, and the hope that the government would indirectly benefit (personal interview, July 9, 2010). As K.M. Chandrasekhar, who was instrumental in the chair’s creation when he was Joint Secretary, informed us, “the idea was to get young lawyers who can follow and provide expertise on WTO matters. The idea was to create new structures within the Indian context” (personal interview, January 16, 2012).

In practice, the vast majority of these students have gone to serve business clients in the “rising” India. However, they have

also taken a number of independent initiatives that have spurred the building of knowledge in international trade law in India. NLSIU started one of the first student-edited journals on international trade law, *The Indian Journal of International Economic Law*. The National Law University in Jodhpur, followed by creating a specialization in International Trade and Investment Law and a journal entitled *Trade, Law and Development*. The student who started the journal, then got his LLM at Yale, worked at the Centre for WTO Studies, and became the first Indian member of the WTO Appellate Body secretariat. A new generation of academics at Jindal Global Law School organized a concentration on international trade law and trade remedy law for LLM students, and run a research center on international trade and economic law where students from law schools in India and abroad are offered a paid internship.

A number of Indian international trade lawyers came out of these national law schools, such as R.V. Anuradha who graduated from Bangalore National Law School in 1995 and Samir Gandhi and Moushami Joshi who respectively graduated from there in 1998 and 2001. As Joshi told us, she had three graduates from the national law schools working for her on trade law matters in 2012 (personal interview, January 12, 2012). Similarly, within the Centre for WTO Studies, Shailaja Singh joined as a legal consultant after receiving a degree from the West Bengal National University of Juridical Sciences, Kolkata, followed by an LLM at Cambridge University (personal interview, January 10, 2012).

Both the government and private sector have created internships in trade law to attract these students. Building from an earlier Brazilian internship model (Shaffer et al. 2008) that was prominently covered in Geneva, MoCI created a trade policy internship program for law students overseen by the India Institute of Foreign Trade. The Centre for WTO Studies created one as well, as did the NGO CUTS International and a number of Indian law and consulting firms. Placement in these internships is highly competitive, and law graduates have opted for them despite opportunities to work in the more lucrative corporate law sector. The internships facilitate subsequent public-private collaborations and reflect a significant shift in the previously closed Indian state bureaucracy.

Transnational Legal Ordering of Trade in Goods: Negotiation, Litigation, and Implementation

Indian private lawyers perform four types of work that engage with the trade TLO and that implicate the new developmental state. They advise the government in the development of its negotiating positions. They assist the government in

evaluating, litigating, and settling WTO cases for and against it. They work for the government and represent the private sector in providing trade protection within the WTO's constraints, which is limited to three types of legalized import relief work. And they provide input on the drafting of legislation and regulation and the consideration of domestic policy in light of WTO law. In doing so, they both embed and shape the transnational trade legal order.

Negotiations

In 1998–1999, the government made its first overtures to involve business groups in trade policymaking, and these business groups responded by supporting the government's economic reforms, including "support for liberalization across India's states" (Sinha 2007, 16). The government delegation to the 1999 WTO ministerial in Seattle for the first time included members from the three main trade associations, FICCI, CII, and ASSOCHAM (personal interview with CII official, January 1, 2002). Although the Seattle ministerial failed, the experience brought home the need for much wider consultations with industry as a "stakeholder." After the Seattle ministerial debacle, the government created an expert and business group under the "Prime Minister's Council on Trade and Industry" to produce a strategy paper on the WTO. For 3 months, the group met at FICCI's office one-to-two days a week to discuss issues and produce a report and set of recommendations (personal interview; Sinha 2014).

By the early 2000s, there had been a sea change in the nature and extent of consultations conducted with private business. As a senior Indian official told us, the new TPD decided to "open its doors" to the private sector during the Doha Round of negotiations (personal interview, January 2012). The government launched public seminars to disseminate information about the WTO and India's obligations to other ministries, state governments, and the broader public, including through trade associations, trade unions, farmer representatives, NGOs, intellectuals, political parties, and other interest groups. Government officials prominently issued public statements on WTO-related issues, organized press conferences, and met various actors. From just April to September 2003, they held at least thirty seminars, conferences, and meetings to consult the public and interested parties in preparation for the WTO ministerial meeting in Cancun (Sinha 2014: 14). While contestation remains, and the opening primarily engaged business, the result was a more transparent process than in traditional bureaucratic policymaking, not only for international relations, but also for Indian domestic policy.

