Developing Countries Participating As Third Parties in the WTO Dispute Settlement

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Abstract

While almost all of the issues in the dispute settlement process of the WTO have been discussed, the issue of third parties has not been explored thoroughly and deeply. This paper, by examining the 16-year practice of Members as third parties, seeks to generalize characteristics of their participation of developed countries and developing countries. Beyond the characteristics, it elaborates the reasons contributing to the gaps of the participation levels between developed countries and developing countries. In the end, it proposes how to improve the third party rules in order to provide more sufficient protection for developing countries.

1. Introduction

As a product of WWII, the dispute settlement of the General Agreement on Tariff and Trade (hereinafter “GATT”) was set up with the objective of preventing trade frictions from contributing to war by promoting “satisfactory adjustment of the matter.”¹ This “adjustment” was to rebalance the impaired interest between a complainant and respondent. It implied a bilateral vision with an understanding of the relationship of parties. Although the GATT permitted multi-party disputes, the procedures focused on adjusting the balance between plural complainants and a respondent. Scholars argue that this bilateral model might have originated from the “the concept of opposition” which “reduces the issue to one of bilateral application as between the immediate parties.”² The procedures of dispute settlement in the GATT paid more attention to protecting the interests of parties to the dispute. These procedures further affected substantial rights in that panelists were to “determine the

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¹ GATT 1947, Article XXIII:1.
² Christine M. Chinkin, Third Parties in International Law, Oxford University Press 2 (1993).
legal rights and duties of the respective parties after hearing their arguments on the merits of the dispute.”

This bilateral model might be workable with a small group of 23 initial Contracting Parties who shared a consensus on free trade and resolved disputes by overwhelmingly relying on diplomatic negotiation. However, “the doctrine has been based upon a highly artificial notion of social interaction, and has overlooked the rather obvious fact that in circumstances of even minimal interdependence, the stabilized practices of several participants do indeed effect many others.” These “many others” were not been clarified in the GATT 1947 except in the ambiguous language of Article XXII that “[E]ach contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement.” Until the 1970’s, in the dispute United Kingdom—Dollar Area Quotas, third parties first participated in the panel procedure instigated by GATT Council, instead of on the basis of their own requests. However, third parties’ participation was not formally recognized until the issuance of the Understanding on Notification, Consultation, Dispute Settlement and Surveillance (hereinafter “1979 Understanding”). Later, the Improvements to the GATT Dispute Settlement Rules and Procedures (hereinafter “Improvement Decisions”) agreed by contracting parties in 1989 integrated detailed rules on third parties, which provided the basis of the fundamental rules related to third parties for the WTO. Despite the progressive improvement of the third parties’ rules, it should be noted that the participation of third parties in the GATT was under the agreement of parties to the dispute and subject to refusals.

The Uruguay Round negotiations invigorated the world trading system by legalizing dispute settlement into “a remarkably sophisticated and quite effective

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3  *Id.* at 147.
5  “The Chairman said that the Panel would certainly wish to hear representatives of Jamaica, Trinidad and Tobago and Cuba on this matter.” Minutes of Meeting Held on 19 December 1972, C/M/83.
6  Improvements to the GATT dispute settlement rules and procedures: Decision of 12 April 1989, L/6489.
system.”\textsuperscript{7} However, despite the significant evolution of the Dispute Settlement Mechanism (hereinafter “DSM”) of the WTO, it did not alter the basic understanding of the bilateral model of a dispute. The multilateral relationship secured by the DSM\textsuperscript{8} is, rather, a combination of bunches of bilateral relationships. In this context, third parties are still regarded as the interveners into a bilateral relationship between the complainant and respondent. Their procedural rights, therefore, are limited compared to those of the parties and they receive limited rights to participate. At the same time, the extensive membership of the WTO involves countries varying greatly in their legal and financial capabilities, economic power and political power that affect their decisions to bring a case to the DSB. Many developing countries are confronted with the fact that they are not able to protect their interests by filing a case as complainants because of legal and financial limits and various political concerns. They, therefore, compromise with the reality by joining in a dispute as third parties. A prominent trend has revealed that developing countries, especially small developing countries, seek to influence the panel or the Appellate Body decisions by participating as third parties instead of complainants. In this sense, developing countries, especially small ones, could be adversely affected by the difference between rights of third parties and parties and the dangers of their interest in an insufficient protection.

This paper, in a review of the practice related to third parties in the DSM up to now, reveals differences among Members in using third parties and different strategies implied between developed countries and developing countries. Beyond these facts, the paper will pay special attention to developing countries and explore reasons beyond the fact of developing countries’ extensive participation as third parties. Furthermore, the paper elaborates that developing countries overwhelming participation as third parties—whose rights are restricted—might prevent developing countries, especially small developing countries from making fuller use of the DSM and inadequately protect their interests. In fact, the issues on treatment of third parties have attracted widespread attention of Members in Dispute Settlement Understanding Review (hereinafter “DSU Review”). Although a general consensus of Members was

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\item \textsuperscript{7} John H. Jackson, Perceptions about the WTO Trade Institutions, 1 World Trade Rev. 101-114, at 108 (2002).
\item \textsuperscript{8} DSU, Article 3.2 provides the task for the DSM: “[T]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system.”
\end{itemize}
achieved on expanding third parties’ rights in the panel or the Appellate Body procedures, there has been no substantial progress towards drafting language to that effect. Based on scrutiny of the proposals discussed, the paper further proposes how to extend third parties rights for the benefit of developing countries.

The paper, in Section 2, analyzes the data of Members’ participation in the past 15 years of the dispute settlement and reveals the underlying tendencies. In Section 3, it discusses the underlying problems for developing countries. Section 4 will review the proposal relevant to third parties in the DSU Review and propose the ideas to reform third parties’ rights for the benefits of developing countries. Section 5, it concludes the discussion.

