

Article

The WTO and Development Policy Space in India

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I. INTRODUCTION

Globalization and trade continue to pose significant challenges for economic and industrial development in both developed and developing nations. Critics of globalization have highlighted its negative consequences for increasing economic inequality, capital migration, and loss of industrial jobs to

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other nations.¹ Over the past decade, these dynamics have arguably fueled nationalist populist movements that have given rise to Brexit in the European Union, the election of Donald Trump, and rising nationalism and protectionism in other nations.² These trends reflect growing discontent with globalization and the economic dislocation it has caused for industrial workers and broader domestic concerns about how the international economic order privileges globalization over national interests and sovereignty. In particular, the World Trade Organization (WTO) and international trade law regime continue to pose significant challenges for developing nations' policy autonomy to pursue a variety of development strategies and presents challenges for development, national sovereignty, and democracy.³

Current shifts in global trade policy now present new challenges for developing nations. Over the past two years, the Trump administration has signaled a more aggressive protectionist approach on global trade and has also pursued rigorous enforcement of international trade law through a series of challenges to industrial and trade policies in China, India, and other developing nations.⁴ In just the last two years alone, the United States has aggressively challenged India's policies at the WTO, including the first ever counter-notification challenging India's minimum price supports in the agricultural sector before the Agriculture Committee,⁵ ongoing claims of noncompliance with the WTO Appellate Body's report in *India-Solar Cells*,⁶ and challenges to

¹ See, e.g., DANI RODRIK, *HAS GLOBALIZATION GONE TOO FAR* (1997) (analyzing adverse effects of globalization on social stability across nations, and on autonomy of nations to pursue industrial development policies); JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* (2003) (critiquing neoliberal policies advanced by the World Bank, the International Monetary Fund, and the World Trade Organization and negative consequences of globalization for development).

² See Gregory Shaffer, *How Do We Get Along? International Economic Law and the Nation-State*, 117 MICH. L. REV. 1229 (2019) (reviewing DANI RODRIK, *STRAIGHT TALK ON TRADE: IDEAS FOR A SANE WORLD ECONOMY* (2018) and arguing that international economic law needs to better accommodate national policy space and complement and support domestic policy options and domestic institutions).

³ See, e.g. DANI RODRIK, *STRAIGHT TALK ON TRADE: IDEAS FOR A SANE WORLD ECONOMY* (2018) (arguing for the need for a better balance between globalization and national development in international economic law); SONIA E. ROLLAND, *DEVELOPMENT AT THE WORLD TRADE ORGANIZATION* 74-93 (2012) (discussing debates on development during Uruguay Round and the extent to which the WTO has integrated development goals and interests of developing nations); STIGLITZ, *supra* note 1 (discussing failure of international economic institutions to consider negative effects of globalization on developing nations); *DEVELOPING COUNTRIES IN THE WTO LEGAL SYSTEM* (Chantal Thomas & Joel P. Trachtman eds., 2009) (discussing how WTO accommodates development goals).

⁴ See Shaffer, *supra* note 2, at 1248 n.101 (discussing divergence between U.S. attack on international trade law and the WTO, and China and India's increasing support and defense of the WTO).

⁵ See Communication from the U.S. Pursuant to Article 18.7 of the Agreement on Agriculture, *Certain Measures of India Providing Market Price Support to Rice and Wheat*, ¶¶ 2.1, 4.16, WTO Doc. G/AG/W/174 (May 9, 2018) (presenting data that the United States claims shows that India's market price support for wheat and rice is significantly higher than what India has reported to the WTO); Points Raised by Members Under the Review Process: Compilation of Questions for the Meeting on 11-12 June 2018, WTO Doc. G/AG/W/178/Corr.1 (June 6, 2018) (counter-notification suggesting that India substantially underreported its market price support (MPS) for wheat and rice in India's 2010-11 and 2013-14 notifications to the WTO).

⁶ Recourse to Article 22.2 of the DSU by the United States, *India-Certain Measures Related to Solar Cells and Modules*, WTO Doc. WT/DS456/18 (Dec. 19, 2017) (United States "request for authorization from DSB to suspend concessions or other obligations with respect to India" based on "failure of India to comply with the recommendations and rulings of the DSB"); see also Request for Consultation by the

India's export subsidies in *India-Export Related Measures*.⁷ Trade tensions between the United States and India have continued to intensify. In May 2019, the Trump administration suspended preferential treatment for India under the Generalized System of Preferences program.⁸ India responded by imposing tariffs on U.S. products, and the United States countered by filing a WTO challenge to these new tariffs.⁹

Within existing scholarship on international trade law, there has been significant debate over how much flexibility exists for domestic industrial development policies, particularly in developing nations.¹⁰ One key shortcoming within this body of scholarship has been the lack of precision in defining and conceptualizing development policy space. Existing studies on international trade law's impact on development policy space have emphasized three main approaches: legal approaches, institutional approaches, and compliance approaches.¹¹ Legal approaches analyze how the relative flexibility of international trade law rules impact policy space. Institutional approaches analyze the extent to which developing nations have cultivated legal capacity to expand policy autonomy. Compliance approaches examine patterns of state compliance with international trade law rules and WTO disputes. However, I argue that these existing approaches have paid insufficient attention to the domestic context of policy implementation in response to WTO dispute resolution.

This Article argues for a policy implementation approach to development policy space that examines how key aspects of domestic policy regimes shape available policy space for industrial development. The policy

United States, *India-Certain Measures Related to Solar Cells and Modules*, WTO Doc. WT/DS456/1 (Feb. 6, 2013) [hereinafter Request for Consultation by the U.S., *India-Solar Cells*]. In September 2016, India countered the U.S. challenge in *India-Solar Cells* by filing a request for consultations challenging U.S. state and local renewable energy policies. See Request for Consultations by India, *United States-Certain Measures Relating to the Renewable Energy Sector*, WTO Doc. WT/DS510/1 (Sept. 9, 2016). In June 2017, a WTO Panel found that the challenged state renewable energy programs violated international trade law rules that prohibited providing preferences to domestic products over foreign products. See Panel Report, *U.S.-Certain Measures Relating to the Renewable Energy Sector*, WTO Doc. WT/DS510/4 (June 27, 2019); see also *US Moves WTO Accusing India of Violating 2016 Verdict on Solar Power Programme*, SCROLL.IN (Dec. 20, 2017), <https://scroll.in/latest/862188/us-moves-wto-accusing-india-of-violating-2016-verdict-on-solar-power-programme> (discussing U.S. filing of request for authorization to suspend concessions in response to India's non-compliance with DSB rulings in India Solar Cells dispute).

⁷ Request for Consultations by the United States, *India-Export Related Measures*, WTO Doc. WT/DS541/1 (Mar. 19, 2018) [hereinafter Request for Consultations by the U.S., *India-Export Related Measures*]. On October 31, 2019, the WTO Panel found that several of the challenged programs, including the SEZ scheme, were prohibited export subsidies. See Panel Report, *India-Export Related Measures*, WTO Doc. WT/DS541/R (Oct. 31, 2019).

⁸ *United States will Terminate GSP Designation for India and Turkey*, OFFICE OF THE U.S. TRADE REPRESENTATIVE (Mar. 4, 2019), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/march/united-states-will-terminate-gsp>; Amy Held, *India Becomes Trump's Latest Trade Target*, NPR (Mar. 5, 2019), <https://www.npr.org/2019/03/05/700345593/india-becomes-trumps-latest-trade-target>.

⁹ *U.S. Drags India to WTO for Imposing Additional Tariffs on 28 Goods*, THE HINDU BUS. LINE (July 4, 2019), <https://www.thehindubusinessline.com/news/world/us-drags-india-to-wto-over-duty-hike-on-28-american-goods/article28287341.ece> (discussing U.S. filing of request for consultations against Indian tariffs on U.S. goods).

¹⁰ See *infra* Section II.A.

¹¹ See *infra* Section II.B and II.C.

implementation approach set forth in this Article examines how domestic industrial policies and domestic constraints impact development policy space, by examining three key factors: the underlying policy goals, tradeoffs, and available policy alternatives in a policy regime; the size and position of the industrial sector vis-à-vis sectors in other nations; and whether the regime is undergoing major policy transition and change. This approach moves beyond analyzing legal flexibility and deployment of litigation strategies at the WTO in order to analyze the availability and viability of alternate WTO-compliant policy choices where existing policies are ruled to violate international trade law rules and norms.

In advancing a policy implementation approach to development policy space, the Article analyzes case studies of legal contestation and policy implementation and adaptation in two WTO disputes involving industrial policy: *India-Solar Cells*, and *India-Export Related Measures*. In the *India-Solar Cells* dispute, the United States challenged India's inclusion of local content requirements (LCRs) for solar cells in India's National Solar mission program.¹² In *India-Export Related Measures*, the United States filed a challenge to India's export subsidies, including its Special Economic Zones (SEZ) policy.¹³ By analyzing key aspects of domestic policy regimes in each of these disputes, I highlight key differences in policy implementation and adaptation in each dispute. I find that India has greater development policy space in the context of export subsidies and SEZ policy than in solar industrial policy, and that this difference is in large part due to key differences in the nature and structure of policy regimes governing each sector.

I selected these two disputes as case studies for four primary reasons. First, these cases represent two contemporary, high-profile WTO disputes in which a developed nation challenges a rapidly industrializing developing nation's industrial development policies. Both disputes are high profile in nature given their global implications for the future of renewable energy and green industrial policy and for manufacturing and global exports. Consequently, these two cases allow for analyzing how governments have responded and adapted to contemporary international trade law rules and WTO adjudication in the context of two highly salient global issues.¹⁴

Second, both disputes involve examples of policies that have been key components of India's contemporary development strategy and are widely used by other developing countries seeking to catch up with developed nations. LCRs have been widely used by both developed and developing nations in renewable energy policy, and developing countries including China and India have used export subsidies programs like SEZs to promote growth in manufacturing and

¹² Request for Consultation by the U.S., *India-Solar Cells*, *supra* note 6. India uses the term "domestic content requirements" in its domestic policy documents, but the terms "local content requirements (LCRs)" and "domestic content requirements (DCRs)" are both used by the WTO, and I use both terms interchangeably in this article.

¹³ Request for Consultations by the U.S., *India-Export Related Measures*, *supra* note 7.

¹⁴ See Szu Ping Chan, *Why India is One of the World's Most Protectionist Countries*, BBC (Apr. 11, 2019), <https://www.bbc.com/news/business-47857583> (comparing BJP government's international trade policies to Congress government's international trade policies).

exports. As a result, both disputes have key implications for the study of international trade law's impact on development strategies globally.

Third, these case studies allow for comparison of national policy responses in industrial sectors of different scope and size. The *India-Solar Cells* dispute involves industrial policy in one industry, while the *India-Export Related Measures* dispute involves industrial policies ranging across a broader range of industrial sectors. This variation allows for examining how the nature and scope of the regulated industries impacts the degree of available policy space.

Fourth, these disputes allow for comparison of how application of two different sets of international trade law rules interact with domestic policy regimes to impact development policy space: the *India-Solar Cells* dispute involves the applicability of LCRs, while *India-Export Related Measures* involves the applicability of rules governing export-contingent subsidies. As illustrated by WTO Dispute Settlement Body (DSB) rulings in both disputes, the rules on LCRs are fairly strict and inflexible, while the rules governing subsidies are somewhat more flexible given that the Subsidies and Countervailing Measures (SCM) Agreement requires proving multiple elements in establishing the existence of subsidies, allows for certain types of subsidies, and provides for certain exceptions for the use of subsidies including export-contingent subsidies by developing nations. These two case studies allow for examining how different sets of legal rules influence and shape legal, institutional, and compliance strategies in response to WTO rulings.

The *India-Solar Cells* and the *India-Export Related Measures* disputes demonstrate the limitations of legal, institutional, and compliance approaches. In certain areas of international trade law, nations may not always be successful in securing victories at the WTO DSB in securing favorable rulings and/or rule changes, and there are limits to the "buying time" strategy that seeks to utilize WTO dispute resolution to secure additional time for compliance. Finally, compliance approaches that focus on whether nations do or do not comply with international trade law rules and WTO decisions do not fully capture the nature and scope of domestic policy regimes, the availability of policy alternatives, and constraints, and challenges involved with policy implementation and adaptation. Through case studies of the *India-Solar Cells* and *India-Export Related Measures* disputes, this Article analyzes the obstacles and challenges faced by the Indian government in pursuing WTO-compliant policies and strategies. These case studies illustrate how international trade law rules and WTO dispute resolution interact with domestic context to produce variation in policy space.

This Article makes three key contributions to the literature on international trade law and development policy space. First, it highlights the importance of looking beyond international trade law rules and WTO dispute resolution to fully assess how the realities of domestic industrial policy implementation impact development policy space. This includes analyzing the interrelationship between international law and WTO dispute resolution and

domestic policy regimes.¹⁵ A comparison of India's policy response in *India-Solar Cells* and *India-Export Related Measures* illustrates how international trade law interacts with the domestic policy context in shaping the menu of available and viable WTO-compliant policy alternatives. Second, this Article bridges insights from existing scholarship on development and industrial policy and international trade law and dispute resolution, by illustrating how a closer understanding of domestic policy regimes can impact development policy space and the efficacy of WTO dispute resolution. Third, by drawing closer attention to the realities of domestic policy implementation, the Article suggests the need for reformers to look beyond the realm of international trade law rules and WTO dispute resolution to examine how structural aspects of domestic policy can impact the success of trade policy and WTO dispute resolution.

Part I of this Article analyzes competing perspectives on the flexibility of international trade law and theoretical approaches to development policy space and advances a policy implementation approach to analyzing development policy space. Part II provides a historical account of recent trends in industrial policy and analyzes India's legal and policy response to *India-Solar Cells* and *India-Export Related Measures*. Part III compares India's response to these two disputes and draws insights on how key aspects of domestic industrial policy regimes and policy implementation impacts policy space. Part IV concludes by exploring implications of the policy implementation approach for policy space.

II. THE WTO AND DEVELOPMENT POLICY SPACE: THEORETICAL PERSPECTIVES

The WTO fundamentally transformed the international trade law order by introducing a new regime based on trade liberalization and a rule-based system with strong dispute resolution mechanisms.¹⁶ Since its inception, scholars have debated whether the WTO's free trade regime has been beneficial for global trade and development policy space.¹⁷ The term "policy space" was

¹⁵ See, e.g., Terence C. Halliday and Gregory Shaffer, *Transnational Legal Orders*, in *TRANSNATIONAL LEGAL ORDERS* 3, 11 (Terence Halliday and Gregory Shaffer eds., 2015) (defining a transnational legal order as "a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions") (emphasis removed); Gregory Shaffer, *Theorizing Transnational Legal Ordering*, 12 *ANN. REV. OF L. & SOC. SCI.* 231 (2016) (discussing three approaches to theorizing transnational legal ordering that focus on: analysis of private legal ordering; analyzing the interaction of lawmaking and practice at the transnational, national, and local levels; and approaches that critique and reformulate transnational law by examining non-state processes).

¹⁶ See ROLLAND, *supra* note 3, at 74-93 (discussing debates on development during Uruguay Round and the extent to which the WTO has integrated development goals and interests of developing nations); Alvaro Santos, *Carving Out Policy Autonomy for Developing Countries in the World Trade Organization: The Experience of Brazil and Mexico*, 52 *VA. J. INT'L L.* 551, 556-557 (2012) (discussing shift from GATT to WTO and attributes of the WTO regime).

¹⁷ See Santos, *supra* note 16, at 557-59 (discussing debates between free trade and development scholars on desirability of WTO restrictions and implications for development) (citing JAGDISH BHAGWATI, *IN DEFENSE OF GLOBALIZATION* 60-67 (2004); MARTIN WOLF, *WHY GLOBALIZATION WORKS* (2004)). For scholarship examining the impact of the WTO on development, see ROLLAND, *supra* note 3; DEVELOPING COUNTRIES IN THE WTO LEGAL SYSTEM, *supra* note 3 (discussing how the WTO regime has accommodated development goals and interests of developing nations).

first used in the United Nations Conference on Trade and Development (UNCTAD) documents in the early 2000s and was defined as the “scope for domestic policies, especially in the areas of trade, investment and industrial development” which might be “framed by international disciplines, commitments and global market considerations.”¹⁸ Dani Rodrik has defined development policy space as the autonomy of nations to pursue trade and industrial policies needed to restructure and diversify economies in order to benefit from globalization and foster economic growth.¹⁹ Rodrik argues that developing nations require policy space to advance industrial policies that address unique national priorities and development goals.²⁰

Debates about the degree of policy space available to developing nations intensified following the transition from the General Agreement on Trade and Tariffs (GATT) regime to the WTO regime, following the adoption of the Single Undertaking and the Uruguay Round.²¹ Although the GATT agreements codified principles of non-discrimination in the form of the most-favored-nation (MFN) status, national treatment obligation, and reciprocity, the GATT framework arguably offered greater policy flexibility for developing nations’ industrial policies and also was less aggressive in its enforcement of these free trade norms against developing nations.²² Under GATT, some degree of policy space for developing nations was effectuated through the incorporation of the Special and Differential Treatment principle into the trading system via the enactment of the Enabling Clause in 1979.²³ The inclusion of Special and Differential Treatment was predicated on the belief that developing nations needed to have flexibility and policy space to pursue policies that protected infant industries from foreign competition while allowing for preferential access to the markets of developed economies.²⁴

¹⁸ Sheila Page, *Policy Space: Are WTO Rules Preventing Development?*, OVERSEAS DEV. INST. 1 (Jan. 2007), <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/106.pdf> (noting that policy space was defined in Sao Paulo consensus as referring to “the scope for domestic policies, especially in the areas of trade, investment and industrial development” which might be ‘framed by international disciplines, commitments and global market considerations’); see also RODRIK, *supra* note 3, at 13-14 (discussing conception of domestic policy space that focuses on national autonomy to pursue development goals and objectives).

¹⁹ RODRIK, *supra* note 3, at 13-14; see also Dani Rodrik, *Globalization Dilemmas & the Way Out*, 47 INDIAN J. INDUS. REL. 393, 404 (2012) (arguing for a set of international economic law rules that recognize that nations “have the right to protect their own social arrangements and institutions but not to impose them on others” and arguing that “[t]he objective of international economic arrangements must be to attain the maximum amount of integration or the maximum thickness in economic transactions that are consistent with maintaining space for diversity in national institutions and the arrangements”).