Litigation

What is particularly striking about WTO law is its judicialization in which legal precedent is shaped through litigation. As a result, legal expertise becomes particularly important (Weiler 2001). With the legal commitments that India and other countries made, and with the rise of the WTO's judicialized dispute settlement system, India became one of the leading users of the WTO system, unlike its disengagement from the GATT. Through April 2015, India was a complainant in 21 disputes, a respondent in 22 disputes, and a third party in 106 additional ones. Third party submissions are important because decisions in WTO cases involving other countries can have systemic implications for the understanding and future application of WTO law, and India has increasingly asserted third party rights.

This engagement with transnational legal ordering has required new legal expertise and public-private coordination. The government originally used Swiss attorney Frieder Roessler and the Advisory Centre on WTO Law (ACWL) in Geneva. However, the government wished to develop indigenous Indian expertise given the broader implications of the interpretation of WTO rules. It decided to groom and use specialized, transnationally connected, private Indian lawyers instead of government attorneys, reflecting a new developmental state model spurred by the trade TLO.

The government began to work on WTO cases with an Indian attorney, Krishnan Venugopal, first in parallel with Roessler and the ACWL and later alone. Venugopal worked on the *India-Patents*, *India-QR*, *India-Autos*, *EC-Tariff Preferences* (AB 2005), and *US-Customs Bond Directive* (AB 2008a) cases, either alone or jointly with other lawyers. Over time, a small group of Indian lawyers in the private sector became increasingly important for providing counsel to the government on potential and actual WTO trade disputes.⁴ The government hired Economics Laws Practice in the *India-Additional Duties* case (AB 2008b), and Luthra & Luthra Law Offices in the *India-Agricultural products* case (WTO 2012). It engaged Clarus Law Associates to examine the legal issues regarding trade in services for a WTO GATS complaint against restrictive U.S. visa requirements under the Southwest Border Protection Act and the James Zadroga Act (personal interview, May 21, 2012). Indian law firms also increasingly provide legal analysis and drafting support for

⁴ For a full list of cases and counsel in them, see Gregory Shaffer, James Nedumpara and Aseema Sinha, *Indian Lawyers and the Building of State-Trade Related Authority*, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2390673 (Annex 1).

India's third party submissions in WTO cases (personal interview, January 12, 2012). In September 2014, the Indian law firm of Lakshmikumaran & Sridharan, which at the time was assisting the government in the *US-Steel Plate* case (AB 2014), became the first non-U.S. or European law firm to establish an office in Geneva. The firm is charging fees significantly less than its competitors and will specialize in servicing India and smaller developing countries (personal interview, November 13, 2014).

Implementation

The implementation of WTO law has significant implications for law and policy within developmental states. Implementation issues potentially create work for lawyers because they involve legal interpretation that affects the understanding of flexibilities in WTO law. The Commerce Department frequently receives questions from other Indian departments on the WTO compatibility of legislation and regulation and it at times outsources these questions to private consultants. The Joint Secretary in MoCI informed us that it "gets references about every single day" regarding the WTO implications for proposed legislation, regulation, or policy (personal interview, January 13, 2013), illuminating the extent of transnational legal ordering's potential impacts within India.

As other government departments became aware of the implications of WTO agreements, they have engaged private lawyers as well, especially regarding industrial policy options. The Indian Planning Commission, for example, contacted private attorneys regarding choices over building power infrastructure, including options for increasing or reducing tariffs and applying local content requirements to build domestic manufacturing capacity (personal interview, Moushami Joshi, January 12, 2012). In the past, we were told that the Planning Commission would never have consulted outside lawyers, much less regarding international trade law. The government likewise consulted private law firms regarding the implications of the WTO agreements on India's emerging renewable energy policies, including for utilities. These government departments work with private attorneys who initially worked with the Department of Commerce on trade law matters. These significant developments indicate the broader impact of the WTO on Indian law and policy beyond the Commerce ministry.