2. The Participation of Third Parties: Facts

2.1 General Facts

Since the inception of the WTO on 1 January 1995, the DSM involved the extensive participation of Members. As of 10 May 2011—16 and half years of the DSM’s operation, there have been 424 disputes brought by Members. A variety of Members—involving developed countries, developing countries and least developed countries (hereinafter LDCs)—have participated as parties and third parties. In order to understand the situation better, this paper collects the data of the Members based on the categories of advanced economies, developing countries and the LDCs. In

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9 This categorization is based on the International Monetary Foundation Advanced Economies List (World Economic Outlook (WEO): Risk, Recovery and Rebalancing, 6 October 2010, at 150.) and includes the countries: Australia, Austria, Belgium, Canada, Cyprus, Czech Republic, Denmark, Finland, France, Germany, Greece, Hong Kong, Iceland, Ireland, Israel, Italy, Japan, Korea, Luxembourg, Malta, Netherlands, New Zealand, Norway, Portugal, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Taiwan, United Kingdom, United States. In consideration of the participation of countries that join the European Union (hereinafter “EU”) after the establishment of the WTO may affect the data of the EU, the countries, such as Bulgaria, Estonia, Hungary, Latvia and Lithuania, are also integrated into this Category. Countries of Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Malta, Netherlands, Portugal, United Kingdom are combined into the EU group.

10 There has been no clear definition for “developing countries.” In this paper, the category of “developing countries” includes the Members who are neither advanced economies nor least developed countries.

11 The least developed country Members, by the standard of the United Nations are Angola, Bangladesh, Benin, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Democratic Republic Congo, Djibouti, Gambia, Guinea, Guinea Bissau, Haiti, Lesotho,
addition, horizontally, this paper analyzes each country by comparing the data of Members participating as complainants, respondents and third parties.

### 2.2 The Participation of the Advanced Economies as Third Parties

Countries in Chart 1 are displayed in descending order of their frequency of participating as third parties. Among these countries, Japan and the EU are the most active third party participants with a record of 104 disputes. As to Japan, intriguingly, its third party participation constitutes a contrast to its experience in 14 disputes as a complainant and 15 disputes as a respondent. Third party participation covers a vast majority (78.2%) of its practice in the DSB. This could be interpreted as an evolution of the Japan’s—“aggressive legalism” which described Japan’s strategies in the dispute settlement system of the GATT/WTO shifted to a more aggressive attitude towards using dispute settlement in late 1980s and 1990s.\(^{12}\)

The EU is a frequent user in the DSB in terms of both participating as parties and third parties. It has been present in a significant number of disputes and ranks No.2 of the total number of participations. The EU is one of the most active third parties with a record of 104 disputes—the same with Japan. In its absence as a complainant or respondent, nearly 85% of the cases, the EU was present as a third party. Meanwhile, in contrast to Japan, the EU’s is evenly distributed. Third party participation covers only 40.7% of its practice.

Chart1: Participation of Advanced Economies\(^{13}\)

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\(^{12}\) Saadia M. Pekkanen, *Aggressive Legalism: The Rules of the WTO and Japan’s Emerging Trade Strategy*, 24 World Economy, 707-737 (2002). In this paper, Professor Pekkanen defined the “aggressive legalism” as “a conscious strategy where a substantive set of international legal rules can be made to serve as both ‘shield’ and ‘sword’ in trade disputes among sovereign states.” She also added, “This is the strategy that Japan has embraced as principal means of dealing with its major trade partners. And this transition is especially remarkable given the non-legalistic and non-confrontational character of Japan’s post-war trade diplomacy.” At 708.

\(^{13}\) Countries marked with “*” are the ones that became Members of the European Union after the establishment of the WTO.
The US, as the most frequent user of the dispute settlement mechanism, has participated in 296 disputes—almost all the disputes going to the panel procedures. The US participated in 97 disputes as a complainant, 113 disputes as a respondent and 86 as a third party. Data has shown that in 99% cases where it was not parties, the US was a third party.\(^ {14}\) Also, interestingly, the same as the EU, utilization of the three forms of participation is more or less even: To file a case in the DSB, to defend its policies or measures and reserve rights of third parties in a dispute are free options—

It is true that appearing as a defendant is not a choice, but defending itself in the DSM seems available.

Canada, undoubtedly, is another important player in the DSM. While it totally joined in 120 disputes as a complainant, respondent and third party, close to 133 of Japan. However, it has been a more aggressive complainant compared to Japan given that it has initiated the cases as much as twice of Japan’s in the DSM. On the other hand, it participated less frequently than Japan as third parties. There have been 71 cases, 59.2% of the whole, where Canada was a third party.

Chart 1 also indicates that Australia, Chinese Taipei and South Korea, for the sake of their similar amount of disputes presenting as third parties, share a common attitude towards using third parties: Participating as third parties may be an effective way to keep an eye on the procedural issues and the interpretation of rules of panels and the Appellate Body and to stay in touch with activities in panels. Among them, Chinese Taipei is an impressive third party in the sense that it has shorter history in the WTO but a greater record of third party participation. But it is also true that it has been less active in acting as parties. It has brought only 3 cases to the DSB and has not been a respondent in any case. Therefore, third party participation thus reaches 95% of its practice in the DSB. Arguably, the impressive record of Chinese Taipei could also be interpreted its litigation strategy of learning by doing. Australia and South Korea shared almost the same number of cases as third parties, although Australia was not as active as South Korea in participating as a third party. So for Australia, the disputes in which the Member was a third party cover 77.3%, while those of South Korea cover 65.9%.

15 According to the interview adopted by Professor Shaffer with a lawyer from the mission of middle-sized developed country, the consideration to participate as a third party could be “First, an important procedural issue could arise affecting all future cases. Second, the interpretation of a point of substantive law could have implications for the country in future cases. Third, and perhaps most importantly, a country needs “to stay in touch with panel activity” in order to know how panels and the Appellate Body are working so that, when it has a complaint, it can tailor legal arguments and litigation strategies accordingly. WTO Appellate Body members and secretariat officials change over time. Just as in domestic litigation, a party needs to know the “institutional culture and personalities” of the judges and the tribunal.” Gregory Shaffer, Developing Country Use of WTO Dispute Settlement System, James C. Hartinog (eds.) Trade Disputes and the Dispute Settlement Understanding of the WTO: An Interdisciplinary Assessment, Emerald 167-190, at 169, (2009).
Another group of countries like Norway and New Zealand share the same number of joining in the disputes and almost the same number as third parties. Their participation as third parties represents 89.2% and 81.1% respectively, of total participation. They also share the fact that they had no experience in defending their interest as respondents, probably because their trade volume and trade characteristics did not arouse sufficient antagonism so as to be targets of disputes.