²⁰ See RODRIK, *supra* note 3, at 249-50 (discussing the need for international trade law regime to accommodate unique national development strategies of developing nations).

²¹ See ROBERT E. HUDEC, DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM 154-87 (1987) (analyzing GATT’s relatively weak enforcement of non-discrimination and reciprocity norms against development countries).

²² *Id.*; see also Alisa DiCaprio & Kevin P. Gallagher, *The WTO and the Shrinking of Development Space: How Big Is the Bite?*, 7 J. WORLD INV. & TRADE 781 (2006).

²³ See Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, GATT Doc. L/4903 (Nov. 28, 1979), GATT BISD (26th Supp.), at 203 (1980); HUDEC, *supra* note 21; Bernard Hoekman, *Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment*, 8 J. INT’L ECON. L. 405 (2005).

²⁴ See Hoekman, *supra* note 23.

The establishment of the WTO in 1994 expanded the scope and enforcement of regulations governing industrial policies, and when compared to GATT, has arguably restricted the policy space available to developing countries to pursue industrial policy and development strategies.²⁵ Although the Doha Round sought to prioritize development interests of developing countries, subsequent rounds of negotiations and liberalization have failed to fundamentally advance and address the goals of the Doha Development Agenda.²⁶ Early scholarship on international trade law and policy space in this period emphasized how the transition from the GATT to the WTO ushered in a new order imposing significant constraints on developing nations' policy space.²⁷ In this section, I analyze competing perspectives on international trade law's impact on policy space and existing theoretical approaches for assessing policy space in order to provide background and context for the article's proposed policy implementation approach.

A. *Perspectives on International Trade Law and Policy Space*

Scholars have offered competing assessments of international trade law's impact on development policy space. One group of scholars argue that international trade law largely serves as a constraint on development policy space and provides minimal flexibility for development policies. In his recent book, Rodrik argues that the international trade law order in its current state has failed to provide a more optimal balance between globalization and the development interests of nation states.²⁸ Rodrik and other scholars continue to argue that international trade law provides insufficient policy space for developing nations when it comes to industrial policies and that providing sufficient policy space is crucial to allowing nations the flexibility to experiment with different types of policies that work in different contexts.²⁹ Other leading economists and scholars including Ha-Joon Chang and Robert Wade have written about the importance of policy space and how the international trade law regime has been guilty of "kicking away the ladder" in not allowing developing countries the flexibility to pursue development policies that developed and newly industrialized countries have used successfully.³⁰

²⁵ Santos, *supra* note 16, at 564-69 (discussing ways in which the WTO restricts developing nations' policy space as compared to the GATT regime); DiCaprio and Gallagher, *supra* note 22 (analyzing changes in development space under WTO by examining national policy implementation and compliance with WTO norms).

²⁶ See Tomer Broude, *Development Disputes in International Trade*, in LAW AND DEVELOPMENT PERSPECTIVE ON INTERNATIONAL TRADE LAW 32 (Yong-Shik Lee, Gary Horlick, Won-Mog Choi, and Tomer Broude eds., 2011) (discussing different conceptions of development in international law); Tomer Broude, *The Rule(s) of Trade and the Rhetos of Development: Reflections on the Functional and Aspirational Legitimacy of the WTO*, 45 COLUM. J. TRANSNAT'L L. 221, 237-39 (2006) (discussing gap between new emphasis on development in rhetorical discourse on trade law, and the lack of commitment to effectuating develop in trade agreements and WTO institutional structures and mechanisms).

²⁷ DiCaprio and Gallagher, *supra* note 22; Hoekman, *supra* note 23.

²⁸ RODRIK, *supra* note 3.

²⁹ *Id.*

³⁰ See HA-JOON CHANG, *BAD SAMARITANS: THE MYTH OF FREE TRADE AND THE SECRET HISTORY OF CAPITALISM* (2007) (highlighting how western developed economies used protectionist measures as part of their industrial growth and development strategies); HA-JOON CHANG, *KICKING AWAY THE LADDER:*

Another group of scholars has argued that international trade law does provide some flexibility for developing nations to pursue industrial policies. For example, Alice Amsden and Takashi Hikino have argued that the WTO's "bark is worse than its bite" and that international trade law still allows for policy flexibility in the form of tariffs, trade restrictions for nations dealing with balance of payments difficulties, antidumping and countervailing duties and safeguards, and certain types of subsidies.³¹ Similarly, Sheila Page has also highlighted the relative flexibility of certain international trade law provisions and how the WTO has both simultaneously increased and decreased policy space in different areas.³²

In addition, scholars have highlighted the relative open-endedness and flexibility of some aspects of international trade law that can be strategically used and exploited by countries in WTO litigation in order to change and expand rule interpretations in order to advance domestic industrial policies.³³ Alvaro Santos illustrates how nations have sought to extend time to "adjust to the rule" through strategic use of WTO litigation, while Rachel Brewster has argued that the long delays inherent in WTO adjudication create what she refers to as a "remedy gap."³⁴ While acknowledging that the WTO has restricted policy space for developing countries, DiCaprio and Gallagher also suggest that the WTO and international trade law allow countries the ability to gain additional time for non-compliant policies through policy shifting strategies, including the use of notifications, and simply waiting and refusing to withdraw WTO-inconsistent measures until challenged in WTO adjudication.³⁵

DEVELOPMENT STRATEGY IN HISTORICAL PERSPECTIVE (2003) (discussing how international trade law and the WTO have prohibited developing nations from the use of industrial development and trade policies that previous nations had used to promote rapid domestic industrial manufacturing capacity).

³¹ See Santos *supra* note 16, at 561 (citing Alice Amsden & Takashi Hikino, *The Bark is Worse Than the Bite: New WTO Law and Late Industrialization*, ANNALS AM. ACAD. POL. & SOC. SCI (2000), and Alice Amsden, *Promoting Industry Under WTO Law*, in PUTTING DEVELOPMENT FIRST: THE IMPORTANCE OF POLICY SPACE IN THE WTO AND INTERNATIONAL FINANCIAL INSTITUTIONS (Kevin P. Gallagher ed., 2005) and arguing that international trade law under the WTO does provide for flexibility for industrial development for developing nations).

³² See Page, *supra* note 18 (discussing areas where the WTO regime has both increased and decreased policy space).

³³ Santos, *supra* note 16, at 553-58 (2012) (discussing how developing nations can seek to exploit open-endedness and flexibility in international trade law in trade law through strategic litigation in order to expand policy autonomy in industrial policy).

³⁴ See Santos, *supra* note 16, at 575 (discussing how nations can use delays in WTO litigation to extend time period for adjusting its policies in compliance with the WTO Appellate Body's rulings, and can also use WTO adjudication to "test the boundaries of rules"); Rachel Brewster, *The Remedy Gap: Institutional Design, Retaliation, and Trade Law Enforcement*, 80 GEO. WASH. L. REV. 102 (2011) (discussing how nations can take advantage of the extended time periods for compliance that result from the protracted nature of WTO dispute by making slight changes and modifications to policies to buy time).

³⁵ DiCaprio & Gallagher, *supra* note 22, at 781, 798-800 (discussing use of notifications and strategy of maintaining WTO-inconsistent measures until challenged in WTO adjudication).

B. *International Trade Law and Approaches to Conceptualizing Policy Space*

Within the literature on international trade law and policy space, there are arguably three main approaches to conceptualizing how international trade law restricts or impacts policy space. First, scholars have focused on the extent to which variation in the flexibility of international trade law rules and WTO rulings impacts development policy space. Second, scholars have advanced institutional approaches that examine how nations have sought to develop and utilize trade legal capacity in order to expand policy space for domestic development policies. Finally, a third body of scholarship has focused on studies of compliance with international trade law rules and WTO rulings in order to assess policy space. In part, these different approaches reflect differences between scholarship in different fields, including work by economists, social scientists, and legal scholars. This section explores each of these approaches in order to demonstrate how a policy implementation approach both supplements and contributes to existing frameworks for assessing international trade law's impact on policy space.

1. Legal Approaches

One dominant approach to analyzing international trade law's impact on policy space focuses on the flexibility of the legal rules of international trade law. A wide range of scholars have focused primarily on the actual text of international trade law provisions in examining the relative flexibility of the present WTO regime as compared to the GATT regime.³⁶ As Santos argues, this includes both structural and pragmatic development scholars who examine how the flexibility of legal rules themselves affords nations policy flexibility.³⁷ In particular, scholars have highlighted how provisions of various international agreements, including key provisions of GATT, the SCM Agreement, the Trade Related Investment Measures (TRIMs) agreement, and the Trade Related Intellectual Property Rights (TRIPs) agreement all impact development policy space. In addition, other scholars have focused on the uncertainty of legal rules of international trade law. For example, scholars including Luca Rubini have argued that because of its inconsistency, the existing subsidies framework does not provide clear guidance and certainty with respect to key issues, including the legality of state subsidies, and the use of LCRs in green industrial policy.³⁸ This uncertainty affects the policy space for green industrial policy at the national level.³⁹

³⁶ See Santos, *supra* note 16, at 564-69 (discussing how WTO constraints national policy autonomy).

³⁷ *Id.*

³⁸ See Luca Rubini, *Ain't Wastin' Time No More: Subsidies for Renewable Energy, The SCM Agreement, Policy Space, And Law Reform*, 15 J. INT'L ECON. L. 525, 532-36, 543-48, 577 (2012) (arguing that the status of renewable energy subsidies under international trade law is one of "significant legal uncertainty" and "conflict between legal requirements and policy prescriptions," and proposing reforms that would provide explicit definitions for certain types of allowable renewable energy subsidies).

³⁹ See *id.*; see also Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT'L. L. 247 (2004).

Another line of scholarship has emphasized the importance of legal interpretation of international trade law rules. For example, many scholars have focused on the nature of the analyses that international trade law allows for in balancing trade versus environmental and human rights interests. International law scholars have highlighted how international law can serve distinct interests or goals, including human rights. However, as Rob Howse has argued, the WTO dispute settlement system has been primarily grounded in a “statist understanding of the nature of international trade law,” although some recent cases have suggested a partial shift toward a “human centered” approach.⁴⁰ While Howse and other scholars have highlighted how some WTO cases have provided some deference to human rights and other environmental interests in some of the “classic” environmental trade cases, they acknowledge that there are still inherent limitations on the WTO’s ability to advance human rights and other goals such as sustainability and development. Howse and Ruti Teitel have argued for interpreting international trade law instruments in light of the International Covenant of Economic, Social, and Cultural Rights, which is part of the normative environment of the international economic order according to the Report of the Study Group of the International Law Commission.⁴¹ In a separate article, in the context of the *India-Balance of Payments* dispute,⁴² Howse discusses how the WTO failed to consider the applicability of a “right to development” in adjudicating a challenge by the U.S. to India’s decision to maintain quantitative import restrictions based on a balance of payments rationale.⁴³

Other recent scholarship has emphasized transformations in the WTO’s jurisprudential approach to adjudicating disputes involving subsidies. For example, Mark Wu and James Salzman have recently argued that the emerging jurisprudence of renewable energy subsidies disputes represents a major shift from earlier trade disputes involving environmental interests. Doctrinally, Wu and Salzman argue that these disputes have involved a major shift in WTO jurisprudence away from the “balancing” of goals of trade liberalization versus environmental goals approach applied in earlier “classic” environmental trade disputes like the *Shrimp/Turtle* case under Article XX of GATT 1994, toward a strict liability approach in which the WTO simply assesses whether particular

⁴⁰ See Robert Howse, *Moving the WTO Forward - One Case at a Time*, 42 CORNELL INT’L L.J. 223, 227-230 (2009) (contrasting the WTO judiciary’s “human centered” approach in its adjudication of disputes involving nongovernment stake holders, with its more “state centered” approach).

⁴¹ Robert Howse & Ruti G. Teitel, *Beyond the Divide: The Covenant on Economic, Social and Cultural Rights and the World Trade Organization* (Dialogue on Globalization Occasional Paper Series, Paper No. 30, April 2007), <http://library.fes.de/pdf-files/iez/global/04572.pdf> (discussing how International Covenant of Economic, Social, and Cultural Rights can be used to guide interpretation of international trade law rules and norms).

⁴² Report of the Appellate Body, *India-Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WTO Doc. WT/DS90/AB/R (1999).

⁴³ See Robert Howse, *Mainstreaming the Right to Development into the World Trade Organization*, in *REALIZING THE RIGHT TO DEVELOPMENT: ESSAYS IN COMMEMORATION OF 25 YEARS OF THE UNITED NATIONS DECLARATION ON THE RIGHT TO DEVELOPMENT* 249, 255 (Office of the High Commissioner for Human Rights ed., 2013) (noting that the Appellate Body relied on a decision of the International Monetary Fund that held that “India did not need to change its development policies because it could address the consequences of removing its balance of payments-based import restrictions through ‘macroeconomic’ policies.”).

policies violate the SCM agreement.⁴⁴ Because the SCM Agreement does not contain exceptions or provide for balancing tests similar to GATT or the Agreement on Technical Barriers to Trade (TBT), Wu and Salzman argue that next generation disputes do not allow for balancing trade versus environmental interests.⁴⁵ In more recent work, Wu has also highlighted how the WTO in its interpretation and application of key aspects of the SCM Agreement, has in some ways accommodated particular forms and structures of state capitalism in both China and India.⁴⁶ While this research highlights how the WTO does analyze the nature and structure of domestic policy economy structures in interpreting and applying international trade law rules adjudication, it does not examine how the underlying realities of domestic policy regimes constrain nations seeking to respond to and adapt to WTO rulings through pursuit of WTO-compliant policy alternatives.

2. Institutional Approaches

A second approach to analyzing international trade law's impact on policy space is the institutional approach. Institutional approaches analyze how nations are able to strategically develop the capacity to use litigation in the WTO DSB to expand policy space in the context of specific industrial policy disputes. Although the institutional approach highlights how nations utilize and develop legal capacity and legal strategies in WTO dispute resolution, this approach does not fully explore how the nature and scope of domestic industrial policy regimes shape legal strategies, and impact policy space based on the range of available and viable WTO-compliant policy alternatives. One example of this approach can be seen in recent work on how states foster and create developmental "legal capacity" and have strategically used WTO litigation to expand rule interpretations to advance domestic industrial policies within the WTO legal framework. For example, Gregory Shaffer, Michelle Rattón Sanchez, and Barbara Rosenberg illustrate how Brazil successfully developed and utilized legal trade capacity in WTO dispute resolution by leveraging public-private partnerships and coordination in order to gather information and to define and advance Brazil's interests in WTO negotiations and dispute settlement.⁴⁷ In his work comparing Brazil and Mexico's industrial and trade policies, Alvaro Santos argues that developing nations, including Brazil, have successfully developed and utilized legal trade capacity to effectively participate in WTO resolution to push for favorable rules and decisions in order to provide for more development

⁴⁴ Mark Wu & James Salzman, *The Next Generation of Trade and Environment Conflicts: The Rise of Green Industrial Policy*, 108 NW. L. REV. 401 (2014) (analyzing how international trade law frameworks governing next generation green industrial disputes differ from first generation disputes).

⁴⁵ *Id.*, at 452 (arguing that in Next Generation disputes, "this balancing of trade and environmental interests disappears" and "the applicable law effectively acts as a strict liability standard, requiring adjudicators to find that so long as there is a violation of a trade obligation, the environmental policy is illegal.").

⁴⁶ See Mark Wu, *The "China, Inc." Challenge to Global Trade Governance*, 57 HARV. INT'L L.J. 261, 301 (2016) (discussing the public body debate in WTO DSB disputes and the factors that should be evaluated in determinations of whether state-owned enterprises are public bodies).

⁴⁷ Gregory Shaffer, Michelle Rattón Sanchez & Barbara Rosenberg, *The Trials of Winning at the WTO: What Lies Behind Brazil's Success*, 41 CORNELL INT'L L.J. 383, 390, 423-54 (2008).

policy space.⁴⁸ In describing Brazil and Mexico's trade strategies and approach to legal strategy, Santos suggests a distinction between what he calls "free-trade legal capacity" and "developmental legal capacity."⁴⁹

Santos critiques existing structural development and pragmatic development scholarship for treating existing rules and exceptions as static, "as if they imposed clear, fixed, and stable limits on states' actions."⁵⁰ Instead, he argues for a more dynamic approach that examines both the "rules in flux" and institutional practices developed in the WTO in order to understand how states can develop legal capacity to push for changes in rule interpretations that afford states greater flexibility to pursue their developmental strategies.⁵¹ Santos suggests that developing nations have successfully expanded legal capacity to push for rule changes in the long term and to buy time for "adjusting to the rule" in the shorter term.⁵²

Recent work on India has also analyzed how international trade law norms have led to significant changes in developmental statism. Drawing on Halliday and Shaffer's theory of transnational legal ordering and existing theories of developmental state trajectory, Shaffer, James Nedumpara and Aseema Sinha have analyzed India's development of legal trade capacity as a response to its early losses in key WTO disputes including *India-Quantitative Restrictions* and *India-Patents*. They describe the Indian state's shift 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."⁵³ Shaffer, Nedumpara and Sinha illustrate how the imperatives of WTO dispute resolution have helped drive significant transformations in India's developmental state strategies. A policy implementation approach can help contribute to and supplement existing institutional accounts by examining how the nature of specific industrial policy regimes, the availability of policy alternatives, and specific constraints and obstacles to policy adaptation also impacts the space available for achieving industrial policy goals.

3. Compliance Approaches

A third approach to analyzing international trade law's impact on policy space focuses on actual compliance with international trade law norms and the WTO decisions. For example, Alisa DiCaprio and Kevin Gallagher argue that policy space should be measured by assessing actual policy implementation in

⁴⁸ See Santos, *supra* note 16, at 594, 609-610.

⁴⁹ *Id.*

⁵⁰ *Id.*, at 563.

⁵¹ *Id.*

⁵² *Id.*, at 575.

