Chapter 1 Introduction

Free Trade Agreements (FTAs) have become "an indelible feature of the international trading landscape".[1] After the failure of Cancun Ministerial Meeting of WTO and prolonged negotiation on Doha Development Agenda (DDA), many trading nations engaged in negotiations of FTAs including China and India. The torpedo of Trade Facilitation Agreement reached in Bali in 2013 may push this trend even further.

There is no doubt that the commitments made in the FTAs are, in some cases, more than what WTO can offer. However, the benefits of an FTA such as free flow of goods, services, investments, technology, capital which can be beneficial for the development, stability, and growth of the countries as well as the region can only be locked in by adopting a "dispute settlement system with fair and efficient procedures and practices".[2] This is because "dispute settlement mechanisms provide a means to enforce the commitments made in international trade agreements".[3] Moreover, an "inefficient dispute settlement mechanisms, can be an effective non-tariff trade barrier, therefore, it might be accurate to say that dispute settlement mechanisms which are inefficient and ineffective actually block trade".[4] It is also argued that "if the commitments cannot be enforced, international trade agreements would be expected to breakdown or would not have concluded in the first place".[5] An FTA, in addition to bringing about liberalisation of the economy and reducing tariffs, should also contain comprehensive rules on dispute settlement, which are practical, efficient and effective.[6] Dispute settlement mechanism serves as the enforcement mechanism to enforce the commitment made by parties in their FTAs. Such enforcement mechanism through dispute settlement mechanism reflects enforcement capacity and enforceability. Enforcement capacity is the "ability to reciprocate credibly against a violation of the terms of the international trade agreement".[7] Enforceability "includes

[1] Claude Chase; Alan Yanovic; Jo-An Crowford; Pamela Ugaz, "Mapping of Dispute Settlement Mechanisms in Regional trade Agreements: Innovative or Variations on the a Theme?", *WTO Staff Working paper*, No. ERSD-2014-07.

[2] Asian Development Bank, *How to Design, Negotiate and Implement a Free Trade Agreement in Asia*, Asian Development Bank, Metro Manila, Philippines, 2008.

[3] Claude Chase; Alan Yanovic; Jo-An Crowford; Pamela Ugaz, "Mapping of Dispute Settlement Mechanisms in Regional trade Agreements: Innovative or Variations on the a Theme?", *WTO Staff Working paper*, No. ERSD-2014-07.

[4] Jack R. Miller, "ADR in International Disputes", Paper presented at The North American Conference on Peacemaking and Conflict Resolution, Montreal, Canada, 4 March 1989.

[5] Claude Chase; Alan Yanovic; Jo-An Crowford; Pamela Ugaz, "Mapping of Dispute Settlement Mechanisms in Regional trade Agreements: Innovative or Variations on the a Theme?", *WTO Staff Working paper*, No. ERSD-2014-07.

[6] Virachai Palasai, "Coordinating Trade Litigation", ICTSD Background Paper No.4, May 2012.

[7] Claude Chase; Alan Yanovic; Jo-An Crowford; Pamela Ugaz, "Mapping of Dispute Settlement Mechanisms in Regional trade Agreements: Innovative or Variations on the a Theme?", *WTO Staff Working paper*, No. ERSD-2014-07. Also see WTO Secretariat, "World Trade Report 2007: Six Decades of Multilateral Co-operation – What have We Learned?", WTO, 2007.

three other components: verifiability (where the complaining party can point to a provision in the international trade agreements and prove its violation); observability (the ability to detect the infringement in the first place); and quantifiability (the ability to quantify damage incurred as a result of the breach)".[8] Often, a general answer is given to the question as to what extent is dispute settlement obligatory: "Well, a panel two years from now will solve it". This is not a satisfactory answer. Such answers would in fact make the FTA worthless.[9]

The Asian Development Bank has suggested, "as a framework and practical approaches for the best practices in the dispute settlement mechanisms under any FTA, as far as possible to 'work within WTO rules' in light of the success of the WTO dispute settlement system, which has served as an inspiration for many FTAs."[10] Therefore, the WTO dispute settlement mechanism may be a good starting point for the China-India FTA dispute settlement mechanism. The WTO dispute resolution mechanism only deals with the State – State disputes and a private party have no standing.[11] Only disputes which are related to trade and services or measures which affect the trade of goods and services can be brought before the WTO for resolution. In other words, those disputes which are not within the scope of the Dispute Settlement Understanding (DSU) cannot be resolved within the WTO dispute resolution system. When the disputes are brought under the WTO dispute settlement mechanism, they may go through four stages: 1. mandatory consultations; 2. Panel proceeding when consultations fail; 3. Appellate Body proceeding to deal with the appeal against the Panel Report; and 4. The enforcement stage, which includes the withdrawal of concessions.[12] In short, the WTO dispute settlement mechanism is state-to-state, rule-based, binding and takes place within strict time limits.[13] So far as effectiveness is concerned, the WTO dispute settlement system offers the best model.[14] The WTO dispute settlement system is admired because it is so effective that even big economies may not be able to ignore the recommendations of the WTO panel or the

[8] Claude Chase; Alan Yanovic; Jo-An Crowford; Pamela Ugaz, "Mapping of Dispute Settlement Mechanisms in Regional trade Agreements: Innovative or Variations on the a Theme?", *WTO Staff Working paper*, No. ERSD-2014-07. Also see WTO Secretariat, "World Trade Report 2007: Six Decades of Multilateral Co-operation – What have We Learned?", WTO, 2007.

[9] Gary Horlick, "Dispute Resolution Mechanism: Will the United States Play by the Rule", *Journal of World Trade*, 29(2): 163-171, 1995.

[10] Asian Development Bank, *How to Design, Negotiate and Implement a Free Trade Agreement in Asia*, Asian Development Bank, Metro Manila, Philippines, 2008.

[11] For a discussion against such proposition and to include private parties see, Navneet Sharma and Rahul Rai, "Private Party Rights under Free Trade Agreement", *Asia Law*, available at http://www.asialaw.com/Article/708548/Article.html.

[12] Arther E. Appelton, "Forum Selection in Trade Litigation", ICTSD Background Paper No.2, May 2012. WTO Secretariat, "A Handbook on the WTO Dispute Settlement System", Cambridge University Press, UK, 2004.

[13] Asian Development Bank, *How to Design, Negotiate and Implement a Free Trade Agreement in Asia*, Asian Development Bank, Metro Manila, Philippines, 2008; CUTS, "Dispute Settlement at WTO: from Politics to Legality", Briefing Paper, No. 3/1999.

[14] Chad P. Bown, "On the Economic Success of GATT/WTO Dispute Settlement," *The Review of Economics and Statistics*, available at http://www.brandeis.edu/~cbown/.

Appellate Body.[15] The WTO dispute settlement mechanism, therefore, has been very successful as it is efficient and effective due to its enforcement mechanism.[16]

The WTO dispute settlement mechanism also provides for the use of Good Offices, conciliation, mediation and independent arbitration, although members have not utilised this process to resolve their disputes.[17]

The other relatively comprehensive and successful dispute settlement mechanism, in terms of utilisation, is the NAFTA, Chapter 20 dispute settlement mechanism. All disputes, except disputes relating to anti-dumping, countervailing measures and investment, are dealt with under Chapter 20. This dispute settlement mechanism is also for the use of state-to-state disputes, and private parties are not allowed to invoke this mechanism. Whenever there is a dispute the first recourse is consultations between the disputing governments. If consultation fails then the dispute is referred to the NAFTA Free Trade Commission, which comprises of trade ministers of the parties. If the Commission is also unable to resolve the dispute, then a disputing party may request to establish a five member arbitration panel to resolve the dispute. Moreover, NAFTA gives options to the parties to resolve the dispute through arbitration within NAFTA or before the WTO.[18]

The dispute settlement mechanism consisting of the use of consultations first and upon a failure of the consultations, the use of arbitration is an example where the process of dispute resolution continuum moves from a political process to a legalistic, judicialised or arbitralised dispute settlement mechanism.[19] The judicialised dispute settlement process in effect neutralises the power imbalance between the disputing parties. However, the consultation or negotiation phase of the dispute settlement mechanism is simply a political process.[20] Therefore, consultations and arbitration are the common method of resolving disputes arising from any FTA.

[15] Robert E. Hudec, "The Uruguay Round if Negotiations on Dispute Settlement", *ABA National Institute on Urguay Round of Trade Negotiations: Where Do We Go From Here?*, March 21-22, 1991, Washington, D.C.

[16] H.E. Elin Østebø Johansen, "WTO Dispute Settlement Body developments in 2011", Speech delivered on 13 March 2012. A copy of the Speech is available at http://www.wto.org/english/tratop_e/dispu_e/speech_johansen_13mar12_e.htm.