Transnational Legal Ordering of Protectionism: Import Relief Work

The WTO forms part of a process of transnational legal ordering as regards protectionism as well as liberalization. WTO rules not only liberalize markets; they also explicitly permit

governments to provide economic protection in legally cabined ways. They provide that economic protection (above bound tariffs) may be provided exclusively through three mechanisms—antidumping, countervailing duties, and safeguard regulations. These rules affect not only national law, but spur the creation of entirely new national institutions and new professional specializations, which enhances the role of executive agencies, courts, lawyers, and accountants. They catalyze greater interaction of state officials with the private sector and lawyers. Antidumping law, in many ways, is a U.S. export that is instantiated in the WTO. But since the WTO's creation, India has brought a number of cases before the WTO affecting the interpretation of these rules, proposed new rules, and adapted WTO law domestically in ways that provide new models for antidumping law that can be diffused to other developing countries. Overall, India has become the world's greatest user of antidumping law since the WTO's creation in 1995.

These rules can be used by firms and industries for purely protectionist purposes, but they also offer safety valves that can “provide Indian corporations with the “breathing space” to become competitive” (Wu 2014). They thus, at least in theory, can also be used by states to advance industrial policy objectives (Amsden 2000), including in response to other state's actions (Moore and Wu 2015). Mark Wu (2014) shows, for example, how such policies worked regarding the Indian telecommunications equipment company M/s Sterlite Industries. After an antidumping award, it became one of the 10 fastest growing Indian technology companies and a leading exporter of optical fibers.

India has participated in the shaping of the meaning of antidumping law through litigation in ways opposed by the United States. Most notably, India was the first to challenge the controversial practice of zeroing used by the E.U. and U.S., which creates biased calculations of dumping margins against imports. In the *EC-Bed Linen* case (AB 2003), the Indian government worked with the Indian textiles industry (through Texprocil, the textiles export promotion council) and with a Brussels-based law firm which represented the Indian industry in the underlying antidumping case in Brussels. India won the WTO case, which established new precedent that led to a series of subsequent cases against U.S. antidumping regulations and regulatory practices, all of which the U.S. lost before the Appellate Body. The U.S. argued vehemently that the Appellate Body holdings were contrary to the parties' intentions under the WTO antidumping agreement, but to no avail. Through this litigation, India helped to define the TLO for import relief, even though the initial rules came out of U.S. and other developed countries' practices.

Similarly, Indian shrimp exporters pushed the government to join a group of countries that successfully challenged the U.S. Byrd Amendment (known in the WTO as the *US-Offset Act*) under which the U.S. distributed the revenue obtained from U.S. antidumping and countervailing duty proceedings to the petitioning U.S. domestic industry, thereby subsidizing it. Once more, the U.S. contended that WTO rules did not extend to this practice. Once more, the U.S. lost the case, and U.S. commentators complained that the Appellate Body was engaged in inappropriate gap filling to impose new rules on the United States, but without success.

The Indian government's work with the affected private sector in *US-Custom Bond Directive* (AB 2008a, b) provides an example of how the government has created new forms of public-private coordination to enhance state capacity. In this case, India successfully challenged an "enhanced bond requirement" applied by the U.S. in an antidumping proceeding against frozen warm water shrimp. Indian seafood exporters saw their exports decline by almost one-third following the U.S. duties. The affected Indian private sector was small and unorganized, so the government worked with it through two public agencies—the Marine Products Exporters Development Authority (MPEDA) and the Seafood Exporters Association of India (SEAI). MPEDA and SEAI covered most of the legal fees and expenses in the underlying proceedings. SEAI contributed over 50 percent of the total costs from its internal budget and the rest from member contributions (Battacharyya 2007). Seafood exporters on MPEDA's Management Board facilitated the public-private cost-sharing arrangement.