⁵³ See Gregory Shaffer, James Nedumpara & Aseema Sinha, *State Transformation and the Role of Lawyers: The WTO, India and Transnational Ordering*, 49 LAW & SOC'Y REV. 595 (2015).

response to international trade constraints and challenges to domestic policies.⁵⁴ DiCaprio and Gallagher examine policy implementation by Newly Industrialized Countries, including Trade Policy Reviews and other forms of WTO notifications, as well as actual policy compliance in response to WTO dispute resolution in order to assess the degree of policy flexibility available to NICs following the transition from GATT to the WTO.⁵⁵ Gregory Shaffer has also examined the extent to which WTO dispute resolution forces nations to change laws and regulations.⁵⁶ Similarly, Kevin Gallagher has analyzed the extent to which nations have adopted WTO-compliant policies including policies that focus on improving infrastructure, tax concessions, and other incentives.⁵⁷

Other examples of compliance approaches include comparative case studies of compliance with WTO Panel disputes. For example, Kaoru Natsuda and John Thoburn analyzed case studies of the development of the automobile industry in Thailand and Malaysia in order to illustrate how each of these nations have sought to carve out industrial policy space under international trade law.⁵⁸ Santos also examines some aspects of domestic policy compliance in examining both how nations use legal capacity and legal strategy to advance particular development strategies, highlighting the interrelationship between participation in WTO dispute resolution and domestic policy, but spends less time on examining the nature of policy compliance and adaptation.⁵⁹ While these compliance approaches do examine the extent to which nations actually comply with WTO rulings, they do not fully capture how the realities of the domestic policy context impacts policy space. The policy implementation approach can complement compliance accounts by exploring how the nature and scope of domestic policy regimes, the availability of policy alternatives, and constraints and challenges involved with policy implementation and adaptation all impact development policy space.

C. *Conceptualizing Policy Space: Policy Implementation and Policy Regimes*

As illustrated above, there are several competing approaches for assessing the WTO and international trade law's impact on development policy space and for conceptualizing policy space. However, I suggest that each of these approaches fails to fully consider the importance of domestic policy

⁵⁴ DiCaprio & Gallagher, *supra* note 22, at 781 (analyzing trade policy reviews, compliance with WTO Panel disputes, and notifications and balance of payments applications to assess the degree of in development policy space available to NICs).

⁵⁵ *Id.*

⁵⁶ Gregory Shaffer, *How the WTO Shapes the Regulatory State*, 9 REG. AND GOVERNANCE 1 (2015) (discussing how WTO has forced changes in domestic law and regulations).

⁵⁷ Kevin Gallagher, *Understanding Developing Country Resistance to the Doha Round*, 15 REV. INT'L POL. ECON. 62, 82 (2008) (discussing nations' adoption of alternate policies to comply with WTO norms).

⁵⁸ See Kaoru Natsuda & John Thomas Thoburn, *How Much Policy Space Exists Under the WTO?: A Comparative Study of the Automotive Industry in Thailand and Malaysia*, 21 REV. INT'L POL. ECON. 1346 (2014) (comparing how international trade law rules impacted industrial policy in Thailand and Malaysia).

⁵⁹ See Santos, *supra* note 15, at 594-99.

implementation in assessing available policy space. In this section, I argue for a policy implementation approach to assessing domestic policy space in key sectors and suggest that this approach fills a key gap in the existing literature.

Santos has arguably gone the furthest in articulating a conception of policy space that seeks to account for the influence of international trade law, the assertion of trade legal capacity by nations at the WTO, and domestic policy strategies. Santos defines policy autonomy as the “available regulatory space that results from the combination of three factors: rule and doctrinal flexibility, legal capacity, and development strategy.”⁶⁰ Santos argues that policy autonomy is a product of a nation’s ability to use its legal capacity to successfully seek rule change or flexibility to accommodate its development strategy over the long term and to buy time for “adjusting to the rule” through WTO dispute resolution. Santos’ conception of policy autonomy is thus based on a dynamic institutional understanding of the role of states and their ability to develop and deploy legal capacity to achieve rule changes over time to advance the underlying goals of their developmental strategies.⁶¹

In analyzing national compliance and policy implementation in order to assess policy space, DiCaprio and Gallagher’s findings also highlight how nations have been able to carve out “temporal” policy space by taking advantage of the long time delays associated with WTO enforcement mechanisms and WTO dispute resolution and compliance proceedings. Nations buy time for compliance by strategically using notification and WTO adjudication. However, like Santos, DiCaprio and Gallagher’s approach emphasizes the use of WTO dispute resolution and other tactics to procure rule changes that accommodate domestic policies and temporal strategies aimed at buying time for “adjusting to the rule.”⁶² While Santos, DiCaprio, and Gallagher highlight how nations can carve out policy space through strategic use of WTO dispute resolution and notification mechanisms, in certain cases, a nation’s active use of legal capacity and other strategies may not guarantee policy flexibility. In disputes in which the WTO DSB is unable to adopt a change in legal rules or interpretation, one must analyze the nature of domestic policy regimes in order to ascertain the level of policy flexibility in a particular sector.

I argue for moving beyond the legal, institutional, and compliance approaches to fully assess the policy landscape of particular industrial policy sectors.⁶³ In advancing a policy implementation approach to policy space,

⁶⁰ *Id.*, at 594.

⁶¹ *Id.*, at 595.

⁶² See DiCaprio & Gallagher, *supra* note 22; Brewster, *supra* note 34.

⁶³ As noted earlier, some scholars have sought to move beyond existing approaches to compliance to assess how the WTO has impacted the regulatory state. See Vinod K. Agrawal & Simon J. Evenett, *Do WTO Rules Preclude Industrial Policy?*, 16 *BUS. POLIT.* 481, 486-491 (2014) (reviewing existing literature on WTO’s impact on policy space and highlighting how states adopt alternate policies in response to WTO dispute resolution); Gregory Shaffer, *How the WTO Shapes the Regulatory State*, 9 *REG. & GOVERNANCE* 1 (2015) (discussing how WTO norms and WTO dispute settlement have forced nations to change national law, legal practices, and administrative regulations in response to WTO

I seek to bridge the gap between scholarship on industrial policy and development and studies of WTO dispute resolution and compliance, by focusing on how *internal* domestic policies and constraints impact development policy space.⁶⁴ This includes analysis of the underlying policy goals and policy tradeoffs of a policy regime, the size and position of the industrial sector vis-à-vis sectors in other nations, and whether the regime is undergoing major policy transition and change.

As the case studies of India's policy response to WTO challenges in *India-Solar Cells* and *India-Export Related Measures* illustrate, variation across each of these aspects of domestic policy regimes has a strong impact on industrial policy space. In analyzing actual policy implementation and adaptation in this article, I seek to move beyond assessment of legal flexibility and WTO strategies in order to examine how India has sought to adopt alternative WTO-compliant policy choices where existing policies are found to violate international trade law. As both *India-Solar Cells* and the *India-Export Related Measures* disputes illustrate, it is not always possible to succeed in immediately effecting rule changes through WTO dispute resolution, and there are limits to the "buying time" strategy to secure additional time for compliance.⁶⁵ As such, this Article focuses on how India has sought to navigate the process of policy implementation and adaptation by exploring alternative WTO-compliant policies and on the obstacles and challenges faced by the Indian government in pursuing these alternate policies and strategies. As illustrated by these case studies, assessing policy space available in these types of disputes requires a closer analysis of a nation's policy goals, tradeoffs, and the availability and viability of alternate policies. In the next section, I analyze case studies of India's policy implementation in particular sectors to understand how international trade law rules interact with the domestic context to produce variation in policy space.

III. INTERNATIONAL TRADE LAW AND INDUSTRIAL POLICY IN INDIA

A. *Indian Industrial Policy: From Liberalization to the New Industrial Policy*

India's policy responses to WTO challenges and its compliance with WTO decisions must be understood in the broader context of significant shifts

rulings); cf. Robert Howse & Ruti Teitel, *Beyond Compliance: Rethinking Why International Law Really Matters*, 1 GLOBAL POL'Y 127 (2010) (arguing that a strict focus on rule compliance is too narrow and cannot adequately account for international law's normative effects).

⁶⁴ See Dani Rodrik, *Industrial Policy for the Twenty-First Century* (Sep. 2004) (unpublished manuscript), <https://drodrik.scholar.harvard.edu/files/dani-rodrik/files/industrial-policy-twenty-first-century.pdf> (discussing the distinction between analysis of policy outcomes and policy processes in industrial policy).

⁶⁵ In distinguishing Brazil from Mexico, Santos suggests a binary dichotomy between states that use legal capacity to advance developmental strategies (e.g. Brazil), and states with legal capacity but no domestic development strategies (Mexico). See Santos, *supra* note 16, at 554-55. But there is arguably a third category of cases: nations like India with strong legal capacity *and* coherent industrial development strategies may still have limited policy room or flexibility in areas or sectors in which it is not possible to effect rule changes through WTO dispute resolution, and where policy alternatives and adaptation are limited by state resources and the nature and size of an industrial sector.

taking place in Indian industrial policy. India is now currently in the midst of a significant transition in industrial and development policy under the current Bharatiya Janata Party (BJP) government of Prime Minister Narendra Modi. India's industrial policy has transitioned through several key phases, including the transition from Mughal rule to British colonial rule and to an independent nation.⁶⁶ In the 1950s, India's industrial policy was based on democratic socialism, developmental statism featuring centralized state planning, import substitution industrialization, and protectionism.⁶⁷ Under the leadership of Prime Minister Jawaharlal Nehru, India announced a series of five-year plans in which the state was charged with coordinating centralized planning to promote industrialization.⁶⁸ India's early industrial policy was based on a developmental statist model premised on state-owned enterprises, restrictions on exports and imports, tariffs, and other forms of protectionism.

Under the governments of Indira Gandhi and Rahul Gandhi, India shifted toward gradual liberalization of key sectors of the Indian economy, and this process significantly accelerated in 1991 following the balance of payments crisis.⁶⁹ In 1991, India entered a second phase of industrial policy as the Congress government of P.V. Narasimha Rao ushered in new economic liberalization and privatization policies in the 1990s.⁷⁰ Liberalization and privatization accelerated through the 2000s under coalition governments led by both the Congress and BJP parties. In 2019, India announced the development and implementation of a New Industrial Policy, marking the third time India has announced a major shift in industrial policy.⁷¹ The shift in India's industrial policy strategy reflects the BJP government's economic agenda, but also reflects how state institutions are responding to significant changes in the international trade law regime and to domestic politics and domestic policy imperatives.

The New Industrial Policy includes a focus on boosting domestic manufacturing and domestic employment, integrating the economy into global supply chains, and attracting 100 billion USD foreign direct investment annually, in line with the Make in India program's goal of increasing the total share of

⁶⁶ See ATUL KOHLI, STATE-DIRECTED DEVELOPMENT: POLITICAL POWER AND INDUSTRIALIZATION IN THE GLOBAL PERIPHERY 223-34, 247-55 (2004) (discussing history of colonial political economy and state construction in India).

⁶⁷ *Id.*

⁶⁸ Early drafts of the new industrial policy call for new job creation initiatives, promoting foreign technology transfer, and dramatically increasing annual foreign direct investment (FDI) by over 100 billion USD. *Government to soon Unveil new Industrial Policy: DIPP Secretary*, ECONOMIC TIMES (Nov. 16, 2018), http://economictimes.indiatimes.com/articleshow/66650716.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst.

⁶⁹ See FRANCINE FRANKEL, INDIA'S POLITICAL ECONOMY: 1947-2004 at 586-87 (2005) (discussing gradual shift toward liberalization and privatizing in the 1980s under the Congress governments of Indira Gandhi and Rajiv Gandhi).

⁷⁰ *Id.*, at 488-600 (discussing post-1991 macroeconomic reforms); SURESH TENDULKAR & T.A. BHAVANI, UNDERSTANDING REFORMS: POST-1991 INDIA (2007) (discussing liberalization and privatization reforms).

⁷¹ *New Industrial Policy Linking Global Supply Chain on the Anvil: Suresh Prabhu*, INDIAN EXPRESS (Jan. 13, 2019), <https://indianexpress.com/article/business/economy/new-industrial-policy-linking-global-supply-chain-on-the-anvil-suresh-prabhu-5535808>.

manufacturing to 25 percent of the economy by 2020.⁷² The policy will also seek to upgrade India's infrastructure, reform restrictive labor laws, and reduce and streamline business regulations and laws and dispute resolution mechanisms.⁷³ In addition, the new policy framework is aimed at deregulating and streamlining laws and regulations and will provide for "single-window clearances" at both the central and state government level for industrial zones, easing of environmental regulations and clearances, and self-certification for many processes, including labor standards.⁷⁴ The new policy will also include new incentives and reforms to spur innovation, including simplification of the existing taxation system.⁷⁵

B. *India's Earlier Approach to WTO Adjudication*

In the transition from GATT to WTO, India sought to retain some policy space for subsidies and incentives. An example of this can be seen in its efforts to maintain local content policies in the auto industry. Consistent with its liberalization policies of the early 1990s, India gradually liberalized its automobile manufacturing industry through the 1990s and early 2000s.⁷⁶ During this earlier era, there were arguably three major sets of economic reforms: the post-1991 liberalization reforms, the adoption of transitional indigenization (domestic content) and trade balancing policies in the mid-1990s, and the Auto Policy of 2002.⁷⁷ In the early 1990s, India adopted several key reforms, including gradually delicensing key sectors of the auto industry, expanding allowances for foreign direct investment up to 51 percent, and gradually relaxing restrictions on capital imports and technology.⁷⁸ As a larger number of foreign manufacturers began to invest in automobile production in India (including through joint ventures with Indian companies) during the early 1990s, India sought to harness this influx of investment to stimulate the development of its auto component industry.

During this transitional period, India conditioned the granting of certain import licenses on both indigenization requirements (LCRs) and trade balancing requirements in the automobile industry. As part of this broader policy approach, the Indian government entered into a series of MOUs with individual automobile manufacturers in 1995 and later issued Public Notice 60 in 1997, which systematically imposed local content, trade balancing, and minimum investment requirements on auto manufacturers seeking licenses to import Completely

⁷² Kirtikia Saneja, *Ministry Sends New Industrial Policy for Cabinet Approval: Suresh Prabhu*, THE ECONOMIC TIMES (Dec. 10, 2018), http://economictimes.indiatimes.com/articleshow/67011821.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst.

⁷³ *Id.*

⁷⁴ R. Suryamurthy, *Easy Land in New Industrial Policy*, THE TELEGRAPH (Feb. 4, 2019), <https://www.telegraphindia.com/business/easy-land-in-new-industry-policy/cid/1683655>.

⁷⁵ *Id.*

⁷⁶ See Mahipat Ranawat & Rasjnish Tiwari, *Influence of Government Policies on Industry Development: The Case of India's Automotive Industry* (Hamburg University of Technology (TUHH), Institute for Technology and Innovation Management (TIM), Working Paper, No. 57, Mar. 2009), <https://www.econstor.eu/bitstream/10419/55450/1/594744865.pdf> at 32-33.

⁷⁷ Ranawat & Tiwari, *supra* note 76 at 45-46.

⁷⁸ *Id.*, at 45-47.

Knocked Down/Semi Knocked Down (CKD/SKD) automobile kits. In 1998 and 1999, both the European Union and the U.S. challenged India's local content and trade balancing requirements in the *India-Autos* dispute at the WTO.

The WTO Panel ruled that these requirements were inconsistent with provisions of the GATT agreement. Although India initially filed an appeal to the Appellate Body, it ultimately withdrew its appeal. However, India was able to take advantage of the long delays in the WTO dispute resolution process to buy time for its LCRs in the automobile industry in the *India-Autos* dispute.⁷⁹ India initiated its policies providing for indigenization and LCRs for import licenses in the auto industry in 1995 and ultimately filed and withdrew its appeal in 2002, a full seven years after it had initiated its policies. During this period, India was able to use the LCRs to help stimulate the development and growth of its domestic auto component manufacturing industry, and the value of output from this sector increased from 2.4 billion USD in 1997 to 4.2 billion USD in 2001.⁸⁰

As Shaffer, Nedumpara, and Sinha argue, India has worked to strengthen and enhance WTO-related legal trade capacity to effectively participate in WTO dispute resolution through expanding specialized governmental bodies focused on trade, as well as forming public-private partnerships that rely on private lawyers and the business sector for consulting and advising on WTO litigation and compliance.⁸¹ Notably, India has had some success in recent WTO disputes as a complainant.⁸² In *EU-Generic Drugs*, India brought a successful challenge to EU policies allowing for seizure of Indian generic drugs on patent infringement grounds during transit through the Netherlands to other nations.⁸³ And in *US-Carbon Steel*, India challenged the U.S. imposition of countervailing measures on hot-rolled carbon steel products from India and was able to gain a partial victory in terms of the WTO ruling on

⁷⁹ See Gregory Shaffer et al, *Equalizing Access to the WTO: How Indian Trade Lawyers Build State Capacity*, in *THE INDIAN LEGAL PROFESSION IN THE AGE OF GLOBALIZATION: THE RISE OF THE CORPORATE LEGAL SECTOR AND ITS IMPACT ON LAWYERS AND SOCIETY* 640 (David B. Wilkins et al. eds., 2017) (noting that "India lost this case as well, but, in practice, was able to use the dispute settlement system to continue its requirements for a number of years to help develop local manufacturing know-how and enhance competitiveness").

⁸⁰ UN DEVELOPMENT PROGRAM, *HUMAN DEVELOPMENT REPORT 2005*, INTERNATIONAL COOPERATION AT A CROSSROADS: AID, TRADE, AND SECURITY IN AN UNEQUAL WORLD 134 (2005) (citing John Sutton, *The Auto-Component Supply Chain in China and India: A Benchmarking Study*, LONDON SCH. OF ECON. AND POL. SCI (2004), <http://sticerd.lse.ac.uk/dps/ei/ei34.pdf>; Meenu Tewari, *Engaging the New Global Interlocutors: Foreign Direct Investment and the Re-Shaping of local productive Capabilities in Tamil Nadu's Automotive Supply Sector*, UNIV. OF N.C., CHAPEL HILL (2003), <http://www.ids.ac.uk/globalvaluechains/publications/AutoLorraine2003-FINAL.pdf>) [hereinafter "HUMAN DEVELOPMENT REPORT 2005"].

⁸¹ Gregory Shaffer, James Nedumpara, and Aseema Sinha, *State Transformation and the Role of Lawyers: The WTO, India, and Transnational Ordering*, 49 *LAW & SOC'Y REV.* 595, 607-615 (2015).

⁸² Rajeev Kher, *India's Trade Disputes: Implications for Public Policy*, in *WTO DISPUTE SETTLEMENT AT TWENTY: INSIDER'S REFLECTIONS ON INDIA'S PARTICIPATION* (A. Das, and J.J. Nedumpara eds., 2016) (discussing India's recent success in WTO dispute resolution challenging U.S. and EU trade policies).

