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The Supplement of Deficiencies in the Complaint Within the WTO Dispute Settlement Mechanism

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Abstract

This paper analyzes the underprivileged status of developing countries as complainants in the WTO dispute settlement mechanism. After addressing the existing special and differential treatment provisions under the DSU, the competences of WTO panels, the role of complaints and the experience of developing countries as complainants within the WTO DSM, the author proposes an amendment to Article 7 of the DSU that would allow panels to supplement deficiencies in the complaints of developing-country and least-developed country Members, to compensate for a general lack of financial and human resources in these countries. Such amendment, as a means to correct defective or incomplete motions filed by the complainant party to a dispute, would enable panels to correct mistakes in the citation of legal authority and to remedy any deficiency found in the requests for the establishment of WTO panels, as well as the complainants' first written submissions.

A. Introduction

Developing-country Members' participation in the WTO Dispute Settlement Mechanism (DSM) has increased during the last decade. However, this increased participation is remarkably uneven; very few Members constitute the majority of developing countries participating in the system. In this sense, surveys have shown that most of developing-countries' representatives consider the lack of legal capacity one of the main reasons their governments eventually decided not to file a case to the DSM.

Indeed, there are significant financial, human, and institutional restrains that may impede WTO Members' exercise of their rights under the Dispute Settlement Understanding (DSU),[1] e.g., a lack of domestic WTO legal expertise or fewer financial resources to retain expert legal counsel. These sort of restraints create an asymmetry between developed-country Members' legal capacity and that of developing-country Members and Least Developed Countries (LDCs). Such asymmetry impacts the ability of developing-country Members and LDCs to obtain favorable outcomes with

[1] Available at http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm (last visited 28 January 2013).

regard to their complaints and to fully benefit and make use of the WTO dispute settlement system.

This article addresses the experiences of developing-country Members and LDCs in the WTO DSM, and proposes an amendment to the DSU to modify the panels' terms of reference in a way that would allow developing countries and LDCs an opportunity to remedy deficiencies in their complaints. Such an amendment would enable panels to correct the mistakes in the citation of legal authorities and, in particular, supplement and remedy any deficiency found in the initial request for the establishment of a panel and in the complainant's initial written submissions, as a means to correct defective or incomplete motions filed by complainants.

Such amendment could encourage developing-country Members and LDCs to have a wider participation in the WTO DSM, as they would receive direct assistance in enforcing their legal rights from the panels. Besides, it would allow the Appellate Body to analyze legal issues supplemented by panels which would otherwise not be subject to legal review.

This article is divided in four sections. The first section provides a general background concerning: ***(i)*** the Special and Differential Treatment (S&DT) provisions established in favor of developing-country Members and LDCs under WTO law and the DSU; ***(ii)*** the role and competences of panels within the WTO DSM; ***(iii)*** the relevance of panels' terms of reference; and ***(iv)*** the role of complaints in the DSM.

The second section analyses developing-country and LDC Members' experiences as complainants in the WTO DSM through August 2012. Unless specified otherwise, all statistical data is based on the Worldtradelaw.net database, which labels countries as low income, lower middle income, upper middle income, and high income. Low income countries include countries such as Nicaragua, India and Pakistan; lower middle income countries include Peru, Philippines and Colombia. Upper middle income countries include Mexico, Brazil and South Africa. High income countries include the United States, the European Union (formerly "the European Communities") and Japan.[2] For purposes of this article, the data corresponding to high income countries has been used as relating to developed-country Members, whereas the data concerning low income,

[2] The Worldtradelaw.net database is frequently used among WTO practitioners and it is partnered with the Georgetown University Institute of International Economic law, a leading academic center on WTO law.

lower middle income and upper middle income countries has been used in reference to developing-country Members.

The third section concerns the principle of supplementing deficiencies found in complaints, its definition, origins and scope of application, and puts forward the applicability of such principle in the WTO DSM.

The fourth section of the paper discusses a proposed amendment to Article 7 of the DSU, and addresses the feasibility of coherently incorporating the ability to supplement deficiencies in complaints with WTO case law. The most difficult part of such an endeavor lies in previous cases concerning the interpretation of Article 6.2 of the DSU, particularly issues such as the panels' inability to cure the failings of a deficient panel request, a potential lack of jurisdiction over imprecise claims or claims not included in panel requests, and due process allegations. Finally, the article addresses the main criticisms that could be raised regarding the applicability of such principle in the WTO DSM.

B. Background

I. S&DT Provisions and the WTO Dispute Settlement System: A Brief Review

Since the advent of the WTO, it is clear that the system was intended to encourage developing countries' participation, as demonstrated by the S&DT provisions laid out across the WTO agreements.[3] These provisions grant preferential treatment only to developing-country and LDC Members while the same preferential treatment is not given to developed countries. In other words, S&DT provisions were intended to level the playing field and

[3] In general, the WTO special and differential treatment provisions comprise: technical assistance, longer time periods for implementing agreements and commitments, a more favourable treatment in the multilateral negotiation of non-tariff measures, preferential tariff rates for developing countries, preferences from regional or general agreements concluded between developing countries in the framework of reciprocal trade, and/or any special treatment for less developed countries in favor of developing countries and LDC Members. See, e.g., K. Bohl, 'Problems of Developing-Country Access to WTO Dispute Settlement', 9 *Chicago-Kent Journal of International & Comparative Law* (2009), 130, 133-134 [Bohl, Problems of Developing-country Access]; A. Keck & P. Low, 'Special and Differential Treatment in the WTO: Why, When and How?' (May 2004), available at http://ssrn.com/abstract =901629 (last visited 28 January 2013).

take into account the existing asymmetries between large and small economies within WTO membership.[4]

In the early days of GATT 1947, special provisions for developing countries were limited to Article XVIII of the Agreement, which were to assist the progressive development of the economies of Contracting Parties that were in premature stages of development.[5]

In 1963, during the preparatory phase of the Kennedy Round, the principle of "non-reciprocity", under which developing countries are not obligated to grant the same preferential treatment given to them by developed countries, was recognized. As a result, in 1964, the GATT Contracting Parties agreed to the addition of Part IV (on Trade and Development) to GATT, which came into force in 1965.[6] Part IV set forth certain provisions concerning principles, commitments, and joint actions in favor of developing countries.[7] That same year, the Contracting Parties

4 See International Institute for Sustainable Development, 'Special and Differential Treatment', 2 *IISD Trade and Development Brief* (2003), available at http://www.iisd.org/pdf/2003/investment_sdc_may_2003_2.pdf (last visited 28 January 2013), 2; and M. Tortora, 'Special and Differential Treatment and Development Issues in the Multilateral Trade Negotiations: The Skeleton in the Closet', UNCTAD WEB/CDP/BKGD/16 (2003), 1, 14.

5 Committee on Trade and Development, *Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions*, WT/COMTD/W/77, 25 October 2000. Art. XVIII of *GATT*, 30 October 1947, 55 U.N.T.S. 187, 252-258. Art. XVIII referred to the Governmental Assistance to Economic Development, divided into four sections. Section A allowed the Contracting Parties to modify or withdraw tariff concessions in order to promote the establishment of a particular industry. Section B provided for additional flexibility for the use of quantitative restrictions. Section C allowed developing countries to use any measure not consistent with other GATT stipulations (except Arts I, II and XIII) in case of the promotion of a particular industry. Finally, Section D enabled developing countries to be released from their obligations under relevant provisions of other articles of the GATT to the extent necessary to the establishment of a particular industry.

6 WTO (ed.), *GATT Analytical Index, Part IV: Trade and Development*, (2012), 1039-1051 [GATT Analytical Index (2012)].

7 These provisions are Arts XXXVI, XXXVII and XXXVIII of the GATT. Art. XXXVI enables less-developed Contracting Parties to use special measures to promote their trade and development and codifies the non-reciprocity principle in its paragraph 8. Art. XXXVII requires developed countries to, *inter alia*, prioritize the reduction and removal of barriers which affect less-developed countries and to make every effort to maintain trade margins at equitable levels. Art. XXXVIII states, *inter alia*, that GATT Contracting Parties shall act jointly to guarantee greater participation by less developed parties in international trade and shall provide them with greater access to primary product markets.

established the Committee on Trade and Development to continuously review the application of Part IV of the GATT.[8]

In 1979, the Contracting Parties adopted the "Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries", commonly known as the "Enabling Clause", as it allowed developed Members to give differential and preferential treatment to developing countries.[9] Following the Tokyo Round in 1980, the Sub-Committee on Trade of Least-Development Countries was established by the Committee on Trade and Development to give special attention to the particular situation and trade problems of the least-developed among the developing countries.[10]

Hence, by the time of the Uruguay Round, the special and different treatment clauses had become embedded into the GATT system.

With the establishment of the World Trade Organization, Members agreed to incorporate S&DT provisions into the DSU, an integral part of the WTO Agreement that is binding on all Members.[11] The text of the DSU contains at least eleven S&DT provisions.[12] These provisions include, for example, the obligation of Members to give "special consideration" to interests of developing-country Members during consultations.[13]

With respect to the panels' composition, developing-country Members can demand that at least one panelist in cases in which they are a party be a national of a developing country.[14] In consultations involving a measure

8 *GATT Analytical Index (2012)*, *supra* note 6, 1045-1046.

9 Para. 1 of this decision provided as follows: "1. Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties." *Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*, BISD 26S/203, 28 November 1979.

10 *GATT Analytical Index (2012)*, *supra* note 6, 1050.

11 *Agreement Establishing the World Trade Organization*, Art. 2.2, available at http://ww w.wto.org/english/docs_e/legal_e/legal_e.htm (last visited 28 January 2013).

12 DSU, Arts 3.12, 4.10, 8.10, 12.10, 12.11, 21.2, 21.7, 21.8, 24.1, 24.2, and 27.2. See World Trade Organization, Development Division, 'Background Document, Annex II: Summary of Provisions Contained in the Uruguay Round Agreements for the Differential and More Favourable Treatment of Developing and Least Developed Countries' (17 March 1999), available at www.wto.org/english/tratop_e/devel_e/bkgd ev_e.doc (last visited 28 January 2013).