Hong Kong, Switzerland, Singapore, Iceland and Israel represent another level of participation among advanced economies. They have limited experience in the DSB and almost no experience of respondent. In the DSB, they were more likely to present their views as third parties. A little extreme in the situation of Iceland and Israel, third party participation has been the only way they practiced in the DSB.

The other countries, like Hungary, Poland and so on had very little experience in the DSB prior to their joining the EU. Except Hungary and Poland, the rest of countries were almost silent in the DSB.

2.3 The Participation of Developing Countries as Third Parties

Developing countries in the WTO cover a wide range of countries that are at different development levels and thus have different legal capacities to participate in the DSB. Chart 2 listed 78 developing countries in descending order of the number of cases where they participated as third parties. Indicated by Chart 2, some of developing countries seem to share similar frequencies of presenting as third parties and also similar distribution between the choices of participating as parties and third parties. Therefore, analyses will be adopted by dividing developing countries into several groups. These groups include: Group1: China, Brazil, India and Mexico; Group 2: Thailand, Turkey, Argentina, Colombia and Chile; Group 3: Guatemala, Venezuela, Costa Rica, Honduras, Paraguay, Cuba, Ecuador, El Salvador, Nicaragua, Peru and Jamaica and Vietnam; Group 4: Pakistan, Philippines, Panama, and Indonesia; Group 5: Mauritius, Barbados, Cote d’Ivoire, Dominican Republic, Egypt, Saudi Arabia, Belize, Dominica, Fiji, Guyana, Kenya, Saint Kitts and Nevis, Saint Lucia, Sri Lanka, Swaziland, Trinidad and Tobago and Malaysia; Group 6: Bolivia, Cameroon, Ghana, Grenada, Kingdom of Bahrain, Kuwait, Saint Vincent & the Grenadines, Suriname and Zimbabwe. Group 7: the other countries.
Group 1 contains three of the “BRICs” plus Mexico and demonstrates large developing countries’ practice in the DSB. These four countries have been active
players among developing countries in terms of participating both as parties and third parties. Among them, despite the fact that China is a new comer to the WTO, 78 disputes with third party participation is the same as India, ranking No.1. It covers 72.9% of its all participation. This could partly explain its litigation strategies in the WTO. Unlike China, India has been a more active complainant in the DSB. Its third party participation covers 61.7% of all. The cases where India participated as a third party indicate a wide spectrum: the respondents were various developed countries and developing countries. Close to the amount of India’s third party participation, Brazil has reserved its third party rights in 64 cases, taking up 62.15% of the total. However, different from India, its third party participation focused on the cases where the US, the EU and China were respondents. Plausibly, Brazil pays more attention to the trade policies of large trade participants even though its direct interests are not injured. In addition to resorting to third party participation, Brazil has been the most active complainant among the four large developing countries and all other developing countries. Although it participated in fewer disputes than the other three countries as a whole, Mexico has been an undoubtedly frequent user of third party. Its third party participation takes 61.1% of the total—close to the participation level of India and Brazil. Its third party participation concentrates on the disputes where developed countries were respondents, even though it also shows keen interest in a few cases whose respondents were Chile, China and Philippines.

Group 2 comprises five countries that are not economically as large as the countries in Group 1. They have participated in similar numbers of disputes as a whole. But Thailand, Turkey, and Colombia participated less as parties and have a high proportion of third party participation, 75%, 77.8% and 78.4% respectively. Third party participation is a critical means for these countries to protect their interests. In detail, Thailand has intended to join the disputes that challenged trade remedies and custom measures of developed countries, especially the US. Concerning

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16 China joined as a third party to protect its interest usually in the areas where its interest is traditionally harmed, such as customs and antidumping cases. (Andrew L. Stoler, China’s Role in World Trade Organization and the Doha Round of Multilateral Trade Negotiations, Second World Forum on China Studies, Shanghai, China, 2006). This frequent third party participation benefits China in its capacity building in terms of training local firms and lawyers. (Pasha L. Hiseh, China’s Development of International Economic Law and WTO Legal Capacity Building, 4 Journal of International Economic Law 13, 997-1036, at 1028 (2010)).
Turkey, it was interested in the cases related to TRIPs and trade remedy, whomever the respondent is. Similar to Turkey, Columbia’s third party participation also demonstrated its interest in TRIPs and agriculture without targeting any particular respondent countries. However, in contrast, the participation of Argentina and Chile exhibited a more balanced strategy between joining as parties and third parties. Third party participation covers 48.4% of Argentina and 53.1% of Chile’s total participation. While Argentina seems interested in the disputes related to trade remedies and customs involving the US, the EU and China, Chile would claim third party rights in antidumping and agricultural products in general.

The countries in Group 3, coincidently, are almost from the same region. Maybe it is not a coincidence since they share have similar comparative advantages, trade compositions as well as the concerns on several issues. However, the participation is not uniform. The extreme cases are Cuba and Paraguay for which third party participation was their only form of practice in the DSB. For others, despite presence as parties in several cases, third party participation represents the dominant proportion. Hence, it implies that smaller developing countries share a characteristic that they rely more on third party option when participating in the DSB compared with the countries in advanced economy category and the former two groups of large and wealthier developing countries.

Group 4’s countries join fewer disputes than Group 3 in total, whereas their participation displays more balanced between as parties and third parties. For these countries, third party participation rates range from Pakistan at 64.3%, Panama at 50%, Philippines at 42.1% to Indonesia at 30.8%. These data imply that these countries, unlike countries in Group 3, have not paid special attention to using third party participation in protection of their interests.