⁸³ Request for Consultations by India, *EU and a Member State-Seizure of Generic Drugs in Transit*, WTO Doc. WT/DS408/1; Kher, *supra* note 82, at 28-29 (discussing *EU-Generic Drugs* dispute).

the definition of a “public body” and ruling that India’s NMDC did not meet this definition.⁸⁴

However, as the next section illustrates, while this enhanced legal capacity has enabled India to better advance its own development interests and goals at the WTO in certain disputes, India still faces key constraints on policy space in the context of WTO challenges to Indian industrial policies in which India is a respondent. Here, I argue that policy space is also a product of key aspects of domestic policy regimes, including the specific policy goals of policy regimes, the viability of WTO-compliant policy alternatives, the status of particular industrial sectors as compared to the global industry, and whether particular policy regimes are part of broader industrial policy transitions.

Over the past five years, the United States has challenged a number of India’s industrial policies as violative of WTO norms, including India’s LCRs in solar industrial policy, and its export subsidies in SEZs. In the context of solar industrial policy and SEZ policy, India is rapidly adapting and adopting new policy compliance and adaption strategies in response to WTO dispute resolution and ongoing negotiations. In the next sections, I compare India’s response to WTO dispute resolution in *India-Solar Cells* and *India-Export Related Measures*.

C. India-Solar Cells and Solar Industrial Policy

1. Policy Goals and Tradeoffs: India’s National Solar Mission

India’s path to expanding solar generation capacity and solar industrial manufacturing capacity began in the 2000s. The Congress Party government, led by Prime Minister Manmohan Singh, launched the Jawaharlal Nehru National Solar Mission in 2010. Since its inception, the National Solar Mission (NSM) has sought to advance two main policy goals: expanding India’s solar generation capacity and stimulating the development of a domestic solar industry in India.⁸⁵ The NSM set ambitious targets for solar generation capacity aiming for a generation capacity of 20,000 MW of solar power by 2022.⁸⁶ The NSM was designed to replicate India’s success in using financial and fiscal incentive programs to help stimulate and grow the wind energy sector in India in the 1990s.⁸⁷ The NSM consisted of several components: a long-term policy framework, large scale deployment goals, investment in aggressive research and

⁸⁴ Appellate Body Report, *United States-Countervailing Measures on Certain Hot-rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R (Dec. 8, 2014) (ruling that India’s NMDC was not a public body under the Subsidies and Countervailing Measures Agreement, and that U.S. Department of Commerce determination that NMDC was a public body violated SCM Agreement.)

⁸⁵ *Id.*, at 3.

⁸⁶ See *Jawaharlal Nehru National Solar Mission: Towards Building SOLAR INDIA*, MINISTRY OF NATURAL RESOURCES AND ENERGY, GOVERNMENT OF INDIA, <http://www.indiaenvironmentportal.org.in/files/mission-document-JNSM.pdf>, at 3.

⁸⁷ See Ashish Khanna & Luiz Barroso, *Promoting Renewable Energy through Auctions: The Case of India*, LIVEWIRE, WORLD BANK GROUP (2014).

development, and increasing domestic production of critical raw materials, components, and products to achieve grid tariff parity by 2022.⁸⁸

The NSM sought to deploy and expand solar energy generation through the introduction of feed-in tariffs that provided preferential or favorable pricing to solar power developers that enter into Power Purchase Agreements (PPAs) with the government.⁸⁹ A key policy component of the National Solar Mission's push to develop domestic solar manufacturing capacity was the inclusion of LCRs for solar power developers entering into PPAs with the government.⁹⁰ Under the NSM, these policies introduced feed-in tariffs providing preferential pricing for developers entering into PPAs.⁹¹

Since coming to power in 2014, Prime Minister Narendra Modi's BJP government has sought to dramatically expand the scope and goals of the National Solar Mission. In 2015, Modi's government dramatically increased the NSM's goals in announcing new policies aimed at the development of 100GW of solar energy generation capacity by 2022, a five-fold increase in the original goal set by the Congress government in 2010.⁹² The Central Government's national solar policies have been complemented by state solar policies. Gujarat was the first state to launch state level solar policies in 2009, and many other states have joined Gujarat in launching solar policies.⁹³ At present, eighteen states now have solar policies in place, and five states account for two-thirds of India's solar generation capacity: Gujarat, Tamil Nadu, Rajasthan, Andhra Pradesh, and Telangana.⁹⁴

India's Draft Solar Energy plan of 2016 further signaled the Modi government's desire to shift from fossil fuel to solar and renewable energy generation, announcing that no new coal plants would be built beyond those that were currently under construction.⁹⁵ A major component of India's push to expand solar is tied to the Modi BJP Government's broader "Make in India" and

⁸⁸ *Jawaharlal Nehru National Solar Mission: Towards Building SOLAR INDIA*, *supra* note 86. Under the NSM, the Ministry of New and Renewable Energy of India (MNRE) is the central ministry responsible for "all matters relating to renewable energy," and is charged with setting forth the guidelines and terms and conditions governing the three phases of the NSM.

⁸⁹ See Gireesh Shrimali et al., *Renewable Deployment in India: Financing Costs and Implications for Policy*, 62 ENERGY POL'Y, 28, 30 (2013) (discussing various aspects of renewable energy financing).

⁹⁰ Panel Report, *India-Certain Measures Relating to Solar Cells and Solar Modules*, WTO Doc. WT/DS456/R, ¶¶ 7.7-7.14.

⁹¹ *Id.*, at ¶¶ 7.2, 7.7-7.9.

⁹² *Id.*

⁹³ Nishant Rohankar et al., *A Study of Existing Solar Power Policy Framework in India for Viability of the Solar Projects Perspective*, 56 RENEWABLE AND SUSTAINABLE ENERGY REV'S 510, 511 (2016) (providing an overview of India's current solar industrial policies).

⁹⁴ *Id.*; Saurabh, *These 5 States Host Two-Thirds Of India's Solar Power Capacity*, CLEAN TECHNICA (Jan. 9, 2017), <https://cleantechnica.com/2017/01/09/five-states-host-two-thirds-indias-solar-power-capacity>.

⁹⁵ Rachel Cleetus, *Renewable Energy Surges Globally with China and India in the Lead*, UNION OF CONCERNED SCIENTISTS BLOG, <http://blog.ucsusa.org/rachel-cleetus/renewable-energy-china-india> (citing *Draft National Electricity Plan*, CENTRAL ELECTRICAL AUTHORITY, MINISTRY OF POWER GOVERNMENT OF INDIA, http://www.cea.nic.in/reports/committee/nep/nep_dec.pdf).

“Invest India” strategies.⁹⁶ These policy initiatives are aimed at increasing and expanding India’s solar generation capacity and its domestic manufacturing through attracting foreign investment to India.⁹⁷

In terms of achieving its original targets for solar generation capacity, the National Solar Mission has been highly successful, and India has seen exponential increases in installed solar generation capacity.⁹⁸ By 2014, India had added over 2.5 GW of capacity and achieved the 20 GW target by January 2018, four years ahead of the original goal.⁹⁹ However, there has been less progress in developing India’s domestic solar manufacturing capacity. Despite India’s success in expanding its solar PV energy generation capacity, India’s domestic solar manufacturing industry is small, and in its nascent stages, and domestic solar industrial manufacturing capacity remains limited.¹⁰⁰ India’s domestic solar industry at present is limited primarily to the production of solar cells and modules, and there is a lack of domestic production of thin-film PV cells.¹⁰¹ India’s solar industry lags far behind other countries in manufacturing capacity and also lacks vertical integration.¹⁰² As a result, India still imports approximately 90 percent of solar cells primarily from China, Malaysia, and Taiwan.¹⁰³ As Fickling argues, India lags behind other nations in part because of India’s failure to adopt strong government subsidies and incentive programs implemented in other nations, including China.¹⁰⁴

2. The India-Solar Cells Dispute

India’s approach to adjusting and changing its policies in response to the WTO’s ruling in *India-Solar Cells* illustrates both the nature of international trade law’s constraining effects on development policy space and how nations seek to adapt and operate within these constraints. In this section, I analyze both India’s legal strategy in *India-Solar Cells*, and its policy response during the implementation phase following the DSB’s adoption of the report in October 2016.

⁹⁶ See Anil Gupta & Haiyan Wang, *Make in India: Lessons from China*, CNBC (June 21, 2016), <https://www.cnbc.com/2015/06/21/make-in-india-lessons-from-china.html>.

⁹⁷ Anindya Upadhyay, *Modi Said to Plan \$3.1 Billion Boost for India’s Solar Factories*, BLOOMBERG (Oct. 17, 2016).

⁹⁸ In 2016, alone, India added over 5GW of capacity and in 2017, India added over 9GW, leapfrogging Japan to become the third largest solar PV market globally in terms of installed solar generation capacity. *Bridge to India Report, India Solar Handbook* (May 2017) at 8, http://www.bridgetoindia.com/wp-content/uploads/2017/05/BRIDGE-TO-INDIA_India-Solar-Handbook_2017-1.pdf (discussing current trends in global and Indian solar policy).

⁹⁹ *Id.*

¹⁰⁰ See Meera Fickling, *Solar Cells and Modules in India*, in LOCAL CONTENT REQUIREMENTS: REPORT ON A GLOBAL PROBLEM, 93-108 (Gary Clyde Hufbauer et al. eds., 2013) (discussing use of local content requirements in renewable energy sector);

¹⁰¹ *Id.*

¹⁰² *Id.*, at 92-93.

¹⁰³ *Id.*

¹⁰⁴ See *id.*, at 92 n. 92 (discussing use of subsidies, local content requirements, and export incentives in the U.S., China, Brazil, and other nations); see Anshuman Sahoo & Gireesh Shrimali, *The Effectiveness of Domestic Content Criteria in India’s Solar Mission*, 62 ENERGY POL’Y, 1470, 1471 (2013) (arguing LCRs were not likely to promote competitiveness of India’s solar PV sector).

In *India-Solar Cells*, the United States filed a complaint in 2013 against India's imposition of certain DCRs on solar power developers who were selling electricity to the government as part of the National Solar Mission under Phases I and II of that mission.¹⁰⁵ In 2016, the WTO Appellate Body affirmed the Panel's finding that India's DCRs were inconsistent with national treatment requirements of the TRIMs and GATT 1994 agreements and that they were not covered under the government procurement derogation under Article III:8(a) of GATT 1994.¹⁰⁶ The Appellate Body's decision followed its earlier ruling in *Canada-Renewable Energy*, in which the WTO had previously held that Ontario's inclusion of DCRs also violated national treatment and non-discrimination norms.¹⁰⁷

Following the U.S. filing of the request for consultations in *India-Solar Cells*, India did not halt its domestic content requirements (DCRs) but rather extended and expanded these policy requirements as part of Phase II of the NSM.¹⁰⁸ Significantly, while the Commerce Ministry issued warnings about the policies' continuing noncompliance with international trade law norms, the Ministry of New and Renewable Energy (MNRE) remained undeterred in continuing to extend and expand LCRs in order to continue to protect and foster the nascent domestic solar manufacturing industry in India.¹⁰⁹ However, the Commerce Ministry continued to publicly defend India's use of DCRs signaling the need for policies aimed at promoting and developing India's domestic manufacturing capacity.¹¹⁰

India was able to buy some additional time for phasing out its DCRs through vigorously defending its policies at both the Panel and Appellate Body levels at the WTO. While the original request for consultations and complaint was filed by the U.S. in 2013, the Panel did not issue its final until well into 2015,

¹⁰⁵ See Request for Consultations, *India-Certain Measures Relating to Solar Cells and Solar Modules*, WTO Doc. WT/DS456 (2013); Panel Report, *India-Solar Cells*, *supra* note 90, paras 7.8-7.9, 7.14. See also Fickling, *supra* note 100. It is worth noting here that the National Solar Mission's shift to LCRs for even thin-film solar cells had significant implications for U.S. exports of thin-film cells to India, given that U.S. companies exported a significant percentage of thin film cells to India. See US SOLAR ENERGY TRADE ASSESSMENT 2011: TRADE FLOWS AND DOMESTIC CONTENT FOR SOLAR ENERGY-RELATED GOODS AND SERVICES IN THE UNITED STATES, GTM RESEARCH STUDY (2011) (discussing U.S.-based First Solar's exports of thin-film cells to India and presence in the market).

¹⁰⁶ Appellate Body Report, *India-Certain Measures Relating to Solar Cells and Solar Modules*, WTO Doc. WT/DS456/AB/R (Sep. 16, 2016).

¹⁰⁷ Recourse to Article 21.5 of the DSU by India, Request for Establishment of a Panel, *India-Certain Measures Relating to Solar Cells and Solar Modules*, WTO Doc. WT/DS456/20 (Jan. 19, 2018); Appellate Body Reports, *Canada-Certain Measures Affecting the Renewable Energy Generation Sector, Canada—Measures Relating to the Feed-in Tariff Program*, WTO Doc. WT/DS412/AB/R, WT/DS426/AB/R (adopted May 24, 2013).

¹⁰⁸ Amiti Sen, *Local Sourcing Mandatory in Phase II of Solar Projects*, THE HINDU BUS. LINE (Oct. 20, 2013), <https://www.thehindubusinessline.com/economy/local-sourcing-mandatory-in-phase-ii-of-solar-projects/article20678794.ece1>.

¹⁰⁹ *Id.* The MNRE's willingness to press ahead with DCRs following the filing of the U.S. request for consultations in *India-Solar Cells* can be contrasted from the Ministry of Commerce and Industry's proactive approach to immediately revise trade and export policies following the filing of the request for consultations in *India-Export Restrictions*. See *infra*, Section III.C.

¹¹⁰ Kate Sheppard, *U.S. Tries to Stop India's Solar Policy While Pushing Fight Against Climate Change*, HUFFINGTON POST (Mar. 28, 2014), https://www.huffpost.com/entry/india-us-solar-wto_n_5031345 (discussing Commerce Minister Anand Sharma's public statements defending DCR policies in India).

and the Appellate Body issued its final report in September 2016. In September 2016, India also immediately filed its own request for consultations in *US-Renewable Energy*, challenging U.S. state and local renewable energy policies incorporating DCRs. In June 2017, the WTO Panel found that these state and local renewable energy programs violated national treatment and non-discrimination norms under international trade law.¹¹¹

After the DSB adopted the Appellate Body report in October 2016, India announced it would implement the DSB's recommendations and rulings, but that it would require a reasonable period of time for implementation and compliance. On June 16, 2017, India and the U.S. announced that they had agreed to a reasonable period of time (RPT) for implementation of 14 months, and that this RPT would expire on December 14, 2017.¹¹² On December 14, 2017, India circulated a status report to the WTO DSB Chairperson and informed the WTO that after extensive stakeholder consultations, it had "ceased to impose any measures as found inconsistent in the DSB's findings and recommendations."¹¹³

However, the U.S. continued to claim that India had failed to comply with the Appellate Body's report and recommendations and to bring its policies into compliance with the WTO Appellate Body report within the agreed upon RPT compliance period. On December 19, 2017, the U.S. requested authorization from the DSB to impose retaliatory measures and suspend tariff concessions pursuant to Article 22.2 of the Dispute Settlement Understanding (DSU).¹¹⁴ On January 3, 2018, India objected to this request as invalid under the grounds that the U.S. had failed to initiate negotiations on compensation and failed to identify specific elements of noncompliance or the proposed level of suspension of concessions as required under Article 22.2 of the DSU.¹¹⁵ On January 12, 2018, the DSB referred the matter to arbitration under Article 22.6.

In January 23, 2018, India filed a request for the establishment of a compliance panel pursuant to Article 21.5 of the DSU. At the February 9 meeting of the DSB, the U.S. objected to India's request for a compliance panel, arguing that it believed that the request signaled that India would continue to apply DCRs

¹¹¹ See Panel Report, *US-Renewable Energy Sector*, *supra* note 6 (finding state and local renewable energy programs in California, Washington, Minnesota, Michigan, Connecticut, and Delaware violate Article III:4 of the GATT 1994 by providing preferential treatment for domestic products and less favorable treatment for foreign products). The WTO's decision could have significant implications for future state and federal programs, including "Green New Deal" proposals at the federal level. See Todd Tucker, *There's a Big New Headache for the Green New Deal*, WASH. POST (June 28, 2019), <https://www.washingtonpost.com/politics/2019/06/28/theres-big-new-headache-green-new-deal/> (discussing implications of WTO Panel Report in *US-Renewable Energy for Green New Deal proposals*).

¹¹² Agreement Under Article 21.3(b) of the DSU, *India-Certain Measures Related to Solar Cells and Solar Modules*, WTO Doc. WT/DS456/16 (June 16, 2017).

¹¹³ Status Report Regarding Implementation of the DSB Recommendations and Rulings by India, *India-Certain Measures Relating to Solar Cells and Solar Modules*, WTO Doc. WT/DS456/17 (Dec. 14, 2017).

¹¹⁴ See *India—Certain Measures Relating to Solar Cells and Solar Modules*, WORLD TRADE ORG. https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds456_e.htm (last visited Mar. 2, 2020).

¹¹⁵ *Id.*

in PPAs that India had entered into prior to December 2016.¹¹⁶ In addition, the U.S. reserved its rights to seek DSB authorization to engage in countermeasures while continuing to work with India toward a bilateral resolution. Finally, after India reiterated its request for a compliance panel, the DSB agreed to establish a compliance panel at its February 28, 2018 meeting.¹¹⁷

As noted in its request for a compliance panel, India acknowledged that it continued to hold auctions for solar projects with DCRs during the pendency of the WTO proceedings and litigation.¹¹⁸ India acknowledged that during the pendency of the Panel and Appellate Body hearings, the MNRE continued to issue guidelines for new projects with DCRs, issuing guidelines and request for selection documents for the selection of: 3000 MW of solar projects under Phase II, Batch II in March 2015; 2000 MW of solar projects under Phase II, Batch III in August 2015; and over 5000 MW of solar projects under Phase II, Batch IV in March 2016.¹¹⁹ Finally, India noted that seven new PPAs totaling 525 MW capacity were entered into between March and December 2016, and that after December 2016, India did not enter into any PPAs requiring DCRs that had been ruled to be inconsistent with international trade law by the DSB's recommendations and rulings.¹²⁰ Since the filing of the U.S. challenge in *India-Solar Cells*, through the WTO DSB's adoption of the Appellate Body report in 2016, India has seen a significant reduction in DCR tenders.