13 DSU, Art. 4.10.

14 *Id.*, Art. 8.10.

taken by a developing-country Member, a time extension may be granted to such Member to prepare and present its arguments.[15]

In case one or more of the parties to a dispute is a developing-country Member, the panel's report shall indicate the form in which account has been taken of the relevant S&DT provisions that form part of the covered agreements raised by the developing-country Member in the course of the dispute settlement procedures.[16] On surveillance of the implementation of recommendations or rulings, matters affecting the interests of developing-country Members related to issues subject to dispute settlement should receive particular attention.[17]

Moreover, "particular consideration" shall be given to the special situation of LDC Members at all stages in the determination of causes of dispute and during dispute settlement.[18] Furthermore, Members shall "exercise due restraint" in raising matters under these procedures involving an LDC Member.[19]

Although these provisions are intended to "support to help developing countries build the infrastructure for WTO work [and] handle disputes",[20] and indeed represent the culmination of decades of negotiations concerning developing countries' interests and the WTO DSM, the vagueness in the wording of some of the S&DT provisions, along with the lack of sanctions for non-compliance, diminish the value of their applicability in practice. This has led to comments such as the following:

> "The DSU contains provisions providing positive measures designed to assist developing countries by addressing their particular problems and interests. However, these measures are not effective and adequate [...]. Most of the provisions on special and differential treatment of developing countries are so hortatory and imprecise that it is either difficult for developing countries to invoke these provisions to their benefit or the invocation of such provisions does not help at all [...]. Therefore,

15 *Id.*, Art. 12.10.
16 *Id.*, Art. 12.11.
17 *Id.*, Art. 21.2.
18 *Id.*, Art. 21.8.
19 *Id.*, Art. 24.1.
20 WTO, *10 Things the WTO Can Do: No. 6 Help Countries Develop*, available at https://www.wto.org/english/thewto_e/whatis_e/10thi_e/10thi06_e.htm (last visited 28 January 2013).

> there is a pressing need to reform the WTO dispute settlement system to make it work for developing countries and remain relevant. Otherwise the system risks accusations of being deficient and biased to developed countries."[21]

Expressions such as to give "special consideration", to allow "sufficient time" or to pay "particular attention" to developing-country Members, and to give "particular consideration" and "exercise due restraint" in raising matters under dispute settlement procedures involving LDC Members are simply too broad and do not seem to point at any specific obligation of panels or developed-country Members. What does it mean to give "special consideration"? What are the limits of giving such "particular attention" to developing-countries? How much time is "sufficient time"? It is not clear. These provisions could be more accurately described as general statements, difficult to enforce in practice, for the settlement of disputes involving developing-country Members and LDCs.

Therefore, the need to reform the current legal framework for developing-country and LDC Members under the DSU becomes relevant. However, any amendment would require concrete actions so that any newly imposed obligation on panels would be clear and Members could understand its scope of application. Part four tackles this reality in its discussion of a proposed amendment to Article 7 of the DSU concerning the rights of developing-country and LDC Members.

II. Role and Competences of WTO Panels

Understanding the nature of the WTO DSM and its relationship with S&DT provisions requires a discussion of the role and competences given to the body in charge of hearing the parties' arguments and issuing a report to adjudicate disputes: the panel.

As it is well-known, there are three main stages of the DSM: consultations between the interested parties, adjudication by panels (and the Appellate Body, if appealed), and the implementation of the ruling.

[21] G. R. Lekgowe, 'The WTO Dispute Settlement System: Does it Work for Developing Countries?' (24 April 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2045470 (last visited 28 January 2013), 23 [Lekgowe, The WTO Dispute Settlement System].

If consultations between the parties fail to settle the dispute within 60 days of the receipt of the request for consultations, the complaining party may request that the DSB establish a panel to adjudicate the dispute.[22]

Panels are generally composed by three members but may, in certain cases, have five members. The panelists are nominated by the WTO Secretariat from a list, and must possess the required expertise to the subject of the case, but may not be citizens of parties or third parties to a dispute.[23]

The panels' function is "to assist the DSB in discharging its responsibilities under [the DSU] and the covered agreements." In particular, a panel "should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements." Panels should also consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.[24]

Panelists have the power to seek information and technical advice from any appropriate individual or body.[25] Moreover, panels shall preserve the rights and obligations of Members under the covered agreements and have the duty of clarifying the existing provisions of these agreements. However, WTO panels are precluded from increasing or impairing the rights and obligations provided in the covered agreements.[26]

A panel submits its findings in the form of a written report to the DSB, which is then circulated to all WTO Members and published, after the following process has been followed:

> "Panel procedures normally begin with the receipt of (often lengthy) written submissions by the plaintiff and respondent, which are then exchanged. Any third parties may then make their own submissions [...]. This is followed by a closed oral hearing involving all of the parties after which the parties exchange written rebuttals to each other's legal arguments. A

22 DSU, Art. 4.7. In many cases, however, the complaining party will not, immediately upon the expiration of the 60 day period, request the establishment of a panel, but will allow for considerably more time to settle the dispute through consultations. UNCTAD (ed.), *Course on Dispute Settlement in International Trade, Section 3.2: Panels* (2003), 5.

23 DSU, Art. 8.

24 *Id.*, Art. 11.

25 *Id.*, Art. 13.

26 *Id.*, Arts 3.2 and 19.2.

> second closed oral hearing is then held, during which the parties' arguments and rebuttals are presented. Where expert evidence, usually of a scientific nature is required, additional sets of oral hearings may be held. A panel then drafts the 'descriptive' section of its report outlining the arguments of each party and summarizes all of the factual and legal arguments which is circulated to the parties for comments and corrections. This is followed by the circulation of the Interim Review, which contains the description of the case along with a panel's findings and conclusions regarding the legal validity of the complaint. Again, the parties are permitted to make comments, request corrections and ask a panel to review specific points. These amendments and elaborations are then incorporated to produce a Final Panel Report which is circulated to all WTO Members and published."[27]

As further analyzed below, a crucial aspect of panels' competences throughout dispute settlement procedures are their terms of reference, insofar as a panel may consider only the claims identified under its terms of reference.

III. The Need for Consistency Between Panels' Requests and Panels' Terms of Reference

Unless the parties agree otherwise, a panel is given the following standard terms of reference:

> "To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document … and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement."[28]

[27] R. Read, 'Dispute Settlement, Compensation and Retaliation Under the WTO', in W. A. Kerr & J. D. Gaisford (eds), *Handbook on International Trade Policy* (2007), 497, 501 [Read, Dispute Settlement Under the WTO].

[28] DSU, Art. 7.

The "document" in these standard terms of reference is usually the request for the establishment of a panel, provided for in Article 6.2 of the DSU.[29] This article serves a pivotal function in WTO dispute settlement, and sets out two key requirements that a complainant must satisfy in its panel request: the "identification of the specific measures at issue, and the provision of a brief summary of the legal basis of the complaint (or the claims)". Together, these two elements constitute the "matter referred to the DSB", so that, if either element is not properly identified, the matter is not within the panel's terms of reference. Both elements are therefore crucial to defining the dispute's scope that the panel is to address.[30]

The Appellate Body has repeatedly stated that panel requests must be sufficiently precise for two main reasons: ***(i)*** they form the basis for the

[29] Reports of the Appellate Body, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R, 30 January 2012, 86, para. 219 ("a panel request forms the basis for the terms of reference of panels.") [China-Exportation of Raw Materials]. See also Report of the Appellate Body, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, 20 October 1998, 65, para. 220 ("[t]he matter at issue is set forth in the Panel's terms of reference, which are usually defined by the request for establishment of a panel.").

[30] *China-Exportation of Raw Materials*, *supra* note 29, 86, para. 219; Report of the Appellate Body, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, 15 July 2011, 223-224, para. 562 ("[t]he panel request "assists in determining the scope of the dispute" in respect of each measure and consequently, establishes and delimits the jurisdiction of the panel.") [EC-Fasteners]; Report of the Appellate Body, *Australia – Measures Affecting the Importation of Apples from New Zeleand*, WT/DS367/AB/R, 29 November 2010, 144-145, para. 416 [Australia-Apples]; Report of the Appellate Body, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, 4 February 2009, 68, para. 168 ("[t]he identification of the measure, together with a brief summary of the legal basis of the complaint, serves to demarcate the scope of a panel's jurisdiction.") [US-Continued Zeroing]; Reports of the Appellate Body, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, 12 September 2005, 61-62, para. 155 [EC-Chicken Classification]; Report of the Appellate Body, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, 25 April 2005, 47-48, para. 120 [Dominican Republic-Cigarettes]; Report of the Appellate Body, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R, 28 November 2002, 42, para. 125 [US-German Steel CVDs]; Report of the Panel, *United States – Tax Treatment for "Foreign Sales Corporations", Second Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/RW2, 30 September 2005, 25, para. 7.71.

terms of reference of panels, pursuant to Article 7.1 of the DSU; and ***(ii)*** they ensure due process by informing the respondent and third parties of the matter brought before a panel.[31]

Since a panel is bound by its terms of reference, it is very important that a request for the establishment of a panel be sufficiently precise. But what happens if a panel request is deficient and claims are poorly or imprecisely defined? As it will be further discussed in part four of this document, WTO case law has determined, in several occasions, that panels are not permitted to cure the failings of a deficient panel request, and that imprecise claims may lead to determine the lack of jurisdiction over such claims. This approach may, however, do more harm than good in balancing developing-country and LDC Members' legal capacity in the WTO DSM. On the contrary, panels should be given the authority to supplement deficiencies in the request for the establishment of a panel, and to assist developing-country and LDC Members so that panels' terms of reference can be sufficiently precise.

[31] *Australia-Apples*, *supra* note 30, 144-145, para. 416; Report of the Appellate Body, *United States – Measures Relating to Zeroing and Sunset Reviews, Recourse to Article 21.5 of the DSU by Japan*, WT/DS322/AB/RW, 18 August 2009, 46, para. 108 [US-Zeroing (Japan), Article 21.5]; *US-Continued Zeroing*, *supra* note 30, 65-66, para. 161; *EC-Chicken Classification*, *supra* note 30, 61-62, para. 155; Reports of the Appellate Body, *European Communities – Export Subsidies on Sugar*, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, 28 April 2005, 51, para. 143 [EC-Sugar Subsidies]; *US-German Steel CVDs*, *supra* note 30, 42-43, para. 126; Report of the Appellate Body, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, 12 March 2001, 25, para. 84-85 [Thailand-Steel]; Report of the Appellate Body, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, 14 December 1999, 38-39, paras 122-124 [Korea-Dairy Safeguards]; Report of the Appellate Body, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, 5 June 1998, 26, para. 69; Report of the Appellate Body, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, 19 December 1997, 30-31, para. 87 [India-Patents]; Report of the Appellate Body, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, 9 September 1997, 63-64, para. 142 [EC-Bananas].

IV. The Importance of Complaints Under the DSM

Along with panels' terms of reference, complaints constitute the initial step to proceed with the dispute settlement mechanism after the establishment of a panel.

