



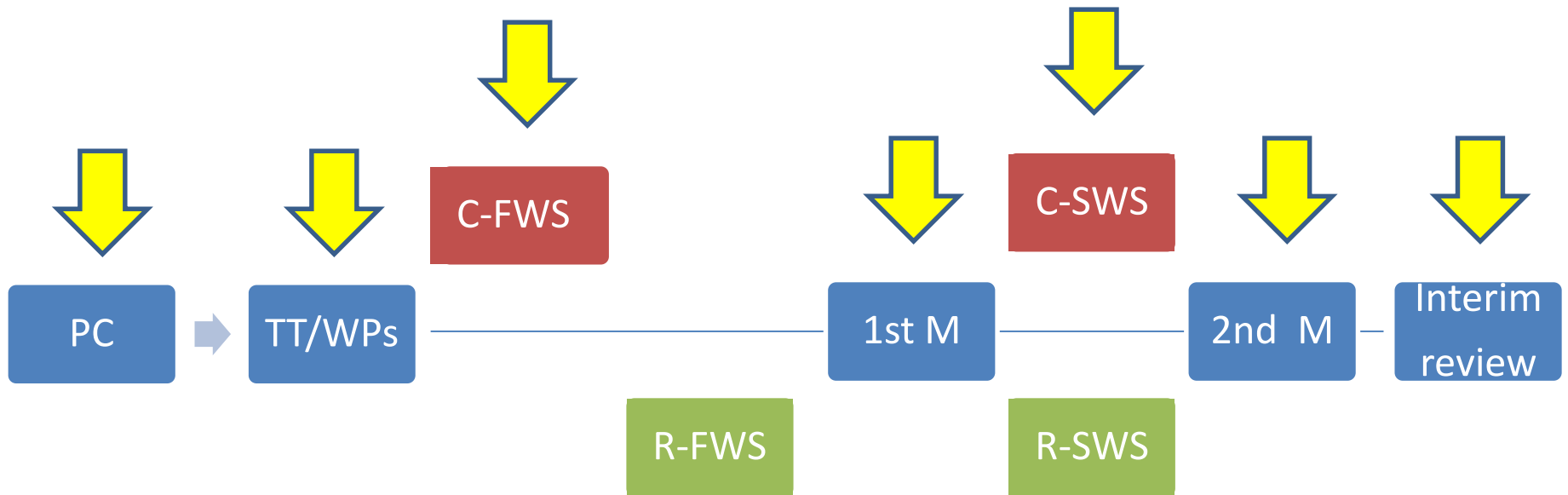
Advisory Centre on WTO Law
Centre Consultatif sur la Législation de l'OMC
Centro de Asesoría Legal en Asuntos de la OMC