[17] Asian Development Bank, *How to Design, Negotiate and Implement a Free Trade Agreement in Asia*, Asian Development Bank, Metro Manila, Philippines, 2008; WTO Secretariat, "A Handbook on the WTO Dispute Settlement System", Cambridge University Press, UK, 2004.

[18] Asian Development Bank, *How to Design, Negotiate and Implement a Free Trade Agreement in Asia*, Asian Development Bank, Metro Manila, Philippines, 2008.

[19] A recent study on 226 RTAs notified to the WTO has classified dispute settlement mechanism in FTAs in three categories: political, quasi-judicial and judicial. See Claude Chase; Alan Yanovic; Jo-An Crawford; Pamela Ugaz, "Mapping of Dispute Settlement Mechanisms in Regional trade Agreements: Innovative or Variations on the a Theme?", *WTO Staff Working paper*, No. ERSD-2014-07.

[20] Amin Alvi, "On the (Non-) Effectiveness of the World Trade Organization Special and Differential Treatments in the Dispute Settlement Process", *Journal of World Trade*, 41 (2): 319-349, 2007.

Mediation has great potential for resolving any dispute.[21] Mediation may also be used to resolve any dispute arising from an FTA as it is more than a political process and less than the legalistic or judicialised system of dispute resolution.[22] APEC emphasises mediation and conciliation rather than arbitration as a dispute settlement mechanism for disputes which are far beyond the dispute settlement mechanism in the WTO. Mediation is preferred in APEC because it is in line with the growing sense of community rather than the "win or lose" confrontation in the WTO.[23] The Korea-EU FTA has used mediation to resolve disputes relating to non-tariff barriers.[24] Within the WTO also proposals have been made to use mediation to facilitate the resolution of disputes relating to non-tariff barriers.[25] Although mediation is used as a fact-finding process in non-technical barriers to trade (NTBs) disputes under the Korea-EU FTA, the potential of mediation is recognised in the dispute settlement mechanism.

It is always assumed that the dispute settlement provisions in an FTA are mere formalities rather than having any real and practical importance as both parties to a FTA do not or would not want to use such a mechanism.[26] Some believe that having a good mechanism is necessary just in case in the future it has to be used to resolve any dispute that arises.[27] On the other hand, some are critical of the fact that dispute settlement mechanism in FTAs overlaps with the jurisdiction of the WTO dispute settlement mechanism.[28]

The reason such a dispute settlement system should be practical is because when parties have disputes, they may be able to use it fully and rely on it. A dispute settlement mechanism is adjudged as efficient if it can be completed in a reasonable amount of time, utilises new means of technology and is able to respond according to the situation. The effectiveness of the dispute settlement mechanism is measured by the degree of compliance by the parties.

[21] John Mo, *Arbitration Law in China*, Sweet & Maxwell Thompson, Hong Kong, 2001.

[22] Paul J Davidson, "ASEAN: The Evolving Legal Framework for Economic Cooperation", Times Academic Press, Singapore, 2002.

[23] Paul J Davidson, "ASEAN: The Evolving Legal Framework for Economic Cooperation", Times Academic Press, Singapore, 2002.

[24] EU-Korea FTA, Annex 14-A. Also see Nohyoung Park, "Mediation Mechanism in the Korea-EU FTA", Paper presented at the Asian WTO Research Network, Seoul, 22 May 2010.

[25] Non-Tariff Barriers – Proposal on Procedures for the Facilitation of Solutions to NTBs, TN/MA/W/88, 23 July 2007 and Ministerial Decision on Procedures for the Facilitation of Solutions to NTBs, TN/MA/W/106/Rev., 3 February 2010.

[26] In the context of China it has been said to be true. See Wang Guiguo, "China's FTA Practices and Prospects", paper presented at the Asian WTO Research Network Meeting, Seoul, 22 May 2010.

[27] Asian Development Bank, *How to Design, Negotiate and Implement a Free Trade Agreement in Asia*, Asian Development Bank, Metro Manila, Philippines, 2008.

[28] Jennifer Hillman, "Conflicts Between Dispute Settlement Mechanisms in Regional Trade Agreements and the WTO: What Should the WTO Do?", 42 *Cornell Int'l L.J.* 193; Kyung Kwak and Gabrielle Marceau, "Overlaps and Conflicts of Jurisdiction Between the WTO and RTAs", paper presented at the Conference on Regional Trade Agreements, WTO, Geneva, 26 April 2002; Pieter Jan Kuijper, "Conflicting Rules and Clashing Courts: The Case of Multilateral Environmental Agreements, Free Trade Agreements and the WTO", Issue Paper No.10, ICTSD, 2010.

Although a dispute settlement mechanism is an important aspect of any FTA, nevertheless, "the question of dispute settlement in the FTA context has rarely featured in the discussion".[29] There is ample literature which has examined the economic benefits of FTAs in general.[30] Some literature has examined tariff and goods and services provisions of FTAs.[31] However, such literature has not examined or analysed the dispute settlement provisions of FTAs.[32] On the other hand, the dispute settlement system of the WTO and NAFTA have been explored, analysed and examined.[33] To some extent the dispute settlement system of ASEAN and MERCOSUR have also been analysed. [34] Thus, the area of dispute settlement in FTAs is comparatively "unexplored".[35]

In the realm of literatures, there is huge scarcity on literatures on the topics of dispute settlement mechanism in the FTA let alone such discussion in the context of the FTAs of India and China. Even during the transparency review by the WTO members, neither the WTO secretariat nor the members paid adequate attention to on the dispute settlement part of the reported FTA. For example, when India-Singapore CECA was reported in the WTO, the WTO secretariat in its factual presentation devoted only one short paragraph with a flow chart to describe the dispute settlement mechanism agreed in the India-Singapore CECA. At the transparency

[29] Roger Alford, "The New World of International Trade Arbitration", *Opinio Juris*, http://opiniojuris.org/2010/11/10/the-new-world-of-international-trade-arbitration/.

[30] Vinod K. Aggarwal, "Bilateral Trade Agreements in the Asia-Pacific" in Vinod K. Aggarwal and Shujiro Urata (ed.), *Bilateral Trade Agreements in the Asia-Pacific: Origins, Evolution, and Implications*, Routledge London, pp3-20; John Ravenhill, "The Political Economy of the New Asia-Pacific Bilaterlalism: Benign, Banal or Simply Bad?", in Vinod K. Aggarwal and Shujiro Urata (ed.), *Bilateral Trade Agreements in the Asia-Pacific: Origins, Evolution, and Implications*, Routledge London, pp21-49.

[31] Timothy Webster, "Bilateral Regionalism: Paradoxes of East Asian Integration", 25 *Berkeley J. Int'l L.* 434.

[32] Chad P. Bown and Berard M. Hoekman, "Developing Countries and Enforcement of trade Agreements: Why Dispute Settlement is not Enough", *Journal of World Trade*, 42(1): pp177-203, 2008.

[33] J. Michael Taylor, "Dispute Settlement Under the FTAA: An Apparent Melding of WTO, NAFTA and MERCOSUR Approaches", *Journal of International Arbitration*, 19(5): 3929-422, 2002; Mary E. Footer, "Developing Country Practice in the Matter of WTO Dispute Settlement", *Journal of World Trade*, 35(1): pp55-98, 2001; Kofi Oteng Kufuor, "From GATT to the WTO: The Developing Countries and the Reform of the Procedures for the settlement of International Trade Disputes", *Journal of World Trade*, 31(5): p145, 1997; Ernst-Ulrich Petersmann, "The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement Since 1948", *Common Market Law Review*, 31: pp1157-1244, 1994; James R. Holbein and Gary Carpentier, "Trade Agreements and Dispute Settlement Mechanism in the Western Hemisphere", 25 *Case W. Res. J. Int'l L.* 531; Patrick Specht, "The Dispute Settlement Systems of WTO and NAFTA-Analysis and Comparison", 27 *Ga. J. Int'l & comp. l.* 57.

[34] Jeffrey A. Kaplan, "ASEAN's Rubicon: A Dispute Settlement Mechanism for AFTA", 14 *UCLA Pac. Basin L.J.* 147 (1996); Paul J Davidson, "ASEAN: The Evolving Legal Framework for Economic Cooperation", Times Academic Press, Singapore, 2002.

[35] James McCall Smith, "The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts", *International Organisation* 54, 1, Winter 2000, pp137-180; Tobias Hofmann and Soo Yeon Kim, "Designing Reciprocity: The Politics of Dispute Settlement Mechanism in Asia's PTAs, Paper prepared for the Workshop on the Politics of Trade Agreements: Theory, Measurement, and Empirical Applications at the Niehaus Centre for Globalisation and Governance, Princeton University, 30 April-1 May 2010.

review meeting only one member Japan asked one question on dispute settlement mechanism. Other members such the USA, the EU, and Australia were mainly concerned about the other provisions of the FTA.[36] Similarly, when India-Chile PTA was reported the WTO secretariat devoted only two paragraphs on the dispute settlement mechanism in its Factual Presentation report. In those two paragraphs only consultation stage of the mechanism was written, although a flow chart of the dispute settlement mechanism under the India-Chile PTA was included.[37] This shows the level of attention which the dispute settlement mechanism has acquired by the academic or policy maker.