Group 5 consists of Caribbean countries whose participation in the DSB has been characterized with the homogenous practice as third parties. Except for some countries like Dominican Republic, Egypt, Trinidad and Tobago and Malaysia that were sued as respondents, the others only appeared as third parties. Indeed, 13 of 19
countries in this group\(^{17}\) were ACP countries and third parties in \textit{EC—Sugar}.\(^{18}\) It is worth mentioning that they participated with the assistance of the EU to pay their bills to hire lawyers.\(^{19}\) Nonetheless, it has to be admitted that these countries’ third participation is limited. They have been only presented their view as third parties in a few cases in addition to \textit{EC—Sugar}.

Group 6 embodies countries that participated as third parties only once. For all of them except Bahrain, Kuwait and Zimbabwe, this sole participation was in \textit{EC—Bananas III}.\(^{20}\) Probably, the EC provided technical assistance for these countries presence in the DSB. Together with the countries in Group 5, third party participation of small developing countries in Group 6 is occasional and again indicates the fact that they could not afford to participate in the system even though it has been often used by other developing countries. What is even worse, Group 7, of 27 small developing countries, has never participated in the DSB. Even though this could be interpreted as a result of their small trade volumes, low GDP levels, it reveals the unfair reality that small developing countries’ arguments could not be heard and their interest could not be protected by the system. It is an ironic reality for the DSM that is supposed to serve as protecting multi-party’s interests in an organization where a vast majority of whose membership are developing countries.

Chart 3: The Participation of LDCs as Third Parties

\(^{17}\text{Mauritius, Barbados, Cote d’Ivoire, Belize, Dominica, Fiji, Guyana, Kenya, Saint Kitts and Nevis, Swaziland, Trinidad and Tobago.}\)

\(^{18}\text{European Communities—Export Subsidies on Sugar (WT/DS283).}\)

\(^{19}\text{Shaffer, supra note 15, at 177.}\)

\(^{20}\text{European Communities—Regime for the Importation, Sale and Distribution of Bananas (WT/DS27).}\)
2.4 The Participation of LDCs as Third Parties

Chart 3 manifests the situation of least developed countries in using the dispute settlement. Among 32 countries, only 7 countries had experience in the DSB. Bangladesh marked itself as the first and so far the only one of LDCs to bring a case to the DSB. The other 6 countries, such as Madagascar, Malawi, Tanzania, Senegal, Benin and Chad only participated in a few disputes as third parties. The other countries in this group remain silent in the DSM. In the same box with small developing countries, LDCs are marginalized in the dispute settlement system.

2.5 Some Generalizations

The large trading Members, no matter whether they are in the advanced economy group or the developing country group, rank higher in terms of participation both as parties and third parties. Although their rankings in third party participation is not identical to their rankings in trade volume, their performance of third party
participation again proves a causal relationship between trade stakes and countries’ frequencies in using the DSB.\textsuperscript{21}

Among these large countries, they also share commonalities that their uses of the DSB also demonstrate diversity among presenting as parties and third parties. Since presenting as parties to the dispute or third parties impose different obligations, it suggests they enjoy freedom to resort to these options. Furthermore, more balanced strategies could be found in their practice in the DSB: The number of the cases where they participated as parties and third parties is distributed evenly. But it shows that large developing countries—in comparison with the EU and the US—seem more frequent users of third party participation.

At the same time, however, this balance is hard to achieve for most of developing countries. It shows that the less they participate in the DSB in the aggregate, the higher portion of third party participation. For most of the small developing countries, acting as third parties has been the only way for them to participate effectively in the DSB. The extreme case relates to LDCs. Taking up more than one fifths of the entire Membership of the WTO, the LDC group has been almost silent in the DSB. It is true that there have been courageous attempts of LDCs to join as third parties. But this practice is confined to few countries in few cases. The few cases may include the cases where these countries reckoned on developed countries’ assistance.

Chart 2 and Chart 3 also imply that some geographically close countries share similarities in their practice in the DSB. In fact, because of the geographical characteristics, they may have the same concerns on the same issues and the neighboring countries’ policies in the DSB may affect a country when it drafts similar policies. In a broader context, the pattern of some leading countries, such as large developing countries, could be inspiration for others to participate in the DSB.

All in all, the statistical analysis of Members’ third party participation in the last 15 years reveals an undesirable situation that while developed countries as well as

\textsuperscript{21} “Absolute trading stakes (the aggregate of a WTO member’s exports and imports) appears to be the best predictor of a WTO member’s use of the system.” Shaffer, supra note 15, at 169.
large developing countries have actively taken advantages of the dispute settlement process through the means provided by the DSU, small developing countries and LDCs have participated more as third parties. Most of small developing countries and the LDCs are even not able to afford participating as third parties. The disparity among Members and developing countries challenges the design of dispute settlement because it reflects the neglect of the differences in Members’ capabilities.

3. Beyond the Statistics: The Unfortunate Reality behind Developing Countries’ Participating as Third Parties

3.1 To Participate in the DSB May not be a “Free” Choice

The sophisticated procedures of dispute settlement and panel or the Appellate Body’s adjudication adhere to the substantive rules offer developing countries an impartial arena where “right preserve the might.”  But it does not come without cost. The expansions of the WTO substantive rules have complicated the WTO legislations. Nevertheless, “[S]ubstantive law… is of limited neutrality if weaker parties cannot mobilize legal resources in a cost-effective manner to pursue and defend their claims or negotiate them in the law’s shadow.” To successfully claim or defend their interests, it requires countries to master facts, to make efficient legal arguments or rebuttals and have command of domestic situations to present evidence. This becomes extremely complicated and unconquerable for small developing countries and the LDCs who are faced with the problem of “lack of personnel, experience and legal knowledge exacerbated by the linguistic challenges.” The LDCs are even worse off when they have no delegations in Geneva. Those LDCs generally lack access to adequate information related to possible issues pending in the Geneva, since prior to the formal consultation request, the issue usually is discussed for a while among delegations. In addition, these

23 Shaffer, supra note 15, at 169.
24 For the small developing countries, they could be injured by the inconsistent measures of the respondent. But they are also weak in presenting evidence to demonstrate the harm. In the US—Subsidies on Upland Cottons (WT/DS267), owing to the work of Dr. Nicholas Minot on effects of falling cotton prices on rural poverty in Benin, the panel found that the serious prejudice caused by the US’ cotton subsidies.
countries may have tighter schedule during which to prepare documents because they are not physically present in Geneva.

