



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 a Respondent

New Delhi, 26-28 November 2012

OUTLINE

1. Practical issues
2. Procedural challenges
3. Rebut the complainant's claims
4. Submit a justification
5. Interim review
6. Preparation for appeal

PRACTICAL ISSUES

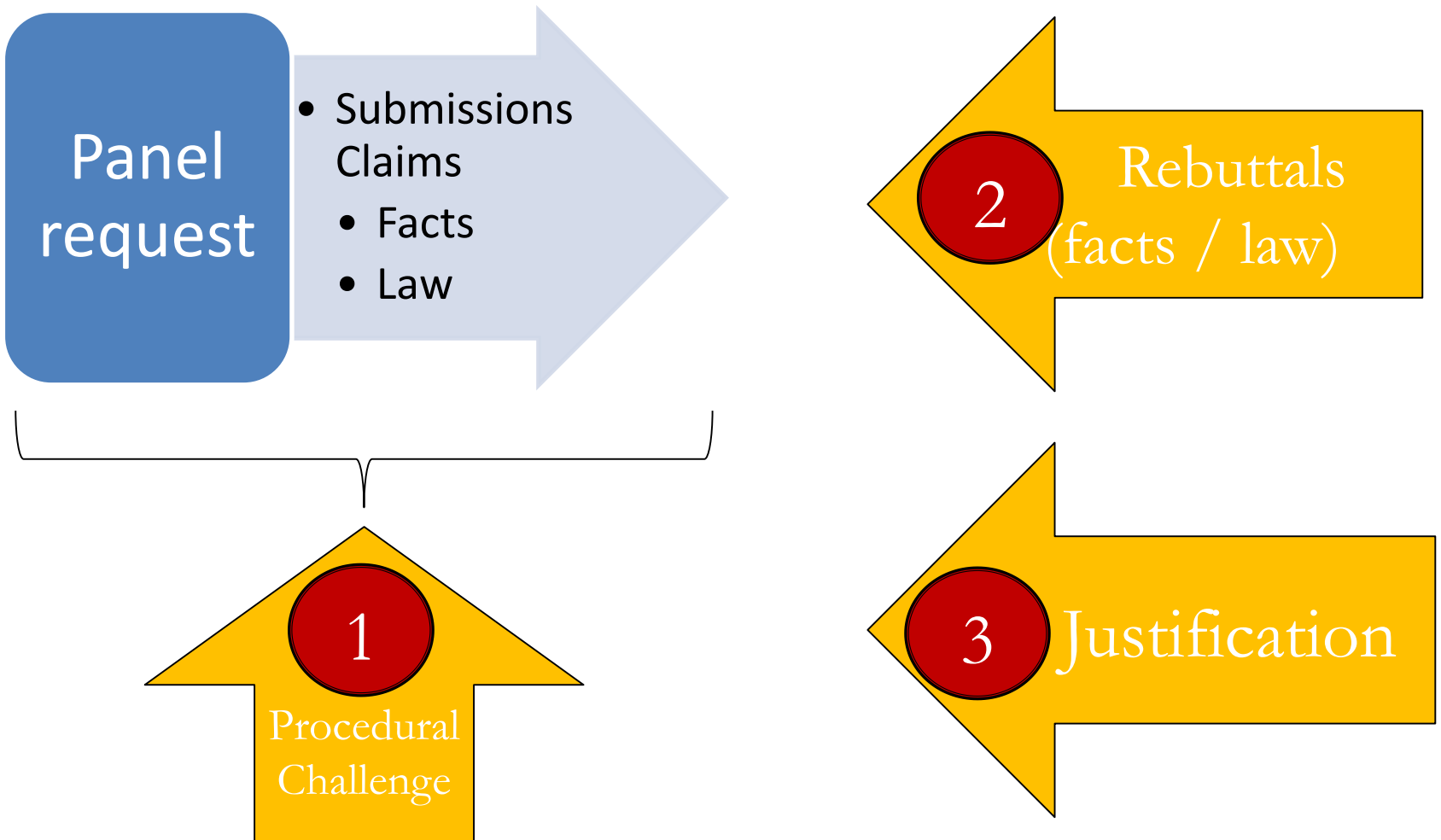
Most WTO cases decided in favour of Complainant.

Sometimes it is not about trying to win the case but just limiting the damage.

Establish what your objectives are:

- Win time to maintain your WTO-inconsistent measure.
- Defend your views and principles

PRACTICAL ISSUES



PRACTICAL ISSUES

Plan ahead carefully as a respondent – tight deadlines make it difficult to draft submission, coordinate with various government departments, consult with industry and obtain approval.