In general, the discussions on dispute settlement mechanisms under the FTAs are scant because "there isn't a critical mass of FTA Dispute settlement practices yet, secondly the arbitration in FTA is not transparent so no information is available, and thirdly, parties do not wish to create any precedence".[38] Apart from NAFTA and MUECOSUR, no other FTAs have had their dispute settlement mechanisms invoked. It has also been seen in many instances, whenever any dispute has arisen, the FTA partners have taken recourse of WTO dispute settlement mechanism rather than dispute settlement mechanism in their respective FTAs.[39]

Moreover, the dispute settlement mechanisms in most FTAs are not sophisticated enough to reflect the legalistic, judicialised or arbitralised system of dispute settlement.[40] Therefore, including "sophisticated dispute resolution mechanisms in FTAs are long overdue, and this can herald a new period of significant international trade arbitration".[41] One study shows that the legalisation of dispute settlement mechanisms in Preferential Trade Agreements (PTA) in the Asia-Pacific region has been notably low.[42] According to the study, FTAs relative to mere PTAs are more likely to yield a formal dispute settlement mechanism in trade agreements. However, if one partner is a stronger economy than the other, the dispute resolution mechanism would not be legalistic because the stronger party would want to resort to power-based reciprocity rather than have recourse to legal measures in enforcing the terms of the PTA. The study also shows that the quality of governance has no

[36] WT/REG228/2.

[37] WT/COMTD/RTA/4/1.

[38] Roger Alford, "The New World of International Trade Arbitration", *Opinio Juris*, available at http://opiniojuris.org/2010/11/10/the-new-world-of-international-trade-arbitration/.

[39] At the end of 2010, 82 out of 443 disputes brought to the WTO were between complainant and respondent members who at the time were partners in a preferential trade agreement. See WTO Secretariat, World Trade Report 2011: The WTO and Preferential Trade Agreements: From Co-existence to Coherence", WTO, 2011.

[40] Robert Echandi, "How to Successfully Manage Conflicts and Prevent Dispute Adjudication in International Trade", ICTSD Background Paper No.1, May 2012.

[41] Roger Alford, "The New World of International Trade Arbitration", *Opinio Juris*, http://opiniojuris.org/2010/11/10/the-new-world-of-international-trade-arbitration/.

[42] Tobias Hofmann and Soo Yeon Kim, "Designing Reciprocity: The Politics of Dispute Settlement Mechanism in Asia's PTAs, Paper prepared for the Workshop on *the Politics of Trade Agreements: Theory, Measurement, and Empirical Applications* at the Niehaus Centre for Globalisation and Governance, Princeton University, 30 April 30-1 May 2010.

significant impact on the designing of a formalistic dispute settlement mechanism. The dispute settlement mechanism of FTAs (vs. PTAs) is fairly unlikely to be of the highest legal obligations. While FTAs are more likely to be legalised, their degree of legalisation does not typically reach the binding plus non-appealable level. If the degree of integration between the two partners is less, it is unlikely that the agreement will have binding features of dispute settlement. The study also shows that if agreements between Asian and non-Asian countries contain a dispute settlement mechanism, they are significantly more likely to come with the highest degree of legal obligation, i.e. resolutions are not only binding, but also unappealable.[43]

Another research highlights that during trade negotiations, the government stands, in part, behind a veil of ignorance with regard to future implementation of the treaty and future disputes.[44] The research investigates the conditions under which member states adopt legalistic mechanisms for resolving disputes and enforcing compliance in regional trade accords. In the research, a theory of trade dispute settlement design based on the domestic political trade-off between treaty compliance and policy discretion has been investigated. According to the research, the designing of dispute settlement mechanisms is not influenced by economic asymmetry with the proposed depth of integration. However, the study has also shown that legalism tends to improve compliance by increasing opportunity costs, though legalism is neither a necessary nor sufficient condition for full compliance. Legalism nevertheless increases the reputational costs of non-compliance, potentially jeopardising opportunities for future international cooperation on issues of relevance to the domestic economy.

China and India in their FTAs with their trading partners have agreed to use consultation as the first stage of mediation followed by arbitration if consultation fails. This, to some extent, follows the WTO dispute settlement mechanism. India and China also have in place compensation and suspension of concessions measures if the losing party does not comply with the recommendations of the arbitral panel. The use of Good Offices, mediation and conciliation are also available in the FTAs of China and India. However, there is no appeal mechanism available in the FTAs of China and India. The difference lies in the detailing of the processes involved at every stage of dispute resolution such as consultation and arbitration. China in all its FTAs (e.g. With Singapore, Chile, Peru, Costa Rica, New Zealand, Pakistan and ASEAN) has included a detailed provision for the settlement of disputes. Only with Hong Kong and Macao has China not signed a formal and detailed mechanism for dispute settlement. Nevertheless, these two agreements do contain a broad principle-based dispute settlement provision. India, on the other hand, has shown two trends. The first trend is to follow a detailed and formal process of dispute resolution (mainly with Singapore, Chile, MERCOSUR, Japan, Malaysia and Korea), and the second

[43] Tobias Hofmann and Soo Yeon Kim, "Designing Reciprocity: The Politics of Dispute Settlement Mechanism in Asia's PTAs", Paper prepared for the Workshop on the Politics of Trade Agreements: Theory, Measurement, and Empirical Applications at the Niehaus Centre for Globalisation and Governance, Princeton University, 30 April-1 May 2010.

[44] James McCall Smith, "The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts", *International Organisation* 54, 1, Winter 2000, pp137-180.

trend is to agree on the broad provision (of one or two articles) for dispute resolution. Such a framework approach is seen in the agreements with small economies (such as Sri Lanka, Thailand, Nepal Bhutan, Maldives, etc.). For example, in the SAARC FTA in which India played a crucial role, the dispute settlement provision merely states the policy and principles without giving any details. However, India's agreements with Singapore, Chile, ASEAN, MERCOSUR, Japan, Korea and Malaysia contain a detailed chapter on dispute settlement, and some even include a separate annex on the rules and procedures of the arbitral tribunals. Therefore, the current trend of India and China suggest that when China and India sign an FTA, both countries will agree on a detailed dispute settlement mechanism.

The idea of China-India FTA has so far been a roller coaster ride. It started with great zeal and interest but very soon the idea faced the road block. Though it was termed as "mother of all FTAs", the negotiation has not moved forward. The change in government in India may push for deeper and wider economic co-operation with China which will certainly include the FTA negotiation.

Even though the negotiation starts, the question remains whether India and China envisage having a formal, legalistic, binding and effective dispute settlement system or just to have a chapter on dispute settlement as a tick box to serve political agenda so far as the content of the FTA is concerned. Or would they follow a process of friendly or informal means to resolve disputes even though a formal text is available to follow in the FTA?[45] Considering the political and trade clout of China and India at the regional level as well as at the global level coupled with their own political and economic relationship, it is advisable to agree on a formal, practical, effective and efficient means of dispute resolution. This is so that if and when the means of dispute resolution is triggered, it would be sufficient to handle the dispute and reach a conclusion based on law and principle rather than getting derailed by or affected by political-economic considerations.

Therefore, this book, in advance, proposes an effective and efficient system of dispute settlement mechanism for the China-India FTA. The aim of this book is to predict and propose a dispute settlement system which is practical, efficient and effective under the China-India FTA as and when it is concluded. The reason for such a dispute settlement system should be practical is because when parties have disputes, they may be able to use it fully and rely on it. A dispute settlement mechanism is adjudged as efficient if it can be completed in a reasonable amount of time, utilises new means of technology and is able to respond according to the situation. The effectiveness of the dispute settlement mechanism may also be measured by the degree of compliance by the parties.

