5. CONCLUSIONS

5.1 The simple statistical analysis carried out on the basis of the income levels of the WTO complainant only bolster the argument that there is an inbuilt bias in use of the system, which ought to have been or could have been partially addressed by the successful conclusion of the review of the DSB in its special session.

5.2 Bigger economies partially because they trade more have an inherent procedural advantage in the way the DSM is presently structured. The legalistic construct both in terms of law and procedures, leaving the political considerations aside, the cost is prohibitive. This is one of the reasons that only one third of WTO's membership have approached the DSM.

5.3 Even in situations, such as with the global economic slowdown, where one would expect that the smaller countries would get more active in using the DSM to protect their economies from the actions brought in by the growing protectionism isn't really borne out through the data. The numbers and types of dispute as also the disputants have largely followed a predictable pattern since establishment of the WTO. The spike in the early years followed by the tapering down of new disputes to a normal hasn't changed. A notable exception is 2012 spike, which was attributed to the breakdown in the Doha talks.

5.4 The historical data, fairly predictably, depicted in the annual filing of complaints and on the various disciplines, highlights the interests – commercial and legislative of the more developed and richer members. Going into history, it may be recalled that the precursor to the WTO, i.e., GATT was largely a rich members club. After its initial days, developing countries had got marginalized with scant participation in the various rounds of negotiations.

5.5 The Uruguay Round sought change that and was effective in making the WTO a truly global body in terms of its membership roll. The largest to the tiniest country or even customs territories are its member today. This has, however, not changed its procedures that actually aid the full participation of its varied membership base in all of its activities.

5.6 One of the reasons cited for the failure of the Doha Round of negotiations was the inability of the small group of centre-table countries to represent the interests of the entire membership. Changes are therefore required. Changes not just in the manner that the WTO negotiates and lays down new agreements i.e., global trade rules but also how it operates today.

5.7 As the case studies showed, it is not only extremely costly for any small nation to bring a case against a bigger nation, there are other reasons working against smaller members, this includes the sheer size of the bigger nation, which may also be its biggest trading partner. It may fear reprisal in other sectors, other non- trade areas or in diplomatic relations.

5.8 Outside of the case studies, there are various instances when the smaller countries have hesitated even when their stake in a dispute is perhaps more significant than that of the complainant. The Brazilian cotton dispute[46] is one such case in point. Despite the documented decimation of the economies of the African cotton exporting countries due to American subsidization, the African countries hesitated in siding with Brazil.

5.9 This was a seminal dispute in many ways, as the US using its economic heft did not implement the DSB ruling. Brazil went on to win its right to retaliate in various ways including through not adhering to the intellectual property rights of American

[46] https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds267_e.htm

pharmaceuticals, but then it never took such action. Instead the US and Brazil entered into a bilateral agreement under which the US pays an unknown amount in compensation in lieu of complete implementation of the rules and recommendations of the DSB.

5.10 For a complaint that was filed in September 2002, the mutually acceptable solution on implementation was notified on 16 October 2014 after a full 12 years. At the end of it all the inconsistent US subsidy programme continued and interests of the African countries, adverse impact on whose economy was proportionally much higher than that of the complainant, i.e., Brazil, remained on the sidelines[47].

5.11 Limitations of the DSM in terms of cost, ability of smaller members to use, the time factor and utility of the eventual reward, are all documented and that is not the purpose of this paper. Here the intention is to look into how the smaller countries have reacted and adapted to the adversities faced by them in the trading world some of which *prima facie* appears unfair.

5.12 In the two Kenyan cases, Kenya acted predictably while dealing with the first problem, i.e., regarding market access for Nile perch in EC The political concerns and non-trade considerations essentially prevented it from taking any decisive action. Cost was a factor, ability to evaluate its self-interest was an issue, legal acumen to present a coherent case was absent, and despite ACWL, and finally EC was far too big a partner for Kenya to take on. Thus, this case highlighted the typical problems faced in reaching out to the DSM by many developing countries as has been discussed by many.

5.13 The second case study involving Kenya, i.e., of tea exports to Pakistan, is a case of adaptation through adoption of means that gave DSM like results without actually having to go through the motions. In this case both Kenya and Pakistan have *prima facie*

[47] ibid.

defensible cases. The provisions relating to GATT are clear that establishment of a FTA cannot create obstacles for the existing trade of non-members.