In advance, assemble all publicly available and internal information on the measures at issue; coordinate with industry; review all Minister's statements, etc.

Be prepared to negotiate on timetable at organizational meeting of the Panel. Address translation requirements.

Once panel is composed and you have working procedures/timetable, establish deadlines for circulation of drafts for comments. Consider conducting moot court.

PRACTICAL ISSUES

First Submission: Adjust your submission to the complainant's to ensure you rebut every point raised.

- Determine your approach: have not met the burden of proof line of argumentation or addressing each issue the complainant has raised.
- Because of tight timeframes, try to anticipate complainant's arguments
- It is your measure being challenged. Do not let the complainant's explanation of your measure stand before the panel.
- Argue the facts and argue the law.
- Make all essential points in your first submission.

PRACTICAL ISSUES

Oral Statement at First Hearing:

- No real advocacy as it is written in advance.
- Make points that you would like the panel to reflect upon when preparing its questions.
- Emphasize weak arguments of complainant; point out where you have third party support.

Questions from Panel:

- Be mindful of the type of questions the Panel is asking. Read between the lines to assess their concerns. Pick up on their questions to the complainant to expand upon in your second submission.
- Close attention to panel's questions: may indicate the thinking of the panel.

PRACTICAL ISSUES

Evidence:

- Carefully read the exhibits presented by complainant to assess if there is anything you can use to your advantage.
- Observe panel's working procedures on evidence
 - Submit evidence on time
 - Make sure evidence is user-friendly

Make the best of it if you are going to lose : try you limit scope of the findings

See if you can use the case to secure market access with respect to other matters.

OUTLINE

1. Practical issues
2. Procedural challenges
3. Rebut the complainant's claims
4. Submit a justification
5. Interim review
6. Preparation for appeal

PROCEDURAL CHALLENGES

Procedural challenges –

Why make a procedural challenge?

To determine certain issues at the outset in order to avoid wasting time and resources, *e.g.* competence of panel, sufficiency of panel request; to try and limit the case against you.

To address issues that affect how the litigants prepare their cases *e.g.* requests that evidence be furnished within specified time limits.

PROCEDURAL CHALLENGES

Article 6.2

Respondent may request a preliminary ruling by the Panel under Article 6.2 of the DSU:

"The request for the establishment of a panel shall ... identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly."

Terms of reference define the scope of the dispute and serve due process objective for parties and third parties.

Compliance with Article 6.2 must be demonstrated on its face and cannot be cured by later submissions.

PROCEDURAL CHALLENGES

When should the respondent file its request under Article 6.2:

- In *US – FSC*, the Appellate Body stated that respondents should "seasonably and promptly" bring deficiencies to the attention of the complaining Member and to the DSB and to the Panel so that corrections, if needed, may be made.
- In *EC – Gl's*, the EC submitted a detailed request the day after the Panel was composed and prior to the organizational meeting. In *Canada – Wheat Board*, Canada filed the day after the Panel was composed.

PROCEDURAL CHALLENGES

However, if respondent's concern is one of discrepancy between panel request and complainant's first submission, then it can file its Article 6.2 request only after it receives complainant's first submission.

Panel's Working Procedures will usually provide "a party shall submit any request for a preliminary ruling *not later* than the first submission".

PROCEDURAL CHALLENGES

Has the Complainant identified the measures at issue?

Panels/AB accepted respondent's claim that measure(s) had not been properly identified in 29 cases; rejected claims in 33.

- In *EC – GIs*, general reference to EC Regulation without describing specific aspects of the Regulation that Complainants intended to raise was challenged by EC; Panel held that Article 6.2 does not require identification of specific aspects of the measures to be identified.
- In *Canada – Wheat Board*, Panel held that the US claim that the "laws, regulations and actions of Canada and the CWB" appear to be inconsistent with Article XVII:1(a) ... did not meet requirements of Article 6.2.

PROCEDURAL CHALLENGES

Has the Complainant identified the products at issue?

- No requirement in the DSU to do so.
- Respondents have challenged on grounds that product categories such as "LAN equipment or multimedia PCs" or "other distilled spirits such as whisky, brandy, vodka, and gin" (without specific HS headings) are too general.

(Note: if complainant is too specific, the Panel's rulings/recommendations will be limited to those products).

PROCEDURAL CHALLENGES

Has the Complainant presented a brief summary of the legal basis of the complaint "sufficient to present the problem clearly"?

In earlier cases such as *EC – Bananas*, the Appellate Body accepted that it was sufficient for Complainants to list the provisions of the articles alleged to be violated.

However, in *Korea – Dairy*, the Appellate Body confirmed that if the articles establish multiple obligations (such as Article XIX that has three sections and five paragraphs each with different obligations), then mere listing of articles is not sufficient.