It has been noted that complaints may encourage Members with consistently targeted policies to adjust such policies in view of the interpretation of WTO norms made by panels and the Appellate Body. Sevilla points to the fact that "the virtual guarantee of access to a panel and adoption of the report makes formal complaints a useful tool for achieving some kind of policy modification in the target state."[32]

In other words, "complaints have important distributional implications regarding the burden of compliance with international trade agreements *ex post*, since they determine which of the signatories are required to adjust their policies in light of specific interpretations of written rules."[33]

Complaints may eventually modify the interpretation of WTO norms and their application over time due to the influence that active participants have in panel proceedings and the manner in which their arguments can impact or integrate part of the arguments used in support of panels' findings within panel reports, and the subsequent interpretation of rules. Therefore, participation in the WTO dispute settlement system is essential for shaping the interpretation of WTO law over time.[34]

Complaints therefore serve to enforce WTO law by allowing the consistency of norms that have not been otherwise voluntarily adhered to. Moreover, they provide a valuable *know-how* on dispute settlement mechanisms by improving the experience of WTO Members on this regard.[35]

32 C. R. Sevilla, 'A Political Economy Model of GATT/WTO Trade Complaints', available at http://centers.law.nyu.edu/jeanmonnet/archive/papers/97/97-05.html (last visited 28 January 2013) [Sevilla, GATT/WTO Trade Complaints].

33 C. R. Sevilla, *Explaining Patterns of GATT/WTO Trade Complaints* (1998), 2.

34 See, e.g., G. Shaffer, 'How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies', in V. Mosoti (ed.), *ICTSD Resource Paper 5: Towards A Development-Supportive Dispute Settlement System in the WTO* (2003), 10.

35 For further analysis on the importance of complaints see C. P. Bown, 'Developing Countries as Plaintiffs and Defendants in GATT/WTO Trade Disputes', 27 *The World Economy* (2004) 1, 59 [Bown, Developing Countries in GATT/WTO Trade Disputes].

C. Developing Countries as Complainants Within the WTO DSM

I. General Overview

Several empirical studies analyzing the participation of developing-country Members in the WTO DSM have been conducted since 1999:

> "In 1999 Horn, Mavroidis, and Nordstrom wrote the first significant empirical paper on developing country participation in the dispute settlement process. They [...] examined the effect of power and capacity constraints on the decision to bring a complaint and found that the capacity constraint has some effect but power has almost none [...]."[36]
> "Busch and Reinhardt (2003) stressed on the issue of legal capacity and argued, "developing countries require more assistance in the lead up to a case [...] wealthier countries have realized more favorable outcomes since 1995." Their observation was further reinforced by Besson and Mehdi (2004) who found that developing countries were unlikely to obtain a favorable outcome because of asymmetric legal capacity. Besson and Mehdi also suggested that when a developing country was reliant on a developed country for bilateral assistance, it was unlikely for that developing country to win a dispute against that developed country."[37]

From 1948 to 1996, the large States accounted for over 85% of all complaints under the GATT system.[38] Since the entry into force of the WTO

[36] G. Antell & J. W. Coleman, 'An Empirical Analysis of Wealth Disparities in WTO Procedures: Do Poorer Countries Suffer From Strategic Delay During Dispute Litigation?', 29 *Boston University International Law Journal* (2011) 2, 267, 271 (internal citations omitted).

[37] S. Odano & Z. Abedin, 'Insufficiency in the Dispute Settlement Mechanism of the WTO: Consequences and Implications for the Multilateral Trading System', *GSIR Working Papers* (2008), 2 [Odano & Abedin, Insufficiency in the WTO DSM].

[38] The EC and its member States held the first place as defendants with 43% (127 of 295 complaints), followed by the United States with 28% (83 complaints), and Japan and Canada at 7% (22 cases) and 6% (18 cases), respectively. Sevilla, *GATT/WTO Trade Complaints*, *supra* note 32. Busch and Reinhardt calculated 654 bilateral disputes

until 2002, 82 panel rulings were issued, of which 90% represented a success for the complainant.[39] Therefore, earlier studies on developing-country participation in the WTO DSM found that a high rate of large-economy countries as plaintiffs was correlated with a high rate of victories and litigation payoffs, and a scarce participation of developing economies with a correlative small rate of litigation payoffs.[40]

But has this changed during the last decade? And, if so, how? As of August 2012, 442 complaints have been filed under the DSU, of which 269

from 1948- 2000 of which 52% involved the United States while 36% the European Communities. M. L. Busch & E. Reinhardt, 'Testing International Trade Law: Empirical Studies of GATT/WTO Dispute Settlement', in D. Kennedy & J. Southwick (eds), *The Political Economy of International Trade Law: Essays in Honour of Robert E. Hudec* (2002), 457, 462.

39 A case can be deemed as "won" by the complainant if the panel urged the defendant party to bring its measures, or some of the measures contested by the complainant party, into conformity with the recommendations and rulings of the DSB forasmuch as some of the policies carried out by the defendant are considered as inconsistent with its WTO obligations. Based on a dataset of 380 concluded GATT/WTO disputes from 1980-2000, 154 occurred under the WTO of which 109 favored the complainant, 26 were mixed, and 17 found for the defendant. M. L. Busch & E. Reinhardt, 'Developing Countries and GATT/WTO Dispute Settlement', 37 *Journal of World Trade* (2003) 4, 719, 723-724. Holmes, Rollo and Alasdair situate the win rate for complainants on 88% of the cases. P. Holmes, J. Rollo, & R. Alasdair, 'Emerging Trends in WTO Dispute Settlement: Back to the GATT?', *World Bank Policy Research, Working Paper No. 3133* (2003), 17.

40 See H. Horn, P. Mavroidis & H. Nordstrom, 'Is the Use of the WTO Dispute Settlement System Biased?', *CEPR Discussion Paper No. 2340* (1999); C. Michalopoulos, *Developing Countries in the WTO* (2001); Busch & Reinhardt, *Developing Countries and GATT/WTO Dispute Settlement*, *supra* note 39; A. Guzman, 'The Political Economy of Litigation and Settlement at the WTO' (12 October 2002), available at http://ssrn.com/abstract=335924 (last visited 28 January 2013); G. Shaffer, *How to Make the WTO Dispute Settlement System Work for Developing Countries*, *supra* note 34, 7; F. Besson & R. Mehdi, 'Is WTO Dispute Settlement System Biased Against Developing Countries?: An Empirical Analysis', available at http://ecomod.net/sites/default/files/document-conference/ecomod2004/199.pdf (last visited 28 January 2013); Bown, *Developing Countries in GATT/WTO Trade Disputes*, *supra* note 35, 5; G. Shaffer, 'Can WTO Technical Assistance and Capacity Building Serve Developing Countries?', 23 *Wisconsin International Law Journal* (2005) 4, 643; C. P. Bown & B. M. Hoekman, 'WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector', 8 *Journal of International Economic Law* (2005) 4, 861; G. Shaffer, 'The Challenges of WTO Law: Strategies for Developing Country Adaptation', 5 *World Trade Review* (2006) 2, 177.

have been lodged by developed-country Members, and 189 by developing-country Members.[41] Hence, complaints by developed countries account for over 60% of the total number of complaints under the DSU, versus 40% of complaints filed by developing-country Members.

Although developed countries submitted a greater number of complaints under the DSU until the year 2000 (as compared to the number of complaints filed by developing-country Members during the same period), since 2001 this is no longer the case.[42] In fact, during 2001 to 2012, developed countries filed 109 complaints, compared to the 115 filed by developing-country Members.[43]

Technically, these figures suggest that there is no longer an unequal participation by developing economies in the WTO DSM. This has led commentators such as Peter van den Bossche to assert that "developing-country Members have made much use of the WTO dispute settlement."[44] Yet, recent analyses have also concluded that the countries with a large share in world trade "not only tend to use the dispute settlement mechanism more but also win more disputes than the countries with low financial strength and small trade share."[45]

41 As noted by the WorldTradeLaw.net database, a number of complaints have been filed by multiple Members acting jointly and, in some of these complaints, the Members filing the complaint fall into different income categories. In such cases, the complaint has been counted in each income category in which at least one complainant falls. Therefore, the number of the complaints adds up to more than the total number of complaints under the DSU. Section "WTO Complaints Grouped by Income Classification", available at http://www.worldtradelaw.net/dsc/database/classificationcount.asp (last visited 28 January 2013).

42 During the first five years of the WTO (1995-2000), developed countries filed 160 cases, against 74 complaints filed by developing-country Members (figures based on the author's assessment of the Worldtradelaw.net "WTO Dispute Settlement Tables and Statistics", available at http://www.worldtradelaw.net/dsc/stats.htm (last visited 28 January 2013)).

43 During the period 2006-June 2012, 53 complaints were lodged by both developed countries and developing-country Members; and during 2000 to 2005, developing-country Members filed 82 complaints, against 73 complaints filed by developed countries (figures based on the author's assessment of the Worldtradelaw.net "WTO Dispute Settlement Tables and Statistics", available at http://www.worldtradelaw.net/dsc/stats.htm (last visited 28 January 2013)).

44 P. v. d. Bossche, *The Law and Policy of the World Trade Organization*, 2nd ed. (2008), 231 [v. d. Bossche, The Law and Policy of the WTO].

45 Odano & Abedin, *Insufficiency in the WTO DSM*, *supra* note 37, 13. See also J. C. Hartigan (ed.), *Trade Disputes and the Dispute Settlement Understanding of the WTO:*

In a way, both findings do not contradict each other. Developing-country Members have indeed become active participants in the WTO DSM and yet – despite the figures shown above – developed-country Members have continued to benefit more from the WTO DSM. The main reason behind this is that participation in the WTO DSM has not been evenly dispersed among developing countries; a very small number of Members constitutes the majority of developing countries participating in the system.

II. A Selected Group of Developing-Country Complainants

At present, the six most active developing countries (Brazil, Mexico, India, China, Thailand and Argentina) account for 60% of the cases involving developing countries; and the 14 most active developing country users account for 90% of cases.[46]

It follows that although figures may suggest that complaints during the last decade have been filed in almost the same proportion by developed and developing-country Members, in fact, the majority of developing countries has not been involved in WTO dispute settlement proceedings.[47] As accurately described by one commentator:

> "[T]hese aggregate figures are misleading in several respects. First, the developing countries that used dispute settlement provisions under the GATT are still the main users under the WTO. Brazil alone totals 103 instances of participation in a dispute [...] and India totals 106 instances. Mexico participated in 90 cases. Argentina and Thailand come next, as they did under the GATT, with over 60 instances each. China is the

An Interdisciplinary Assessment (2009), 236 ("the empirical findings of this paper raise implications for a potential bias of the dispute settlements system's usage.").