Therefore, this book only focuses on the dispute settlement mechanism under the China-India FTA to develop or design a practical, efficient and effective system of dispute settlement mechanism which is legalised and supported institutionally. It is

[45] Rachel Brewster, "Rule-Based Dispute Resolution in International Trade Law", 92 *Va. L. Rev.* 251 (2006). Wang Guiguo, "China's FTA Practices and Prospects", paper presented at Asian WTO Network Meeting, Seoul, 22 May 2010.

hoped that the findings in this book may contribute towards adding new thoughts and ideas to further develop a dispute settlement mechanism not only for the China-India FTA, but also for other FTAs, particularly for Asian economies.[46]

For the purpose of this book, the dispute resolution mechanism as currently employed in the FTAs of China and India will be studied. The purpose of this study is to inquire whether China and India believe in a dispute resolution system, both in substance and in process, as a "one-size-fits-all" approach or prefer adjustment based on the needs of the FTA partner. For this purpose, the dispute settlement mechanisms in China's FTAs with Chile, Costa Rica, Peru, Singapore, ASEAN, Pakistan and New Zealand will be examined. India has signed FTAs with Chile, MERCOSUR, Singapore, ASEAN, Korea, Japan and Malaysia. Therefore, the dispute settlement system of these FTAs will be examined in detail. Additionally, India has also signed agreements with other small economies which contain dispute settlement provisions which are comparatively not comprehensive. In order to show India's approach towards dispute settlement with small economies and developing economies, those FTAs will also be examined briefly.

The book will then focus on the commonalities and differences in the substantive as well as the procedural aspects of the different stages of dispute resolution mechanisms under the FTAs of China and India. This study will show the rigidity or flexibility of China and India which the two countries have shown when agreeing to a dispute settlement mechanism with the same particular trading partner. This will, in turn, help with understanding to what extent India and China may agree on the substantive or procedural aspects of the dispute settlement mechanism when they negotiate the China-India FTA. In other words, this study will be indicative as to which principles and policies of the dispute settlement mechanism are negotiable or non-negotiable for both China and India. For this purpose, only representative FTAs of China and India will be selected for analyses. In this regard, China's FTAs with the countries with whom India has also signed an FTA will be selected for analysis. Therefore, China-Chile FTA, China-Singapore FTA, China-ASEAN DSM, India-Chile FTA, India-Singapore FTA, and India-ASEAN DSM will be selected for study. In addition, the China-New Zealand FTA will also be included in this study because this FTA represents recent trends in the dispute settlement mechanisms adopted by China in its FTAs. From the Indian side, the India-Korea FTA will be studied for an idea of the recent approach of India in this respect.

After finding the rigidity or flexibility of China and India towards their dispute settlement mechanisms in their FTAs with their respective partners, the book will strive to predict and propose the principles and policies of the dispute settlement mechanism (both in substance and procedure) which India and China might agree

[46] Masahiro Kawai and Ganeshan Wignraja, "Regionalism as an Engine of Multilateralism: A Case for a Single East Asian FTA", ADB Working Paper Series on Regional Economic Integration No.14, Asian Development Bank, February 2008; Asian Development Bank, *Emerging Asian Regionalism: A Partnership for Shared Prosperity*, Asian Development Bank, Metro Manila, Philippines, 2008; Vineeta Shankar, "Towards an Economic Community: Exploring the Past", RIS Discussion Paper No.47/2003; Yuling Zhang, "The Impact of Free Trade Agreements on Business Activity: A Survey of Firms in the People's Republic of China", ADBI Working Paper Series, No. 251, October 2010.

Chapter 5 Comparative Analysis of the Dispute Settlement Mechanisms in the FTAs of India

Introduction

After a general survey of the dispute settlement mechanisms as agreed by India with its FTA partners, in this chapter a comparative analysis of dispute settlement mechanism in the India-Chile PTA, India-MERCOSUR PTA, India-Singapore CECA, India-ASEAN DSM, and India-Korea CEPA will be conducted. These five FTAs have relatively detailed provisions for dispute settlement. The India-Chile PTA, India-Singapore CECA, India-Korea CEPA, are bilateral trade agreements; therefore they reflect India's approach towards dispute settlement system at a bilateral level. The India-MERCOSUR PTA and India-ASEAN DSM are representatives of dispute settlement systems of India vis-à-vis a regional trading bloc. In this context, the India-Chile PTA, India-Singapore CECA overlap with the India-MERCOSUR PTA and India-ASEAN DSM because Chile is a member of MERCOSUR and Singapore a member of ASEAN. Therefore, the India-Korea CEPA represents a pure bilateral FTA for the purpose of this investigation.

The India-Chile PTA, India-Singapore CECA, and India-ASEAN DSM have been selected for comparison for one more important reason, i.e. these three FTA

partners are common among India and China. Therefore, the comparison among these three FTAs will help understand to what extent India has negotiated its dispute settlement mechanisms similarly or differently from China. Such a study will suggest what the core values or principles of the dispute settlement mechanism which India can negotiate or not negotiate for the purpose of the India-China FTA are. The findings of this Chapter will thus help set the stage for the next Chapter for the further analysis, and comparison between the different approaches taken by India and China in their respective dispute settlement mechanisms to predict a possible dispute settlement mechanism for the China-India FTA, which is practical, effective and efficient.

As the general survey suggest, India has, in general, agreed to the use of compulsory consultations as the first stage of its dispute settlement mechanisms in its FTAs. Once the consultations fail, then the parties can use arbitration as the means of resolving their dispute. The decision of the arbitral tribunal is final and binding on the parties without any recourse to appeal against the decision of the arbitral tribunal. The party complained against is obliged to implement the recommendations of the arbitral panel. Until it fully implements the arbitral panel's recommendations, it may be liable for compensation and suspension of benefits, measures which make the dispute settlement mechanism an effective one. As a post- implementation measure, a system of compliance review is also provided for in the FTAs.

Only in the India-Korea CEPA has India agreed to use "cooperation" as the moral precondition before the formal process of dispute settlement mechanism commences via consultations. The India-Korea CEPA has also a dedicated article on consultations. Nevertheless, the inclusion of "cooperation and consultation" in the very first article of the CEPA sends the message to the parties to use cooperation and consultation as primary methods of resolving all or any disputes arising between them. As discussed in Chapter 2 and Chapter 3, China has adopted a similar approach in all of its FTAs. In the situation of India, it is not very clear whether cooperation is a general requirement at all stages of the dispute settlement mechanism or cooperation can be used to resolve disputes even before the formal process begins.

For the purpose of this Chapter, within the above general approach of India, comparison will be made of the rules and procedures as applied at different stages of the dispute settlement mechanisms, i.e. from consultations to compliance review, so that the practicality, efficiency and effectiveness of the dispute settlement mechanisms of the FTAs of India will be highlighted or evaluated.

As the India-Chile PTA and India-MERCOSUR PTA also provide for intervention by the Joint Committee in resolving disputes as the second stage of dispute settlement mechanism, that method of dispute settlement will not be taken as the general approach of India and therefore not be examined or compared in this Chapter when the arbitration stage is compared and analysed.

¶4-800 Scope, Coverage and Application

The India-Chile PTA and India-MERCOSUR PTA envisage disputes that may arise in connection with the "interpretation, application and non-compliance" with the provisions of their respective PTAs.[1] However, the India-Singapore CECA, India-ASEAN DSM and India-Korea CEPA envisage avoidance or settlement of disputes as well as any measure taken by a party which affects the rights and obligations of other parties in the agreement. The India-Singapore CECA states "the provisions of this Chapter (Dispute Settlement) shall apply with respect to the avoidance or settlement of disputes between the Parties concerning their rights and obligations under this Agreement".[2] The bilateral agreement of India with Korea, on the other hand, states "this Chapter (Dispute Settlement) shall apply with respect to the avoidance or settlement of all disputes between the Parties regarding the implementation, interpretation or application of this Agreement".[3]

Comparing the India-Singapore CECA and India-Korea CEPA, the avoidance and settlement of disputes between the parties in the India-Singapore CECA is related to their rights and obligations whereas in the India-Korea CEPA, the avoidance and settlement of all disputes between the parties is related to the implementation, interpretation or application of it. Later, the India-Singapore CECA, in the context of consultations does refer to disputes relating to the "implementation, interpretation or application" of the India-Singapore CECA as well as disputes relating to a measure of one party which affects the rights or benefits of other party.[4] The India-ASEAN DSM applies "with respect to the avoidance or settlement of all, disputes arising between the Parties under the covered agreements".[5] Dispute arising under the covered agreements are defined as "a complaint made by a Party concerning any measure affecting the operation, implementation or application of the covered agreements".[6] The India-ASEAN DSM also on the surface does not deal with the implementation, interpretation or application related disputes. As compared to the India-Chile PTA and India-MERCOSUR PTA, the India-Korea CEPA does not cover non-compliance related disputes. In contrast, the India-Chile PTA and India-MERCOSUR PTA do not cover implementation related disputes as well as disputes relating to a measure of a party which affects the benefits of the other parties.

In these FTAs, wording such as implementation, interpretation, application, non-compliance may have been used but the crux of the matter is related to the rights and obligations of the parties. While enforcing the rights or obligations of the parties, it will be but natural for the deciding authority such as an arbitral tribunal to look at the whole agreement and to rule whether or not a concerned party has implemented or complied with the agreement. In order to decide the scope of the rights and

[1] India-Chile PTA, Article 1(1) and India-MERCOSUR PTA, Article 2(1).

