

## 6. RECOMMENDATIONS

6.1 Practically speaking, what are the options before India? Following the failure of the Doha Round to conclude, there is a need to resuscitate the DSB review under its own built-in agenda. India should and persistently pursue its proposals that were made during Doha round.

6.2 There are several proposals on the table that need to be continued with. EC and Canada with the support of India and other developing countries have submitted proposals on a large number of procedural problems for medium to small economy members as well as for the rest of the membership such as sequencing, post retaliation etc. India, with other like minded countries, has circulated informal papers that *inter alia* include proposals to set up and manage a Dispute Settlement Trust Fund which will help developing members overcome or at least manage their financial limitation. Since these proposals are confidential in nature, they are not being discussed in any detail but it should suffice in saying that these meaningful and useful proposals should now be forcefully pursued in the forthcoming Ministerial meeting at Buenos Aries. Having said this, the important thing also is to identify and push the agenda in the direction of addressing the lacunae identified in the DSM through this and other studies referred to herein seeking some form of ‘small causes court’ that will enable low value cases to come in for quick and timely disposal.

6.3 The DSM, as we know, is a member-to-member mechanism where economic entities are not directly involved in the process of dispute settlement. Any action by a trader adversely affecting the traders of other members, by itself cannot be a ‘measure at

issue' in a WTO dispute. Such a measure has to be taken by the government of the WTO member concerned. This flows from the fact that the WTO Agreement is an inter-governmental agreement, not a contract between two international economic actors dealing with a traded product. This limits the role of business entities from participation in WTO DSM. The affected business entities have to approach their governments to make a case for launching a dispute in the WTO. Of course, WTO Members are expected to protect the interests of their traders in the international trading system, but then governments are rarely focused on a particular business entity/ sector alone.

6.4 Historically, participation in the WTO has been aimed primarily at undoing the giant tariff walls resurrected by the big powers during the World Wars and benefit from the Ricardian Principles of trade growth through lower tariff barriers so as to ameliorate their economies from the recessional morass that followed the wars. Over a period of 50 years since signing of GATT and 8 trade rounds of trade (largely tariff) negotiations, that has been by and large accomplished. The focus has to shift to non-tariff barriers to make further inroads into the protectionist tendencies of nations and their investors. The fact that the Doha Round had fumbled in making much headway shows how difficult that is. Proliferation of RTAs has further compounded the problem of tariff reduction as a means to further trade growth. In the meanwhile, traders the world over are facing non-tariff barriers that they need to take to their governments to resolve through diplomatic channels or the DSM, with the decision making lying squarely with the governments, not the trader's board of management.

6.5 In the light of this new paradigm, business entities need a better handle on the way WTO rules operate in settling disputes and the economic undercurrents underlying

the multifaceted and convoluted trade rules enshrined in its umpteen Agreements; Understandings; Decisions and Interpretations. Allowing their national bureaucrats to second-guess their trade interests are, to put it in a cliché, is *'not in their interest'*. Governments have a macro economy-wide view of trade interests, whereas the trader is interested in his product, his buyer, his territory and his profits. While the measure at issue has still to be that of the WTO importing member, its examination has to be from the trader's individual interest point of view, not the nations.

6.6 While the trigger for a dispute will inevitably be the adverse impact of a measure taken by a WTO Member that is importing, it is the trader that has to understand what rules apply. It is the trade who has to think about the costs. Therefore, there is a need for a dedicated institutional mechanism to support removal of trade barriers from the perspective of traders rather than trading nations.

6.7 To achieve this, the following recommendations are made:

**A. Set up the WTO Business Help Centre**

6.7.1 Set up an industry focused WTO Business Help Centre (WBHC). Initially it could operate out of Geneva, with possibility of opening regional offices later. The WBHC will have the objective of providing legal advice for applicable rules and available dispute settlement recourse to them from domain experts in trade law. This Centre should be constituted under the aegis of the WTO, like the ACWL, and have WTO members on its governing board like EIF<sup>51</sup>. It will be funded by the national industry associations, but run professionally like the ACWL or World Economic Forum (WEF). It may be noted that most international business

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<sup>51</sup> <http://www.enhancedif.org/>

associations have their presence in Switzerland already, and many national business bodies have set up offices there too, like India's CII. They already are very active in the margins of the WTO activities, as also the WEF's annual meeting at Davos.

6.7.2 The trade lawyers selected for legal advice should preferably be from developing countries who understand the way their governments operate and what kind of canvassing within the government establishment works for the traders' interests. They should have had an experience in handling trade issues for their countries.

6.7.3 There will be questions about possible lack of support, even opposition, from global business associations as they primarily represent multinationals. With the Global Compact of the UN and the new measurements being worked out under Goal 17 of SDGs, the United Nations (through UNCTAD) may step in to enthuse corporate responsibility in these associations, while the constitution of the Centre may be prepared in a manner that the decision making is done with equal weight to businesses from the developed and developing countries.

6.7.4 The trade advice given to the applicants would be limited to the product and market in question without the encumbering strategic and political ramifications of launching disputes that may mire the chances of their countries toning down advice.

## **B. Summary Dispute Procedures**

6.7.5 In addition to setting up a system for obtaining specific advice by individual business entities on their trade issues, it is also recommended to establish

“Summary Dispute Procedures” for the economic entities facing trade barriers from developing countries. The intention is that once a trader is convinced about the legal advice provided by the WBHC, it is for the business entity to use the domestic political and trade forums to convince the government about launching a dispute in the WTO. Often, as has been seen in the literature reviewed by me, governments give cost as a reason to dither from launching disputes. Therefore, DSU needs to be supplemented by a new summary procedure<sup>52</sup> to provide shortened procedures for a Panel report with only one Panelist who is mutually agreed between the disputing traders of the two countries rather than the WTO Members. The traders can directly present the case to the Panel and obtain documents, evidence and even witnesses if required, themselves (may also be sourced from their own governments) rather than operate through the formal channels of the WTO member. The Panel may follow a quick 2-month procedure, following all the principals of natural justice but not constrained by the complex government to government timelines or dealing with plenipotentiaries who are involved in other matters in the WTO.

6.7.6 The Summary Panel Report will be given to the WTO member countries of the disputing parties and not to the DSB. The Members consider the Report bilaterally; try to resolve the dispute through a mutually agreed solution; and file compliance in the DSB. If that does not come about, then either Party may be permitted to take it to the DSB for adoption through the same procedure as the regular dispute (including reverse consensus). Any clear issues of law that Members may be concerned with in the recommendations of the Panel may be

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<sup>52</sup> Not unlike the procedures allowed in the 2003 Public Health Agreement to interpret the TRIPS Agreement Article 31(f).

taken to the Appellate Body, so that the underlying trade issue benefits from faster settlement while the horizontal legal issues may get sorted out either through legal interpretation as per the WTO Agreement or through the Appellate Body.

6.8 In making these recommendations' I have worked around the negotiating problems already faced by the members, i.e., the US not being in favour of any proposal that will require them to pay for countries adversely affecting their interest. An independent industry financed but professionally run, organisation modelled on the ACWL meets the requirements. This will be useful for trade and the membership of the WTO that expends a fair amount for running the system.