46 N. Meagher, 'The WTO Dispute Settlement Process and Developing Countries: Issues and Challenges' (8 June 2012), available at www.tradelaw.nccu.edu.tw/%E5%B0%88%E9%A1%8C%E6%BC%94%E8%AC%9B/ppt/2012%E5%B0%88%E9%A1%8C%E6%BC%94%E8%AC%9B%28Niall_Meagher_8_June_2012%29.pdf (last visited 28 January 2013), 7 [Meagher, The WTO Dispute Settlement Process].

47 See H. Nottage, 'Developing Countries in the WTO Dispute Settlement System', 47 *GEG Working Paper* (2009), 2 ("the vast majority of developing countries have not participated actively in the WTO dispute settlement system. This raises concerns that they are not benefitting fully from the WTO legal regime.") [Nottage, Developing Countries in the WTO].

> major newcomer, with 108 instances of participation [...]. However, as in the GATT, the bulk of developing countries, particularly African ones, have virtually no record of participating in disputes.
> [...]
> Second, the likelihood that a developing country will face a complaint has grown exponentially, despite their proportionally lower participation in disputes overall. Between 2005 and 2011, disputes between developed and developing countries amounted to more than half of the total number of disputes [...].
> Third, the number of disputes between developing countries has also grown [...]. Between January 2005 and October 2011, 25 of 102 new disputes were between developing countries.
> Fourth, and perhaps even more importantly, the number of instances where developing countries made development arguments has not grown proportionally with their overall participation, compared to the record of the GATT years. This is all the more surprising given that the proliferation of SDT clauses in the WTO agreements now provides many more opportunities for making development-oriented arguments that under the GATT."[48]

Besides, the near absence of LDCs in the WTO dispute settlement mechanism is noteworthy. The first LDC to ever file a complaint was Bangladesh in 2004 when it requested consultations with India over anti-dumping measures on battery imports from Bangladesh.[49]

This lack of participation by most of developing-country Members in the WTO DSM raises concerns and has led several commentators to question whether the DSM is biased against developing-country Members.[50]

48 S. E. Rolland, *Development at the WTO* (2012), 142-143 [Rolland, Development at the WTO].

49 See Request for Consultations by Bangladesh, *India – Anti-Dumping Measure on Batteries from Bangladesh*, G/ADP/D52/1, G/L/669, WT/DS306/1, 2 February 2004.

50 For authors arguing that there is evidence supporting that the WTO DSM is biased against developing-country Members see *supra* note 40. See also W. A. Kerr & J. D. Gaisford (eds), *Handbook on International Trade Policy* (2008), 78 ("different criticisms have been leveled against the DSU. The first is that the procedure is biased against small countries, who can less easily afford the legal costs."); A. Santos, 'Carving out Policy Autonomy for Developing Countries in the World Trade Organization: The Experience of Brazil & Mexico', 52 *Virginia Journal of*

In any case, "if the dispute settlement system has credibility in principle and could deliver if developing countries were able to utilize it to its full potential,"[51] then why are most of these Members not making use of it?

III. Reasons Behind a Less Active Participation in the WTO DSM

There are several reasons why developing-country Members and LDCs do not participate more frequently in WTO dispute settlement proceedings, some of which are not directly related to their legal capacity. For instance, the overall dispute settlement activity has declined in recent years.[52] Besides, several developed countries participate infrequently in the DSM.[53]

However, there are several other reasons which indicate a lack of legal *know-how* and other human capital.[54] Generally, these restraints include the high costs of access to the system, the lack of sufficient domestic WTO legal expertise, foreign language difficulties, and the technicalities concerning WTO law.[55]

International Law (2012) 3, 551, 631 ("the asymmetry of power and resources between countries does affect their experience in the system and thus influences the outcomes to a greater extent than liberal trade scholars usually acknowledge.").

51 Rolland, *Development at the WTO*, *supra* note 48, 137.

52 Whereas during the period 1995-2000 developed-country complaints accounted for 160, during 2000-2005 only 73 complaints were filed and during 2006-2012, the number of complaints filed by developed countries dropped to 53. Similarly, during the period 1995-2000 complaints filed by developing countries accounted for 74, during 2000-2005 this number increased to 82, and during 2006-2012, the number of complaints filed by developing countries dropped to 53 (figures based on the author's assessment of the Worldtradelaw.net "WTO Dispute Settlement Tables and Statistics", available at http://www.worldtradelaw.net/dsc/stats.htm (last visited 28 January 2013)).

53 For example, Australia has participated as a complainant only seven times. Worldtradelaw.net, Section "WTO Complaints Filed By Selected WTO Members", available at http://www.worldtradelaw.net/dsc/database/complaintscomplainant.asp (last visited 28 January 2013).

54 Meagher, *The WTO Dispute Settlement Process*, *supra* note 46, 10.

55 See A. T. Guzman & B. A. Simmons, 'Power Plays and Capacity Constraints: The Selection of Defendants in WTO Disputes', 34 *Journal of Legal Studies* (2005) 2, 557.

The complexity of the measures at issue in panel proceedings results in the need for expensive, specialized legal expertise or 'attorney-time'.[56] These cost problems are accentuated by developing countries' small trade shares and government budgets, and a lack of proper domestic WTO legal expertise.[57]

Also, there is a much shorter supply of scholars and graduates specialized in WTO affairs in developing countries and LDCs than there is in developed countries.[58] This situation has two main consequences: first, the number of domestic law firms specializing in WTO law decrease; and

[56] Fees may usually vary between US$600 and more than US$1000 per hour when private law firms are hired to advise and represent States in international proceedings. See, e.g., V. O'Connell, 'Big Law's $1,000-Plus an Hour Club' (23 February 2011), *The Wall Street Journal*, available at http://online.wsj.com/article/SB10001424052748704071304576160362028728234.html ("[l]eading attorneys [...] are asking as much as $1,250 an hour, significantly more than in previous years.").

[57] See D. Bethlehem *et al.* (eds) *The Oxford Handbook of International Trade Law* (2009), 492 ("[t]he cost problems faced by developing countries in the WTO are accentuated by their small trade shares and government budgets [...]. These factors have resulted in developing countries being at an undeniable resource and cost disadvantage in WTO dispute settlement proceedings.") [Bethlehem *et al.*, The Oxford Handbook of International Trade Law]; Nottage, *Developing Countries in the WTO*, *supra* note 47, 4 ("[a] number of WTO Members and commentators argue that WTO dispute settlement system is 'overly complicated and expensive' resulting in insurmountable 'human resource as well as financial implications' for developing countries. Ambassador Bhatia of India observed that, even for a large developing country, the high costs of WTO litigation are a 'major deterrent' for using the system. Developing-country concerns with the high costs of WTO litigation stem from many governments lacking sufficient internal WTO legal expertise to conduct disputes themselves."); Bohl, *Problems of Developing-country Access*, *supra* note 3, 131-132 ("[m]ember states with smaller economies or in differing stages of development either tend to shy away from participating in disputes or are unable to access the system. The reasons for this may include a lack of resources, a lack of institutional capacity, or a lack of political will."); and Read, *Dispute Settlement Under the WTO*, *supra* note 27, 507 ("[a]lthough the DSU Articles pay special attention to the needs of developing countries, their participation continues to be constrained by a lack of financial and intellectual resources necessary to fight dispute cases.").

[58] See, e.g., H. Hohmann, *Agreeing and Implementing the Doha Round of the WTO* (2008), 312-313 ("[developed] WTO Members have highly qualified and experienced lawyers. They also have more sophisticated private industries that also contribute resources to assist the government in defending the country's interests in the dispute settlement system. This, combined with the complexity of the WTO dispute settlement proceedings, has resulted in *developing countries being at a distinct disadvantage in WTO dispute settlement.*") (emphasis in the original).

second, the costs associated with "importing" WTO legal expertise from abroad increase.[59]

Moreover, language is another aspect in which developing-country Members and LDCs seem to find an additional barrier, as most of them must participate in WTO panel proceedings that are not in their respective native languages.[60]

The abovementioned considerations are closely interrelated. A more infrequent use of the DSM by developing countries and LDCs may correspond to their comparatively smaller volume of trade, which might explain a fewer mobilization of legal resources, including resources to develop domestic WTO law expertise. A lack of domestic lawyers specialized on international trade law ultimately forces most of developing-country Members and LDCs to retain high-cost legal consultancy and litigation services from abroad.

An interesting study on this matter was conducted by Busch, Reinhardt and Shaffer through a series of surveys made to WTO Members to investigate the main reasons why developing-country Members and LDCs considered themselves constrained to actively participate in the WTO DSM. The results of the survey highlighted the importance of strengthening the legal capacity of these Members.[61]

The study indicated that most of developing-country representatives considered the lack of legal capacity as one of the main reasons why their governments had considered not filing a case to the DSM. In particular, 56% of the respondents pointed at the "high cost of litigation" or a "lack of private sector support", while 9% decided to intervene as third party instead of as party to a dispute so that the experience would be "training for future

59 See, e.g., R. R. Babu, *Remedies Under the WTO Legal System* (2012), 369 ("[t]he lack of expertise in WTO and huge cost of litigation, apart from the incidental cost of having a base and litigating in Geneva have made the DSU process unaffordable for most developing countries [...]. Consequently, for the victim, especially the developing country victim, the costs of dispute settlement and retaliation are generally too high and unaffordable.").

60 In these cases, costs associated with official translations of every document submitted to the panel should be taken into consideration.

61 The survey included the delegations of 150 Member States, of which 52 delegations responded in full, in 2007. The respondents included a broad range of membership in terms of income and geographical diversity. M. L. Busch, E. Reinhardt & G. Shaffer, 'Does Legal Capacity Matter?: Explaining Patterns of Protectionism in the Shadow of WTO Litigation' (1 February 2008), available at http://ssrn.com/abstract=1091435 (last visited 28 January 2013).

disputes." Besides, 88% of the respondents expressed that the advantages of developed Members within the DSM came primarily from their legal capacity instead of other factors, such as market power.