[2] India-Singapore CECA, Article 15.1 (1).

[3] India-Korea CEPA, Article 14.2 (1).

[4] India-Singapore CECA, Articles 15.3 (1) & (2).

[5] India-ASEAN DSM, Article 2(1).

[6] India-ASEAN DSM, Article 1(f).

obligations of the parties, the provisions of these FTAs have to be interpreted. In general, the right of the party is affected by a measure or action taken by the other party. Therefore, in this context, the disputes related to those impugned measures will also become a subject matter of dispute whether or not those provisions are explicitly used in the agreement. Nevertheless, having a clear and detailed provision in an agreement is always good practice. The India-Korea CEPA is a good example of that provision.[7]

> Unless the Parties otherwise agree elsewhere in this Agreement, this Chapter shall apply with respect to the avoidance or settlement of all disputes between the Parties regarding the implementation, interpretation or application of this Agreement or whenever a Party considers that:
>
> (a) a measure of the other Party is inconsistent with its obligations under this Agreement;
>
> (b) the other Party has otherwise failed to carry out its obligations under this Agreement; or
>
> (c) a benefit the Party could reasonably have expected to accrue to it under Chapters Two (Trade in Goods), Three (Rules of Origins), and Six (Trade in Services) is being nullified or impaired as a result of a measure that is not inconsistent with this Agreement.

Another good example is the India-ASEAN DSM, Article 2(1) of which states "This Agreement shall apply with respect to the avoidance or settlement of all disputes arising between the Parties under the covered agreements."[8] It provides for a detailed definition of what such "disputes" mean:[9]

> "a complaint made by a Party concerning any measure affecting the operation, implementation or application of the covered agreements whereby any benefit accruing to the Complaining Party under the covered agreements is being nullified or impaired, or the attainment of any objective of the covered agreements is impeded as a result of:
>
> (i) a measure of the Party Complained Against is in conflict with its obligations under the agreements; or
>
> (ii) the failure of the Party Complained Against to carry out its obligations under the covered agreements."

In respect of nullification and impairment of the rights of a Party in an agreement, the India-Singapore CECA has even included nullification and impairment of "direct or indirect" benefits within the scope of disputes which are not explicitly mentioned in

[7] India-Korea CEPA, Article 14.1(1).

[8] India-ASEAN DSM, Article 2(1).

[9] India-ASEAN DSM, Article 1(f).

both the India-Korea CEPA and India-ASEAN DSM.[10] The India-Singapore CECA states in this respect:[11]

> "Any Party which considers that any benefits accruing to it directly or indirectly under this Agreement are being nullified or impaired or that the attainment of any objective of this Agreement is being impeded, as a result of the failure of the other Party to carry out its obligations under this Agreement, may, with a view to achieving satisfactory settlement of the matter, make representations to the other Party, which shall give consideration to the representations made to it."

The wording of the India-Singapore CECA and India-ASEAN DSM is very similar and unlike the India-Korea CEPA, a measure of a party which affects the objectives of the respective agreement may also become a subject matter of the dispute.

¶4-900 Choice of Forum

Four out of the five FTAs under study have provided for concurrent jurisdiction of dispute settlement system and the WTO DSU.[12] Only the India-MERCOSUR PTA has given exclusive jurisdiction to the WTO DSU on disputes relating to anti-dumping and countervailing measures.[13] The India-ASEAN DSM has not mentioned the WTO as such but reference to "any other treaty" may also mean the WTO DSU.[14] The India-Singapore CECA, however, does not envisage concurrent jurisdiction of the WTO DSU and the dispute settlement system under the India-Singapore CECA. In the India-Chile PTA and India-MERCOSUR PTA, the disputing parties are required to reach an agreement on a single forum and when no agreement is reached, the complaining party has a right to choose the forum of dispute.[15] However, the complaining party may only exercise the right of forum selection after the conclusion of consultations or direct negotiations.[16] In the India-Korea CEPA, the complaining party also has the right to select the forum of dispute resolution but unlike the India-Chile PTA and India-MERCOSUR PTA, there is no requirement to reach any consensus on a single forum.[17] In the India-ASEAN DSM, the complaining party also has a right to select the forum of dispute.[18]

[10] India-Singapore CECA, Article 15.3(2).

[11] India-Singapore CECA, Article 15.3(2).

[12] India-Chile PTA, Article 1(2); India-MERCOSUR PTA, Article 2(2); India-ASEAN DSM, Article 2(4), (5),(6); India-Korea CEPA, Article 14.3.

[13] India-MERCOSUR PTA, Article 2(6).

[14] India-ASEAN DSM, Article 2(5).

[15] India-Chile PTA, Article 1(3); India-MERCOSUR PTA, Article 2(3).

[16] India-Chile PTA, Article 1(3); India-MERCOSUR PTA, Article 2(2).

[17] India-Korea CEPA, Article 14.3 (1).

[18] India-ASEAN DSM, Article 2(5).

It should be noted that unless the complaining party requests the establishment of an arbitral panel according to its FTA or requests for establishing a panel under the WTO DSU, the choice of the forum of dispute resolution will not be considered as having been selected. In other words, a complaining party may initiate consultations before the WTO forum as well as under its own FTA. After the consultations in whichever forum, the complaining party requests for the establishment of an arbitral tribunal or an arbitral panel, as the case may be. That forum will be deemed to have been selected by the complaining party for dispute resolution. Once such proceedings are initiated in one forum, the other forums are automatically excluded.[19] In the India-Chile PTA and India-MERCOSUR PTA, the concurrent jurisdiction of the WTO and the PTAs is subject to review within five years of their implementation.[20] However, there is no indication of such reviews in the India-ASEAN DSM and India- Korea CEPA.

¶5-100 Consultations

Consultations are the first stage of the dispute resolution mechanism under all the five FTAs under study.[21] In the India-ASEAN DSM, "any" party may request consultations with any other party with respect to any dispute arising under the covered agreements.[22] In the India-Korea CEPA, "either" party may request consultations with the other party with respect to a dispute.[23] It is needless to say that only a complaining party may request for consultations; although the words used are "either" party. In the India-Singapore CECA, the complaining party requests for consultations whenever a dispute arises.[24] The same is true for the India-Chile PTA and India-MERCOSUR PTA, although this is not made explicitly; nevertheless, this may be inferred from the relevant provisions of their respective agreements.

All the five FTAs have emphasised consultations as the primary means of resolving disputes and for the request for consultations to be made in writing. The written request for consultations, generally, includes identification of the measure(s),

[19] India-Chile PTA, Article 1(4)&(5); India-MERCOSUR PTA, Article 2(4)&(5); India-ASEAN DSM, Article 2(5)&(6); and India-Korea CEPA, Article 14.3 (2). In the India-MERCOSUR PTA, there is no provision for the establishment of an arbitral panel but the same function is performed by the Joint Administration Committee. In the India-MERCOSUR PTA, the WTO forum is deemed to have been selected even when the complaining party issues the request for consultations under Article 4 of the DSU. India-MERCOSUR PTA, Article 2(5).

[20] India-Chile PTA, Article 1(4); India-MERCOSUR PTA, Article 2(4).

[21] India-Chile PTA, Chapter II; India-Singapore CECA, Article 15.3; India-ASEAN DSM, Article 4; India-Korea, Article 14.4; and India-MERCOSUR PTA, Chapter II. In the India-MERCOSUR PTA, instead of "consultations", the term used is "direct negotiations", which in effect is the same.

[22] India-ASEAM DSM, Article 4(1). Any party that requests consultations is referred to as the Complaining Party. See India-ASEAM DSM, Article 1(c). "Party" means India or an ASEAN member state.

[23] India-Korea CEPA, Article 14.4 (1).