As part of Phase II, Batch 1 (2013-2014), the Solar Energy Corporation of India tendered 750 MW, of which only half (375 MW) had DCR tenders.¹²¹ Under Phase II, Batch 2, DCR projects accounted for only 400 MW out of 3,000 MW tendered; under Phase II, Batch 3, DCR projects accounted for only 200 MW out of 2,510 MW tendered; and under Phase II, Batch 4, DCR projects accounted for only 25 MW out of 225 MW tendered.¹²² Finally, under Phase II, Batch 5, out of the 1,037.26 MW of solar tendered under the DCR category, only 696 MW were auctioned, and the NTPC was able to auction only 510 MW out of 760 MW tendered under the DCR category.¹²³

3. India's Policy Response

In ruling that LCRs violate international trade law norms, the WTO took away a central aspect of India's solar industrial development strategy. Although LCRs are generally disfavored because of their trade-distorting effects, LCRs

¹¹⁶ *WTO Members Consider India's Request for Compliance Panel in Dispute over Solar Cells*, WORLD TRADE ORG. (Feb. 9, 2018), https://www.wto.org/english/news_e/news18_e/dsb_09feb18_e.htm (discussing DSB's consideration of India's request for compliance panel at February 9 meeting).

¹¹⁷ *Panel Established to Determine India's Compliance with Solar Power Ruling*, WORLD TRADE ORG. (Feb. 28, 2018), https://www.wto.org/english/news_e/news18_e/dsb_28feb18_e.htm.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Raj Prabhu, *Mercom Exclusive: Domestic Content Requirement Tenders Are All but Disappearing*, MERCOM INDIA (Apr. 25, 2017), <https://mercomindia.com/mercom-exclusive-domestic-content-requirement-tenders-disappearing/>.

¹²³ *Id.*

can help stimulate growth in domestic manufacturing capacity by attracting foreign investment, as illustrated by Ontario's successful use of LCRs in its green industrial policies, which were challenged in *Canada-Renewable Energy*, and by India's use of LCRs for auto components, which was challenged in *India-Autos*.¹²⁴ India's domestic solar manufacturing capacity remains limited, and India still heavily relies on imported solar cells and modules for domestic projects.¹²⁵

The WTO's decision in *India-Solar Cells* has significantly affected the policy space for solar industrial policies in India, as illustrated by the significant shift in approach in new policies and programs. As a result of the WTO decision, India's MNRE was forced to cancel earlier projects, including a 250 MW tender that had been awarded by the NTPC to Azure Power under the DCR category in October 2017, one of the largest DCR projects awarded since the inception of the NSM.¹²⁶ In addition, the pace of India's addition of new solar capacity has slowed considerably, and India's domestic solar industry is still struggling to compete with foreign solar imports.¹²⁷

Since the Appellate Body's ruling, India has focused on implementing several WTO-compliant policy alternatives that illustrate how policy viability, political will, and complementary or conflicting goals, the nature of the industrial sector, and the existence of broader policy transitions impact policy space. India's approach to adopting policy alternatives reflects the importance of the availability and viability of WTO-compliant policy alternatives that are covered under the government procurement derogation to the rules prohibiting LCRs and the more flexible rules of the SCM Agreement's subsidies regime. However, the nature and state of India's solar manufacturing industry, and the lack of a shift to a new national industrial greatly affected the success of India's policy response and adaptation strategy in *India-Solar Cells*.

First, India has sought to continue using DCRs by expanding its government procurement programs for solar energy, through the expansion of the Central Public Sector Undertaking (CPSU) Scheme and other government programs. In December 2017, the Indian government announced that it was considering expanding the CPSU scheme from the existing 1 GW goal, to an

¹²⁴ See HUMAN DEVELOPMENT REPORT 2005, *supra* 80, at 134 (citing John Sutton, "The Auto-Component Supply Chain in China and India: A Benchmarking Study"); ENVIRONMENTAL DEFENCE, GETTING FIT, HOW ONTARIO BECAME A GREEN ENERGY LEADER AND WHY IT NEEDS TO STAY THE COURSE (2016).

¹²⁵ *India's Import Dependence for Solar Equipment over 90 Per Cent in Last 3 Fiscal: Government*, ECON. TIMES (July 19, 2018), <https://economictimes.indiatimes.com/industry/energy/power/indias-import-dependence-for-solar-equipment-over-90-per-cent-in-last-3-fiscal-government/articleshow/65055838.cms>.

¹²⁶ Kaavya Chandrasekaran, *NTPC Forced to Cancel 250 MW October 2017 Solar Auction*, ECON. TIMES (Jan. 10, 2018), <https://economictimes.indiatimes.com/industry/energy/power/ntpc-forced-to-cancel-250-mw-october-2017-solar-auction/articleshow/62422698.cms>.

¹²⁷ The Indian Parliament's Standing Committee on Energy recently criticized the government for its failure to achieve its yearly targets under the National Solar Mission by about 40 percent, by only achieving 6166.15 MW out of the target of 10,000 MW of grid-connected solar power, with a utilization of only 951.93 crore. The committee also noted the NSM's rooftop solar targets, with only 953 MW capacity installed out of the 40 GW target set for 2022.

additional 12 GW goal, but there have been significant delays, and as of January 2019, the government had still failed to announce that it is implementing this scheme.¹²⁸ However, in recent months, the government has signaled greater support for expanded investment in government procurement policies for solar, and in January 2019, the Indian Railways announced plans to tender a 4 GW solar project with domestic requirements.¹²⁹ On February 5, 2019, the government announced that the Cabinet Committee on Economic Affairs (CCEA) chaired by Prime Minister Modi had finally approved the MNRE's 12 GW CPSU scheme providing for the use of local content and allocated Rs. 8,580 crore (approximately 1.2 billion USD) to these projects to be built over a four-year time frame.¹³⁰

However, industry analysts have questioned whether the CPSU scheme would be fully compliant with *India-Solar Cells*, given that many of these CPSUs will not be able to consume all of the energy generated by solar installations using local content.¹³¹ For example, requiring the use of domestically manufactured solar panels for use by the National Thermal Power Corporation to generate auxiliary power to run coal plants may run afoul of *India-Solar Cells* since the electricity that would be generated from coal plants is sold to the public and not entirely consumed by the government.¹³²

Second, India has been attempting to provide subsidies for domestic solar manufacturers. This includes using the existing Modified Special Incentive Package Scheme (M-SIPS), a capital subsidy program of the Ministry of Electronics and Information Technology, which provides for capital subsidies of 20 percent for investments in SEZs and 25 percent in non-SEZs.¹³³ Although the M-SIPS program could provide billions in subsidies, it has two key limitations. First, because of a lack of resources, there have been significant delays in processing applications for these subsidies. Second, the program only provides subsidies retrospectively through reimbursement of expenditures after the completion of the manufacturing of facilities. As a result, participation in these programs has been at relatively low levels, and the solar industry has sought

¹²⁸ Kuwar Singh, *2018 Showed Why Import Duties Can't Save India's Solar-Panel Makers*, QUARTZ INDIA (Dec. 31, 2018), <https://qz.com/india/1511463/safeguard-duties-didnt-help-indias-solar-sector-in-2018/>.

¹²⁹ *Indian Railways Plans to Tender 4 GW Solar Project*, PV MAG. (Jan. 17, 2019), <https://www.pv-magazine.com/2019/01/17/indian-railways-plans-to-tender-4-gw-solar-project>.

¹³⁰ Press Info. Bureau, *Ministry of New and Renewable Energy, CCEA Approves Proposal for Setting up 12,000 MW Grid-Connected Solar Photovoltaic (PV) Power Projects*, GOV'T INDIA MINISTRY NEW & RENEWABLE ENERGY (Feb. 5, 2019), <http://pib.nic.in/newsite/erelcontent.aspx?relid=188139>.

¹³¹ See Kuwar Singh, *Why India's Latest Push for Solar Panel Manufacturing May Not Be Strong Enough*, QUARTZ INDIA (Feb. 10, 2019), <https://qz.com/india/1546930/why-indias-latest-push-for-solar-panel-manufacturing-may-not-be-strong-enough>.

¹³² *Id.*

¹³³ *National Solar Mission: An Appraisal*, presented to Standing Committee on Energy (2016-2017), 16th Lok Sabha, Twenty-Eight Report, GOV'T INDIA MINISTRY NEW & RENEWABLE ENERGY (July 2017); Plamena Tisheva, *India Explores Options After US Wins Dispute*, RENEWABLES NOW (Sept. 19, 2016), <https://renewablesnow.com/news/india-explores-options-after-us-wins-wto-solar-dispute-540125/>.

upfront subsidies for its projects.¹³⁴ Following the Appellate Body's report in 2016, the MNRE proposed a wide-ranging set of subsidies and incentives worth Rs. 20,000 crore (approximately 3 billion USD) to support the domestic solar industry and allow it to survive and compete with the influx of cheaper imports – especially Chinese solar imports – which rose 38 percent between 2016 and 2017.¹³⁵ The Finance Ministry repeatedly rejected MNRE's proposed subsidies in June 2017, and also failed to include these subsidies in the 2018 and 2019 budgets.¹³⁶

However, in the lead up to the 2019 Lok Sabha elections, the Modi Government signaled a greater willingness to push for solar subsidies programs, demonstrating the importance of political will for WTO-compliant policy alternatives. In February 2019, the Modi Government announced a new massive subsidy program worth Rs. 46,000 crore (6.48 billion USD) for both rooftop and farmland solar programs.¹³⁷ First, the new program allocates Rs. 11,814 crore (1.6 billion in USD) to India's rooftop solar program to provide subsidies to group housing societies and resident welfare associations for the installation of rooftop solar.¹³⁸ The program has a goal of installing 40 GW of rooftop solar by 2022, which is 40 percent of India's 100 GW solar target.¹³⁹ Second, the new policy allocates Rs. 34,422 crore (approximately 4.9 billion USD dollars) to the Kisan Urja Suraksha Evam Utthan Mahaabhiyan (KUSUM) rural solar scheme.¹⁴⁰ The goal of KUSUM is to install 10 GW of decentralized ground-mounted solar installations, grid-connected power plants and 1.75 million solar-powered agriculture water pumps.¹⁴¹ Based on some estimates, the KUSUM program may be able to surpass the 10 GW capacity goal significantly.¹⁴² In addition, as part of reaching its overall goal of 100 GW by 2022, the Indian government is now implementing policies that build utility scale installations aimed at generating 60 GW of energy.¹⁴³

¹³⁴ Shreya Jai, *Solar Manufacturing Schemes Face Hurdles over Subsidy, WTO Rules*, BUSINESS STANDARD (May 3, 2018), https://www.business-standard.com/article/economy-policy/india-s-two-solar-manufacturing-policies-in-knots-118050301130_1.html.

¹³⁵ Kaavya Chandrasekaran, *Finance Ministry Rejects Rs 20,000-Crore Plan for Local Solar Equipment Firms*, ECON. TIMES (June 23, 2017), <https://economictimes.indiatimes.com/industry/energy/power/finance-ministry-rejects-rs-20000-crore-plan-for-local-solar-equipment-firms/articleshow/59276262.cms?from=mdr>.

¹³⁶ *Id.*; Saamy Prateek, *Budget 2018-2019: A Disappointing Budget for Solar and Renewable Energy Sector*, MERCOM INDIA (Feb. 1, 2018), <https://mercomindia.com/budget-2018-19-india-renewable-sector/>; Saamy Prateek, *Budget 2019 Fails to Meet Renewable Industry's Expectations Again*, MERCOM INDIA (Feb. 1, 2019), <https://mercomindia.com/budget-2019-fails-to-meet-expectation-renewable-industry/>.

¹³⁷ Uma Gupta, *Indian Government Approves \$6.48bn for Rooftop and Farmland Solar*, PV MAG. (Feb. 20, 2019), <https://www.pv-magazine.com/2019/02/20/indian-government-approves-6-48bn-for-rooftop-and-farmland-solar/>.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Marian Willuhn, *India Solar Water Pump Scheme Could Add 150 GW, Report Says*, PV MAG. (Aug. 1, 2018), <https://www.pv-magazine-india.com/2018/08/01/india-solar-water-pump-scheme-could-add-150-gw-report-says/>.

¹⁴³ *Id.*

Third, India has attempted to protect India's domestic solar manufacturing industry through the imposition of safeguards and other duties on solar imports. However, this strategy has highlighted the conflicting goals between WTO-compliant policy alternatives and the original goals of the NSM. In addition, these policies also highlight the importance of the nature of India's incipient solar manufacturing sector vis-à-vis other nations, and its reliance on foreign nations for solar cells and modules. In December 2017, the Indian Solar Manufacturing Association (ISMA) filed an application with the Directorate General of Trade Remedies (part of the Ministry of Commerce and Industry) seeking imposition of 95 percent safeguards on solar imports from China and Malaysia.¹⁴⁴ In July 2018, following findings that increased solar imports from East Asia had caused or threaten to cause serious injury to domestic solar producers, the Directorate General of Trade Remedies (DGTR) recommended imposition of safeguards of 25 percent on solar imports, and shortly thereafter the Ministry of Finance imposed a safeguard duty of 25 percent on solar imports from both China and Malaysia that would gradually decrease to 15 percent over the next two years.¹⁴⁵ The imposition of these safeguards, along with other factors, has led to a slowdown in the NSM's achievement of its targets for solar generation capacity, because of India's heavy reliance on imported solar cells and modules. Additionally, new solar imports from other countries, including Vietnam and Thailand, have also posed challenges for the domestic solar industry in India.¹⁴⁶

Fourth, in response to the WTO Appellate Body's decision in *India-Solar Cells*, the Indian government has sought to stimulate domestic solar manufacturing capacity by linking auctions for solar power PPAs to new domestic manufacturing requirements, instead of DCRs. Beginning in January 2018, the MNRE, through its subdivision Solar Energy Corporation of India (SECI), announced a new policy scheme wherein the government would issue tenders for solar power with a local production requirement for successful bidders, with the goal of increasing renewable energy production from 70 GW to 225 GW in four years.¹⁴⁷ Under this new scheme, solar power developers that submit winning bids for auctions would be required to invest and develop manufacturing facilities with the capacity to manufacture half of the overall

¹⁴⁴ Ian Clover & Becky Beetz, *India Mulls Solar Cell Import Duty After Petition by Five Local Manufacturers*, PV MAG. (Dec. 27, 2017), <https://www.pv-magazine-india.com/2017/12/27/india-mulls-solar-cell-import-duty-after-petition-by-five-local-manufacturers/>; *Impose 95% Safeguard Duty on Solar Cells Import: ISMA*, DECCAN HERALD (June 26, 2018), <https://www.deccanherald.com/business/impose-95-safeguard-duty-solar-677269.html>.

¹⁴⁵ Preeti Verma Lal, *India Imposes 25% Safeguard Duty on Solar Imports*, PV MAG. (July 31, 2018), <https://www.pv-magazine.com/2018/07/31/india-imposes-25-safeguard-duty-on-solar-imports/>. The DGTR also cited several reasons supporting the imposition of safeguards, including that the WTO's decision in *India-Solar Cells* was an "unforeseen development" and that the imposition of anti-dumping duties by the US and EU against Chinese imports had led to Chinese companies significantly increasing exports to India.

¹⁴⁶ Anindhya Upadhyay, *India Solar Duty Fails Domestic Producers as Demand Dwindles*, BLOOMBERG (Jan. 29, 2019), <https://www.bloomberg.com/news/articles/2019-01-29/india-solar-duty-fails-domestic-producers-as-demand-languishes>.

¹⁴⁷ Sidhartha, *Government Set to Seek 20 Gigawatt Solar Bids*, Times India (Apr. 30, 2018), <https://timesofindia.indiatimes.com/business/india-business/government-set-to-seek-20-gigawatt-solar-bids/articleshow/63966168.cms>.

equipment requirement.¹⁴⁸ In May 2018, SECI issued tenders and conducted auctions for a total of 10 GW aggregate capacity for solar power PPAs linked to manufacturing requirements amounting to 5 GW aggregate capacity, though SECI later lowered the manufacturing target in September 2018.¹⁴⁹

However, these alternative policies have proven to be unsuccessful, highlighting the conflict between the goals of expanding energy generation capacity and expanding domestic solar manufacturing capacity. Since June 2018, the SECI auctions have suffered numerous setbacks in the form of deferrals and cancellations of bids and subsequent extensions of the deadlines for submitting bids. In August 2018 alone, SECI cancelled allotment of 2,400 MW out of 3,000 MW that had been auctioned in July, cancelling all projects except a 600 MW PPA with Acme Solar, the lowest bidder in the auction (Rs. 2.44 per unit).¹⁵⁰ Although India has attempted to pursue alternate WTO-compliant measures to support its domestic industry, the WTO's decision in *India-Solar Cells* has significantly constrained policy space and helped contribute to a short-term decline in solar industrial installations. In addition, because India had not yet undertaken a major shift in its broader industrial policies at the time of the WTO's Appellate Body ruling in *India-Solar Cells*, much of its policy response was ad hoc and reactive. By taking away LCRs as one policy avenue, the WTO forced India to pursue alternative policies aimed at building domestic solar manufacturing capacity, but these approaches have been ineffective and have arguably hindered progress toward the achievement of India's ambitious solar generation capacity goals.

D. India-Export Related Measures and India's Special Economic Zones Policy

In its request for consultations in *India-Export Related Measures*, the U.S. brought a challenge to six key Indian programs, including India's foreign trade policy, SEZ policy, the Merchandise Export from India Scheme (MEIS), the Export Promotion Capital Goods Scheme (EPCGS), the Duty Free Imports for Exports Program, and the Export Oriented Units Scheme and certain sector specific schemes, including the Electronic Hardware Technology Parks Scheme. These policies include programs supporting India's steel, pharmaceuticals, chemicals, and textiles industries. In this section, I analyze India's policy response to the U.S. challenge in *India-Export Related Measures* by focusing

¹⁴⁸ *Id.*

¹⁴⁹ Originally, the scheme called for 5MW of manufacturing capacity, but this was later reduced to 3 MW. See Preeti Verma Lal, India's SECI Defers 10 GW Solar Auction Again, PV MAG. (Sept. 28, 2018), <https://www.pv-magazine.com/2018/09/28/indias-seci-defers-10-gw-solar-auction-again/> (discussing SECI decision to tender bids for 10GW of solar); Preeti Verma Lal, *India's SECI Reduces Manufacturing Tender Size from 5 MW to 3 MW*, PV MAG. (Sept. 3, 2018), <https://www.pv-magazine-india.com/2018/09/03/seci-reduces-manufacturing-tender-size-from-5-gw-to-3-gw/> (discussing SECI decision to reduce solar manufacturing tender size from 5 GW to 3 GW, and reduce minimum bid capacity from 1 GW to 600 MW).