WTO-ACWL-ICTSD WORKSHOP ON WTO DISPUTE SETTLEMENT

Presenting Your Case before the Panel as the Complainant

New Delhi, 26-28 November 2012

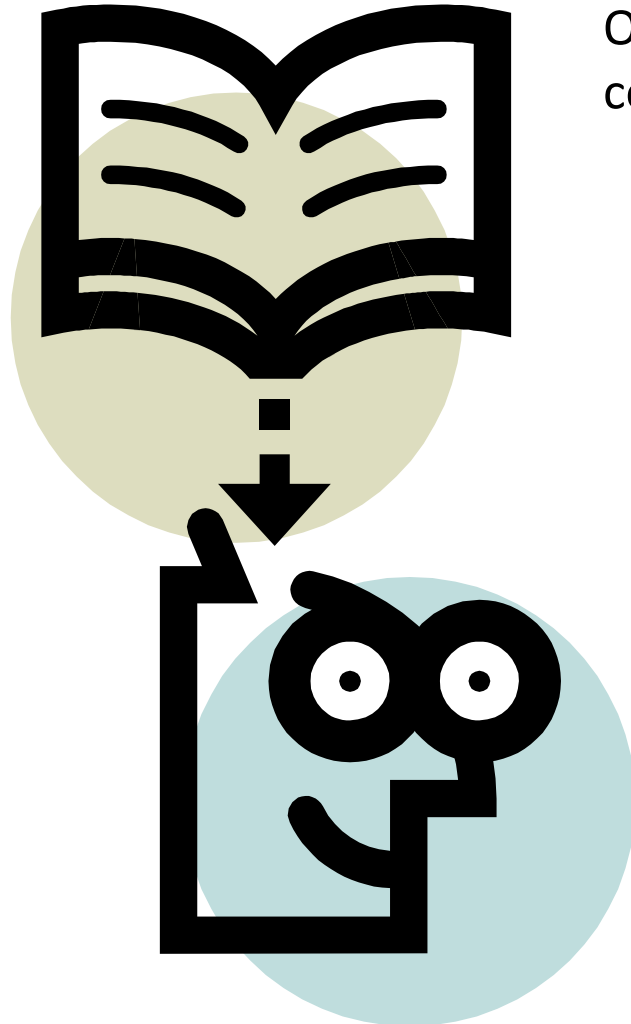
OUTLINE



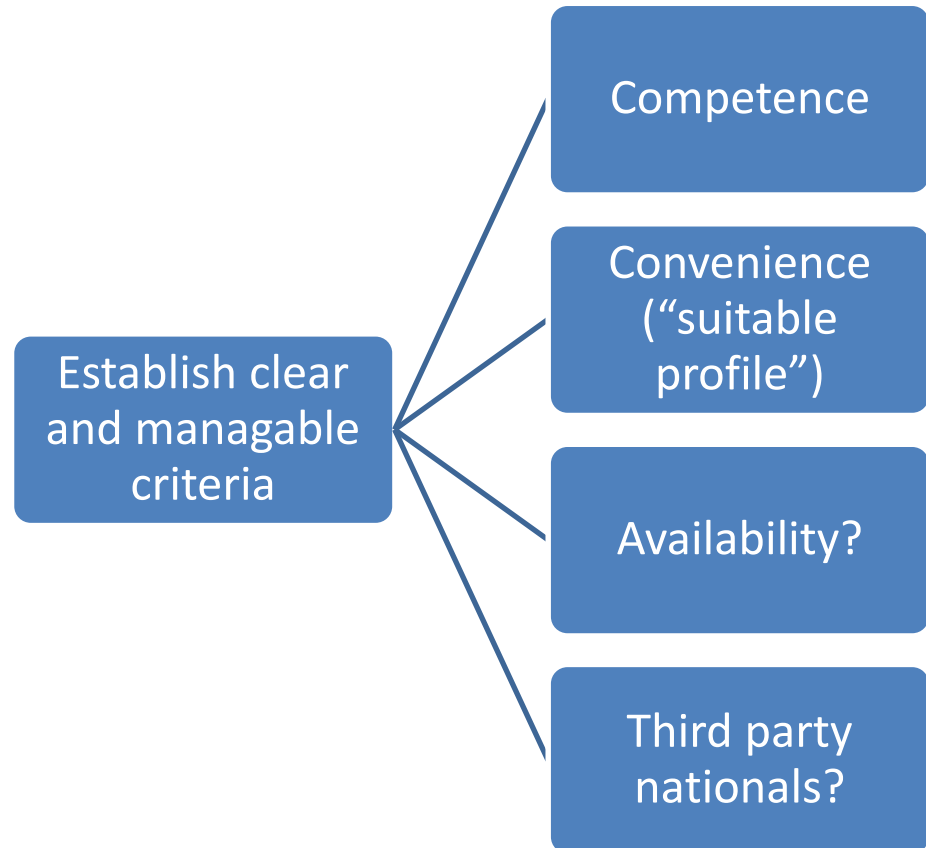
OUTLINE

1. Panel composition
2. Timetable & Working Procedures
3. First Written Submission (drafting & filing)
4. Hearing (oral statement & Q/A)
5. Second Written Submission
6. Evidence
7. Interim review

PANEL COMPOSITION



Objective: select individuals who are likely to conduct an “objective assessment” of the matter



PANEL COMPOSITION

- Review proposed candidates in the light of:
 - Your criteria
 - Likelihood of any potential bias that may affect the “objective assessment of the matter” sought.
- Accept/reject/keep “on hold” cautiously.
- If necessary, do not hesitate to request DG appointment promptly.
- Make sure DG knows your preferences and the acceptances/rejections you have made.

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TIMETABLE & WORKING PROCEDURES

- Objective: prompt resolution of legal dispute
- Define position re: urgency, evidentiary activity.
- Are draft timetable / WPs acceptable?
- Timetable: realistic counterproposals.
- Back up counterproposals.
- Try to accommodate panel's/secretariat's needs.
- WPs: pay attention to rules on filing of documentation, language & translation issues, submission of business confidential information if applicable.

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SUBMISSIONS (1)

- First submission:

- Elaborates claims in the panel request.
- Develops arguments.
- Provides evidentiary base for all factual assertions.