[24] India-Singapore CECA, Article 15.3 (1) & (2).

reasons for the request and a legal basis of the dispute.[25] In the India-ASEAN DSM, the factual basis of the complaint is also included in the request for consultations.[26] In the India-MERCOSUR PTA, there is no mention of the requirement to identify the measure in dispute.[27] In the India-Korea CEPA, the written notification for consultations include any matter within the scope and coverage of the agreement, however, it does not explicitly mention the requirement of stating the reasons for the request or the legal and factual basis of the dispute.[28]

Once the request for consultations is made, all the five agreements require the responding party to reply within ten days after the date of its receipt.[29] The India-Singapore CECA, India-ASEAN DSM and India-Korea CEPA require the responding party to enter into consultations within 30 days after the date of receipt of the request.[30] In the India-Chile PTA and India-MERCOSUR PTA, the period for consultations or direct negotiations last for 30 days from the date of the receipt of the request.[31] These two FTAs do not expressly state when the responding party must enter into consultations. Only in the India-Chile PTA and India-ASEAN DSM is an expedited consultations process provided for perishable goods. Under the India-ASEAN DSM, in cases of urgency, which include matters relating to perishable goods, the responding party is required to enter into consultations within ten days from the date of receipt of the request.[32] Consultations on matters regarding perishable agricultural goods last only for 20 days from the receipt of the request for consultations in the India-Chile PTA.[33]

India has agreed on different periods of consultations with different trading partners. With Chile and MERCOSUR, the consultations period is 30 days[34] but with Singapore and ASEAN, it is 60 days.[35] With another Asian partner, Korea, the consultations period lasts only 45 days from the date of receipt of the request for consultations.[36] After deducting the maximum number of days to reply and to enter into consultations, the effective period for consultations is only 20 days for Chile and

[25] India-Chile PTA, Article 3; India-MERCOSUR PTA, Article 5; India- Singapore CECA, Article 15.3 (3); India- ASEAN DSM, Article 4(2); and India- Korea CEPA, Article 14.4 (1).

[26] India-ASEAN DSM, Article 4(2).

[27] India-MERCOSUR PTA, Article 5.

[28] India-Korea CEPA, Article 14.4 read with Article 14.2.

[29] India-Chile PTA, Article 4(1); India-MERCOSUR PTA, Article 6(1); India-Singapore CECA, Article 15.3 (4); India-ASEAN DSM, Article 4(3); and India-Korea CEPA, Article 14.4 (2).

[30] India-Singapore CECA, Article 15.3 (4); India-ASEAN DSM, Article 4(3); and India-Korea CEPA, Article 14.4 (2).

[31] India-Chile PTA, Article 4(3) and India-MERCOSUR PTA, Article 6(3).

[32] India-ASEAN DSM, Article 4(6).

[33] India-Chile PTA, Article 4(3).

[34] India-Chile PTA, Article 4(3) and India-MERCOSUR PTA, Article 6(3).

[35] India-Singapore CECA, Article 15.5 and India-ASEAN DSM, Article 6(1).

[36] India-Korea CEPA, Article 14.6 (1).

MERCOSUR;[37] 30 days for Singapore and ASEAN;[38] and only 15 days for Korea.[39] India has agreed to treat consultations, including any information exchanged during the consultations, as confidential.[40]

¶5-200 Arbitration

After making "all reasonable efforts",[41] "every effort",[42] "every attempt",[43] or "in good faith"[44] in consultations, if a dispute is still not resolved, India has agreed to use arbitration as a method of resolving the dispute with its FTA partners. With Chile, India has agreed for interventions of the committees before using arbitration as a method of dispute resolution.[45] Whilst with MERCOSUR, India has agreed to use the Joint Administration Committee (JAC) to resolve disputes if direct negotiations fail. It should be noted that there is no arbitration as such in the India-MERCOSUR PTA; nevertheless, the process of JAC mirrors the arbitral process for all practical purposes.[46] In the India-Chile PTA, however, the arbitral process is included in addition to intervention by the Committee.[47] For the purpose of the study of India's approach towards arbitration as a dispute resolution process, only four agreements will be compared: the India-Chile PTA, India-Singapore CECA, India-ASEAN DSM and India-Korea CEPA. The JAC system of India-MERCOSUR will be compared only to highlight the similarities or differences between the process of JAC and arbitration.

¶5-210 Request for Arbitration

A request for arbitration is made by the complaining party to the responding party after the consultations process is exhausted. The request for arbitration is also

[37] In the India-Chile PTA and India-MERCOSUR PTA, the responding party has ten days to reply but there is no period by which it is required to enter into consultations. See India-Chile PTA, Article 6(1).

[38] In the India-Singapore CECA and India-ASEAN DSM, the responding party has ten days to reply and has 30 days from the date of receipt of the request to enter into the consultations. See India-Singapore CECA, Article 15.3 (4) and India-ASEAN DSM, Article 4(3).

[39] In the India-Korea CEPA, the responding party has ten days to reply and has 30 days from the receipt of the request to enter into the consultations. See India-Korea CEPA, Article 14.4 (2).

[40] India-Chile PTA, Article 4(2); India-MERCOSUR PTA, Article 6(2). It should be noted that these two PTAs do not put any obligations on the parties to keep the information exchanged during the consultations as confidential. However, this may be inferred as it is explicitly mentioned that consultations as direct negotiations are confidential. In the India-Singapore CECA, the confidentiality of the consultations process is also implied because it requires the parties to treat any information as confidential if it is designated as confidential by the party which has provided that information. See India-Singapore CECA, Article 15.3 (5)(b). Also see India-ASEAN DSM, Article 4(5) and India-Korea CECA, Article 14.4 (3)(b).

[41] India-Chile PTA, Article 2(1) and India-MERCOSUR PTA, Article 4(1).

[42] India-Singapore CECA, Article 15.3 (5).

[43] India-Korea CEPA, Article 14.1.

[44] India-ASEAN DSM, Article 4(3).

[45] India-Chile PTA, Chapter III.

[46] India-MERCOSUR PTA, Chapter III.

[47] India-Chile PTA, Chapter IV.

made in writing. The request for arbitration, under the India-Chile PTA requires identification of the specific measure(s) in dispute together with a brief statement of the legal basis.[48] In the India-Singapore CECA, the request for arbitration includes a statement of the claim and the grounds on which it is based.[49] In the India-ASEAN DSM, the reasons for the request of the establishment of an arbitral panel include the specific measure(s) at issue and factual and legal basis for the complaint sufficient to present the problem clearly.[50] A request for arbitration, in the India-Korea CEPA, requires the reasons for the complaint including the identification of the measure(s) at issue and an indication of the legal basis of the complaint.[51]

It should be noted that the written request for arbitration is made by the same complaining party to the same responding party and it includes the same information which was included in the request for consultations. Therefore, the request for arbitration is almost similar to the request for consultation. Only when a part of the dispute is resolved through consultations, but the other parts remain contentious will the further legal basis for the claim be useful information in the request for arbitration.

For the purposes of efficiency, the written request for consultations should be sufficient for the purpose of satisfying the written request for arbitration unless some of the issues were resolved through consultations or any new issues has become contentious; otherwise in practice, it would make little sense to repeat everything just to satisfy a procedural part of the substantive dispute. In any event, the parties to dispute would already have understood each other's position during the consultations period.

¶5-220 Composition of the Arbitral Panel

In general, India and its FTA partners have agreed for a three-member arbitral panel to resolve their disputes.[52] Out of three members, one member is appointed by the complaining party and the other by the responding party.[53] The process of appointing the third arbitrator, who acts as the chairman of the panel, differs slightly in different FTAs. There is also a possibility that an arbitral panel is comprised of a single arbitrator. In the India-Chile PTA, the complaining party designates its arbitrator at the time of making the written request for the arbitration to the other party.[54] Whilst in the India-Singapore CECA, India-ASEAN DSM and India-Korea

[48] India-Chile PTA, Article 9.

[49] India-Singapore CECA, Article 15.5.

[50] India-ASEAN DSM, Article 6(2).

[51] India-Korea CEPA, Article 14.6 (2).

[52] India-Chile PTA, Article 10(1); India-Singapore CECA, Article 15.6 (1); India-ASEAN DSM, Article 7(1); India-Korea CEPA, Article 14.7 (1).

[53] India-Chile PTA, Article 10(2)&(3); India-Singapore CECA, Article 15.6 (1); India-ASEAN DSM, Article 7.(2), India-Korea CEPA, Article 14.7 (1).

[54] India-Chile PTA, Article 10(2).

Thus, the China-India FTA may include good offices, conciliation and mediation as tools of their dispute resolution system. By enlarging the scope of the utility of this system, the China-India FTA could create an example for others to follow.

¶6-700 Conclusion

In this Chapter, an attempt has been made to predict and propose a principle-based dispute settlement mechanism to be used in the China-India FTA. The proposal is largely based on the agreed text of the dispute settlement mechanism by China and India with their FTA partners. By analysing those texts, some core principles as applied by China and India have been distilled, which serve as the basis for proposing the dispute settlement mechanism for the China-India FTA. It has been generally concluded that consultations and arbitration are the main forms of dispute resolution to be used in the proposed frame of the dispute settlement mechanism in the China-India FTA. Within these methods of dispute settlement, in this Chapter some new and radical proposals with regard to the procedures have been made. The proposed dispute settlement mechanism also includes the use and effectiveness of new technologies to meet the demands of the future. The ultimate aim is to propose a dispute settlement system which is practical, efficient and effective to establish good governance principles together with transparency so as to reap the full benefits of the China-India FTA.[174]

[174] As part of the best practices for the dispute settlement mechanism, it has been suggested that emphasis should be on good governance, in principles including transparency and in FTA dispute settlement procedures and practices. See Asian Development Bank, *How to Design, Negotiate and Implement a Free Trade Agreement in Asia*, Asian Development Bank, Metro Manila, Philippines, 2008.