The total costs in the underlying U.S. antidumping proceeding, which lasted from 2003–2010, were around INR 65 crores (nearly U.S. \$12 million) (personal interview, Zandu Joseph, Secretary, SEAI, May 14, 2011). Challenging the measure at the WTO cost a fraction of that amount, demonstrating the potential benefit of building WTO-related legal capacity, including for smaller stakeholders such as fishermen. The resulting WTO case was the first time that Venugopal worked with the government without assistance from foreign attorneys, as the government signaled its growing confidence in being able to work with a new generation of Indian attorneys (personal interviews with Indian attorneys, 2010).

India has also affected transnational legal ordering through its practices in antidumping law that have been tailored to India's development context. Before the WTO's creation, India had import relief laws on the books but did not use them because of its high tariffs and other import restrictions. After India bound its tariffs and removed its quantitative restrictions, it updated its trade remedy legislation and practice. The government reorganized the

Indian bureaucracy for import controls, and reformed the Directorate-General of Foreign Trade (DGFT) within the Department of Commerce, to enhance expertise. In 1998, it reorganized its antidumping agency and established a DGAD with greater autonomy and expertise to handle antidumping cases.

India did not simply copy the practices of the world's leading users of import relief procedures, the U.S. and E.U., because it lacked the administrative personnel and experience to engage in their costly and time-consuming procedures. It rather indigenized its antidumping law in the context of WTO rules by simplifying them compared to U.S. practices, such as by adopting a lesser duty rule (a variant also used in the E.U.) that is easier to calculate (Wu 2014). Today, India actively participates in negotiations involving antidumping law. To participate effectively, once more it hired a private law firm, in this case the Strategic Law Group, to propose its "lesser duty rule" as a global rule (personal interview, January 12, 2012). Even if not formally required in the WTO system, these practices can now potentially diffuse to other developing countries.

To educate Indian industry, government officials within the Commerce Department organized workshops and seminars for Indian corporations and trade associations, and wrote books and brochures. The petitions followed. From 1995–2013, India initiated 702 antidumping investigations (out of a total of 4,159 investigations for all WTO members), which was more than any other WTO member (Bown 2015). These investigations have required increasing legal and accounting expertise, and exemplify the reach of the TLO within professions. Under WTO antidumping and countervailing duty law, national courts or administrative tribunals are to review executive agency decisions. These legal requirements for state protectionism advance the role of technocrats within national administrations.

Judicial authority is enhanced as a complement, which further empowers the technocrats. The Indian courts reference WTO law even though India is a dualist system in which international law formally has no direct effect. By the end of 2011, it is estimated that lawyers had filed over 254 appeals before the Customs Excise and Service Tax Appellate Tribunal (CESTAT) and its predecessor Central Excise and Gold Appellate Tribunal (CEGAT), a specialized court that hears antidumping matters. They also filed 56 writs before the State High Courts and 25 writs before the Supreme Court of India (Jha 2013, 291). The Indian Supreme Court alone issued eighteen decisions on antidumping cases between 2000 and 2006, "more than any other Supreme Court in the world," and invalidated a number of the antidumping directorate's practices (Wu 2014: 28). Law gradually and increasingly encroached on administrative discretion.

This specialized import relief practice is the most active area of trade law in India. The participating law firms have ranged from India's largest, Armachand Mangaldas, which has around 600 lawyers, to boutique specialized firms. Pallavi Shroff, the wife of Armachand Mangaldas' lead senior partner, developed its practice that was among the first in India (Wu 2014: 22). She is the daughter of P.N. Bhagwati, the former Chief Justice of India's Supreme Court, and niece of renowned trade economist Jagdish Bhagwati, author of *In Defense of Globalization* (2004), reflecting the adaptation of old elites to the new transnational context. TPM Consulting, a firm started by a former cost accountant in the antidumping directorate who was not part of the legal elite initiates the largest number of antidumping petitions in India, and has handled at least 200 antidumping investigations in the last 10 years.⁵ This vibrant legal practice is part of a TLO involving indigenized expertise that originally came from the U.S., catalyzed by the WTO's creation and India's commitments under the WTO agreements.

