2. REVIEW OF LITERATURE

2.1 In the last 14 years developing countries' participation in the WTO DSM has considerably increased, which implies their successful adaptation to the new legal system. The procedural and substantive outcomes of the disputes also demonstrate that there is no serious systemic bias against developing countries in the operation of the court and its decision-making process. However various disadvantages and barriers still exist against developing countries and more effort is needed to encourage developing countries to participate. The Advisory Centre on WTO Law has provided developing countries' help in legal capacity as well as in changing their attitude toward the WTO more positively.

2.2 Success in the DSM heavily depends on their optimal choice of dispute settlement strategies, such as coalition formation, bandwagon-ing with stronger states, learning from other disputes by joining as a third party, soliciting expanded legal assistance, etc. Previous studies have mainly focused on the efficiency aspects of international institutions. Transaction cost economics, which has had significant influence on the development of new institutions, explains varieties of governing structures and organizational functions of institutions based on the concept of cost optimization. International institutions are presumed to facilitate cooperation among nations, which emphasizes mutually beneficial efficiency gains, achieved by reducing transaction costs. Krasner (1991)[10] highlighted distributive conflicts as more important causes of cooperation failure in global communication agreements rather than transaction cost

[10] Krasner, Stephan, "Global Communication and National Power: Life on the Pareto Frontier," *World Politics*, 43

problems, and as such distributive considerations concerning international institutions have attracted more interest.

2.3 In addition to reducing the transaction costs surrounding dispute settlements, the DSM is also responsible for a significant distributive effect on member countries and to answer primarily whether the legalized DSM favoured stronger powers in the system and whether the status of developing countries has been enhanced under the DSM, whether the process has made unbiased and decisions fair without being influenced by power disparity among disputants. This needs to be further assessed empirically and not with simple logical induction or normative assertions and can be examined by the participation trends of developing countries as well as the patterns of disputes filed. In spite of their disadvantage, developing countries have actively participated and have successfully defended their interests as complainants or defendants.

2.4 It is felt that the highly legalized DSM of the WTO has strengthened the principle of equality before the law, which favoured weaker nations. The new DSM adopted a negative consensus rule of decision-making, which prevents the defendant state from blocking panel establishment, panel/appellate body ruling, the adoption of the ruling, and the implementation of retaliation. The credible threat of retaliation authorized and supported by the WTO forces the losing state to comply with the decision more fully and thoroughly. In addition, the procedure mandates a strict timeline for each step. This is one of the most distinctive institutional innovations. Hudec (1993)[11] notes that in the GATT dispute settlement experience, an incidence of blocking or delaying the legal process usually involved the strongest states in the system- the US and the EC.

[11] Hudec, Robert E., *Enforcing International Trade Law* Salem, NH: Butterworth Legal Publishers (1993).

2.5 Cameron and Campbell (1998)[12] contend, however, that resolving disputes through the judicial route is "particularly beneficial for smaller countries, as without the rules and procedures of the DSU and the extensive obligations in the WTO agreements, they would not have the necessary bargaining power vis-à-vis the larger powers." Nevertheless, many international relations students are suspicious of the equality before the law arguments, and claim that stronger states acquire favourable outcomes and weaker states unfavourable outcomes. These arguments find the cause of inequality to be from various sources. The primary one is the unevenly distributed legal resource argument. Developing countries, as weaker/ poorer actors in the WTO, usually have few legal resources available for complaining and defending themselves in disputes under the legal system. The lack of financial capacity, personnel, and information that are needed to engage the legal system inevitably results in unfavourable outcomes for developing countries. It is even argued that compared to the GATT era, developed countries – ones with greater capacity – are much more likely to utilize dispute settlement in the WTO than developing countries.

2.6 Another line of argument offered by Geoffrey Garrett and James McCall Smith (1999)[13] is the biased operation of the legal bodies of the WTO who favour stronger actors and they expect "the Appellate Body to be reluctant to make strong and unequivocal adverse rulings against powerful members on issues of considerable domestic salience".