The DSU contains certain provisions designed to address these resource constraints. Article 27.2 provides that the WTO Secretariat shall make available experts to provide "additional legal advice and assistance" to developing countries. This provision's efficacy is, however, debatable. As noted by several commentators, experts may not provide legal advice prior to the initiation of a dispute, and may only assist the developing-country "in a manner ensuring the continued impartiality of the Secretariat", which poses concerns as to the practical implications and limits of such "continued impartiality" in assisting a party with its defense in a dispute.[62]

There have been other advances in the protection of developing-country Members' legal interests at the WTO. One of the most prominent examples was the creation of the Advisory Centre on WTO Law (ACWL) in 2001. The main activity of the ACWL is to provide legal advice in response to requests from its developing-country Members and the LDCs that qualify for its services. As of 2011, the ACWL issued 218 legal opinions and provided support in three WTO disputes.[63] Notably, the ACWL is staffed with only nine lawyers, including the Executive Director.[64] The ACWL charges fees for support in dispute settlement proceedings, based on hourly rates and a time budget for each stage of the proceeding. Moreover, developing-country Members must have contributed to the ACWL's

[62] See, e.g., v. d. Bossche, *The Law and Policy of the WTO*, *supra* note 44, 234 ("[concerning] Article 27.2 of the DSU [t]he extent to which the Secretariat can assist developing-country Members is, however, limited by the requirement that the Secretariat's experts give assistance in a manner 'ensuring the continued impartiality' of the Secretariat."); Nottage, *Developing Countries in the WTO*, *supra* note 47, 5 ("the utility of this provision is debatable. The experts may only assist 'in respect of dispute settlement' and cannot provide legal advice before a dispute is initiated [...] making it impossible to act as an advocate in a legal proceeding."); Bethlehem *et al.*, *The Oxford Handbook of International Trade Law*, *supra* note 57, 492.

[63] Advisory Centre on WTO Law, 'Report on Operations 2011' (2011), available at http://www.acwl.ch/e/documents/reports/Oper_2011.pdf (last visited 28 January 2013), 1, Appendix 4 "Members of the ACWL" (*id.*, 37) and Appendix 5 "LDCs Entitled to the Services of the ACWL" (*id.*, 38).

[64] The ACWL also provides support through external legal counsel. When parties pursuing incompatible objectives request the support of the ACWL on the same matter, the ACWL's lawyers normally assist the party that first requested advice and provides support to the other party through external counsel. In these cases, fees are increased by 20 per cent. *Id.*, 13.

Endowment Fund to be entitled to its services.[65] Although this assistance should be regarded with the greatest consideration, it has been also noted that the legal assistance offered by the ACWL may be a "partial solution to the problem" which may not "necessarily be in alignment with the welfare interests of the developing countries involved."[66]

Overall, there is a need to enhance developing-country Members and LDCs' legal capacity in the WTO DSM. Insofar as developing-country Members and LCDs consider themselves to be unable to adequately defend their rights and interests before a WTO panel, their participation in the dispute settlement mechanism will continue to be scarce.

Although *external* legal advice and assistance to developing-country Members and LDCs, such as that provided under Article 27.2 of the DSU and the ACWL, should not be discarded, the *internal* assistance that panels may provide to developing countries and LDCs as complainants can and should be further developed. Could WTO panels assist developing countries in presenting their case and claims more clearly? The answer should be yes.

To this purpose, the following sections address an amendment proposal to modify WTO panels' terms of reference with the objective to allow developing countries and LDCs to benefit from the supplement of deficiencies in their complaints. Under this proposal, panels would be enabled to correct the mistakes in the citation of legal authorities and, in particular, to supplement and remedy any deficiency found in the panel request and the initial complaint of developing-country Members and LDCs. Section three below elaborates on the definition, origins and scope of application of this figure. Finally, section four addresses a specific amendment proposal to Article 7 of the DSU and the feasibility of incorporating this figure coherently with WTO case law.

65 Advisory Center on WTO Law, *The Services of the ACWL*, available at http://www.acwl.ch/e/documents/The%20Services%20of%20the%20ACWL%20inside%20pages%2012%20September%202011%20for%20website.pdf (last visited 28 January 2013), 5.

66 Lekgowe, *The WTO Dispute Settlement System*, *supra* note 21, 18 ("it has been argued that the ACWL only offers a partial solution to the problem, depending on the form of the legal assistance and the source of funding or needs of the sponsor, the resulting bias in the distribution of the cases brought forward for litigants might not necessarily be in alignment with the welfare interests of the developing countries involved. This criticism has merit.").

D. The Supplement of Deficiencies in the Complaint

The ability to remedy any deficiency in the complaint is given to constitutional judges in certain jurisdictions to adjust domestic claims filed by complainants considered to be "the weakest party to a dispute."

In Mexico, for example, the principle of supplementing deficiencies in the complaint is applicable to, and derives from, the *amparo* procedure, which is an extraordinary judicial remedy specifically created to protect against constitutional harms or threats committed by authorities or individuals.[67]

These adjustments or corrections are made *ex officio* by constitutional judges with respect to errors, irregularities, omissions or imperfections found in the complainant's submission to an *amparo* procedure. In particular, this principle applies to the allegations of violation of substantive provisions and to the description of grievances identified by the complaining party. In *amparo* procedures, the allegations of violation identify the constitutional provisions allegedly violated by certain acts of an authority or an individual – e.g., that the right to be heard, established in Article 14 of the national constitution, was violated at a certain hearing because the competent authority failed to notify the complainant party –, and in the description of grievances the complainant sets forth the legal reasoning to assert the illegality of such act. In other words, the grievances explain to the *amparo* judge the reasons why certain act of an authority violated certain constitutional rights.[68]

The origin of this principle is found in the Mexican Amparo Act of 1862 that introduced the possibility for constitutional judges to remedy the

[67] In Latin American civil law countries the constitution and special legislation explicitly regulate the judicial remedies available for rights protection, such as the *amparo* proceeding. These constitutional and statutory regulations are generally very detailed, including, for instance, the general rules of procedure and standing to file *amparos*, the definition of the competent courts to hear this type of cases, the specific constitutional rights that can be protected, and the legal effects of judicial decisions in *amparo* suits. See A. R. Brewer-Carías, *Constitutional Protection of Human Rights in Latin America: A Comparative Study of Amparo Proceedings* (2008), 87-91.

[68] Some of the countries that include this figure into their domestic legislation are Mexico and Peru. Mexico incorporates this figure in Art. 107 (II) of its national constitution and Art. 76 bis of the *Amparo Act*, Regulatory of Articles 103 and 107 of the Political Constitution of the United Mexican States. Likewise, Peru developed the supplement of deficiencies in the complainant in Art. 7 of the Peruvian Act No. 23506.

'ignorance' or errors of the complainant, allowing the *amparo* procedure to proceed even when the alleged violations were not accurately specified in the complaining party's *amparo* suit.

This figure was later incorporated into the Mexican Constitution of 1917, mainly for political reasons and as a reaction to the prosecutions against the previous government's opponents who were frequently accused of crimes to keep them away from their public activities, and who used to resort to unprepared defendants that filed deficient lawsuits which the defendant often lost.[69]

Along with the Mexican Constitution of 1917, the Amparo Act of 1936 reiterated this principle's applicability to *amparo* proceedings under the following circumstances: ***(i)*** in any case when the contested act, i.e. the act perpetrated by an authority or an individual that caused or threatened to cause a harm to a constitutional right of the complainant, is grounded on regulations previously declared as unconstitutional by the national Supreme Court; ***(ii)*** in criminal matters, even if the complainant fails to identify any grievances or any allegation of violation of constitutional provisions; ***(iii)*** in agricultural matters, only when the complainant party belongs to the peasantry; ***(iv)*** in labor matters, where this principle applies only in favor of the working class; ***(v)*** in favor of minors and others incapable of their own representation; and ***(vi)*** in other cases, if there has been a manifest violation of the law that deprived the complainant from having any legal defense.[70]

The supplement of deficiencies in the complaint, therefore, stands as a protective, anti-formalist principle that corrects omissions in the complainant party's submissions, always to the complainant's benefit and in accordance with the limitations established by law.[71] It addresses the need to subsume the errors or omissions that the 'weak party' to a constitutional procedure may have in a considerable number of situations due to the complainant's inability to obtain adequate legal counseling.[72]

Under this principle, adjudicators are allowed to set aside from a rigorous and strict technical review of the provisions the claimant considers to be breached by the other party, and the explanation of the manner in

69 J. Castro**,** *Justicia, Legalidad y la Suplencia de la Queja* (2003), 3-4 [Castro, Suplencia de la Queja]**.**

70 See *Amparo Act*, Regulatory of Articles 103 and 107 of the Political Constitution of the United Mexican States, Article 76 bis, available at http://www.juridicas.unam.mx/infjur/leg/constmex/pdf/consting.pdf (last visited 28 January 2013).

71 Castro, *Suplencia de la Queja*, *supra* note 69, 11-12.

72 See H. Fix-Zamudio, *Ensayos Sobre el Derecho de Amparo* (1993).

which said acts violated certain provisions. This way, adjudicators are enabled to add, complete or integrate the omissions or deficiencies of the complaint, acknowledging the existing procedural inequality of the parties and the need to procure a balance in the capacity of obtaining legal counseling by both parties to a dispute.

However, the applicability of this principle is, in no case, to be confused with a divergence from the principle of impartiality that adjudicators must uphold; adjudicators are not allowed to act as counsel to claimant.[73] Under the principle of supplementing or amending deficiencies in the complaint, it is understood that a lack of proper legal counseling impedes the parties to a dispute to accurately expose their arguments and, therefore, to duly present their claims before an adjudicator. However, the understanding of law that adjudicators possess to analyze the legal claims presented by the parties to a dispute shall lead them to issue a decision based on an objective assessment of the facts and law referred by the parties, and should not disregard certain claims for a want of clarity capable of supplementation by the adjudicator in light of the facts of the case and its understanding of the applicable law.

The principle of supplementing deficiencies in the complaint is therefore consistent with the principle *iura novit curia* (commonly translated as "the court knows the law"), under which adjudicators shall apply the law *ex officio*, namely without being bound by the legal arguments or legal reasoning put forward by the parties.[74] That is, through the *iura novit curia* principle, courts are expected to make their own ascertainment of the law and their own legal evaluation of the factual record before them.[75]

I. Differences and Similarities with other Procedural Related Figures

By means of the *iura novit curia* principle, the judge has the duty to identify the applicable law to the dispute, even when it may not be expressly

[73] See I. Burgoa, *El Juicio de Amparo* (2000) [Burgoa, El Juicio de Amparo].

[74] T. Giovannini, 'International Arbitration and Jura Novit Curia: Towards Harmonization', in M. Á. Fernández-Ballesteros & D. Arias (eds), *Liber Amicorum Bernardo Cremades* (2010), 495, 495-496. This principle is a derivative of another maxim, *da mihi facto, dabo tibi ius*, i.e., "give me the facts and I will give you the law (justice)".