It is true that the Advisory Centre on WTO Law (hereinafter ACWL) has offered valuable assistance and promoted developing countries or LDCs’ participation. But its limitations, such as restricted human resources, with lower than commercial fees for service but not free service and with the assistance is confined to the LDCs and its members—is unavoidable, non-member small developing countries can not seek help from the Center as a practical matter. More often, Members have to turn to law firms for legal advice. On average, attorney fees of a dispute exceed U.S. $400,000. The complicated cases that last longer cost more. In the US—Cotton dispute, “Brazil’s cotton association faced legal fees around U.S. $2,000,000.” As to the Members that have no delegations in Geneva, such as Chad and Benin in the cotton case, fees are not limited to legal fees. Constantly traveling to Geneva to present views in meetings may impose additional financial burdens on small developing countries and LDCs. In addition, the amount of the legal expense is not an “absolute value” and should be understood in the context of countries’ capabilities to absorb this expense. Developing countries, particularly small ones and the LDCs, usually share challenges of building up infant industries. The expenses to file a case in the DSB could be an unaffordable burden for these infant industries, even exceeding injuries caused by inconsistent measures, and thus can be met only with government financial assistance, which may not be available.

In addition to lack of legal and financial capabilities, developing country Members may be concerned with “political and economic pressure from members exercising market power, and in particular the United States and EC, undermining their ability to bring WTO claims.” While the dispute settlement mechanism has become more legalized and less politicized, this does not alter the fact that a country has to address corresponding political and economic pressure from the respondent. In cases of developing countries, particularly small developing countries and the LDCs, this pressure could be too overwhelming to handle and they may thus hesitate to file a

26 Shaffer, supra note 15, at 183.
case in the DSB. It should be noted that the facts that developing countries face weak legal and financial capabilities and political concerns might vary significantly from one country to another due to a broad range of developing countries. Shown in Chart 2, large developing countries may also face challenges of a lack of legal and financial capabilities, even though they obviously have demonstrated stronger capabilities than small ones in participation.

3.2 To Seek a Shelter by Participating as Third Parties

Chart 2 demonstrates that small developing countries in Group 5, Group 6 and Group 7 and the LDCs shared commonalities in that they rarely acted as complainants, whereas they have used third party participation and even this has been the only means of their participation in the DSB. It is evident that developing countries, particularly small developing countries use third party status as a way to protect their interest.

Procedurally, the legal burden levied on third parties is not as heavy as on parties to the dispute. According to the DSU, third parties are entitled to make written submissions, to receive the submission of parties and to participate in the first substantive meeting of the panel. In the appeal stage, third parties are required to inform the Secretariat of their participation. They have rights to present in the oral hearing, to make oral statements and to respond the questions \(^\text{28}\) and the “passive third participant” can observe the oral hearing.\(^\text{29}\) However, on the other hand, these rights also mean burdens to third parties. Compared with burdens of parties, these requirements may be less critical to countries. For developing countries and the LDCs lack of legal and financial capabilities, third party participation could be a realistic choice. In this sense, third party participation lowers the threshold for participation and makes the dispute settlement more accessible to developing countries.

Furthermore, third party participation may enable countries to avoid a direct confrontation and the pressure from a respondent, especially when the respondent is a

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\(^{28}\) *Working Procedure for Appellate Review* (WT/AB/WP/6), 16 August 2010, Rule 24 (1) and Rule 24 (2).

\(^{29}\) *Id.* Rule 24(4).
developed country. This provides alternatives for developing countries that are concerned with tensions with a respondent and further motivates them to protect themselves. Among the cases where Group 5, 6 and 7 in Chart 2 were third parties, most of their respondents were developed countries. In addition, in light of the “reasonably good” implementation record of the dispute settlement in the DSB, third parties could “reasonably” expect that inconsistent measures of a respondent could be removed and their interest would be protected equally to that of the complainants. In this sense, third party participation could provide protection for developing countries at lower political cost, and with few disadvantages.

Meanwhile, although the DSM was created as a legal mechanism owing to innovations of Uruguay Round negotiations, the possibility of resolving disputes through the diplomatic approach still remains. “Two of the most important diplomatic features are the selection and modus operandi of panels and the confidentiality or secrecy of dispute settlement proceedings.” 30 Article of 13.1 of the DSU states that “[C]onfidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Members providing the information.” The information is usually undisclosed to the parties uninvolved in the dispute. 31 Therefore, joining a dispute as third party could be an effective route to access to information relating to disputes. In addition, third parties are also able to influence panel or Appellate Body decisions by presenting evidence and stressing their legal arguments. Systemically, this participation is significant because “WTO jurisprudence shapes the interpretation, application, and social perceptions of the ‘law’ over time and thus affects future bargaining positions in light of these understandings.” 32 Given the stagnation of the Doha Round negotiations, 33 the adjudication of panel or the Appellate Body is of critical significance in clarifying the WTO rules, as in most instances it is the only means of such clarification. This explains proactive postures of developed countries in Chart 1 actively participating in

31 Although the efforts to improve transparency of the dispute settlement has been made by the US and the EU by opening the panel meetings to the public, the panel procedures is confidential.
32 Shaffer, supra note 15, at 172.
33 So far to May 30 2011, there have no clear signs that the Doha Round negotiations could be concluded by the end of 2011. See Jagdish Bhagwati, Life without Doha, available at http://www.project-syndicate.org/commentary/bhagwati13/English, last visited at June 3 2011.
many cases. For developing countries, the situation varies. While large developing countries may take account into systemic significance of a dispute and decide to participate as third parties, small developing countries, more often, use third party to protect their trade interests and exert influence on the jurisprudence of panel or the Appellate Body. Therefore, third party participation offers an effective means for developing countries not only accesses to information on a specific dispute but also chances to systematically influence substantive rules of the WTO.