5.14 A dispute filed by India under similar circumstances is already a precedent. India had filed a complaint against Turkey, when it had imposed on apparel import quotas on India following its FTA with the EU[48] the Dispute Panel rejected Turkey's assertion that its measures are justified by the applicable Articles of GATT 1994 and Turkey had to withdraw its measures.[49]

5.15 Rather than go through the lengthy and expensive process of DSM, for Pakistan the easier option was to reach the retaliation stage in an informal manner, more along the lines of a TBT and restrict imports of Kenyan tea and let it be known why.

5.16 Kenya also preferred to negotiate a settlement, rather than legally react to Pakistan's measures. This is not unlike what Brazil did with the US in the Upland Cotton case. This type of non-formal evaluation of one's case and reaching for solutions are the direct result of the complicated DSM procedures.

5.17 In both the Kenyan cases though the private businesses were involved and had to invest substantially to meet the requirements in the European markets, the government was primarily focused on their political necessities. The business never got the priority they deserved. Consequently, several fish processing units in Kenya closed down. In the second case Pakistan, added to the cost of tea for its consumers to protect the rice exporters. Was this a real *quid pro quo?* In handling of the entire issue here, both countries steered clear of the interest of the consumer and the micro level of industry/ enterprises involved and focused on the macro level.

[48] https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds34_e.htm
[49] ibid.

5.18 Bangladesh's case shows how step-by-step confidence and capacity can be built. Which, along with sufficient financial support, will eventually result in a member reaching out to the DSM. In Bangladesh's case, earlier anti-dumping action by two of the bigger WTO members, US and Brazil, resulted in their building capacity to at least evaluate the actions. Access to alternate recourses in Indian courts also enabled them to legally assess the merit of their own case and evaluate it through the fairly rigorous legal scrutiny there. What is even more important was the building up of support from the industry as a whole. All these factors strengthened Bangladesh and enabled the dispute, albeit with strong legal and financial support from ACWL. This is not unlike what Raul Torres describes as the situation that allows the Latin American countries to effectively participate in the DSM[50].

5.19 What is important here is that all the steps leading up to the dispute involved the private company fully? At all stages they were there looking for options within and outside of the WTO, including the Indian courts, where they received no support form their government.

5.20 However, all the three WTO members examined herein and a vast majority of the others who have not even explored the possibilities of the DSM thus far, will always have a greater motivation to resort to options and alternatives outside of the WTO.

5.21 At this point in time, even the biggest economies such as the US and EU are unhappy at being subjected to dispute settlement proceedings. This is primarily due to the domestic sensitivity of national trade policy measures. The idea of being subject to inquiry and inspection at the WTO is seen to be weakness. Even more importantly, the

[50] 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).

changing nature of the rulings and recommendations of the DSB is having an impact, which has not been negotiated in the WTO, on how countries can formulate trade policies in the future.

5.22 For the medium to small WTO members' the size of their economies will remain a critical factor when in a bilateral dispute. The economic clout vis-à-vis a trading partner will decide the options and how to proceed in a trade impacting matter. At the WTO, these choices may always be subject to realpolitik i.e. political consequences of initiating a dispute. It will overshadow and mitigate the risks involved in bilateral dispute settlement. As such, it is far more prudent and a harbinger of success for medium-to-small economies to improve / amend the text of the DSU and the DSM procedures to inherently build into the structure of law and process their unique circumstances and necessities.

5.23 While the focus on the needs of the WTO members is primary, the critical issue that does come out in this examination is the requirement to somehow get the private business into the WTO process, particularly the DSM. They are the ones who suffer the loss, but they are not the ones that benefit with any degree of certainty in following the dispute resolution processes. The case in point is of the Bangladesh battery exporter, whose exports suffered when it was perhaps at a peak to grow and develop its market. Despite the dispute (please see Table 6) the imports into India remain indifferent since. The issue to address is how to, within the existing framework, build in a role for the private businesses of the WTO members in the DSM? The aim is to reduce the burden on the member governments to have intricate monitoring and advisory systems coupled with addressing the cost issue.