[75] M. Oesch, *Standards of Review in WTO Dispute Resolution* (2003), 50.

set out in the complainant's initial submission. However, under the principle's permission to supplement deficiencies in the complaint, the role of judges is not to make an overall assessment of the applicable law to the dispute, but rather to ***(i)*** specifically identify the omissions or errors found in the complainant's submission concerning the alleged violations of substantive provisions and the description of grievances identified by the complaining party, and ***(ii)*** to correct them. The judge therefore issues its decision without intending to rely on facts other than those alleged by the parties and does not incorporate additional claims others than those presented by the complaining party.

The principle of supplement of deficiencies in the complaint also differs from a mere 'supplement of the error'[76] in which the complainant's citation errors are amended in accordance to the *iura novit curia* principle referred above and, therefore, judges have the obligation to apply the pertinent legal precept even in cases where it is not accurately invoked by the parties.

Adjudicators shall not add new claims not set forth by the parties to a dispute. Nonetheless, as abovementioned, there may be cases in which a claim is not clear or evident, or it is sustained in an incorrect manner, or the applicable legal authority has been invoked erroneously. In these cases, judges must perform a factual scrutiny of the case, analyze the core of what they have been requested to decide, and pronounce themselves on that matter.

II. Scope of Application

The traditional elements for the identification of a dispute are the *persona* (the parties), the *petitum* (the request for relief) and the *causa petendi* (the facts underpinning the *petitum*).[77] In other words, there are two main requisites to identify a dispute: ***(i)*** identity of the parties; and ***(ii)*** identity of the subject matter. The latter is in turn generally divided into:

[76] *Amparo Act*, Regulatory of Articles 103 and 107 of the Political Constitution of the United Mexican States, commented by A. del Castillo del Valle (2005), 310; J. A. Campuzano, *Naturaleza y Alcance de la Suplencia de la Deficiencia de la Queja en Amparo Laboral* (2003), 32-33.

[77] B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (2006), 340; S. Rosenne, *Essays on International Law and Practice* (2007), 137.

(i) identity of the relief or object (*petitum*); and ***(ii)*** identity of cause (*causa petendi*).[78]

This distinction arises from the doctrine of *res judicata*, under which parties are prevented from re-litigating issues already decided in a judgment or award. Under most civil law jurisdictions, the method to determine whether an issue has been previously decided requires a triple identity: parties, grounds, and subject matter, whereas common law jurisdictions tend to require only double identity – of parties and subject matter. International law tends to follow the civil law approach requiring triple identity. For example, Judge Jessup of the International Court of Justice, in his dissenting opinion in *The South-West Africa Case*, listed as the essentials for the application of the *res judicata* principle, identity of parties, identity of cause, and identity of object in the subsequent proceedings, namely *persona*, *petitum*, and *causa petendi*.[79]

The *causa petendi* refers to the reasons of fact and law underlying the claims upon which the plaintiff's submission is based, since the issues of fact and law that give raise to a cause of action must be established by the complainant party in order to be entitled to the relief claimed. In relation with the object of the *petitum*, the jurisdictional organ cannot concede something different to that asked by the parties. In words of Professor Lauterpacht:

> "This is particularly true in the preliminary phase of a case, for the *petitum* may be the subject of submissions which, without exceeding the overall scope of the subject of the dispute as reflected in the application, may be modified by the applicant up to the end of the oral phase on its merits. The *causa petendi*, for its part, cannot be modified without a change of case."[80]

Concerning the supplement of the deficiencies in the complaint, adjudicators must evaluate the facts and the law referred by the parties to determine the *causa petendi*, and, insofar as they neither stray from the pled

[78] E. Zuleta, 'The Relationship Between Interim and Final Awards: Res Judicata Concerns', in A. J. v. d. Berg (ed.), *Arbitration Advocacy in Changing Times* (2011) [v.d. Berg, Arbitration Advocacy], 231, 235.

[79] M. Friedman, 'Treaties as Agreements to Arbitrate – Related Dispute Resolution Regimes: Parallel Proceedings in BIT Arbitration' in A. J. v. d. Berg (ed.), *International Arbitration 2006: Back to Basics?* (2007), 545, 562.

[80] E. Lauterpacht, *International Law Reports* (2003), 349 (emphasis added).

facts nor modify the object of the claims, they shall be entitled to supplement any deficiency, error or omission found in the complaint. As further explained below, this same principle could be incorporated into the WTO DSM.

E. Supplementing Deficiencies in the Complaint within the WTO DSM

There are three procedural stages of the WTO DSM where supplementing a complaint's deficiencies would be relevant: ***(i)*** the complaining party's request for consultations; ***(ii)*** the request for the establishment of a panel; and ***(iii)*** the complainant's initial written submissions. The correction, supplement or amendment of any omission or deficiency in the complaint should be applied to the complainant's request for a panel – as the appropriate procedural moment to determine the applicable claims to a dispute – in a manner consistent with the initial request for consultations, as well as to the first submissions made by the complainant before a WTO panel. The consistency of incorporating this principle with the relevant case law concerning each one of the referred procedural stages is addressed below.

I. The Complainant's Request for Consultations

Pursuant to Article 4.4 of the DSU, any request for consultations must provide an "identification of the measures at issue and an indication of the legal basis for the complaint". This provision is relevant insofar as panels must not only determine if a panel request indicates whether consultations were held, but also if the measures identified in the request for consultation are consistent with the measures later identified in the panel request. The Appellate Body has observed that although there is no need for a "precise and exact identity" between the measures subject to consultations and those identified in the panel request, a panel request shall not expand the scope or change the essence of the dispute set forth in the initial request for consultations.

This issue was addressed in *US-Shrimp (Thailand)*, where India requested the Appellate Body to reverse the panel's findings that certain regulations were not within the scope of the measure at issue, and were

therefore not within the Panel's terms of reference. The Panel had noted that, whilst such regulations were mentioned in India's panel request, they had not been included in India's request for consultations with the United States. India claimed that the regulations at issue should nonetheless fall within the panel's terms of reference because it was the request for the establishment of a panel that defined a panel's mandate, and because there was no need for a "precise and exact identity" between the measures subject to consultations and those identified in the panel request.[81]

The Appellate Body recognized the important role that consultations play in providing the parties an opportunity to "define and delimit" the scope of the dispute between them and acknowledged that a "precise and exact identity" of measures between the two requests was not necessary, provided that the 'essence' of the challenged measures had not changed.[82] However, due to the circumstances of the case, the Appellate Body rejected India's claims and upheld the panel's findings on the basis that a "responding Member would not be in a position to anticipate reasonably the scope of a dispute if, by reason only of the inclusion of a specific measure in a consultations request, any legal instrument providing a general authority or legal basis for the specific measure would be deemed to be part of a panel's terms of reference."[83]

Since that there is no further clarification concerning the extent to which the measures identified in the panel request must correspond to the measures identified in a request for consultations, panels should assist developing-country Members and, particularly, LDCs, in supplementing

81 Report of the Appellate Body, *United States – Measures Relating to Shrimp from Thailand, United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties*, WT/DS343/AB/R, WT/DS345/AB/R, 16 July 2008, 109-114, paras 286-296 [US-Shrimp (Thailand)].

82 Similarly, in *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, Mexico argued that the inclusion in the United States' panel request of WTO legal provisions that did not form part of the request for consultations was inconsistent with Art. 6.2 of the DSU. The Appellate Body considered that instead of a rigid approach, the dispute settlement mechanism should allow for a degree of flexibility to Members in subsequently formulating complaints in panel requests and found that it was not necessary that the provisions referred to in the request for consultations be identical to those set out in the panel request, provided that the "legal basis" in the panel request may reasonably be said to have evolved from the "legal basis" that formed the subject of consultations. Report of the Appellate Body, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/AB/R, 29 November 2005, 40-41, paras 136-138.

83 *US-Shrimp (Thailand)*, *supra* note 81, 113-114, para. 294.

deficiencies in their panel requests by examining such panel requests' consistency with these Members' initial requests for consultations. There may be cases where complainants could indeed attempt to change the essence of a dispute for their advantage. In such cases, it is clear that those claims should not be later admitted under a panel's terms of reference. But it also may be the case that complainants do not intend to expand the scope of the dispute nor to change its essence but are seen as doing so due to inexperience in the WTO DSM and the use of imprecise or confusing wording in their request for a panel.

A preliminary analysis on this matter by panels and the supplement of these sort of deficiencies, so as to present the claims of the complainant in a more clearly way, could prevent the panel from determining, in a later stage of the proceedings, a lack of jurisdiction over certain claims, or an appeal before the Appellate Body on grounds such as those expressed in *US-Shrimp (Thailand)* that certain regulations are not within the scope of the measures at issue, and are therefore not within a panel's terms of reference.

II. The Request for the Establishment of a Panel

As noted above, Article 6.2 of the DSU sets out two key requirements that a complainant must satisfy in its panel request: ***(i)*** the "identification of the specific measures at issue"; and ***(ii)*** the provision of "a brief summary of the legal basis of the complaint."

As further analyzed below, the Appellate Body has determined that panels are impeded to 'cure' the failings of a deficient panel request, and that imprecise claims may result in a lack of jurisdiction over such claims. However, if panels were allowed to supplement the deficiencies found in the request for the establishment of a panel, they could avoid complainants from attempting to 'cure' the failings associated with a deficient panel request in a later stage of the proceedings, as panel requests would be previously revised and supplemented, if necessary, by panels at an early stage of the proceedings.

The Appellate Body has acknowledged that defective panel requests "may impair a panel's ability to perform its adjudicative function within the strict timeframes contemplated in the DSU" and therefore complainants

should be "particularly vigilant in preparing its panel request."[84] For instance, in *US-OCTG Sunset Reviews*, the Appellate Body explicitly recognized that the panel request of a developing-country Member, Argentina, "could have been drafted with greater precision and clarity."[85]

In a way, WTO panels have already made preliminary rulings on the adequacy of complainants' panel requests and their consistency with the requirements of Article 6.2 of the DSU. In *China-Exportation of Raw Materials*, one day after the composition of the panel, China submitted a request for a preliminary ruling on the adequacy of the complainants' panel requests and its consistency with Article 6.2 of the DSU.[86] A supplementation of deficiencies in the complaint could therefore take the form of a preliminary ruling on the adequacy of panel requests, in which panels would not merely refer to the existence of deficiencies in panel requests submitted by developing-country Members and LDC, but would be allowed to supplement them.