Chapter 7 Conclusion: A Practical, Efficient and Effective Dispute Settlement Mechanism for the China-India FTA

The proposal of an effective, efficient and practical dispute settlement mechanism is primarily based on the premise that sometime in the future, China and India will agree on an FTA. As and when that FTA will be agreed upon, it is imperative that both China and India agree on a dispute settlement mechanism in that FTA. Therefore in this book an attempt is made to predict and suggest a practical, efficient and effective dispute settlement mechanism for the China-India FTA.

To that end, all dispute settlement mechanisms agreed by China and India in their respective FTAs as of now were surveyed to explore and understand whether a systematic trend is emerging or followed by China and India while negotiating or agreeing on a dispute settlement mechanism in their FTAs. The vertical survey of the FTAs of China suggests that China has adopted a consistent approach in negotiating the dispute settlement mechanism in the FTAs with individual countries.[1]

[1] See Chapter 2.

If there are few deviations, those are not with respect to substance but are related to the number of days set for different stages of dispute settlement. This also shows that in order to accommodate its FTA partners, while adopting a consistent approach, China has been willing to tailor-make the provisions of its FTAs, particularly the dispute settlement provisions. For example, with Chile, Pakistan, Costa Rica, Peru, Singapore and ASEAN, China has agreed to add the Rules and Procedures for Arbitration in the annex of the FTA to provide for detailed rules relating to arbitration. In the China-NZ FTA, China has shown that it can maintain its approach of dispute settlement and yet accept new trends, mainly to make the dispute settlement mechanism more practical and efficient. This can be seen from the number of days which are very short at some stages of the dispute settlement in the China-NZ FTA. In the China-NZ FTA, it has also been seen that China has not agreed on separate rules of procedures of the arbitration, however, China and NZ have included the basic principles of arbitral hearing in the dispute settlement mechanism of the China-NZ FTA. Those principles are mainly based on principles of natural justice which are of paramount importance in any dispute settlement mechanism. Therefore, it can be concluded although the dispute settlement mechanism in China's FTAs may be structurally different, the core of the system is intact and common in all the FTAs of China investigated in this research, which is consultation followed by arbitration.

The horizontal study of the four selected FTAs of China: the China-Chile FTA, China-Singapore FTA, China-ADEAN DSM and China-NZ FTA confirm the conclusion derived from the individual analysis of the dispute settlement mechanism of China, which is the consistency in the Chinese approach.[2] As no case has been filed under any of the China's FTAs so far, the analysis of the dispute settlement mechanism is not based on case studies. The investigation is conducted on the basis of the textual analysis of the individual provisions of one FTA cross-analysed with the same provisions of the other FTAs. This process of analysis is done from the first stage to the last stage of the dispute settlement mechanism in the FTAs. The horizontal textual analysis has revealed one important conclusion about the dispute settlement mechanisms in the China's FTA. The conclusion can be aptly described in one word: consistency. China has shown a great degree of consistency in negotiating its dispute settlement mechanisms in its FTAs. Although China is consistent, careful and with some partners flexible in negotiating dispute settlement mechanisms in its FTAs, it is understood that ultimately China is not interested in using the dispute settlement mechanisms in the FTA. China believes in amicable negotiations as the primary means of dispute settlement. Therefore, the dispute settlement mechanism in the FTAs of China is included to deal with the contingency that a dispute is not sorted out through amicable means of dispute resolution. In that situation, the agreed dispute settlement mechanism will be capable of dealing with every stage of the dispute settlement. This shows that the dispute settlement mechanism is practical in the sense that as and when it is invoked, parties to the dispute may find a clear roadmap to follow. The main aim is to suggest a practical dispute settlement mechanism for the China-India FTA.

[2] See Chapter 3.

A similar approach of investigation was applied to find out the approach of India in agreeing to the dispute settlement mechanisms in its FTAs. The vertical study of those FTAs and the horizontal textual analysis of the five representative FTAs have shown that India's approach can be best described as "inconsistent" in short.[3] India has not shown its own trademark approach in any of the dispute settlement mechanisms agreed in its FTAs. The investigation in Chapter 4 has shown that with some partners, India has agreed on a detailed dispute settlement mechanism and with some partners, India has included only a paragraph or two for dispute settlement just because such provisions are required in an FTA. With Singapore, Chile, ASEAN, Korea, Japan, Malaysia, MERCOSUR, India has agreed on a well-structured dispute settlement mechanism as compared to its other FTA partner. With SAARC, Sri Lanka, Thailand, Afghanistan, Maldives, Bhutan and Nepal, India has only included a few provisions, as a principle, for the dispute settlement mechanisms. Moreover, those principles and guidelines are not even complete enough to allow the parties to follow the process to resolve their dispute, when one arises. The dispute settlement mechanism in those FTAs is by no means considered practical.

In the FTAs with Chile, MERCOSUR, Singapore, ASEAN, Korea, Japan and Malaysia, India has, like China, shown two approaches. In the FTAs with Chile, MERCOSUR and ASEAN, India has also agreed on separate rules and procedures, which are included in an annex. However, with other FTA partners, India has not agreed for any separate rules of procedure. The horizontal investigation in Chapter 5 has shown that at different stages of dispute settlement, India has agreed to different timelines or number of days. The inconsistent approaches of India point to one conclusion: that India has not yet developed a model framework of FTAs on the basis of which it could negotiate with its FTA partners. So far as the dispute settlement mechanism is concerned, it seems that India adopts an *ad hoc* approach and perhaps relies on the text submitted by the other party. A close perusal of the dispute settlement mechanism as agreed with Chile and MERCOSUR shows that they are similar to their FTAs with India, and so are the dispute settlement mechanisms in ASEAN and Singapore.[4] Another reason for such *ad hoc* or unplanned attitude of India can be blamed on the non-preparedness or rush to conclude the FTA. For example, for the India-Chile PTA, only four negotiation sessions in total were held. It is hard to imagine how the entire FTA could be negotiated and agreed within such a short time period. If only four sessions were devoted, it is likely that the dispute settlement mechanism was either touched upon very briefly or was not discussed at all; perhaps just the modified version of the dispute settlement mechanism used in MERCOSUR may have been used. Another example of unplanned or not well-thought out approach of India can be seen from the fact that after signing FTAs with Singapore, Korea, Malaysia, and Japan, India now wants to re-negotiate the provision on investor-state dispute settlement. For a state to take such a U-turn on dispute settlement mechanism is testimony that India has not carefully planned its dispute settlement mechanisms for it FTAs. The other side of the coin also indicates a growing concern by India to be careful about dispute settlement mechanisms and the investor-state dispute incidence

[3] See Chapters 4 and 5.

[4] The provisions of the China-ASEAN DSM and China-Singapore FTA are, in fact, identical which is not the case in the India-ASEAN DSM and India-Singapore FTA.

is an eye-opener for India. The current negotiation of FTA with the European Union is therefore getting complicated as India is learning from its own casual or *ad hoc* approach towards dispute settlement.

At every stage of the dispute settlement mechanism, the current practice of China and India has first been assembled and from there it has been predicted and proposed as to what the China-India FTA should adopt or is likely to adopt.[5] For such discussion, it has also been measured as to what extent China and India will show flexibility in negotiating terms of the dispute settlement mechanism for the China-India FTA. Any proposal, suggestions or recommendations have been given keeping in mind the theme that the system must be "practical, efficient and effective". In this regard, only the principles of the dispute settlement mechanism have been proposed and the text has been not proposed. This is because if China and India agree in principle, the text can be drafted so as to incorporate those principles.

In the following part, the suggested principles of the dispute settlement mechanism in the China-India FTA will be enumerated.

¶6-800 Dispute Settlement Mechanism in the China-India FTA

¶6-810 General Principles

- The current trend of India and China suggests that when China and India sign their FTA, both countries will agree on a detailed dispute settlement procedure.
- Considering the political and trade clout of China and India at the regional level as well as at the global level coupled with their own political and economic relationship, it is advisable to agree on a formal, practical, effective and efficient means of dispute resolution so that if and when it is used, it would be sufficient to handle the disputes and allow the arbitral tribunal to reach its decisions based on law and principle rather than getting derailed by or affected by political-economic considerations.
- Mandatory consultations followed by arbitration by an arbitral tribunal, whose decisions will be final and binding are the main forms of dispute resolution in the mechanism proposed in the China-India FTA. However, there will be no appeal system in the China-India FTA.
- For the China-India FTA, it is suggested that "cooperation" should not be used as a means of dispute settlement or even be used as a pre-condition to initiating a formal means of dispute settlement.
- Since the intervention of the Joint Committee is not final and binding, the China-India FTA should not use the Joint Committee as a means of resolving disputes.