¹⁵⁰ *SECI Okays Lowest Solar Auction Bid, Cancels Rest*, ECON. TIMES (Aug. 3, 2018), <https://m.economictimes.com/industry/energy/power/except-for-acme-solar-energy-corporation-cancels-all-projects-allotted-in-july-13-auction/articleshow/65249746.cms>.

primarily on India's SEZ policies and its current approach to policy implementation and adaptation.

The Indian government launched its SEZ policy in April 2000.¹⁵¹ The primary goals of the original SEZ policy was to promote exports and foreign investment in India by creating duty-free free trade zones supported by strong infrastructure, economic incentives, and minimal regulations.¹⁵² In 2005, India's parliament enacted the Special Economic Zones Act and gave notice of the SEZ rules in 2006, which provided for further streamlining of regulatory procedures and single window clearance for matters involving central and state government governments.¹⁵³ The primary goals of the SEZ Act included generation of additional economic activity promotion of exports of goods and services, promotion of investment from domestic and foreign sources (FDI), creation of employment opportunities, and development of infrastructure facilities. Key aspects of the SEZ Act and rules included eliminating licenses required for importing, allowing for manufacturing and service activities in the zones, direct and indirect tax benefits for SEZ developers, and the goal of achieving positive net foreign exchange (NFE) for a period of five years from the start of production.¹⁵⁴

Among the most significant export-contingent incentives provided to exporting companies under the SEZ policy framework are duty-free imports and duty-free domestic procurement of inputs and capital goods for development, operation and maintenance of EZ units, 100 percent income tax exemption on export income for SEZ units under the Income Tax Act for the first 5 years, a 50 percent exemption thereafter, exemptions from Central and State sales taxes, and single window clearance for Central and State Level regulatory approvals.¹⁵⁵ Overall total subsidies to SEZs as of 2018 amounted to Rs. 3,657 crore (approximately 517 million USD).

As of December 2018, there are seven Central Government SEZs and eleven State or Private Sector SEZs, while government approvals have been given to 420 proposals for SEZs in the country. Out of the 355 SEZs that have been notified, 230 SEZs are operational.¹⁵⁶ Significantly, most of the SEZs that have been established under the SEZ Act and rules have been driven by private investment. As of September 2018, the government reported that total exports from SEZs were equivalent to a value of Rs. 333,000 crore (approximately 48 billion USD) and Rs. 492,312 crore (approximately 71 billion USD) of private investment had been made, while over 19 lakh (1.9 million) jobs had been

¹⁵¹ *Introduction, Special Economic Zones in India*, GOV'T INDIA MINISTRY COM. & INDUSTRY, <http://sezindia.nic.in/cms/introduction.php>.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Exports from SEZs at Rs. 3.33 Lakh Crore; Employment Generation at 19.96 Lakh Persons*, GOV'T INDIA MINISTRY COM. & INDUSTRY (Dec. 17, 2018), <http://pib.nic.in/newsite/PrintRelease.aspx?relid=186474>.

¹⁵⁵ *Facilities and Incentives, Special Economic Zones in India*, GOV'T INDIA MINISTRY COM. & INDUSTRY, <http://sezindia.nic.in/cms/facilities-and-incentives.php> (last modified Nov. 27, 2018).

¹⁵⁶ *Id.*

created in SEZs.¹⁵⁷ The top five sectors in India's SEZs in 2018 were IT/ITES/electronic hardware/semiconductor, multi-product, engineering, pharmaceuticals/chemicals, and textiles/apparel/wool.¹⁵⁸

1. The U.S. Legal Challenge and the WTO: India-Export Related Measures

In its request for consultations in *India-Export Related Measures*, the U.S. argued that the SEZ policies, along with the Export Oriented Units Scheme, MEIS, Export Promotion Capital Goods Scheme (EPCGS), and Duty-Free Imports for Exporters programs all violate Articles 3.1(a) and 3.2 of the Subsidies and Countervailing Measures Agreement's (SCM Agreement) prohibitions on export subsidies, because they provide for subsidies contingent upon export performance.¹⁵⁹ In particular, the U.S. argued that the SEZ policies' direct and indirect tax incentives and other duty-free incentives violate the SCM Agreement. Article 3 of the SCM Agreement prohibits the use of subsidies that are contingent upon export performance (including subsidies listed in the illustrative list of Annex I of the SCM Agreement). In addition, the SCM Agreement also provides that "actionable" subsidies can be challenged through WTO dispute resolution or countervailing measures if these subsidies cause injury to the domestic industry of other WTO member nations.¹⁶⁰ Annex I of the SCM Agreement also specifically provides that direct or indirect exemptions or remissions of taxes and duties in excess of those used for products for domestic consumption are also prohibited.¹⁶¹ In its request for consultations, the U.S. argued that India is no longer able to avail itself of the exemption from the SCM Agreement's prohibition on export subsidies for developing nations, because India "graduated" from the Annexure VIII list of exempted nations when its per capita GNP reached 1,000 USD per year for three consecutive years.

India raised several arguments in defending these policies at the WTO. India argued that it should be allowed a phase-out period of eight years from the point India crossed the graduation threshold, an argument India originally raised in a note submitted to the WTO in 2011.¹⁶² India has based this argument on the fact that developing nations that crossed the graduation threshold at the time the SCM Agreement went into effect in 1994 were provided an eight-year

¹⁵⁷ *Id.*

¹⁵⁸ *Annual Report 2017-2018*, ANNUAL REPORT (2017-2018), GOV'T INDIA MINISTRY COM. & INDUSTRY (2018), http://commerce.gov.in/writereaddata/uploadedfile/MOC_636626711232248483_Annual%20Report%200%202017-18%20English.pdf.

¹⁵⁹ Request for Consultations by the US, *India-Export Related Measures*, *supra* note 7.

¹⁶⁰ Agreement on Subsidies and Countervailing Measures, arts. 3.1, 3.2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14 [hereinafter SCM Agreement].

¹⁶¹ *Id.*, annex I (e), (g), (h) (Illustrative List of Export Subsidies).

¹⁶² *New Delhi to Seek 8 Years to Phase Out Export Subsidies at WTO*, THE HINDU BUSINESS LINE (Mar. 15, 2018), <https://www.thehindubusinessline.com/economy/policy/new-delhi-to-seek-8-years-to-phase-out-export-subsidies-at-wto/article23263660.ece>.

implementation period.¹⁶³ On October 31, 2019, the WTO Panel found that the challenged programs in *India-Export Related Measures* were prohibited export contingent subsidies and rejected India's claims that the challenged subsidies were excluded from the SCM Agreement's prohibition on export subsidies, because India had "graduated" from its original developing country status under the Special and Differential Treatment provision that it had originally fallen under (Article 27.2(a) and Annex VII(b)), and found that most of the subsidies programs challenged were prohibited export subsidies.¹⁶⁴

2. Policy Compliance and Adaptation

India's approach to responding to the U.S. challenge in *India-Export Related Measures* has been quite different from the strategy and response to the challenge in *India-Solar Cells*. India's approach to policy response and adaptation in *India-Export Related Measures* reflected greater policy viability, political will, and complementarity between the goals of policy alternatives, and the original goals of the SEZ regime. In addition, India's policy response also reflected the distinct nature of the industrial sectors in SEZs and the importance of India's broader shift to a new industrial policy.

While the government initially defended its programs and called for an eight-year phase-out period at the WTO, the government also proactively initiated consultations regarding changing its SEZ policies, along with its other export subsidies programs including the MEIS program and Export Capital Goods Promotion Schemes, to make them WTO compliant. The Indian government has been working with public-private partnerships in order to formulate a policy compliance and adaptation strategy well in advance of the Panel adjudication in the WTO dispute.¹⁶⁵

Shortly after the filing of the request for consultations in *India-Export Related Measures*, the SEZ Division of the Ministry of Commerce and Industry constituted a High-Level Committee consisting of numerous stakeholders to be chaired by Baba Kalyani, the chairman and Managing Director of Bharat Forge, one of India's leading auto parts manufacturing companies, to analyze and make recommendations regarding India's SEZ policies.¹⁶⁶ Other stakeholders on the

¹⁶³ *Id.* On October 31, 2019, the WTO panel rejected India's claims that the challenged subsidies were excluded from the SCM Agreement's prohibition on export subsidies because India had graduated from the Special and Differential Treatment provision that it had originally fallen under (Article 27.2(a) and Annex VII(b)), and found that most of the subsidies programs challenged were prohibited export subsidies. See Panel Report, *India-Export Related Measures*, *supra* note 7.

¹⁶⁴ *Id.*

¹⁶⁵ This approach is in line with the findings of Shaffer, Nedumpara, and Sinha regarding India's continued and ongoing development of enhanced trade capacity and use of public-private partnerships. See Shaffer, Nedumpara, and Sinha, *supra* note 53. It also can be compared to Shaffer, Sanchez, and Rosenberg's analysis of Brazil's development of public-private partnerships and information gathering to enhance its legal capacity. See Shaffer, Sanchez and Rosenberg, *supra* note 47.

¹⁶⁶ REVITALIZING SEZs: FROM ISLANDS OF EXPORTS TO CATALYSTS OF ECONOMIC AND EMPLOYMENT GROWTH, PROPOSED POLICY FRAMEWORK FOR EMPLOYMENT AND ECONOMIC ENCLAVES (3ES) IN INDIA, Report of the Group Constituted under Chairmanship of Shri Baba Kalyani (Nov. 2018) [hereinafter KALYANI REPORT].

committee included industry leader representatives from key industries within several SEZs, key officials from the SEZ division of the Ministry of Commerce and Industry, and high-ranking officials from state-level departments of industries and commerce.¹⁶⁷ The Ministry of Commerce and Industry also retained PricewaterhouseCoopers as a “knowledge partner” to work with the Kalyani Committee in developing and drafting its report. Part of the Kalyani Committee’s charge was to explore alternate policies that were compliant with the SCM Agreement’s rules on subsidies. The Kalyani Committee submitted its report to the Ministry of Commerce and Industry on November 19, 2018, and the report was released to the public for comment in mid-January 2019.

The report recommends a new SEZ policy framework aimed at expanding domestic manufacturing and increasing employment.¹⁶⁸ The Kalyani Committee found that SEZs had been successful in promoting export growth in the services sector, including Information Technology Enabling Services (ITES). The ITES sector consists of companies that provide outsourcing of processes through information technology (e.g., call centers) in areas including finance, health care, and telecommunication. However, the report found that SEZs were not successful in promoting export growth in the manufacturing sector, citing several factors, among them: uncertainty in government policies, including tax incentives; the lack of alignment between multiple regulatory stakeholders, including direct tax and indirect tax entities, exchange controls, state governments, and SEZ authorities; and procedural and infrastructure bottlenecks.

The report recommends renaming SEZs as “Employment Economic Enclaves” (EEEs) and shifting away from export-contingent policies that violate the SCM Agreement, to new policies and incentives that promote jobs and employment, expanding manufacturing capacity, and trade competitiveness. It proposes delinking incentives from exports and instead suggests alternative goals including: level of investment committed, job creation, inclusivity, value addition, technology differentiation, trade potential, and emphasizing priority industries.¹⁶⁹

The report recommends several major policy reforms. First, it recommends new and separate policies and rules for manufacturing and services SEZs. For the manufacturing sector, the report calls for “moving away from island of exports to more integrated hub for employment and economic activities

¹⁶⁷ Representatives on the Kalyani Committee included Ravindra Sannareddy, CEO of SriCity, the largest industrial park in South India (located near Chennai), K. Raheja Group, one of the largest real estate and SEZ developers in India, and Ashish Mathur, the CEO of Tata Steel SEZ.

¹⁶⁸ See generally, KALYANI REPORT, *supra* note 166; see Panel Report, *India-Export Related Measures*, *supra* note 7. The Kalyani Report critiques India’s SEZ policy for its failure to significantly increase India’s share of world exports as compared to China’s successful SEZ and export policies, which increased China’s share of world exports from 6.7 percent of world exports in 2005 to 12.7 percent in 2017). The report observes that while India’s SEZ policy has been somewhat effective in expanding India’s services industry and share of services exports, it has failed to significantly expand manufacturing exports.

¹⁶⁹ KALYANI REPORT, *supra* note 166, ¶ 1.2.1.

enabled by quality infrastructure and ease of doing business.”¹⁷⁰ Toward this end, the committee’s report proposes a series of incentives based on employment generation in the manufacturing sector instead of incentives tied to export targets. Since the current SEZ policy provides for a sunset clause for export-based incentives for manufacturing entities that expires in March 2020, the report recommends that manufacturing units will not receive tax benefits after that date and recommends the introduction of a new set of incentives tied to employment generation benchmarks that would be WTO compliant.¹⁷¹ The report also recommends new policies aimed at building a world-class infrastructure with access to ports, uninterrupted power supply, modern technology, skilled labor, and more flexible labor laws.¹⁷²

The report also calls for continuing existing policies and developing new policies in the services sector, given that particular services—including the IT and ITES sector—have been the major beneficiaries of India’s existing SEZ policies.¹⁷³ At the same time, because the SCM Agreement allows for export subsidies in the services sector (as opposed to the manufacturing of goods), the report suggests continuing the current SEZ policy framework’s incentives for services, including extending the sunset clause for the services sector, and broadening the definition of services and allowing multiple services to be bundled together.¹⁷⁴

In addition to supporting existing parts of the services sector where India has a competitive advantage, the report also calls for diversifying the sectoral focus to new “sunrise” services sectors through the Champion Services Sectors Initiative. These new policies would be aimed at expanding employment generation services in order to attract major global corporations to invest in EEEs.¹⁷⁵ Additionally, the report recommends: creating an online portal for new investments and activities in SEZs; relaxing various procedural requirements for SEZ developers related to operational and exit issues; introducing flexibility into leases for SEZ developers and tenants; eliminating export duties on goods supplied to developers for manufacturing of goods; and shifting to dispute resolution through arbitration and commercial courts. Finally, the report also proposes new incentives that focus on supporting micro-, small-, and medium-sized enterprises (MSMEs) through MSME production clusters, given that MSMEs are responsible for a significant percentage of job generation in India.¹⁷⁶

The Central Government is currently formulating policy alternatives to other policies challenged in *India-Export Related Measures*. Key cabinet ministries have engaged in consultations with private expert committees to formulate WTO-compliant alternatives to existing policies, demonstrating strong political will for these policy alternatives. The government is considering

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*, ¶ 4.3.2.

¹⁷⁴ *Id.*, ¶ 1.2.3.

¹⁷⁵ *Id.*, ¶ 4.3.2.

¹⁷⁶ *Id.*, ¶¶ 1.2-1.3, 4.4.11

replacing the Export Capital Goods Promotion Scheme, which allows exporters to import capital goods duty free, with a scheme that ties the duty-free import of capital goods incentives to employment generation requirements.¹⁷⁷ Additionally, the Textile Ministry's Cotton Textile Export Promotion Council (Texprocil) has engaged a private consulting firm and is consulting with an expert committee to formulate policy alternatives to the MEIS program, which will also include a shift to incentives based on employment generation.¹⁷⁸

The central government is currently finalizing a new SEZ policy framework based on the recommendations of the Kalyani Report in line with the New Industrial Policy, including a proposal to extend the sunset clause for tax incentives for SEZ operators.¹⁷⁹ Because of the distinct nature of the industries that India is seeking to bolster and promote in SEZs, and India's shift to a comprehensive new industrial policy that aligns with shifting away from failing policies to new WTO-compliant policy alternatives, the nature of the domestic industrial context in *India-Export Related Measures* has helped contribute to greater policy space.

Leading up to June 2019, the government rolled out key aspects of the New Industrial Policy, India's third industrial policy regime since independence.¹⁸⁰ The New Industrial Policy provides for a series of structural reforms aimed at promoting industrial growth and increasing exports and job creation in the manufacturing sector.¹⁸¹ Several key planks of the New Industrial Policy were introduced as part of the Central Government's July 2019 Budget, including proposals to significantly increase government investment in infrastructure; lift statutory limits on foreign investment in industries including aviation, media, and insurance; expand credit and loans to small- and medium-sized enterprises, and provide new incentives for emerging "sunrise" industries including the electric vehicles and electric batteries sector.¹⁸²

¹⁷⁷ Amiti Sen, *Government Mulls Duty-Free Import of Capital Goods to Skirt WTO*, THE HINDU BUSINESS LINE (Aug. 20, 2018), <https://www.thehindubusinessline.com/economy/macro-economy/govt-mulls-duty-free-import-of-capital-goods-to-skirt-wto/article24739154.ece>.

¹⁷⁸ Dilip Kumar Jha, *Textile Ministry to Replace Export Incentives with WTO-Compatible Schemes*, BUSINESS STANDARD (Dec. 4, 2018), https://www.business-standard.com/article/economy-policy/textile-ministry-to-replace-export-incentives-with-wto-compatible-schemes-118120400396_1.html.

¹⁷⁹ Deepshikha Sikarwar, *Talks on to Extend SEZ Sunset Clause*, THE ECONOMIC TIMES (Sep. 24, 2019), <https://economictimes.indiatimes.com/news/economy/policy/talks-on-to-extend-sez-sunset-clause/articleshow/71283821.cms>. Although the sunset clause expired on March 31, 2020, the Central Government recently provided a three-month extension until June 30, 2020 for SEZ units that applied for and received a Letter of Approval prior to March 31, and could not commence operations before March 31 because of the coronavirus pandemic. See Shilpa Phadnis, *NASSCOM Asks for IT SEZ Tax Holiday Extension*, THE TIMES OF INDIA (Apr. 8, 2020), <https://timesofindia.indiatimes.com/business/india-business/it-sezs-look-for-extension-of-tax-holiday/articleshow/75038810.cms>.