[12] Cameron, James and Karen Campbell, *Dispute Resolution in the WTO* London: Cameron (1998)
[13] Garrett, Geoffrey and James McCall Smith, "The politics of WTO dispute settlement," Presented paper at the 1999 annual meeting of the American Political Science Association, Washington, D.C. (28–31 August 1999)

2.7 Thus, it can be said that the arguments that anticipate disadvantageous outcomes against developing countries under the WTO DSM find the source of inequality from:

(a) the lack of legal resources for developing countries, which restricts their access to the court from the beginning

(b) biased decisions made by the court in favour of developed countries and against developing countries; and

(c) the disadvantageous content of law that is applied and interpreted by the court.

2.8 The larger developing countries and emerging market countries viz. South Korea, India, Brazil, Argentina, Mexico, and Thailand, have aggressively utilized the DSM against developed countries. However, LDC's have seldom participated in disputes as complainants though their participation as a third party in a dispute has increased since 2001[14]. This status also offers valuable experience for learning and becoming familiar with the legal mechanisms of dispute resolution and demonstrates how actively they have adapted to the WTO DSM. Further joining in cases, where multiple numbers of complainants file a case against one defendant, also helps enhance developing countries' ability to utilize the WTO court. By forming a coalition among themselves or with developed countries, developing countries can pool their scarce legal resources or learn the advanced skills and techniques employed by developed countries in the complex litigation process.

[14] Browne, Dennis: Dispute Settlement in the WTO: How Friendly Is It for the LDCs? Centre for Policy Dialogue (January, 2005)

2.9 However, amongst different regions of the world also there are variations. Raul A Torres (2012), of the WTO Development Division has concluded[15] through statistical analysis, the rate of participation in the DSM by Latin American countries is higher than that of other developing countries and higher, too, than their relative weight in world trade. The countries of the region have also found ways to overcome the commonly identified obstacles and impediments to developing countries' participation in the DSM. This required a major effort in terms of training and institutional reform to meet these challenges. He has concluded that in order to maximize the benefits of participation in the DSM, it is necessary to develop internal mechanisms that enable the private sector to inform the government of the trade barriers it encounters, with a view to assessing whether WTO proceedings are advisable[16]. This is not the case for the many of WTO's African and Asian LDC and small economy members.

2.10 Hunter Nottage (2009) identified six specific obstacles for developing countries to fully and effectively participate in the DSM. These are: lack of expertise in WTO law; identification and communication of trade barriers to the government; fear of political or economic pressure on the part of respondent Members; duration of proceedings; commitments covering part of developing country trade that are not enforceable in the WTO; and inability to enforce DSB recommendations[17].

2.11 Schaffer and Nordstrom (2008) have pointed out that the current dispute settlement system of the WTO offers a particular challenge for WTO Members with

[15] Torres Raúl A., *Use of The WTO Trade Dispute Settlement Mechanism by the Latin American Countries – Dispelling Myths and Breaking Down Barriers*, WTO Economic Research and Statistics Division, February 2012

[16] ibid

[17] Hunter Nottage (2009) "Developing Countries in the WTO Dispute Settlement System", GEG Working Paper 2009/47

limited exports since litigation costs are more or less independent of the commercial stakes involved in a dispute. Small Members with small trade stakes, therefore, find it too costly to pursue legitimate claims. Reviewing the aims and practices of 'small claims procedures' at the national and supranational level, they have analysed whether a similar institution could be introduced at the WTO. They have made a strong empirical case for such an option to the current DSU in the WTO. They state that the legal and political challenges should not be underestimated. They have made a *prima facie* case that the current dispute settlement system effectively discriminates against small claims and hence owners of small claims, and thus, in particular, against least developed countries, small island economies and low income developing countries[18].

2.12 WTO support in the form of the Advisory Centre on WTO Law or the Trade-Related Technical Assistance (TRTA) and Training programs, also contributes to more active utilization of the DSM by developing countries. In sum, the increase in the number of disputes filed by developing countries since 2001 represents the progress made by developing countries in enhancing their legal and administrative capacity for utilizing the legal DSM of the WTO.

[18] Nordström, H. and Shaffer, G. (2008) 'Access to justice in the World Trade Organization: a case for a small claims procedure?' *World Trade Review*, 7(4), pp. 587–640.