These developments in Indian import relief laws and practices reflect transnational legal ordering's institutional and professional impact within the Indian developmental state. The state continues to be the central decision maker in providing protection and it can potentially do so to advance industrial policy goals, but it now engages in a legalistic process in which legal capacity is central, especially compared to lawyers' minimal roles during the License Raj. India's tailoring of antidumping laws in light of its development situation and its engagement to shape the negotiation, interpretation, and practice of the rules show how this TLO is a dynamic one. An international lens fails to capture these transnational processes that both permeate nation states and recursively shape the international.

Transnational Legal Ordering and Intellectual Property: Pharmaceutical Patents

The transformation of Indian law in the context of the WTO TRIPs Agreement further exhibits how transnational legal ordering works, and its implications for the new developmental state. The GATT regime did not include intellectual property protection, and the Paris Convention for the Protection of Industrial Property provided for no minimum substantive standards. India, as many other developing countries, did not provide patent protection for pharmaceutical medicines or chemical products used in agriculture, such as fertilizers and pesticides. The WTO TRIPs

⁵ See <http://tpm.in/about-us.aspx>.

Agreement, pressed by the U.S., E.U., and Japan, changed such options by providing in article 26 that “patents shall be available for any interventions, whether products or processes, in all fields of technology.”

In 1996, the first year after the WTO’s formation, the U.S. and E.U. targeted India to press for TRIPs compliance. In the *India-Patents case* (AB 1997), they successfully challenged India’s implementation of its commitment to create a transitional “mail-box system” where patent applications could be filed to establish priority and obtain exclusive marketing rights on a transitional basis. The decision spurred significant contestation over the government’s implementation of its commitments in light of India’s development priorities. Social movements organized mass protests and the Parliament acrimoniously debated alternatives. At the last moment, the Indian President issued a decree on January 1, 2005 to comply with the TRIPs deadline (when India’s 10-year transition period terminated), which remained in effect until the Parliament passed an act months later.

Since then, Indian government and business norms have shifted toward innovation policies and a research and development ethos (Kher 2013). In 2010, the government created a National Innovation Council aimed to foster a change of mindset toward innovation strategies, declaring 2010–2020 the “Decade of Innovation.” The implementation of the TRIPs Agreement created new incentives for Indian companies. S. Aiyar, a prominent editor, wrote: “The sad truth is that they [the pharmaceutical companies in India] were dragged kicking and screaming into new territory, and only then discovered that it was the promised land” (Sinha 2014). As a former Indian Ambassador to the WTO quipped to us, “now one speaks of patent or perish; whereas before the mantra was no patents or perish” (personal interview, December 14, 2013). From 1990–2014, Indian pharmaceutical companies collectively increased their R&D from less than 50 crore (just US\$8 million) in 1990 to almost 4,000 crore (over US\$644 million) by 2009 (Sinha 2014). Patent filings in India by Indian applicants are increasing significantly and rising much faster than filings by foreign applicants. They now constitute almost a quarter of all filings.⁶

The TRIPs Agreement created not only new incentives for industry but also new stakes for Indian professionals. The World Intellectual Property Organization (WIPO) (2013) reports that “[f]rom 1997 to 2011, patent filings increased . . . in India by 605 percent.” Around 2004, India started to modernize its patent

⁶ Government of India, Office of CGPDTM, Annual Report 2012-2013 (2014).

infrastructure and the process accelerated after 2005. The government created four new Patent Offices in the four largest metropolitan areas, hired new patent examiners, and established an Intellectual Property Training Institute in Nagpur (Maharashtra). Although more capacity is needed given the high volume of filed patents, India has increased the size, capacity, and skills of its administration (Sinha 2014). In addition, India has developed an important industry that provides transnational services for drafting patents, wherever they might be filed.