¹⁸⁰ *New Industrial Policy to be Announced Soon, President Ram Nath Kovind*, THE ECONOMIC TIMES (June 20, 2019), https://economictimes.indiatimes.com/policy/new-industrial-policy-to-be-announced-soon-president-ram-nath-kovind/articleshow/69874073.cms?from=mdr_

¹⁸¹ *Id.*

¹⁸² *Sitharaman's Budget a Blueprint for Creating USD 5 trillion economy by 2025*, BUSINESS TODAY (July 5, 2019), <https://www.businesstoday.in/top-story/sitharaman-5-trillion-economy-by-2025/story/361971.html>

In addition, the government has enacted several other policies targeted at SEZs. In June 2019, the government enacted a new amendment to the SEZ Act allowing trusts to operate in SEZs by amending the definition of a “person” in the Act to include trusts.¹⁸³ The amendment seeks to expand domestic and foreign investment in SEZs by allowing a wide range of entities, including public charitable trusts, private corporate trusts, business trusts including real estate investment trusts (REITs), infrastructure investment trusts (InvITs), and government-run port trusts to operate units in SEZs.¹⁸⁴ In September 2019, the Central Government also announced new policies aimed at stimulating economic growth in light of lagging export and economic growth indicators, including policies impacting SEZs. First, the Government announced a major corporate tax cut that would reduce corporate taxes to their lowest levels since India’s independence in 1947, reducing the revenue from corporate tax by approximately 20 billion USD. The new tax program reduces corporate tax rates from 30 percent to 22 percent, and reduces tax rates on new manufacturing companies from 25 percent to 15 percent.¹⁸⁵ Second, the government announced a set of WTO-compliant policies aimed at boosting exports.¹⁸⁶ The government introduced a new 7-billion-USD tax rebate policy, the Remission of Duties or Taxes on Export Products, to replace the existing MEIS.¹⁸⁷ The new policy would refund central and state duties and levies on exporters operating within SEZs. In addition, the government announced a new program to provide exporters with cheaper and easier credit and loans under the Export Credit Insurance Scheme.¹⁸⁸

IV. COMPARING POLICY REGIMES: *INDIA-SOLAR CELLS, INDIA-EXPORT RELATED MEASURES*

Previous scholarship advancing legal and institutional approaches to policy space have focused primarily on both legal flexibility and how nations utilize legal capacity to advance development policy goals through WTO dispute resolution. As noted in Part I, Santos argues that policy autonomy is a product of legal rule flexibility, legal capacity, and development strategy, and that nations such as Brazil have successfully used WTO dispute resolution both to seek extended time for challenged policies, and to push for rule changes and favorable rulings that allow for more flexibility for development policy goals.¹⁸⁹

¹⁸³ *Bill to Allow Trusts to Set Up SEZ Units in Lok Sabha*, THE ECONOMIC TIMES (June 25, 2019), <https://economictimes.indiatimes.com/news/economy/policy/bill-to-allow-trusts-set-up-sez-units-in-lok-sabha/articleshow/69935630.cms?from=mdr>.

¹⁸⁴ Prasanna Mohanty, *SEZ Amendment Bill 2019: A Boost to Economic Activities and Employment*, BUSINESS TODAY (July 3, 2019), <https://www.businesstoday.in/current/economy-politics/sez-amendment-bill-2019-sepecial-economic-zones-boost-economic-activities-employment/story/360856.html>.

¹⁸⁵ Rishi Iyengar, *India slashes business taxes in bid to boost growth*, CNN (Sept. 20, 2019), <https://www.cnn.com/2019/09/20/economy/india-corporate-tax-cut-sitharaman/index.html>.

¹⁸⁶ *Govt unveils 3rd eco booster, focuses on housing, exports*, TIMES OF INDIA (Sept. 15, 2019), <https://timesofindia.indiatimes.com/business/india-business/government-unveils-3rd-eco-booster-focuses-on-housing-exports/articleshow/71131645.cms>.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ See Santos, *supra* note 16; see Shaffer, Sanchez, and Rosenberg, *supra* note 47.

Compliance scholars, including Dicaprio and Gallagher, have focused on legal strategies for seeking additional compliance time, as well as actual policy compliance.¹⁹⁰ In this section, I analyze how the domestic policy context impacts policy space by tracing the relationship between legal flexibility and domestic policy regimes; comparing legal and compliance strategies in *India-Solar Cells* and *India-Export Related Measures*; and comparing how different aspects of India's solar and SEZ policy regimes impact policy implementation and adaptation to fully assess policy space.

A. *Legal Flexibility and Domestic Policy Regimes*

From the perspective of legal flexibility, there is a difference between international trade law governing LCRs and subsidies. With respect to LCRs, international trade law rules are inflexible and these requirements have been held to violate the rules governing the national treatment obligation under Article III:4 of GATT 1994 together with the TRIMs Agreement's prohibition on the use of DCRs in WTO Disputes including *Canada-Renewable Energy* and *India-Solar Cells*.¹⁹¹ Article III:4 of GATT 1994 sets forth the national treatment obligation or principle, which requires that products of member nations "shall be accorded treatment no less favourable than that accorded to like products of national origin," and the national treatment obligation has been held to apply to internal taxes as well as domestic regulatory measures.¹⁹² Articles 2 and 3 of the TRIMs Agreement build on and incorporates Article III:4's national treatment obligation, GATT's quantitative restrictions ban, and the various exceptions contained in GATT, applying them to trade related investment measures.¹⁹³ In addition, the TRIMs Agreement also provides a list of illustrative measures that are illegal in the Annex to the Agreement.¹⁹⁴

International trade law does allow for derogations and exceptions to these requirements. Article III:8(a) provides for a government procurement derogation from Article II:4's national treatment obligation and applies to "laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view

¹⁹⁰ See DiCaprio and Gallagher, *supra* note 22; see Santos, *supra* note 16.

¹⁹¹ See generally *TRIMs Agreement – Article 2/Illustrative List (Jurisprudence)*, WTO (Dec. 2019), https://www.wto.org/english/res_e/publications_e/ai17_e/trims_art2_jur.pdf. The two key provisions governing nondiscrimination under GATT are Article 1, which sets forth most-favored-nation (MFN) principle, and Article 3, which sets forth the national treatment obligation. The MFN principle requires that member states extend market concessions made regarding products in one nation to "like products" of other member nations. See *Understanding the WTO: Principles of the Trading System*, WTO, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (last visited Apr. 26, 2020).

¹⁹² General Agreement on Tariffs and Trade 1994, art. 3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT]; see Timothy Meyer, *The World Trade Organization's Role in Global Energy Governance*, in PALGRAVE HANDBOOK ON THE INTERNATIONAL POLITICAL ECONOMY OF ENERGY (Thijs Van de Graaf et al. eds., 2016).

¹⁹³ Agreement on Trade-Related Investment Measures, arts. 2,3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 186 [hereinafter TRIMs Agreement]; see also *Trade and Investment: Technical Information, Agreement on Trade Related Investment Measures*, WTO, https://www.wto.org/english/tratop_e/invest_e/invest_info_e.htm (last visited Apr. 26, 2020).

¹⁹⁴ TRIMs Agreement, *supra* note 193, annex.

to commercial resale or with a view to use in the production of goods for commercial sale.”¹⁹⁵ In addition, Article XX of the GATT provides for exceptions to the MFN and national treatment obligation principles for environmental, health, and other state interests and goals.¹⁹⁶

The relatively strict nature of international trade law rules on LCRs is illustrated by the Panel and Appellate Body rulings in *India-Solar Cells*. The Panel ruled for the U.S. and found that the LCRs in the NSM directly violated the nondiscrimination obligations under GATT Articles III:4 and Article 2.1 of the TRIMs agreement. Following the WTO AB’s earlier report in *Canada-Renewable Energy*, the Panel found that the NSM’s LCR measures were not covered under the government procurement derogation of Article III:8(a), applying the competitive relationship standard applied by the Appellate Body in *Canada-Renewable Energy*.¹⁹⁷ After finding that India’s LCR measures were not covered under the government procurement derogation, it then proceeded to engage in a limited analysis of the other elements of Article III:8(a), and found that the LCR measures were “laws, regulations, or requirements governing the procurement of electricity” and also found that procurement of electricity under the NSM constituted procurement “by governmental agencies.”¹⁹⁸ However, the Panel did not make findings in regard to whether the electricity procured under the LCR measures was purchased “for governmental purposes” and “not with a view to commercial resale.”¹⁹⁹ The Appellate Body agreed with the Panel in finding that India’s LCR measures were inconsistent with Articles III:4 of the GATT and Article 2.1 of the TRIMs Agreement and that the measures were not covered by the Article III:8(a) government procurement derogation because the electricity procured by the government through entering into Power Purchase Agreements with solar power providers was not in a competitive relationship with the product (solar cells) being discriminated against by the LCRs.²⁰⁰

With respect to subsidies, international trade law rules are arguably more flexible, as they require proving more elements, provide for exceptions, and allow a range of non-prohibited subsidies. However, as illustrated in the WTO Panel report in *India-Export Related Measures*, international trade law rules governing *prohibited* subsidies are stricter than those governing subsidies generally, because they fall within a prohibited category of subsidies under the SCM Agreement. The legal framework governing state subsidies under international law draws on provisions contained in two agreements: the GATT 1994 and the SCM Agreement (a product of the Uruguay Round). Within the

¹⁹⁵ GATT, *supra* note 192, art. 3.

¹⁹⁶ *Id.*, art. 20.

¹⁹⁷ Panel Report, *India-Certain Measures Relating to Solar Cells and Solar Modules*, WTO Doc. WT/DS456/R, ¶ 7.107 (Feb. 24, 2016).

¹⁹⁸ *Id.*, ¶ 7.151

¹⁹⁹ Appellate Body Report, *India-Solar Cells*, *supra* note 106, ¶ 5.42 (citing Panel Report, ¶¶ 7.162, 7.186). The Panel Report’s approach can be contrasted with the approach of the Panel in *Canada-Renewable Energy*, which did proceed to analyze each of these elements and found that Ontario’s DCR measures were for commercial resale and therefore inconsistent with and not covered under the government procurement derogation under Article III:8(a) of GATT.

²⁰⁰ *Id.*, ¶ 5.40.

category of actionable subsidies, the SCM sets forth the governing framework for defining the substance and scope of prohibited, allowable, and actionable subsidies.²⁰¹ In contrast to the national treatment obligation and TRIMs based claims, proving a subsidy under the SCM is difficult because of the complexity of the SCM framework.²⁰²

The SCM Agreement requires that a challenging party establish that a policy or program (1) meets the definition of a subsidy and (2) is specific.²⁰³ Article 1.1 of the SCM Agreement sets forth the definition of a subsidy, and provides that “a subsidy shall be deemed to exist if,” under 1.1(a)(1), “there is a financial contribution by a government or a public body,” and, under 1.1(b), “a benefit is . . . conferred.”²⁰⁴ Article 1.1(1)(a)(i)-(iii) also sets forth a list of government actions that meet the definition, and in addition to financial contributions, the provision includes other forms of direct transfers of funds, including grants, loans, equity infusions, loan guarantees, tax credits, and government provision of goods or services or purchases of goods.²⁰⁵ In addition, Article 1.1(1)(a)(iv) also includes in the definition of subsidy actions by governments, including payments to a funding mechanism and entrusting or directing a private body to carry out the actions set forth above in Article 1.1(a)(i)-(iii).²⁰⁶

After determining whether an action is a subsidy, a challenging party must also establish that a subsidy is “specific” under Article 2 of the SCM in order to be able to respond to a subsidy by imposing countervailing duties or through the WTO dispute settlement process.²⁰⁷ The SCM Agreement does provide carve-outs, exemptions, transitional phase-out periods for developing countries, and longer time extensions and transition periods for developing nations. Additionally, the subsidies regime provides for more flexibility, allowing for certain types of subsidies, and the SCM Agreement also applies to goods, not services. Consequently, international trade law rules governing subsidies do appear to offer room for other forms of WTO-compliant subsidies as an alternative to export-contingent subsidies.

The rules governing export-contingent subsidies are somewhat stricter than those governing other subsidies generally, as they are considered to be *prohibited* subsidies. Article 3.1 of the SCM Agreement prohibits the use of export-contingent subsidies—subsidies that are contingent in law or in fact on export performance or on the use of domestic or imported goods.²⁰⁸ Article 3.2 of the SCM Agreement prohibits member nations from granting or maintaining these subsidies.²⁰⁹ These subsidies are generally considered to be trade-distorting

²⁰¹ SCM Agreement, *supra* note 160, Parts II, III and IV, arts. 3-8.

²⁰² See generally Meyer, *supra* note 192.

²⁰³ *Id.* (citing SCM Agreement, *supra* note 160, art. 1.1).

²⁰⁴ SCM Agreement, *supra* note 160, art. 1.1.

²⁰⁵ *Id.*, art. 1.1(1)(a)(i)-(iii).

²⁰⁶ *Id.*, art. 1.1(1)(a)(iv).

²⁰⁷ *Id.*, art. 2.

²⁰⁸ *Id.*, art 3.1(a) and (b).

²⁰⁹ *Id.*, art 3.2.

and harmful, and are considered to be specific under the Agreement, obviating the need for proving specificity.²¹⁰ However, several aspects of the legal rules governing export-contingent subsidies still suggest that there is still a degree of flexibility for nations in this area of law.

First, the SCM Agreement still requires that a party must demonstrate that the financial contribution and benefit elements are met.²¹¹ In the context of tax incentives such as those present in India's SEZ scheme, Article 1.1.(a)(1)(ii) of the SCM Agreement provides for specific rules governing "revenue foregone" and stipulates that a financial contribution in the form of revenue foregone exists if "government revenue that is otherwise due is foregone or not collected (e.g., fiscal incentives such as tax credits)."²¹² In addition, Article 1.1(a)(1)(i) and (ii) also set forth rules governing the analysis of benefit element of subsidies analysis. In *India-Export Related Measures*, the WTO Panel analyzed two types of financial contribution to assess whether they constituted benefits: foregone of revenue otherwise due, and the direct transfer of funds by the state to private entities.²¹³ Second, Footnote 1 of the SCM Agreement does stipulate that two categories of activity are not considered to be export-contingent subsidies: "the exemption of an exported product from the duties or taxes borne by the like product when destined for domestic consumption" and "the remission of such duties or taxes in amounts *not in excess* of those which have accrued."²¹⁴ Fourth, the SCM Agreement does provide for some degree of flexibility in providing for an exception to the prohibition on export-contingent subsidies for developing nations that have not yet "graduated."²¹⁵

In the WTO Panel report ruling in *India-Export Related Measures*, the WTO Panel ruled that most of the challenged programs did constitute prohibited subsidies, finding that the United States had presented sufficient evidence that the various programs (including the SEZ scheme, the Export Oriented Units and Sector-Specific Schemes, the Export Promotion Capital Goods Scheme, the Duty-Free Imports for Exporters Scheme, and the MEIS) were export-contingent

²¹⁰ *Trade Guide: WTO Subsidies Agreement*, U.S. DEP'T OF COM. INT'L TRADE ADMIN., <https://www.trade.gov/trade-guide-wto-subsidies>.

²¹¹ SCM Agreement, *supra* note 160, art 1.1 (a) and (b).

²¹² Panel Report, *India-Export Related Measures*, *supra* note 7, ¶ 7.297 (citing SCM Agreement, *supra* note 160, art 1.1(a)(1)(ii)).

²¹³ *Id.*, ¶¶ 7.297 and 7.8 (citing SCM Agreement, *supra* note 160, art 1.1(a)(1)(ii)).

²¹⁴ SCM Agreement, *supra* note 160, art.1.1(a)(1)(ii) n.1. The WTO panel in *India-Export Related Measures* further noted that these categories contained four definitional elements that must be proven: "there must be (1) an exemption or remission (2) of duties or taxes (3) on an exported product, (4) not in excess of the duties and taxes which have accrued." Panel Report, *India-Export Related Measures*, *supra* note 7, ¶ 7.170.

²¹⁵ Panel Report, *India-Export Related Measures*, *supra* note 7, ¶¶ 7.74-7.76.7.74. ("It is an undisputed fact that India has graduated from Annex VII(b). The text of Article 27.2(b), in its context and in light of the object and purpose of the SCM Agreement, leads us to conclude that the eight-year transition period from the date of entry into force of the WTO Agreement set forth in Article 27.2(b) has expired on 1 January 2003, also for Members graduating from Annex VII(b). Therefore, we find that Article 27 no longer excludes India from the application of Article 3.1(a) of the SCM Agreement.")

subsidies.²¹⁶ In addition, the Panel also found the challenged programs, including the SEZ policies, were subsidies in that they constituted financial contributions that also conferred a benefit under Article 1.1 of the SCM Agreement.²¹⁷ Furthermore, the Court held that none of the challenged programs were covered by Footnote 1 of the SCM Agreement. Finally, the Panel found that because India had reached the graduation threshold, it could no longer avail itself of the exemption from the prohibition on export contingent subsidies for developing nations.

As the next sections illustrate, these differences in the flexibility of legal rules do influence and shape domestic policy space by affecting legal strategies and constraining the scope of WTO-compliant policy alternatives that nations can adopt in response to WTO challenges. However, in order to fully assess policy space, one must look beyond legal strategies and WTO dispute resolution to the realities of domestic policy implementation and adaptation.

B. *Legal and Policy Compliance Strategies*

India's legal and policy response in *India-Solar Cells* and *India-Export Related Measures* reflect distinct approaches to legal strategy and policy compliance. The differences between the rules governing LCRs and subsidies arguably played a role in shaping the legal strategies used by India in *India-Solar Cells* and *India-Export Related Measures*. Because of the lack of flexibility of the rules governing LCRs, India was forced to follow a reactive approach to buying as much time as possible for its use of LCRs in the NSM and through the DSU compliance proceedings. By contrast, because of the relative flexibility of international trade law rules governing subsidies, India has mainly focused on proactive compliance in attempting to change its policies governing SEZs and other export subsidies programs well in advance of the Panel adjudication in *India-Export Related Measures*.

In the *India-Solar Cells* dispute, India has pursued strategies in line with the institutional approach through harnessing legal capacity in its strategic use of litigation. Like its earlier approach in *India-Autos*, India's legal strategy and approach in *India-Solar Cells* were largely based on "buying time" for non-compliant policies.²¹⁸ In response to challenges to LCRs in solar industrial policy, India's legal strategy was to vigorously defend its policies at the WTO while buying additional time for such policies. As it had done earlier in *India-Autos*, after losing at the WTO Panel and appellate body, India sought to delay

²¹⁶ See *id.*, ¶ 7.533 (finding that the challenged subsidies under the SEZ Scheme, including the exemption from customs duties on imports into SEZ units, the exemption from IGST on imports into SEZ units, and the deduction of export profits from the income of SEZ Units for purposes of corporate income tax, are export contingent subsidies). See also, *id.*, ¶ 7.551 (pertaining to the MEIS), ¶ 7.542 (pertaining to portions of DFIS).