SUBMISSIONS (2)

- First submission:
 - Objective: present *prima facie* case of WTO-inconsistency of challenged measure(s)
 - Objective: present case clearly and as “objective” as possible:
 - clarity,
 - simplicity,
 - persuasiveness,
 - conciseness

SUBMISSIONS (5)

- Structuring the first submission:

I. Introduction

II. Procedural Background

III. Factual Background

IV. Legal Argument

V. Request for rulings, recommendations
(suggestions)

VI. Exhibits



SUBMISSIONS (6)

Preparation stage

- Identification of conduct
- Identify relevant obligation

Consultations request

- Consulted measure
- Claims

Panel request

- Measure at issue
- Claims

First submission

- Factual background
- Legal argument

SUBMISSIONS (7)

- Structuring the first submission:

I. Introduction

II. Procedural Background

III. Factual Background

IV. Legal Argument

V. Request for rulings, recommendations
(suggestions)

VI. Exhibits



SUBMISSIONS (3)

■ Drafting the first submission:

- Follow the structure/format of AB/panel reports (and now also the Style Guide).
- Note systemic implications of case.
- Explain the measure at issue:
 - Objective: an independent reader would think “in the light of these facts, a violation must have occurred”.
 - Clear, thorough and detailed, looking as “objective” and “neutral” as possible.
 - Thoroughly but only pertinent facts (avoid overloading panel).

This MUST be a violation of WTO law!



SUBMISSIONS (4)

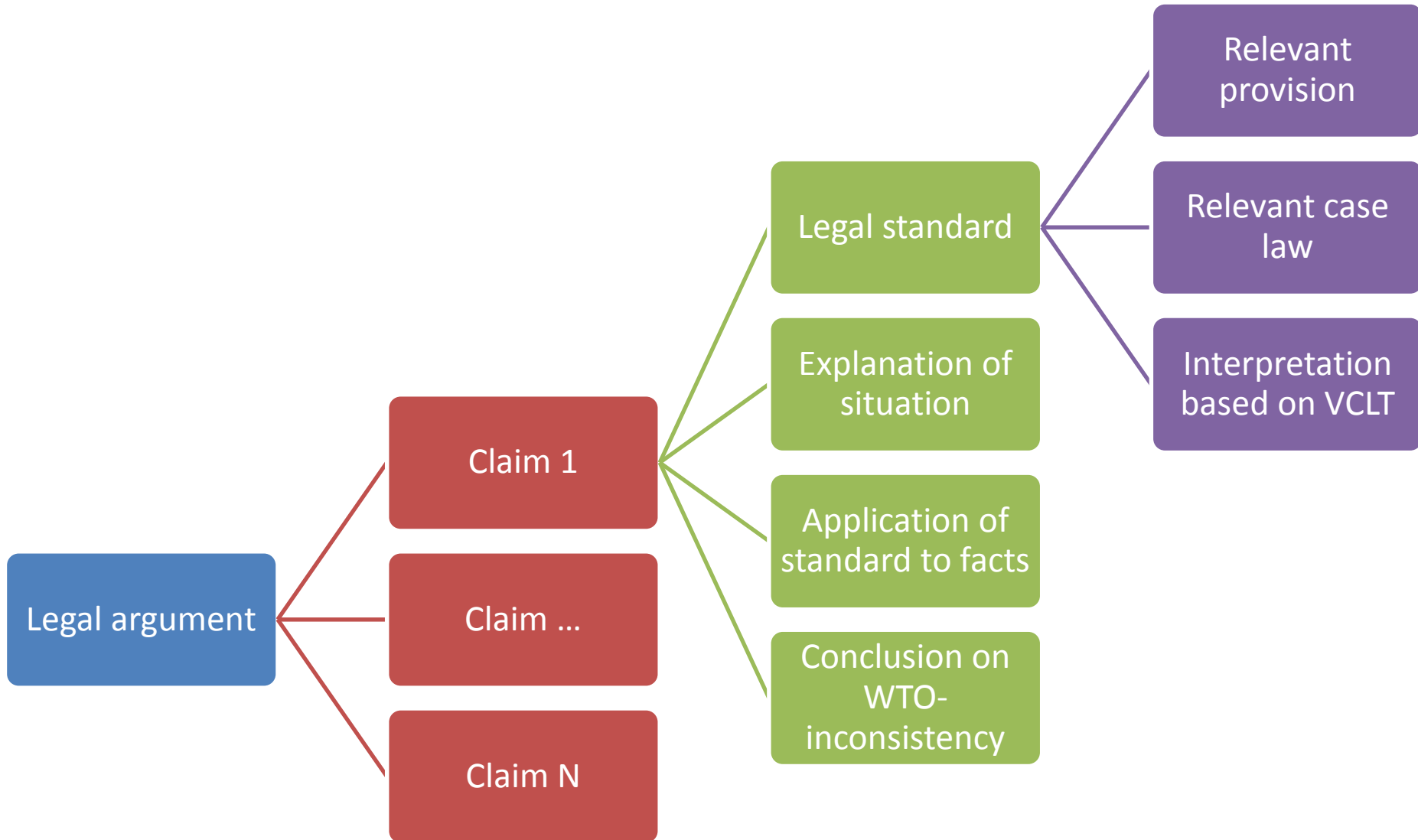
- Drafting the first submission:
 - Present well-founded legal argument:
 - Present the relevant obligation
 - Rely on WTO jurisprudence
 - Follow the Vienna Convention approach.
 - Avoid overloading the panel.
 - Avoid unnecessary adjectives, adverbs, qualifications
 - Anticipate the respondent's defense/arguments?
 - State clearly what you want: rulings, recommendations, suggestions for implementation?