The TRIPs Agreement grants countries flexibility in interpreting its provisions so that India had some leeway in determining how to revise its laws and adapt its institutions (Olsen and Sinha 2013). India radically revised its patent law, expanding protection to pharmaceutical and agricultural chemical products. Yet the government did so in an innovative manner after a long internal study and consultations with industrial and civil society stakeholders. It created new definitions of what a patent must show in terms of novelty and an inventive step, thus narrowing the scope of patent claims and facilitating the development of generics. It simultaneously eased the ability to challenge patent claims by including both pre- and postgrant challenges, and by permitting these challenges to occur before an administrative body whose processes are more efficient and less costly than a court (Kapczynski 2009). The pregrant and administrative challenge opportunities are not provided in the U.S. or E.U., which oppose their use in India, and the Indian generic industry has made successful use of them in delaying and opposing patenting. In a 2008 case, *Roche v. Cipla*, an Indian court denied Roche's demand for injunctive relief against Cipla, a generic producer, by creatively citing a U.S. case, *eBay v. MercExchange*, and a nonprecedential U.S. Federal Circuit decision that noted public health concerns, even though a U.S. court would have regularly granted such relief (Kapczynski 2009, 1607). Other major litigation over intellectual property rights is now taking place in Indian courts in the shadow of the TRIPs Agreement. In 2013, the government successfully defended itself in the Indian Supreme Court against the Swiss pharmaceutical firm Novartis' challenge to its right to implement flexibilities to prevent evergreening of drugs and against Bayer's challenge to a compulsory license for a cancer drug.

Similarly, to protect against multinational firms patenting traditional knowledge (called biopiracy), India developed a digital library of traditional knowledge. It likewise created a Traditional Knowledge Resource Classification system designed to be easily used by patent examiners around the world to verify that a patent claim involves a "prior art" and thus is not eligible for a

patent (Drahoš 2009: 95). India has also played a leading role in international negotiations regarding the protection of biological materials under the Convention on Biodiversity (CBD), and pressed for reform of TRIPs to require disclosure of the origins of genetic resources (Drahoš 2009: 94). It also was a leader in the creation of a new development agenda in WIPO, and it reached out to African countries to help block initiatives that would have led to stronger intellectual property rules there (Kher 2013). In these multiple ways, India has both implemented TRIPs commitments while doing so in a more development-friendly manner that other countries can adopt, shaping the overall transnational regime.

The explosion of the AIDS crisis provided leverage for India and other developing countries to press for the loosening of TRIPs requirements to enhance access to medicines, including as regards the issuance of compulsory licenses. India was a leader of developing countries in WTO negotiations that, in 2001, gave rise to the Doha Declaration on TRIPs and Public Health and the adoption of a waiver in August 2003. The waiver enables any member country to import pharmaceutical products under a compulsory license, although the conditions of the waiver remain stringent and contested. India has since been one of a number of developing countries that have issued a compulsory license, and threatened to issue others, to induce price decreases.

India also began to work more closely with the private sector and private lawyers to safeguard the export of generics. Most notably, India and Brazil coordinated complaints at the WTO against the E.U. and the Netherlands, in May 2010, for seizing Indian generic drugs at airports in Europe when the planes were being refueled to fly to other developing countries, such as Brazil (Forman 2011). A number of Indian industry associations, including Pharmexcil and FICCI, worked with the government to assess the facts, legal claims, and negotiating strategies before the government commenced consultations with the European Union. The government worked with Venugopal and U.S. law professor Frederick Abbott to negotiate a favorable settlement with the E.U. pursuant to which the E.U. revised the relevant law (personal interviews, January 2012).

In sum, the TRIPs Agreement is largely a U.S. and European export, and it has had dynamic effects within India, catalyzing change in the Indian pharmaceutical sector, Indian institutions, and the Indian legal profession. Yet India has also worked with lawyers to use flexibilities to tailor its patent law to its development context that can serve as a model for other developing countries. Although civil society activists do not trust the Indian state and critique it for not going further in exploiting TRIPs

flexibilities, the government has taken initiatives to shape the understanding of the meaning of TRIPs norms, as reflected in the Doha declaration, the resulting waiver, and Indian practice. The TLO for pharmaceutical patent rights remains contested. By building legal capacity, and coordinating with private lawyer expertise, India has participated to a greater extent in shaping it.

Conclusions

This article contributes to the existing literatures on TLOs, the new developmental state, and legal capacity building. First, it contributes to empirical analysis regarding TLOs (Halliday and Shaffer 2015). It demonstrates how international and national trade and regulatory law and practice have become enmeshed. India's engagement with the international trade legal order has led to significant changes not only in Indian law, but also in the country's governmental institutions, its professions, the relations of the bureaucracy to the private sector, and norms regarding the role of markets and the state.