²¹⁷ *Id.*, ¶¶ 7.439-7.470.

²¹⁸ As noted below, India has been publicly arguing for an eight-year extension on the SCM Agreement's prohibition on export subsidies following the attainment of the graduation threshold in *India-Export Related Measures*, but has also aggressively sought to develop and formulate alternative policies well in advance of the Panel adjudication in that dispute.

enforcement of the WTO's decision through ongoing negotiations with the U.S. and successfully delayed the enforcement date until December 2017, more than a year after the WTO Appellate Body's decision in 2016. However, unlike *India-Autos*, India's buying time strategy in *India-Solar Cells* did not provide enough time for the NSM's LCRs to stimulate domestic manufacturing capacity, and India still remains heavily dependent on foreign solar imports, which constitute between 85 to 90 percent of solar cells and modules used in domestic installations.²¹⁹ The *India-Solar Cells* dispute illustrates the limitations of the institutional approach. In order to fully analyze India's policy response after it lost in the Appellate Body and compliance proceedings, one must also examine the domestic policy context to understand how India sought to adopt new WTO-compliant policies in the solar industrial sector.

By contrast, the Indian government adopted a more proactive approach to policy implementation and compliance in *India-Export Related Measures*, by constituting special advisory committees and initiating the process of developing and implementing alternate WTO-compliant policies far in advance of WTO Panel adjudication. However, as illustrated in the next section, the *India-Export Related Measures* dispute highlights the limitations of legal flexibility and compliance approaches. While India's anticipatory compliance strategy in this dispute may have been influenced by the relative flexibility of subsidies rules and a strategic assessment of available WTO-compliant policy alternatives, I argue that this strategy was also shaped by the failings of India's existing SEZ policy and the significant transition that is taking place in India as part of the adoption of a new industrial policy. In the next section, I suggest the need to move beyond analyses of legal flexibility, institutional strategies, and compliance approaches to examine key aspects of domestic industrial policy regimes in order to fully assess available policy space in the solar and SEZ sectors.

C. Policy Implementation and Adaptation

In order to fully assess differences in how policy space in the solar industry and SEZs has been impacted by WTO dispute resolution in these two disputes, one must also examine the actual nature of each of these policy regimes. There are key differences in India's approach to policy compliance and adaptation in the two disputes that illustrate how differences in the nature of domestic policy regimes in specific sectors affects policy space. India's response to WTO challenges to each of these policy regimes has varied based on policy viability, political will, the conflicting versus complementary goals of WTO-compliant policy alternatives, the actual scope and size of the domestic industrial sector, and whether the particular industrial policy is undergoing a significant policy transition.

²¹⁹ See Kaavya Chandrasekaran, *Global, Local Solar Manufacturers spar over Safeguard Duty*, THE ECONOMIC TIMES (June 26, 2018) <https://economictimes.indiatimes.com/industry/energy/power/global-local-solar-manufacturers-spar-over-safeguard-duty>.

1. Policy Viability, Political Will, and Conflicting Versus Complementary Goals

India's response to WTO challenges in *India-Solar Cells* and *India-Export Related Measures* has been affected by three main factors that have impacted the adoption of WTO-compliant policy alternatives: policy viability, political will, and conflicting versus complementary goals. India's solar industrial policies and its SEZ policies have both arguably failed to achieve all of their original goals, but India's response to WTO challenges to each of these policy regimes has varied based on the viability of alternative WTO-compliant policy goals and internal policy tradeoffs that exist within each sectoral regime. The Indian government has considered three main policy alternatives to LCRs: direct subsidies, government procurement, and safeguards.

In terms of policy goals and tradeoffs, the WTO's ruling in *India-Solar Cells* has had a significant impact on India's ability to achieve the key goals of the NSM. As noted in Part II, NSM's main goals included expanding India's solar generation capacity and promoting the development of domestic solar manufacturing capacity. India has been able to rapidly expand its generation capacity and surpass the original installation goals of the NSM. By utilizing LCRs, India has sought to pursue LCRs as a second best alternative to domestic subsidies in order to attract and leverage foreign direct investment in an attempt to stimulate the domestic solar manufacturing industry. However, India has faced challenges on the domestic manufacturing front. Given the relatively small size of the sector, strong competition from foreign solar imports subsidized by China and other foreign governments, and the lack of robust domestic subsidies, India has been unable to stimulate domestic manufacturing capacity, and arguably still needed a longer time frame to achieve its domestic manufacturing capacity goals.

In adopting alternate policies aimed at boosting domestic manufacturing, India has at least in the short-term undermined its first goal of expanding solar capacity and has also still not been successful in stimulating domestic manufacturing capacity due to the limitations of WTO-compliant policy alternatives. India has been slow to adopt a robust subsidies program as an alternative strategy until recently, and the Modi government recently announced new programs for utility scale, rooftop and farmland solar subsidies shortly before the start of India's national elections in 2019. In addition, other measures, including direct government procurement of solar energy (which allows for the use of LCRs under the government procurement derogation) have inherent limitations based both on the available financial resources and political will for government expenditures on these programs, and the inherent limits on how much electricity central and state government units can consume.

In addition to policy viability, the level of political will or support for particular alternate policies can also affect policy space.²²⁰ India initially failed

²²⁰ See Santos, *supra* note 16, n. 28 (discussing and comparing Rodrik and Amsden and Hikino on whether nations have "vision" to pursue policies that take advantage of flexibility in international trade law rules).

to adopt proposals for new direct subsidies programs to support the solar industry because of resource constraints and opposition from the Ministry of Commerce and Industry. However, just months before the 2019 elections, the Modi government announced new large-scale subsidies for rooftop solar, farmland solar, and utility scale solar projects, suggesting that electoral imperatives can affect the political will for pursuing WTO-compliant policy alternatives.

India's imposition of safeguards on foreign solar imports from China and Malaysia has also undermined both of the main goals of the NSM, by creating uncertainty about the price of solar inputs and by allowing for continued imports from other nations including Vietnam and Thailand. Similarly, India's adoption of new manufacturing-linked solar tenders also faces key limitations. Given the significant resources required for developing new manufacturing plants and the increasing uncertainty caused by the imposition of safeguards, this program has met with low levels of interest and participation from major domestic solar power developers.

By contrast, India's SEZ policies do not present the same conflicts between goals, tradeoffs, and strategies. As noted in the Kalyani Report and other studies of Indian SEZs, India's existing SEZ policies have been largely ineffective and unsuccessful in achieving the original goals of increasing exports, employment, investment, and economic growth.²²¹ The complementary nature of existing policy goals within the SEZ regime (increasing exports and boosting manufacturing) thus allows India greater policy flexibility when considering adoption of WTO-compliant alternative policies.²²² This distinction between conflicting and complementary goals highlights a crucial difference between India's domestic policy regimes in the solar industry and SEZ policies. The adoption of viable WTO-compliant policy alternatives in solar industrial policy such as safeguards can arguably advance one goal (manufacturing) while undermining a second goal (expanding installed solar energy generation capacity) because of the impact of safeguards on the price of solar panels.

Because of the nature of the SEZ policy goals, WTO-compliant policy alternatives in SEZ policy do not have similar implications for those goals. This analysis of policy goals and tradeoffs can thus deepen our understanding of domestic policy space. As a result, India has actually used the WTO challenge to pivot and adopt alternate policies that are more likely to be successful in promoting employment and expanding manufacturing and trade competitiveness and that align better with the Make in India regime and India's New Industrial Policy. And because international trade law allows for greater flexibility for subsidies and other forms of indirect support for industries, it appears that India will have greater flexibility and policy space in this area going forward.

²²¹ See KALYANI REPORT, *supra* note 166, ¶¶ 1.2-1.3, 4.4.3.1-4.4.3.2 (discussing weaknesses and failures of India's SEZ policy).

²²² See KALYANI REPORT, *supra* note 166, ¶ 4.1 (recommending shift to WTO-compliant policies that can increase employment, exports and growth in manufacturing and services).

2. Nature and Scope of Industrial Sector

The state of an industrial sector can also significantly impact the efficacy of the use of LCR policies to have an impact. As noted above, despite the fact that LCRs were involved in both *India-Autos* and *India-Solar Cells*, India had much more success in stimulating the development of manufacturing capacity in the automobile parts industry than it did in its recent measures aimed at the solar industry.²²³ In part, this reflects the relative status of the Indian auto components industry vis-à-vis the India solar industry. Through investment and key policy decisions of the 1980s, India already had developed the early stages of an automobile industry and by the mid-1990s, already had developed a growing auto components industry that could take advantage of LCR policies and foreign investment. By contrast, India's domestic solar manufacturing industry and capacity were nascent and small at the inception of the NSM in 2010, and despite recent policy interventions, Indian companies have struggled to compete with foreign solar imports from companies in China and East Asia. India arguably needed more time for LCR policies to work, and it appears that alternative WTO-compliant policies are unlikely to stimulate the domestic industry in the near term.²²⁴ The actual size and development stage of a domestic industrial sector are an important factor in assessing the probable success of temporal "buy time" strategies aimed at extending compliance time horizons.

While the relatively small size of an industrial sector may affect the efficacy of particular trade policies such as LCRs, it can also create opportunities for policy transformations. India currently has a relatively small manufacturing sector located within SEZs and as such, has faced less pressure to maintain existing export subsidies programs within these zones. Consequently, key leaders across different industrial sectors have been more willing to embrace new and transformative policies aimed at investing in India's weak domestic infrastructure and to adopt new policies and incentives that aim to increase employment and manufacturing growth through a more holistic set of policies aimed at reducing regulatory restrictions on companies seeking to invest in SEZs.²²⁵

In addition, the actual scope of particular industrial policies may also impact development policy space. Industrial policies that focus on multiple industrial sectors may offer nations more policy flexibility than policies that focus on single industries. India's SEZ policy differs from the solar industrial context in that SEZ policy encompasses multiple potential industrial sectors. Because of this important difference, India can explore several different policy alternatives and strategies that seek to advance different and multiple industrial

²²³ See HUMAN DEVELOPMENT REPORT 2005, *supra* note 80, at 134 (citing John Sutton, *The Auto-Component Supply Chain in China and India: A Benchmarking Study*, LONDON SCH. OF ECON. AND POLITICAL SCI. (2004)); Tewari, *supra* note 80.

²²⁴ India's lack of success in stimulating domestic solar manufacturing can be compared to the relative success of Ontario's use of local content requirements in its renewable energy policies (challenged in the WTO in *Canada-Renewable Energy*) in attracting manufacturers and developers to stimulate the domestic solar manufacturing industry. See ENVIRONMENTAL DEFENCE, *supra* note 124.

²²⁵ See KALYANI REPORT, *supra* note 166, ¶¶ 1.2-1.3, 4.4.3.1-4.4.3.2.

sectors. Following the recommendations of the Kalyani committee, the Indian government is currently considering broadening its SEZ policies and framework to include a broader range of industries and companies.²²⁶ In addition to expanding the scope of manufacturing industries housed in SEZs, the government is considering opening up SEZs for other sectors including medical tourism, financial services, and information technology.²²⁷

3. Transitions in Industrial Policy

Broader transitions in national industrial policy may also affect development policy space. During the *India-Solar Cells* dispute, India's solar industrial policy was not part of a broader national industrial policy transition.²²⁸ The Modi BJP government did significantly increase the targets of solar energy generation capacity under the NSM and also accelerated implementation of NSM policies, allowing India to meet and surpass the original energy generation targets. However, during the pendency of the WTO dispute, India was not yet in the midst of a major industrial policy transition that significantly altered or changed the nature and scope of solar industrial manufacturing policies. In fact, much of India's policy response in this case was ad hoc and reactive and motivated by the BJP government's re-election strategy in the 2019 national elections. Consequently, the lack of a broader industrial policy transition arguably diminished the effectiveness of India's policy response and strategy in *India-Solar Cells*.

By contrast, *India-Export Related Measures* illustrates how transitions in industrial policy can impact policy space. India's policy response in *India-Export Related Measures* has strong parallels to India's policy strategy in *India-Autos*. Both policy approaches involve the development of industrial policies that seek to take advantage of transitional periods in industrial policy. In *India-Autos*, India utilized the pre-existing import restrictions regime to harness foreign investment in auto manufacturing to stimulate the domestic auto components manufacturing industry, through introduction of LCRs, as India transitioned from a closed economy to liberalization policies in the early 1990s. In *India-Export Related Measures*, the Indian government is arguably utilizing the WTO challenge to help justify and support transformational changes in India's SEZ policies in line with the New Industrial Policy, and SEZs are a central component

²²⁶ Kirtika Suneja, *New SEZ Policy Bats for Easy Exits and Flexibility in Leases*, THE ECONOMIC TIMES, (May 26, 2019), available at <https://economictimes.indiatimes.com/news/economy/policy/new-sez-policy-bats-for-easy-exits-and-flexibility-in-leases/articleshow/69509265.cms>.

²²⁷ *Id.*

²²⁸ It should be noted that the Central Government did launch the early phases of Prime Minister Narendra Modi's "Make in India" strategy in 2014 to attract expanded foreign direct investment into domestic manufacturing in India. However, this policy did not lead to immediate and significant shifts in domestic solar industrial and manufacturing policy. In 2017, the Central government announced it was planning to launch a New Industrial Policy aimed at making transformative changes in domestic industrial policy, boosting industrial growth and fostering creation of manufacturing jobs. Following its victory and re-election in the May 2019 national elections, Modi's BJP government released several key aspects of the New Industrial Policy as part of the July 2019 budget. See *Sitharaman's Budget a Blueprint for Creating USD 5 trillion economy by 2025: India Inc.*, BUSINESS TODAY (July 5, 2019), <https://www.businesstoday.in/top-story/sitharaman-5-trillion-economy-by-2025/story/361971.html>.

of this broader national industrial policy transition. In addition, India can also use the likelihood of the WTO finding that the SEZ and other export subsidies violate international trade law to attract foreign investment in the near term. Foreign companies are likely to consider investing in Indian SEZs during the current transitional period in India's industrial policy, to take advantage of existing incentives for export subsidies (e.g., the sunset clause for SEZ tax incentives) before they are phased out.²²⁹ *India-Export Related Measures* illustrates the importance of major national industrial policy transitions for development policy space. The launch of the New Industrial Policy has enabled India to rapidly pivot away from non-compliant policies, to WTO-compliant policies that could dramatically boost exports and domestic manufacturing. By contrast, the lack of an industrial policy transition during India's response to *India-Solar Cells* limited the possibility of success of newly adopted policy alternatives, as these policies were ad hoc and reactive and not part of a comprehensive shift in industrial policy.

V. CONCLUSION

India adopted two distinct approaches to policy implementation and adaptation in *India-Solar Cells* and *India-Export Related Measures*. In *India-Solar Cells*, India adopted a "reactive" buy time institutional strategy and only adopted policy compliance and adaptation after losing at the WTO, while in *India-Export Related Measures*, India adopted an anticipatory compliance and adaptation strategy. These distinct strategies were shaped not only by differences in the legal flexibility of international trade law rules and WTO decisions, but also by fundamental differences in the policy regimes in each of the sectors. Although legal capacity and legal strategy can be utilized by developing nations to expand long-term policy autonomy, the policy space available to nations in individual industrial and policy sectors is also a product of the nature of domestic policy regimes.

The two case studies analyzed in this article illustrate how policy space in particular sectors is impacted by legal flexibility and effective legal strategy, as well as by the realities of domestic policy regimes and viability of pursuing WTO-compliant policy alternatives to achieve development goals. The *India-Solar Cells* dispute illustrated how DCRs can complement the Modi-BJP government's new "Make in India"²³⁰ and "Invest India" programs, which are aimed at inviting foreign investment by foreign corporations to manufacture in India and use domestic content in their manufacturing. DCRs can help "bootstrap" or stimulate domestic manufacturing by requiring foreign or

²²⁹ For example, Apple and FoxConn are currently considering making investments in iPhone manufacturing plants in Indian SEZs, and a U.S. based pharmaceutical is currently considering investing in new manufacturing plants in SEZs. See Bharani Vaitheesvaran, *FoxConn plans plant expansion to manufacture iPhones from Tamil Nadu*, ECONOMIC TIMES (Dec. 27, 2018), <https://economictimes.indiatimes.com/tech/hardware/foxconn-may-begin-assembling-top-end-apple-iphones-in-india-in-2019/articleshow/67270909.cms>; *NY Firm May Invest Rs. 400 in SEZ*, TIMES OF INDIA (Jan. 17, 2019), <https://timesofindia.indiatimes.com/city/indore/ny-firm-may-invest-400cr-in-sez/articleshow/67563819.cms>.

²³⁰ See Gupta & Wang, *supra* note 96.

Related Measures dispute illustrates how transitions in industrial policy can also afford greater policy space, by creating incentives for private corporations to take advantage of older incentives that will be phased out over certain time periods. The Indian case illustrates the need to not only examine legal and institutional approaches to policy space, but also focus on policy implementation and adaptation in order to understand how the realities of the domestic policy context affect domestic policy space.

An analysis of India's approach to policy implementation and adaptation in response to *India-Solar Cells* and *India-Export Related Measures* highlights how the architecture of domestic policy regimes can have significant impacts on development policy space. In doing so, this article advances an approach which bridges different approaches for assessing policy space, and makes an important contribution to existing scholarship on the impact of transnational legal ordering on domestic legal and governance structures.²³⁴ and on studies of international law compliance.²³⁵ In addition, by focusing greater attention on the realities of domestic policy implementation, this study also has important implications for reformers seeking to align international trade law norms and instruments with the reality of the development goals and interests of developing nations. Rather than focusing exclusively on legal norms and WTO dispute resolution, this article suggests that scholars and reformers should also examine how structural aspects of domestic policy implementation can impact the relative success of key industrial policies and WTO dispute resolution involving those policies.

²³⁴ See, e.g., Halliday and Shaffer, *supra* note 15.

²³⁵ See, e.g., LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* (2nd ed. 1979); Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CALIF. L. REV. 1823 (2002); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997).