84 *China-Exportation of Raw Materials*, *supra* note 29, 86-87, para. 220. In *Thailand-Steel*, the Appellate Body "encourage[d] complaining parties to be precise in identifying the legal basis of the complaint", in view of the importance of the request for the establishment of a panel. *Thailand-Steel*, *supra* note 31, 29, para. 97. Panels could perhaps do more than merely "encouraging" complainants to be precise, and assist developing-country Members and LDCs in supplementing errors and deficiencies found in their panel requests.

85 Report of the Appellate Body, *Unites States – Sunset Review of Anti-Dumping Measures on Oil Country Tubular Goods From Argentina*, WT/DS268/AB/R, 29 November 2004, 59, para. 172 [US-OCTG Sunset Reviews].

86 The panel issued a preliminary ruling in two phases responding to China's allegation that complainants' panel requests failed to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. The Appellate Body criticized the panel's decision of reserving its decision on whether the panel requests complied with Art. 6.2 until it had examined the parties' first written submissions and was more able to "take fully into account China's ability to defend itself." The Appellate Body found that Section III of the complainants' panel requests did not satisfy the requirements of Art. 6.2 and declared moot and of no effect the panel's finding relating to the claims under such Section. See *China-Exportation of Raw Materials*, *supra* note 29, 82-85, paras 211-216 and 93-94, paras 233-235. Interestingly, in 1997, the Appellate Body found in *EC-Bananas* that issues concerning whether a claim is sufficiently specified in the request for the establishment of a panel "could be decided early in panel proceedings, without causing prejudice or unfairness to any party or third party, if panels had detailed, standard working procedures that allowed, *inter alia*, for preliminary rulings." *EC-Bananas*, *supra* note 31, 64, para. 144.

To determine whether complaints from developing countries or LDCs are sufficiently precise to comply with Article 6.2 of the DSU, panels would follow the usual path of "scrutiniz[ing] carefully the language used in the panel request", "read as a whole, and on the basis of the language used."[87] Such obligation of panels to scrutinize the request for a panel has been previously noted by the Appellate Body in *Thailand-Steel*, where it emphasized that "in view of the automaticity of the process by which panels are established by the DSB, it is important for panels to scrutinize closely the request for the establishment of a panel."[88]

Hence, panels could look into the particular context in which measures identified by developing-country Members and LDCs operate and examine the extent to which they are capable of precise identification. For instance, whether a panel request challenging a number of measures on the basis of multiple WTO provisions sets out "a brief summary of the legal basis of the complaint sufficient to present the problem clearly" may depend on whether it is sufficiently clear which "problem" is caused by which measure or group of measures.[89] Or, to the extent that a provision may contain multiple obligations, panels may assist developing-country Members and LDCs in specifying which of the obligations contained in the provision is being challenged.[90]

In any event, *all claims* must be included in the request for establishment of a panel in order to come within the panel's terms of reference. In *EC-Sugar subsidies*, the Appellate Body recalled its previous decision in *EC-Bananas III* that Article 6.2 of the DSU "requires that the *claims*, but not the *arguments*, must all be specified sufficiently in the

87 *China-Exportation of Raw Materials*, *supra* note 29, 86-87, para. 220; *EC-Fasteners*, *supra* note 30, 223-224, para. 562. See also *US-Zeroing* (Japan), Article 21.5, *supra* note 31, 46, para. 108; *US-Continued Zeroing*, *supra* note 30, 65-66, para. 161; *EC-Sugar Subsidies*, *supra* note 31, 51, para. 143; *US-German Steel CVDs*, *supra* note 30, 42-43, para. 126.

88 *Thailand-Steel*, *supra* note 31, 25, para. 86, referring to *EC-Bananas*, *supra* note 31, 63-64, para. 142.

89 *China-Exportation of Raw Materials*, *supra* note 29, 86-87, para. 220.

90 Complainants may refer in general to "Respondent's trade law" as a measure at issue (*id.*, 90-91, para. 227). Yet from that language it would be impossible to discern which provisions of the WTO covered agreements at issue are alleged to have been violated by such measure.

request for the establishment of a panel."[91] In this sense, it is pertinent to distinguish between claims and arguments.[92]

Claims refer to the specific provisions of the covered agreements that contain the allegedly violated obligations.[93] In *Dominican Republic-Cigarettes*, the Appellate Body observed that there is a distinction "between the *claims* of a Member regarding the application of the various provisions of the *WTO Agreement*, and the *arguments* presented in support of those claims. Claims, which are typically allegations of violation of the substantive provisions of the *WTO Agreement*, must be set out clearly in the request for the establishment of a panel. Arguments, by contrast, are the means whereby a party progressively develops and supports its claims. These do not need to be set out in detail in a panel request; rather, they may be developed in the submissions made to the panel."[94]

Moreover, in *US-OCTG Sunset Reviews*, the Appellate Body clarified that "[b]y *'claim'* we mean a claim that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement. Such a *claim of violation* must [...] be distinguished from the *arguments* adduced by a complaining party to demonstrate that the responding party's measure does indeed infringe upon the identified treaty provision."[95]

Therefore, whereas *claims* would fall under the scope of application of the supplement of deficiencies in the complaint, *arguments* would not.

The supplement of deficiencies in the complaint would preserve the due process rights of the parties, as it would not allow panels to add new

91 *EC-Sugar Subsidies*, *supra* note 31, 50-51, paras 140-144; *EC-Bananas*, *supra* note 31, 64, para. 143.

92 The Appellate Body has addressed such distinction between claims and arguments in several occasions. See, e.g., Report of the Appellate Body, *Japan – Measures Affecting the Importation of Apples*, WT/DS245/AB/R, 26 November 2003, 44, para. 127 (note 213); Report of the Appellate Body, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, 23 September 2002, 57-58, paras 181-182; *Korea-Dairy Safeguards*, *supra* note 31, 39, para. 125; *India-Patents*, *supra* note 31, 30, para. 88; *EC-Bananas*, *supra* note 31, 63, para. 141; Report of the Panel, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, Recourse to Article 21.5 of the DSU by India*, WT/DS141/RW, 29 November 2002, 20-21, para. 6.63.

93 Report of the Appellate Body, *European Communities – Selected Customs Matters*, WT/DS315/AB/R, 13 November 2006, 51, para. 130.

94 *Dominican Republic-Cigarettes*, *supra* note 30, 48, para. 121.

95 *US-OCTG Sunset Reviews*, *supra* note 85, 55, para. 162, citing the Appellate Body Report in *Korea-Dairy Safeguards*, *supra* note 31, 43-44, para. 139.

claims during the course of the proceedings. In any case, both parties to a dispute would still be able to provide further supporting evidence and argumentation throughout the panel stage.

As a result, in case of a broadly phrased, imprecise or faulty request for the establishment of a panel, supplementing deficiencies in the complaint would become a job of the panels, and would require a close examination of the complainant's panel request, to determine precisely which claims (and not arguments) have been made and may fall under the terms of reference of the panel.

III. The Complainant's Initial Written Submissions

The Appellate Body has consistently established that, although submissions by a party may be referenced in order to confirm the meaning of the words used in the panel request, the content of those submissions cannot cure the failings of a deficient panel request.[96] Notably, however, the Appellate Body in *US-German Steel CVDs* also acknowledged that panels may consult with the complainant with respect to its first written submission in order to "confirm the meaning of the words used in the panel request" as follows:

> "[I]n considering the sufficiency of a panel request, submissions and statements made during the course of the panel proceedings, in particular the first written submission of the complaining party, may be consulted in order to confirm the meaning of the words used in the panel request and as part of the assessment of whether the ability of the respondent to defend itself was prejudiced."[97]

Such exercise of confirming the meaning of the words used in a panel request by a complainant party is exactly what stands behind the possibility of allowing panels to supplement the deficiencies found in a request for the establishment of a panel, or even in the initial written submission of the

[96] See, e.g., *China-Exportation of Raw Materials*, *supra* note 29, 86-87, para. 220; *EC-Fasteners*, *supra* note 30, 223-224, para. 562; *Australia-Apples*, *supra* note 30, 145, para. 418; *US-German Steel CVDs*, *supra* note 30, 43, para. 127.

[97] *US-German Steel CVDs*, *supra* note 30, 43, para. 127 (emphasis added).

complainant: to clarify and confirm the intention of the complaining party to a dispute.

In order to incorporate the supplement of the deficiencies in the complaint within the WTO system, Article 7, paragraph 2, of the DSU should be amended. The current text of this provision reads as follows:

> "7.2 Panels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute."

The amendment would consist in adding a second sentence to this provision, in the following terms:

> "7.2 Panels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute, and shall supplement and correct any deficiency found in the request for the establishment of a panel, and in the initial written submissions, filed by developing-country and least developed country Members parties to the dispute."

As noted before, this amendment would allow the Appellate Body to review legal aspects that, if not supplemented by panels, would not have been otherwise subject to a legal review analysis.[98]

This amendment would also benefit respondents, as the lack of clarity may lead them to be "[unable] to provide adequate responses due to the

[98] E.g., in *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, the Appellate Body concluded that, provided that Mexico's panel request referred only to three actions taken during the course of an investigation by Guatemalan authorities as the "matters in issue" but did not specifically identify the final, definitive anti-dumping duty, considered "that the merits of Mexico's claims in this case [were] not properly before[the Appellate Body]." Therefore, the Appellate Body did not consider "any of the substantive issues raised in the alternative by Guatemala in this appeal." Report of the Appellate Body, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, 2 November 1998, 31, para. 89. Similarly, in *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil* the panel considered that 'inter-linked' or 'dependent' obligations upon a provision identified in the panel request must not be considered if not expressly set out by the complainant party. Panel Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, 7 March 2003, 15-18, para. 7.14.

confusion" of complainants' claims, and could ultimately save time and expenses associated with respondents' appeals alleging that panels' findings were based on unclear claims and are therefore moot and without legal effect.[99]

As observed by the Appellate Body in *US-Gambling*, "[a] party must not merely be given an opportunity to respond, but that opportunity must be meaningful in terms of that party's ability to defend itself adequately. [Otherwise, if a] party considers it was not afforded such an opportunity, [it] will often raise a due process objection before the panel."[100] In other words, "[a] defending party is entitled to know what case it has to answer and what violations have been alleged so that it can begin preparing its defense."[101]

The core of this proposal is therefore to enhance WTO's ability to settle international trade disputes by balancing the disadvantages of developing-country Members and LDCs, and could also serve to increase the legitimacy of the DSB and to stimulate these Members to become active participants in the system.

Finally, there are several arguments that could be raised in favor and against the implementation of this proposal in the WTO DSM that are analyzed below.