The article demonstrates that significant changes in the Indian state cannot be understood outside of transnational legal ordering of which the WTO forms an integral part. To engage with the WTO legal context, India has transformed itself through professionalizing its trade administration, opening that administration to work with stakeholders (namely business), and retaining specialist private lawyers in ways that were not needed in the past. It is no longer an insular developmental state. Yet, unlike those who theorize the transnational predominantly in terms of private forces, this article shows the ongoing role of the state in relation to them.

Although other work has assessed how local actors adapt and localize international legal norms (Acharya 2004; Merry 2006), this article also shows complementary state investments in legal capacity to shape those norms at the international level through negotiation and interpretation, as well as domestic practice. India's engagement has not resulted in structural changes, but it has affected the interpretation of WTO rules and created some policy space for India's domestic strategies. This enhancement of state capacity has helped the Indian state manage conflicts arising out of its engagement with the international trade legal order, so that the legal order is best viewed in transnational terms.

Second, there is debate as to how to interpret these changes, and in particular whether to interpret them as a move to a neoliberal model or a reformed version of the developmental state.

There has been a clear turn in India toward global markets and domestic market regulation through law, which some will view as a neoliberal turn. WTO agreements support the development of market-oriented reforms, and the private sector's position accordingly has enhanced. The election of Prime Minister Modi and his appointment of free trade-oriented economists to leading positions in his administration provide support for this interpretation.

Yet, rather than viewing the state as weakening in light of market forces, or existing solely to support market reforms, we find that the state has also strengthened itself along a new developmental state model to mediate between market liberalization and other state development goals, as we addressed in Part IV. The state has done so through diffusing expertise and working with economic stakeholders and professionals such as lawyers. Conventionally, many scholars have focused on the movement of market forces through trade, privatization, and structural adjustment programs. This article shows the complementary development of enhanced state capacity through public-private coordination and the diffusion and enhanced role of legal expertise. Although many international lawyers and international relations scholars focus on the issue of "compliance" as a binary one, and commentators like Thomas Friedman (1999) refer to the "golden straitjacket" of global markets, countries retain flexibility to engage in hybrid policymaking within constraints. In implementing, they may invent; in adopting, they may indigenously adapt. Such a mindset is critical for new developmental states, and lawyers play important roles.

This turn to a new developmental state model, however, was not an autonomous one, but rather a response to the global economic context and the new legal order for trade. The WTO *catalyzes* the enhancement of state and private professional expertise, and in particular legal expertise, through public-private coordination mechanisms. The turn to a new developmental state model should thus be viewed as part of larger changes across countries in light of transnational market and legal developments.

Third, this article contributes to the literature on the building of legal capacity in major emerging economies to advance their positions and policies at the international level. To do so, they have engaged lawyers who help mediate between the state's development policies and the opportunities and constraints of WTO law. In line with the work of Yves Dezalay and Bryant Garth, a number of the transnationally connected actors we met had links to old Indian legal elites. Nonetheless, many of the young generation are new entrants taking advantage of new professional opportunities.

The article complements others that show these changes across large emerging economies such as Brazil and China. India generally is better positioned to engage with WTO law than other developing countries because English is an official language, Indian professionals have a long tradition of studying abroad in England and of working in international organizations, and India's domestic legal system is one in which lawyers and judicial interpretation play important roles. Yet, in each of these three cases, we find enhanced public-private coordination mechanisms with private lawyers playing greater roles. In each case, the changes exhibit local characteristics in light of historical legacies and institutional path dependencies.

Whether the formation of TLOs is occurring across legal fields demands further research, and the answer is likely to be conditional (Halliday and Shaffer 2015). This article shows how such transnational legal ordering occurs regarding trade law in a major emerging economy in the context of a judicialized WTO system. The Indian state and certain constituencies within it are relatively better positioned to participate in, resist, and recursively shape the TLO for trade. In participating, they not only can help to shape it, but also embed it. Their engagement accordingly involves more than an international legal order among nation states; they have helped make it a transnational one.

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