In addition, third party participation, for some of countries, is significant means to protect their trade interests. As shown in the following chart, small developing countries—which have only participated as third parties—and LDCs, have tended to use third party status in protection of their substantial trade interests. In the disputes where they sided with complainant, while they could become a co-complainant, such as Chad and Benin, they chose to participate as third parties probably because of political and financial limits faced by them. As some scholars suggested, for developing countries, joining in a dispute as third party, could be a useful strategy to become involved in the dispute settlement procedures.  

Chart 4: The Reasons of Some Developing Countries and LDCs to Participate as Third Parties  

35 Madagascar, Malawi, Tanzania, Senegal, Chad and Benin are LDCs. The other countries are developing countries, listed in descending order. Also, the reasons for third party participation of some countries are categorized as unidentified that that did not make any submission or present their views in panel or appeal procedures and their views were thus not written into panel or the Appellate Body reports.
QuickTime™ and a decompressor are needed to see this picture.
3.3 Third Party Rights: The Insufficient Shelter to Protect Developing Countries

While third party participation makes the dispute settlement more affordable and accessible to developing countries, third parties—regarded as interveners into the dispute settlement of a bilateral model—are treated less favorably compared to the parties to the dispute. Therefore, it is doubtful whether third parties rights can sufficiently protect developing countries’ interest—especially many small developing countries that usually reserve third party rights to protect their substantial trade interests.

When a dispute is not resolved with a satisfactory resolution in the consultation phase, the dispute will automatically go into the panel procedure. In the panel procedure, the rights of third parties are restricted to (1) the right to make a written submission (Article 10.2); (2) the right to have its submission circulated to the parties and reflected in the panel report (Article 10.2); (3) the right to receive the submission of the parties to the dispute to the first substantive meeting of panel (Article 10.4); (4) the right to participate in the first substantive meeting and to respond to questions and to present their views (DSU Annex 3, para.6). As to the second substantive meeting, third parties are not entitled to participate. This means that a third party cannot hear rebuttals of the respondent and present their view thereof. In addition, the panel interim review provided in Article 15 of the DSU also excludes third parties. The facts and arguments are only disclosed to parties to the dispute. Third parties, the same with other Members uninvolved in the dispute, have to wait to read details of the rebuttals and the discussion until the adoption of the panel report.

Also, third parties cannot enjoy the rights to make a written comments to panel reports or to make written requests for the panel to reexamine some aspects of interim report. This design of restricting third party intervention in dispute settlement procedures, although thought reasonable to promote satisfactory settlement of disputes, has demonstrated limitations in protecting third parties—especially when third parties are developing countries using this mechanism to protect their substantial trade interest. Although pursuant to Article 10.4 of the DSU, third parties have the option to file a case in the DSB on the same issue again, small developing countries and LDCs may not be able to make a “free” choice for reasons as discussed
above. The restricted third party rights may impede developing countries’ full use of the dispute settlement system and undermine the efficiencies and credibility of the DSM for protection of a broader range of Members.

In practice, as requested by third parties, there have been attempts of panels to expand third parties rights in the dispute of EC—Bananas III\textsuperscript{36}, EC—Tariff Preferences\textsuperscript{37}, EC—Hormones\textsuperscript{38}, US—1916 Act\textsuperscript{39} and EC—Export Subsidies on Sugar\textsuperscript{40} and so on, although expanded third party rights were not authorized in all these disputes. In the US—1916 Act, the panel rejected Japan and EC’s requests based on the reason that the enhance third parties’ rights were authorized for “the specific reasons only.”\textsuperscript{41} Yet, sadly, the practice of panels, nonetheless, was not able to shed light on the “specific reasons” further. Panels are thus granted a large margin of discretion in deciding whether third party rights should be enhanced in a specific case. It might be a cautious stand taken by panels to not upset parties or third parties. But indeed it hurts third parties by failing to provide them predictability. In an individual case, it is difficult for third parties to argue why the expansion of third party rights is necessary. It is even more difficult for developing countries to successfully argue for expanded third party rights since they usually have lower legal capabilities. Therefore, the unclear and unwarranted expansion of third party rights might trigger further discrimination against developing countries.

Third parties are excluded not only from adjudication procedures, but also from the suspension of concessions or other obligations (hereinafter “retaliation”) in implementation stage. Article 3.8 of the DSU clarifies that “[T]he last resort… is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member, subject to authorization by the DSB of such measures.” This retaliation is confined to the parties to the dispute and prohibits the intervention by or benefit to third parties. Although

\begin{itemize}
\item \textsuperscript{36} European Communities—Regime for the Importation, Sale and Distribution of Bananas (WT/DS27/R), circulated on 22 May 1997, para. 7.4-7.9.
\item \textsuperscript{37} European Communities—Conditions for the Granting of Tariff Preference to the Developing Countries (WT/DS246/R), circulated on 1 December 2003, Annex 1.
\item \textsuperscript{38} European Communities—Measures Concerning Meats and Meat Products (WT/DS48/R), circulated on 18 August 1997, para. 8.12-8.20.
\item \textsuperscript{39} United States—Anti-dumping Act of 1916 (WT/DS136/AB/R, WT/DS162/AB/R), circulated 28 August 2000, para. 139-150.
\item \textsuperscript{40} European Communities—Export Subsidies on Sugar (WT/DS283/R), circulated on 25 October 2004, para. 2.1-2.9.
\item \textsuperscript{41} US—1916 Act (WT/DS136/R), circulated on 31 March 2000, para. 6.33.
\end{itemize}
the purpose of promoting resolution of the dispute through the last resort is obvious, retaliation will bear no fruit for third parties despite the fact that their substantial trade interests are nullified or impaired. In the dispute of US—Cotton, Paraguay argued that “the damage caused by the kinds of subsidies and support measures at issue in this case have caused an exodus of this rural population to urban areas with no relief or solution in sight, further aggravating the country’s economic situation.”42 Other third parties such as Argentina, Benin and Chad also made similar arguments. Unfortunately, the case did not end with the compliance of the US. The complainant was authorized to retaliate in the amount of U. S. $800 million in 2010.43 Later, Brazil and the US agreed a bilateral solution to the case by forming a “Framework” which includes the requirement that the US create a fund to provide the Brazilian cotton sectors with “technical assistance” and “capacity-building” at an annual amount of US $147.3 million.44 Third parties, such as Paraguay, Benin and Chad, although they spent several years seeking the removal of the US subsidies, are still bleeding. Even though third parties may reinitiate a dispute on same issue in the DSB again, it is the least cost-effective choice for third parties as well as a waste for resources of the DSM.