IV. The Pros and Cons

Perhaps the most anticipated criticisms to this proposal are that it could contravene the WTO panelists' impartiality requirement, and that it would disregard the principle of equality of the parties and the *ne ultra petita* principle. Also, it could be argued that the correction of omissions or deficiencies by panels could 'backfire' and lead to lazy complainants and the potential abuse of the system.

Two other practical considerations are worthy of note: first, the current workload of panels could make this amendment too burdensome to be observed, and second, the lack of a precise identification of the beneficiaries of this amendment –given that the WTO does not distinguish

99 See, e.g., *EC-Fasteners*, *supra* note 30, 26, para. 67.

100 Report of the Appellate Body, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, 7 April 2005, 90, para. 270 [US-Gambling]. See also *Thailand-Steel*, *supra* note 31, 26, para. 95.

101 *EC-Sugar Subsidies*, *supra* note 31, 50, para. 142; *US-OCTG Sunset Reviews*, *supra* note 85, 55, para. 161; *Thailand-Steel*, *supra* note 31, 26, para. 88.

between 'developed' and 'developing-country' Members– could also complicate the amendment's application.

In essence, the principle of supplementing deficiencies in the complaint attempts to eliminate the legal rigor in cases where there is a material inequality of the parties to a dispute. Therefore, it is said that this principle constitutes an exception to the principle of 'equality of the parties' or 'strict respect for the rule of law,' which refers to the adjudicators' obligation to analyze the allegations of violations and grievances in the submissions of the parties to a dispute without considering anything beyond what is expressly set out by the parties.[102] Under international law, this principle is similar to that of *ne ultra petita*, which prohibits judges, arbitrators or panelists from deciding something not explicitly entrusted to them by the parties.[103]

The principle of equality of the parties implies that both parties to a dispute must have the same ability to advocate for their position. There are two main reasons behind the applicability of the principle of equality of the parties: first, it provides legal certainty, as both parties must be aware of the legal grounds upon which their dispute is to be adjudicated without the subjective appreciations of judges, panelists, or arbitrators; and second, it prevents the idleness of the parties who, aware of the formalities associated with a proceeding, will provide the adjudicator with all the necessary elements to present their case.[104]

[102] Burgoa, *El Juicio de Amparo*, *supra* note 73, 297.

[103] D. de Groot, 'Chapter 16: The Ex Officio Application of European Competition Law by Arbitrators', in G. Blanke & P. Landolt (eds), *EU and US Antitrust Arbitration: A Handbook for Practitioners* (2011), 567, 577 ("[a] court decision is *ultra petitum* [...] if in its decision (*dictum*), the plaintiff was awarded more than had been requested (*petitum*)."); C. v. Wobeser, 'The Effective Use of Legal Sources: How Much Is Too Much and What Is the Role for Iura Novit Curia?', in v. d. Berg, *Arbitration Advocacy*, *supra* note 78, 207, 212 ("the limit lies in that [adjudicators] may not award the parties more than they sought in their claims."); G. v. Segesser & D. Schramm, 'Swiss Private International Law Act (Chapter 12: International Arbitration)', in L. A. Mistelis (ed.), *Concise International Arbitration* (2010), 911, 956-957 ("[t]he tribunal only decides *ultra petita* or *extra petita* if [...] it adjudicates more, or something else, than what has been requested in the prayers for relief."); P. Mavroidis, 'Remedies in the WTO Legal System: Between a Rock and a Hard Place', 1 *European Journal of International Law* (2000) 4, 763, 767 ("[i]n public international law the *non ultra petita* rule circumscribes the ambit of the powers of the adjudicating body: according to this rule, an adjudicating body cannot decide more than it has been asked to.").

[104] H. S. Camacho, *Análisis Práctico Operativo de la Suplencia de la Queja Deficiente en el Juicio de Amparo* (1994), 31.

The principle of supplementing deficiencies in the complaint is consistent with the principle of equality of the parties, insofar as panelists would neither be allowed to incorporate new claims on behalf of the complainant nor to modify the *causa petendi* of a dispute, therefore respecting the principle of legal certainty.

Concerning the principle of *ne ultra petita*, it is noteworthy that the predominant tendency "is to treat as *ultra petita* only those [rulings] which decide beyond the relief sought by the parties, and not those in which the reasoning goes beyond the parties' submissions."[105] Hence, so far as supplementing or correcting errors, omissions, or deficiencies in the complaint is not tantamount to granting non-requested remedies, panelists would not adjudicate more than what was originally claimed and this principle would remain intact.

As to the parties' advocacy and the potential abuse of this principle, it should be recalled the interest expressed by developing-country Members and LDCs in gaining experience in the WTO DSM. As noted above, most of developing country representatives considered the lack of legal capacity as one of the main reasons why their governments had considered not filing a case to the DSM. Also, the two-hundred-plus legal opinions issued by the ACWL so far demonstrate that developing-country and LDC Members are indeed eager to participate more actively in the WTO DSM, and to enhance, not hinder, their capacity to present cases before WTO panels.

On the other hand, the panels' workload is a matter that deserves further consideration. The WTO dispute settlement proceedings' complexity demands a significant amount of working hours from panels, and to add more requirements for panelists during the course of the proceedings could be perceived as excessively burdensome. However, as noted above, the Appellate Body has already recognized that panels are obligated to closely

[105] P. Landolt, 'Arbitrators' Initiatives to Obtain Factual and Legal Evidence', 28 *Arbitration International* (2012) 2, 173, 192. See also A. Dimolitsa, 'The Equivocal Power of the Arbitrators to Introduce Ex Officio New Issues of Law', 27 *ASA Bulletin* (2009) 3, 426, 438 ("the principle of '*ne ultra petita partium*' does not enter into play as much when [adjudicators] introduce *ex officio* new issues of law. Indeed, introducing new issues of law does not equate with granting non-requested remedies."); J. Jenkins & J. Stebbings, *International Construction Arbitration Law* (2006), 177 ("there is some debate in the case law as to the extent to which the tribunal must adhere to the arguments pleaded by the parties. For example, a tribunal may award relief of a different nature from that requested by the claimant, provided this is available under the applicable law, within the limits of the claim and (therefore) within the parties' reasonable contemplation.").

scrutinize the request for a panel, and WTO panels have already made preliminary rulings on panel requests' adequacy, suggesting that a panel review to remedy deficiencies in the complaint could fall within the current DSM time frames.

Finally, a relevant aspect to remedying complaints' deficiencies is to determine the parties that would benefit from it. As stated before, this proposal is aimed at 'developing-country Members' and LDCs. The definition of a LDC is determined by the United Nations Economic and Social Council, based on objective criteria regarding their *per capita* income and related development standards, and recognized as such by the WTO.[106]

However, although the term 'developing-country' is often used in WTO Agreements, it is undefined, allowing countries to self-designate their status, subject to challenge from another Member. This self-declared basis of 'developing' countries is a valid concern, given that, if a separate measure is applied to developing countries to offset structural imbalances, the WTO will need to develop clearer legal criteria for defining 'developing country' status.

Alternative definitions of developing countries are available in the criteria set out by the Advisory Centre on WTO Law and the World Bank, under which a country's development status attends to a country's per capita GNP and its share of global trade. The World Bank classifies developing countries into "low" and "middle" income countries.[107] Similarly, the OECD's Development Assistance Committee divides countries into multiple categories that include "least developed countries," "other low income countries," "lower middle income countries," "upper middle income countries," and "high income countries."[108]

Although the definition of "developing country" is conceptually and politically complex, the abovementioned criteria could serve as a starting

[106] Basically, the criteria to classify a country as 'least developed' is based on: ***(i)*** a low-income criterion; ***(ii)*** a human resource weakness criterion; and ***(iii)*** an economic vulnerability criterion. See UNCTAD, 'What are the Least Developed Countries?', available at http://r0.unctad.org/ldcs/LDCs/index.html (last visited 28 January 2013).

[107] See World Bank, 'Beyond Economic Growth, Glossary', available at http://www.worldbank.org/depweb/english/beyond/global/glossary.html (last visited 28 January 2013).

[108] See OECD, 'DAC List of ODA Recipients: Effective for Reporting on 2009 and 2010 Flows', available at http://www.oecd.org/dataoecd/32/40/43540882.pdf (last visited 28 January 2013).

point to qualify countries and thus, to determine which Members could make use of the supplement of deficiencies in their complaints.

F. Conclusions

The remedy of deficiencies in a complaint would be congruent with the WTO's normative framework, and could be incorporated as a special and differential treatment provision aimed toward balancing the existing legal capacity asymmetry between developed country Members on the one hand, and developing-country Members and LDCs on the other hand.

Although the DSU has incorporated certain special and differential treatment provisions, these are generally not binding. Therefore, it is a shared responsibility among WTO Members to facilitate bridging these differences through the review of the existing special and differential treatment provisions, as well as to continue to analyze potential amendments to the DSU to level the legal capacity among WTO Members.

The core of the proposal to incorporate the remedy of deficiencies in complaints is to enhance WTO's ability to settle international trade disputes by addressing the disadvantages faced by developing-country Members and LDCs, and could also serve to increase the legitimacy of the DSB and to stimulate these Members to become active participants in the system.

Under this principle, it is understood that a lack of appropriate legal counsel impedes the parties to a dispute to accurately expose their arguments and, therefore, to duly present their claims before an adjudicator. Hence, this principle's application attempts to eliminate the legal rigor in cases where the parties have materially different capacities to represent themselves.

There are three procedural stages in the WTO DSM in which remedying deficiencies in the complaint would be relevant: ***(i)*** the complaining party's request for consultations; ***(ii)*** the request for the establishment of a panel; and ***(iii)*** the complainant's initial written submissions. The remedying of any omission or deficiency in the complaint should be applied to the complainant's request for a panel as it corresponds to the initial request for consultations, as well as to the first submissions made by the complainant before a WTO panel.

Of course, developing-country Members and LDCs should develop internal techniques to harness their own legal resources more effectively through, e.g., the strengthening of internal legal expertise, and the promotion of academic research and teaching on international trade law.

However, if these efforts are not matched by WTO's provisions allowing developing countries and LDCs to take advantage of the legalized international dispute settlement structure, then all the talk about the need to level their legal capacity misses the point.

Therefore, the proposed amendment to incorporate the remedy of deficiencies in the complaint should be considered as part of other efforts aimed at improving these Members' dispute settlement capacity. Ultimately, insofar as developing-country Members and LCDs consider themselves in a disadvantaged position to defend their rights and interests before a WTO panel, their participation in the dispute settlement mechanism will continue to be scarce.