SUBMISSIONS (8)

- Structuring the legal argument: which (and how many) claims should the complainant make?
 - How many claims to make? All claims in panel request?
 - Think about compliance – will the findings of violation you are seeking ensure the desired commercial or systemic objective?
 - Too many claims complicate the procedure? Judicial economy.
 - Special considerations in trade remedy cases.
 - Should you designate claims as alternative? Advantages and disadvantages?

SUBMISSIONS (9)



SUBMISSIONS (10)

- 1st premise: legal standard
- 2nd premise: the measure at issue
- Characterisation of 2nd premise in light of 2nd premise
- Conclusion: the measure is WTO-inconsistent

Example:

- 1st premise: Art. XI:1 prohibits import restrictions.
- 2nd premise: Country X allows the importation of a limited quantity of a given product.
- Characterisation: the requirement to import only certain quantities of a given product is an “import restriction”.
- Conclusion: The requirement to import only certain quantities of a given product is prohibited under Art. XI:1 of GATT 1994

SUBMISSIONS (11)

China – Measures Related to the Exportation of Various Raw Materials
DS395

First Written Submission by the European Union

IV. LEGAL ANALYSIS

A. Export Quotas

1. China's export quotas are inconsistent with Article XI of the GATT.

195. Article XI of the GATT provides that Members may not adopt or maintain "prohibitions or restrictions...whether made effective through quotas, import or export licences or other measures...on the exportation or sale for export of any product destined for the territory of any other [Member]." It is noted that the text of Article XI expressly prohibits export quotas.
196. It is generally accepted that a measure falls within the prohibition of GATT Article XI when two conditions are satisfied: First, it is a "governmental measure",²¹⁷ i.e., it has been introduced by the government of a WTO Member or there is "sufficient governmental involvement with it".²¹⁸ Second, it is a "quantitative restriction", i.e., it "prohibits or restricts the exportation or sale for export of products".²¹⁹

²¹⁷ See the Report of the Panel in *Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather*, ("Argentina-hides") WT/DS155/R and Corr.1, adopted 16 February 2001, in par. 11.18.

²¹⁸ See the Report of the Panel in *Argentina-hides*, in par 11.18, citing the Report of the Panel in *Japan-Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted on 22 April 1998, par. 10.56.

²¹⁹ See the Report of the Panel in *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, ("India-Quantitative restrictions") WT/DS90/R, adopted 22 September 1999 (upheld by the Appellate Body Report, WT/DS90/AB/R) in par. 5.128. See also the GATT Panel Report in *Japan-Trade in Semi-Conductors*, adopted 4 May 1988, in par. 104.

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197. China's export quotas satisfy both these conditions. First, the export quotas are governmental measures: they are introduced by the government of China through China's Foreign Trade Law and the Chinese Regulations, Measures and Decisions discussed in the Facts section of this submission.
198. Second, China's export quotas are clearly "quantitative restrictions", i.e., measures that "prohibit or restrict the exportation" of goods, as expressly provided for in the text of Article XI of the GATT by expressly limiting exports of the Raw Materials to a certain maximum volume.
199. Consequently, China's export quotas are inconsistent with Article XI of the GATT. As mentioned in the Facts section of this submission, in 2009 China imposed export quotas for the exportation of **Bauxite** (Refractory clay and Aluminium ores, concentrates), **Coke**, **Fluorspar**, **Silicon Carbide** and **Zinc** (Zinc ores and concentrates).