Third party participation provides access for developing countries that cannot afford to be parties to the dispute. However, third party rights, by nature, are restricted and thus cannot provide sufficient protection for developing countries, especially when they participate as third parties to protect substantial trade interests involved in a dispute.

4. To Create a More Effective System to Protect Developing Countries as Third Parties

43 According to Article 22.6 of the DSU, the arbitration award authorized a changing amount based on the former year in terms of the prohibited subsidies. United States—Subsidies on Upland Cotton—Recourse to Arbitration by the United States under Article 22.6 of the DSU and under Article 4.11 under the SCM Agreement, WT/DS267/ARB/1, 31 August 2009, para.4.279. Based on the preliminary data of 2009, Brazil claimed that it could retaliate in amount of more than 800 million in total retaliation. See US and Brazil Reach Agreement on Cotton Dispute, New York Times, April 6 2010.
4.1 The Relevant Negotiation on Third Parties in the DSU Review

Even though the deadline for the review was postponed several times, there has been no consensus achieved among Members on how to improve the DSM further. Regarding the third party issue, it is widely accepted among Members that third parties’ rights should be expanded. The EU addressed the issue of third parties at the beginning of the DSU Review. It was proposed to expand third parties’ rights to allow them to access to all the submissions and to participate in all the panel meetings. However, a detailed discussion on how to expand third parties’ rights was embodied in the proposal of Costa Rica. It advocated the extension of third parties’ rights in each stage of dispute settlement. In the consultation procedure, the proposal argued that the requirement for qualification third party status that Members should have “substantial trade interest” should be eliminated. In panel procedures, a period of 10 days after the establishment of panels for notifying third parties’ participation was proposed. In addition, third parties should be allowed to access all documents, “except for some certain factual confidential information designed as such by the disputing party that submitted it.” Panels should also clarify the argument and findings relating to third parties. What is noteworthy is that Costa Rica, in its proposal, took the point of view that third parties should have access to interim review. In the appeal stage, Members that have not participated in panel procedures could also become third parties to be heard by the Appellate Body. In the implementation stage, third parties should be afforded adequate opportunities to express their view given that the parties to the dispute enter into a consultation on a mutual satisfactory agreement. Obviously, Costa Rica advanced an idea that third party should enjoy almost equal rights to the parties to the dispute.

While most of the Members agreed with Costa Rica’s proposal that third parties’ rights should be expanded to receiving all the documents and submissions of

45 Contribution of the European Communities and its Member States to the Improvement of the WTO Dispute Settlement—Communication from the European Communities (TN/DS/1), 13 March 2002, p 10.
47 Id. Article 10.2.
48 Id. Article 10.3.
49 Id. Article 15.
50 Id. Article 17.
the panel and participating all panel meetings. Members differed on the point to what extent that third parties’ rights should be expanded. At the meeting of 10 September 2002, 17 Members joined a discussion on the proposal put forward by Costa Rica. The US, India, Norway, Mexico and Canada sided with Costa Rica on comprehensive enhancement of third parties’ rights. In contrast, others including EU, Chile, Indonesia, Peru, Hong Kong, Japan, Argentina, took more conservative attitudes towards the third parties’ rights and held that their rights should be restricted so that they do not exceed the rights of parties to the dispute and impede the primary goal of dispute settlement. The controversies arose on whether the panel and the Appellate Body should accord due consideration on the arguments of third parties in their reports, on whether third parties should be granted the rights to participate in interim review as well as on whether third parties that were absent from panel procedures could participate in the Appellate Body procedure. So far there has been no agreements among Members on how to revise the DSU to enhance third parties.

It is true that if the proposal to enhance third parties’ rights could be written into the DSU, the bilateral structure of dispute settlement could be reformed into a more multilateral one. Nevertheless, as Brazil expressed at the same meeting on 10 September 2002, it was doubtful whether this enhanced rights will benefit developing countries because “[O]nly a few countries would be in a position to take advantage of any improved access to panels and the Appellate Body. This would certainly be the case at the second panel meeting, which was dedicated to a detailed discussion of the controversial issues in the case.” Therefore, the proposals of enhancing third parties’ rights are not sufficient to resolve the difficulties faced by small developing countries and LDCs in resorting to third party participation because the proposals of expansion of third parties’ rights are not able to take account into countries’ difference of


52 For the detailed discussion at the meeting, please refer to Minutes of Meeting—Held in the Centre William Rappard on 10 September 2002 (TN/DS/M/4).

53 Id. para. 15.
participation capabilities. The author thinks that developing countries and the LDCs deserve extra attention to how to enable them to fully use third parties’ rights.

The African Group addressed in its proposal its view that the expansion of third parties’ rights is of importance to developing countries’ full participation and capacity building in the DSM. However, bearing a similar idea to grant developing countries rights “to all the documents and information, and to fully participate in all the proceedings,” it could not provide detailed proposal on how to expand third party participation for developing countries. In the following part, the paper will explore how to make the rules of third parties more friendly to developing countries, especially small developing countries and the LDCs.

4.2 Making Third Parties Rules Benefit Developing Countries

As discussed above, the dilemmas confronted by developing countries are that they are not able to handle the complicated legal facts and sophisticated rules of the dispute settlement and they have limited budget for legal service. While third party participation may address and reduce some burdens of developing countries, it does not fundamentally reverse their disadvantaged statuses in using the DSM.

United States civil procedure law provides that “One or more members of a class may sue or be sued as representative parties on behalf of all members” in given conditions. The basic rational beyond class action practice is to “address situations in which it is not feasible for a plaintiff to sue individually or for all of those relevant to a dispute to be joined in a single action.”