PROCEDURAL CHALLENGES

What is "sufficient to present the problem clearly"?

"... in order for a panel request to "present the problem clearly", it must plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed, so that the respondent party is aware of the basis for the alleged nullification or impairment of the complaining party's benefits. Only by such connection between the measure(s) and the relevant provision(s) can a respondent "know what case it has to answer, and ... begin preparing its defence " (para. 162).

Appellate Body Report, US – OCTG-Sunset Review

PROCEDURAL CHALLENGES

"... Compliance with the requirements of Article 6.2 must be determined on the merits of each case having considered the panel request as a whole and in the light of the attendant circumstances".

Appellate Body, US-Carbon Steel

One important attendant circumstance is whether the respondent can demonstrate that it has suffered prejudice - whether it was aware of the claims sufficient to allow it to defend itself.

Respondents were put in a difficult situation: had to assert that it did not know what case it had to answer, but mere assertion was not enough to establish prejudice; on the other hand, the respondent had to make its best attempt to defend itself.

PROCEDURAL CHALLENGES

Trend may be changing. Article 6.2 claim very prominent in recent *China - Raw Materials* dispute:

- First ground of appeal. China claimed that the complainants did not make the connection clearly between the 37 listed measures and the 13 listed treaty provisions.
- Panel did not find a violation of Article 6.2.
- Appellate Body had found that Section III of complainant's panel request did not satisfy Article 6.2 requirements. It found panel's findings under Section III moot. However, this did not affect substantive findings.

OUTLINE

1. Practical issues
2. Procedural challenges
3. Rebut the complainant's claims
4. Submit a justification
5. Interim review
6. Preparation for appeal

REBUT THE COMPLAINANT'S CLAIM

- Address and rebut each and every claim made by the complainant. Follow the order used by the complainant in its first written submission.
- Claims may be rebutted on the basis of the law or the facts.
- Rebuttals based on law may question:
 - a. The applicability of the law
 - b. The interpretation of the law
 - i. Different use of interpretative tools
 - ii. Different reading of relevant jurisprudence

REBUT THE COMPLAINANT'S CLAIM

- Rebuttals based on the facts may question:
 - a) the complainant's appreciation of the facts
 - b) the existence of certain facts
 - c) the absence of adequate evidence supporting the alleged facts (the question of burden of proof)
- In the first hearing, the oral statement should be used to reiterate the respondent's arguments made in the first submission.
- Review first set of questions from Panel to assess what concerns the Panel has with the complainant's case and address these in rebuttal submission.
- Use rebuttal submission to rebut new points made by complainant in its oral statement and in oral responses to panel's questions.

OUTLINE

1. Practical issues
2. Procedural challenges
3. Rebut the complainant's claims
4. Submit a justification
5. Interim review
6. Preparation for appeal

SUBMIT A JUSTIFICATION

In addition to rebut the complainant's specific claims, a respondent may attempt to justify its measure under an exception in WTO law.

The burden is on the respondent to justify the consistency of its measures under the defence it has invoked. For example, to counter a claim under Article I, the respondent can argue:

- Article XX
- Waiver ; see *EC- Bananas III*.
- Enabling Clause (but complaining party must first raise Enabling Clause in making its claim of inconsistency); see *EC – GSP*.
- Article XXIV; see *Canada- Autos*, *Turkey – Textiles*, *Brazil – Tyres*.
- Article XXI.

SUBMIT A JUSTIFICATION

Burden then shifts back to respondent to submit that proposed alternatives does not allow it to achieve its desired level of protection and/or proposed alternative is not reasonably available because it is theoretical in nature, or the proposed alternative would require prohibitive costs or would pose technical difficulties.

If respondent can demonstrate this, then the challenged measure may be found to be "necessary".

Application of the chapeau: Respondent must rebut complainant's claims under the chapeau.

OUTLINE

1. Practical issues
2. Procedural challenges
3. Rebut the complainant's claims
4. Submit a justification
5. Interim review
6. Preparation for appeal

INTERIM REVIEW

- The purpose of interim review:
 - Last opportunity to correct panel's factual assessment.
 - Important to be thorough, and to get factual record straight.
 - Panels consider this stage to be important: *EC – Asbestos*.
- 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.
 - 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.

OUTLINE

1. Practical issues
2. Procedural challenges
3. Rebut the complainant's claims
4. Submit a justification
5. Interim review
6. Preparation for appeal

PREPARATION FOR APPEAL

- Start working on appeal right from time of interim report.
- Current Appellate Body procedures
- Be mindful of limited scope of appellate review