[5] See Chapter 6.

- The dispute settlement mechanism should be applied to a dispute over the interpretation and application of the FTA and issues relating to a measure of a party which nullifies, impairs or impede other party's rights and benefits in the FTA. The ultimate aim is to protect the rights and enforce the obligations of the parties in the China-India FTA.
- In addition to this general scope and coverage, a system of "advisory opinion" may also be included.
- It is suggested that the dispute settlement mechanism in the China-India FTA should state clearly that a non-violation dispute is not permitted under the China-India FTA.
- The dispute settlement mechanism under the China-India FTA should only resolve disputes between the signatories of the FTA, and no private party should have access to the system.
- No private person may institute any proceedings in domestic courts with regards to any violation of the China-India FTA. The FTA must not grant any private rights to its citizens or businesses.
- The proposed dispute settlement mechanism should not apply to investor-state disputes. For investment disputes, a separate system of dispute settlement mechanism should be designed.

¶6-820 Consultations

- Consultations should be the first stage of the dispute settlement mechanism in the China-India FTA.
- Upon receiving the request for consultations, the party complained against should first acknowledge receipt of the request promptly within a specified period of time. Thereafter, the parties should enter into consultations within a specified time and consult in good faith with a view to reaching a mutual agreement within a specified time period.
- For the purposes of clarity, the China-India FTA should allow only the "complaining party" to make the request for consultations.
- In the written request for consultations, the facts, relevant provisions of the FTA and legal reasoning behind the complaint must be communicated to the party complained against clearly so that consultations may be conducted in an effective and efficient manner.
- It is suggested that the relevant government personnel should be available when needed during consultations under the China-India FTA.
- For reasons of completeness and to deal with cases of urgency, the China-India FTA should have an expedited process of consultations.

¶6-830 Mode of Consultations

- With a view to conducting consultations effectively and efficiently, the China-India FTA should allow parties to conduct consultations in person or by alternative means using telecommunications, video-conferencing and other similar modes of communications.

¶6-840 Venue of Consultations

- If consultations are held in person, the parties may agree to a place for consultations.
- If no agreement is reached, as a default, the place of the party complained against should be the place for consultations.

¶6-850 Time Period for Consultations

- To start, a shorter period of time for the acknowledgement of the request for consultations should be provided in the China-India FTA as it is a mere act to inform the complaining party that the party complained against has received the request.
- Therefore, the time for acknowledging the request for consultations should be from three to five days maximum in the China-India FTA. Parties should be encouraged to send the acknowledgement immediately after receiving the request for consultations.
- The date of acknowledgement may serve as the date of the receipt of the request for consultations in the China-India FTA.
- In cases where instantaneous means of communication are used for sending the request for consultations, it may be a good idea to designate the next day as the date of receipt of the request for consultations as a default rule in the China-India FTA.
- It is suggested that that a maximum period of ten days be included in the China-India FTA as a period to reply to the request for consultations. The starting date for the calculation of any time period should be counted from the date of acknowledgement of the request for consultations, as proposed earlier.
- In order to give consultations a full opportunity to succeed, the China-India FTA should provide 60 days for consultations, counting from the date of acknowledgement.
- With a view to reaching a mutually agreeable solution as quickly as possible in cases of urgency including those involving perishable goods, the China-India FTA should provide 20 days for consultations.

¶6-860 Confidentiality

- Consultations in the China-India FTA should be confidential. However, this obligation of confidentiality should not be imposed on the party to keep its own information confidential as well.
- In this regard, a party may request the other party who is providing any information marked as confidential to also provide a summary of that confidential document which could be made public.

¶6-870 Rights of Parties in Further Proceedings

- The principle that the consultation process is not prejudicial to the rights of parties in later or other proceedings should be kept in the China-India FTA.

¶6-900 Choice of Forum

- The China-India FTA may provide for no forum selection provision or simply mention that any disputes falling under the ambit of the FTA shall be resolved through the dispute settlement mechanism provided within the FTA.
- In the China-India FTA, no explicit provision as to the grant of parallel jurisdiction under the FTA and other agreements by the mutual agreement of the parties should be added. For disputes on which the WTO may also have jurisdiction, the selection of a single forum through agreement between the parties is a good approach and should be adopted in the China-India FTA.
- The China-India FTA should not grant any exclusive jurisdiction to the WTO on a particular type of dispute, such as disputes relating to anti-dumping, subsidies, etc. It is suggested that such split and exclusive jurisdiction is not a correct approach and therefore such provisions should not be included in the India-China FTA.
- In order to control the forum selection process in the China-India FTA, it is suggested that initiation of the consultation process under the FTA should be treated as the selection of forum by the complaining party. If the dispute is not resolved through consultations, it is assumed that the complaining party will take the dispute to the arbitral tribunal under the China-India FTA.
- Therefore, it is necessary that under the China-India FTA, in the written request for consultations, the complaining party must make it clear whether that request is issued pursuant to the relevant provision of the FTA and include an undertaking or indicate expressly that if dispute is not settled through consultations, a request for the establishment of the arbitral tribunal will be made under the relevant provisions of the same FTA.

¶7-100 Arbitration

- Arbitration should be the second stage of the dispute settlement mechanism under the China-India FTA, which should be initiated if the consultations fail.
- For the purposes of clarity, in the China-India FTA, only the complaining party who initiated the consultation process should be allowed to make the request for the establishment of an arbitral panel.
- To make the process of dispute resolution simpler and without incurring any recurring costs of implementation, it is suggested that in the China-India FTA, the request to establish an arbitral panel be sent by the complaining party to the party complained against. In other words, there is no need to create a permanent institution to oversee the dispute settlement proceedings.
- It is suggested that for the purpose of initiating the arbitral process, the complaining party should be simply required to send a request for the establishment of an arbitration panel and make reference to the content sent for the consultations process, i.e. the factual and legal basis of the claim. Only when new facts or issues emerge in relation to the issues which were under consultation and now subject to arbitration, should a factual and legal basis be necessary under the China-India FTA.

¶7-110 Composition of the Arbitral Tribunal

- The number of arbitrators shall be three in the China-India FTA.
- In order to make the process efficient, the complaining party under the China-India FTA should nominate its arbitrator together with the request for the establishment of an arbitral panel.
- As a default rule, the China-India FTA should include a provision for an arbitral tribunal to consist of a sole arbitrator in situations where the party complained against fails to appoint its arbitrator within the specified time.
- To expedite the process of arbitration, in the China-India FTA, a total of 15 days should be given to the responding party to nominate its arbitrator and such a time period should be counted from the date of the request for the establishment of an arbitral tribunal.
- Considering the inconsistent approach of India and the very consistent approach of China, in the China-India FTA, if parties do not agree on the name of the chair then the DG of the WTO should be authorised to nominate the chair of the arbitral tribunal.
- If the DG of the WTO is of Indian or Chinese nationality, the Deputy DG of the WTO, or the next person in line who is not of Chinese or Indian nationality will have the authority to appoint the chair of the arbitral panel.

- The request for the appointment of the chair by the DG of the WTO could be made by any party upon the expiration of the time set in the China-India FTA.
- For the selection of the chair, parties should have 30 days from the date of the appointment of the second arbitrator in the China-India FTA.
- The China-India FTA should advise the DG of the WTO to make the appointment, when requested, as soon as practicable and the appointment made by the DG of the WTO or the next person in line as the case may be, is final and parties can only challenge the appointment if the chair does not satisfy the qualification requirements under the FTA.
- The China-India FTA should also have provisions to deal with the appointment of the substitute arbitrators. The process of appointment of the substitute arbitrators should be the same as that adopted for the appointment of the arbitrator who is going to be replaced.
- In that regard, the standard process of appointment should first be used, failing which the default process can be used.

¶7-120 Qualification of Arbitrators and the Chair

- The China-India FTA should follow the universal professional qualifications, i.e. every member of the tribunal including the chair must have expertise, or experience in law, international trade or other matters covered by the FTA or resolution of disputes arising under international trade agreements.
- In the China-India FTA, the personal qualities of the arbitrators, i.e. objectivity, reliability and sound judgement should be added as one of the qualification requirements for the arbitrators.
- Nevertheless, in the China-India FTA, the WTO Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes (WT/DSB/RC/1) should be included.
- In order to clarify the basic rule, it may also be added that the tribunal must remain independent and impartial throughout the arbitral proceedings as one of the qualifications.
- In the China-India FTA, the restriction on nationality, employment, usual place of residence and the involvement in the dispute of the chair should also be incorporated to maintain the integrity of the process.
- In order to make it clear, the China-India FTA may declare that the general restrictions on the chair are not applicable in a situation where a sole arbitrator is appointed as default.