Although in the WTO context third parties are not parallel to plaintiffs in the US’ civil procedure law and their amount is usually not large in each dispute, the class action status emphasizes similar situations where the parties are not able to sue individually, but they have similar interests and status in the dispute. It is conceivable that some of third parties may question the alleged measures of the respondent in

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55 Rule 23 (a) of Federal Rules of Civil Procedures of the US specified that class action could be used “only if: (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.”
violation of WTO law and present corresponding evidence to show how their interests are impaired by the inconsistent measures of the respondent. They may hold similar attitudes towards the conducts of the respondent. In this context, the author thinks, when third parties are developing countries or LDCs, they should be granted rights to act collectively similar to class actions in given conditions.\textsuperscript{57} To be specific, third parties can elect a representative that is obliged to work for the interests of the group. The third parties group should, at the earliest time, inform the DSB of their decision of collective actions, the scope of the class and the content of authorization to the representative. Parties to the dispute have no rights to intervene or block the decisions of this collective action. The representative has equal third party rights: to make and receive submissions, to make a written submission and to participate in the first panel meeting and the Appellate Body’s hearing. The decisions of panel or the Appellate Body have forces over both the representative and the other third parties of the group. The representative should clarify the arguments of each other third party’s arguments in written submissions and distribute the submission of parties to the dispute and other third parties to the group. Also it should report all information to the other third parties of the group the information in a timely manner. Should the representative be thought not to be accomplishing its duties, other third parties could reelect a representative and inform the DSB of this change. The reelected representative would have the same rights of a representative authorized by the other third parties. The cost generated by the representative’s activities should be equally shared by all third parties in the group or shared on some other basis authorized by the group.

Indeed, this collective action is not a new idea in the WTO. In the course of negotiation, collective action permits countries to form alliances and groups that share common interests on some issues. This has been a means used by countries to present their opinions with louder voices and to gain greater bargaining power in the negotiation. Developing countries have been active in joining this kind of groups. “One group is seen as politically symbolic of this change, the G-20, which includes Argentina, Brazil, China, Egypt, India, South Africa, Thailand and many others, but there are other, overlapping “Gs” too, and one “C”—the Cotton Four (C-4), an

\textsuperscript{57} The author thinks that the conditions should be (1) there are questions of law or fact common to the class, (2) the arguments of representative parties are typical of the arguments of the class; and (3) the representative parties will fairly and adequately protect the interests of the class.
alliance of sub-Saharan countries lobbying for trade reform in the sector.”58 However, in dispute settlement, while Article 9 of the DSU provides procedures for multiple complaints, it, by nature, is different from this collective action. The collective action of developing countries as third parties will particularly benefit small developing countries that have less legal capability and limited funds to handle complicated disputes. Allowing developing countries to share legal burdens and expenses, in fact, will lower the threshold for them to participate in dispute settlement as well as motivate them to be more active in protecting themselves through the system. Furthermore, this collective action with unanimous support of the developing countries as third parties in the dispute wills will form stronger voice to affect the panel or the Appellate Body’s decision. This collective action may exert more influences on the decision of the respondent whether to comply.

Of course, criticisms against this collective action of third parties could arise since it will alter the bilateral-model of disputes traditionally held by Members, may complicate dispute settlement and “increase the bargaining costs incurred by the main parties in negotiating a solution.”59 This kind of debate, in nature, points to the understanding of the essence of DSM. Admittedly, the facilitation of dispute settlement has been regarded as a primary task of the DSM. Nonetheless, on the other hand, disputes are resolved by taking account into significant variables, such as the increasing the complicated facts of disputes contributed by international supply chains and the interwoven interest network among entrepreneurs, associations and countries and so on. The bilateral-model of dispute settlement, which simplifies the relationship of parties, may overlook or even fail in protecting third parties’ interests. Furthermore, the concern of an increase of “bargaining cost” is the notion out of the vision of parties to disputes. It presupposes that the DSM is a platform for the parties to the dispute and the procedures should be designed for their interest. But if the system is designed through the perspectives of parties to the dispute, how could it be able to offer more efficient and sufficient protection for Members that rarely participate as the parties and how could the DSM play the roles to provide “predictability and security for multilateral trading system?

58 http://www.wto.org/english/thewto_e/whatis_e/tif_e/org3_e.htm
5. Conclusion

This paper begins with the examination of Members’ participation as third parties and discusses their performance by dividing them into three categories. It finds that developing countries, compared with developed countries, have a higher proportion of third party participation. Also, the distribution of developing countries between being parties and third parties is less diverse and less balanced. This characteristic becomes stronger in the group of small developing countries and the LDCs. For many of them, joining in disputes as third parties is the only form of their participation in the DSB. Therefore, it seems that the larger countries are, the more capabilities they have to make choices between acting as parties and third parties.

Beyond the interesting finding about third parties’ participation, it is developing countries’ compromises with their limitation on resorting to the DSM. Because of the lack of legal and financial capabilities and political power with regard to some respondents, developing countries do not have as free choices as developed countries. To participate as third parties might be a second choice, but it still can provide access to join the DSM and further influence the decisions of panels or the Appellate Body. As advised by some scholars, third party participation has been or will be an important means for developing countries to participate in the DSM.

However, because of the restrictive nature of third party rights, the efficiency of developing countries’ participation in the DSM may be diminished since third parties can only participate in the first meeting of the panel. It may make the DSM fail in protecting these countries’ interest, especially when this interest is substantial trade interest that most of small developing countries and the LDC tried to protect through third party rights.

The negotiation in the DSU Review paid considerable attention to the third parties and agreed generally to expand third party rights. However, because the disagreement how to balance the rights between parties and third parties, there has been no substantial progress on this issue. The discussion so far has not taken full account of the reality that developing countries have less capabilities to handle disputes and the fact uncovered in this paper that they resort to third party status, instead of status as a complainant, for their substantial trade interest. The proposals focusing on enhancing third parties’ rights may not necessarily benefit developing
countries and LDCs who seek full protection by participating as third parties. In this paper, the author suggests a collective means to allow developing countries to work together when they have difficulties in exercising their rights and have the same attitudes towards the dispute.