2. China's export quotas are inconsistent with China's obligations under its Accession Protocol.

200. The Protocol on the Accession of the People's Republic of China to the WTO (the "Accession Protocol") provides in Article 1.2 of Part I that "this Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report, shall be an integral part of the WTO Agreement".²²⁰ Therefore, China must comply

²²⁰ See China's Accession Protocol, annexed to the Decision taken by the WTO Ministerial Conference on November 10, 2001, WT/L/432, circulated on November 23, 2001.

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ORAL STATEMENT

- First opportunity to "personalise" the case to the panel.
- Also, first opportunity for the complainant to respond to the defendant's first submission.
- Complainants' oral statements might become in some cases a full reply to the respondent's first written submission.
- This changes the process outlined above, in effect giving the complainant an additional written statement.



PANEL MEETINGS / ORAL ARGUMENT (1)



- After the oral statements, the panel questions the parties. This can develop into a back and forth discussion.
- Attempt to identify the Panel's reasons for asking the questions at issue.
- All answers will subsequently be submitted in writing, parties do not have to respond if they do not want to.
- If you have no answer, note that you prefer to answer in writing.
- However, answering on the spot gives a good impression.

PANEL MEETINGS / ORAL ARGUMENT (2)

- In responding to questions:
 - Try to respond to the question the panel asked before making any additional points.
 - Highlight the weakness of the other side's case.
 - Reiterate points you feel the panel should not forget.
 - Think carefully who on your delegation will be responding to the panel's questions:
 - Division of labour.
 - Allow experts to speak?



PANEL MEETINGS / ORAL ARGUMENT (3)

Should parties ask questions to the other party?

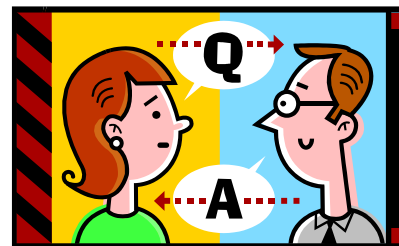
- It may be preferable to ask the panel to exercise its authority under DSU Article 13.1.
- Should not ask questions to which you do not know the answer!
- Ensure that your question to the other party has "value-added" – do not use the opportunity to ask questions simply to repeat the arguments that you have previously made to the panel.
- Focus on specific factual issues or gaps in the evidence.

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WRITTEN ANSWERS TO QUESTIONS/SECOND SUBMISSION (1)

- Panel's questions after first meeting are very important – must be answered clearly and completely.
- Answer the question the panel actually asked before answering the question the panel *should have* asked.
- Depending on timing, there may be some overlap between the answers to the panel's questions and the second submission – where possible, avoid duplication.



WRITTEN ANSWERS TO QUESTIONS/SECOND SUBMISSION (3)

Drafting the second submission:

- Second submission is essentially a rebuttal submission.
 - Address the arguments and defences in the respondent's first submission and in the oral arguments at first meeting.
 - Do not ignore jurisprudence to which the other side has referred.
- Keep the panel on track.
 - New arguments may be presented, but new claims cannot be submitted.
 - Try to refine the issues – may need to respond to new material from the other side.
 - Avoid needless repetition of material in second submission.

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EVIDENCE (1)

- Observe panel's working procedures on evidence – the sooner it is submitted the better.
- Build a complete and accurate record in the exhibits:
 - Label exhibits carefully.
 - Provide accurate translation.
- Arrange and present evidence clearly – make sure panel knows what each document is and why it is important to the case.
- Examples of evidence:
 - Documentary evidence is the most significant type of evidence.
 - Testimony of witnesses is much less common.

EVIDENCE (2)

- Note existence of some express rules on evidence:
 - Anti-Dumping Agreement:
 - "Positive evidence" (Article 3.1).
 - Sets out degree of evidence required (Articles 3.1 and 17.6(i)).
 - Factors that have to be proved (*e.g.* Article 3.4).
 - SCM Agreement:
 - Article 4.2 - statement of available evidence.
 - Article 12 – evidence and confidentiality.
 - Customs Valuation Agreement:
 - Article 8.3 "objective and quantifiable data".

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INTERIM REVIEW

- Interim review is not "appeal":
 - Panels generally do not change their minds after interim review – but see *Korea – Paper*.
 - Do not use interim review to restate your position on all your points.
- Think ahead to a possible appeal / cross-appeal.
 - If you believe a panel got something wrong, think carefully which mistakes you want to point out to the panel and which you should "save" for the appeal.