



**TPSA | CANADA-INDONESIA TRADE AND PRIVATE SECTOR ASSISTANCE PROJECT**

**Session 3**

## BUILDING A STRONG CASE: HOW TO MAKE LEGAL ARGUMENTS FOR TRADE DEFENSE

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 The Conference Board of Canada

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### Outline: Building a Strong Case - How to Make Legal Arguments for Trade Defense

- Part 1** Crafting a legal argument – A four-step approach
  - 1. Know and distinguish relevant facts
  - 2. Research, research, and research
  - 3. Brainstorm on all possible arguments
  - 4. Play devil's advocate
- Part 2** Winning a trade remedy case – Some tips
  - Keep in mind your objective and audience
  - Typical anti-dumping case
  - Typical safeguard case
- Part 3** Presenting a written and oral argument
  - Simple and effective structure
  - Topic sentences and signposting
  - Address your weak points



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# PART 1

## CRAFTING A LEGAL ARGUMENT

- 1. Know and distinguish relevant facts
- 2. Research, research, and research
- 3. Brainstorm on all possible arguments
- 4. Play devil's advocate



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### 1. Know and distinguish relevant facts

#### What to do...

- **Read carefully case material:** identify relevant facts only after reading the compromise several times. Make sure you understand all details.
- **Think of similar cases:** Identify previous cases with similar factual background:
- **Summarize key facts** and learn them by heart – or use a cheat sheet

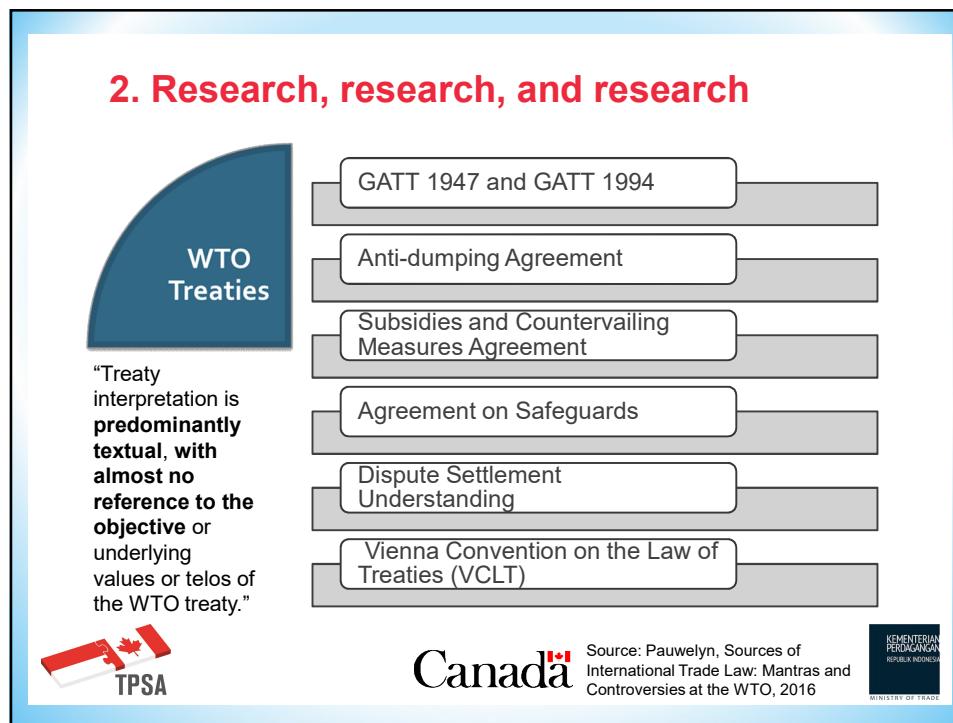
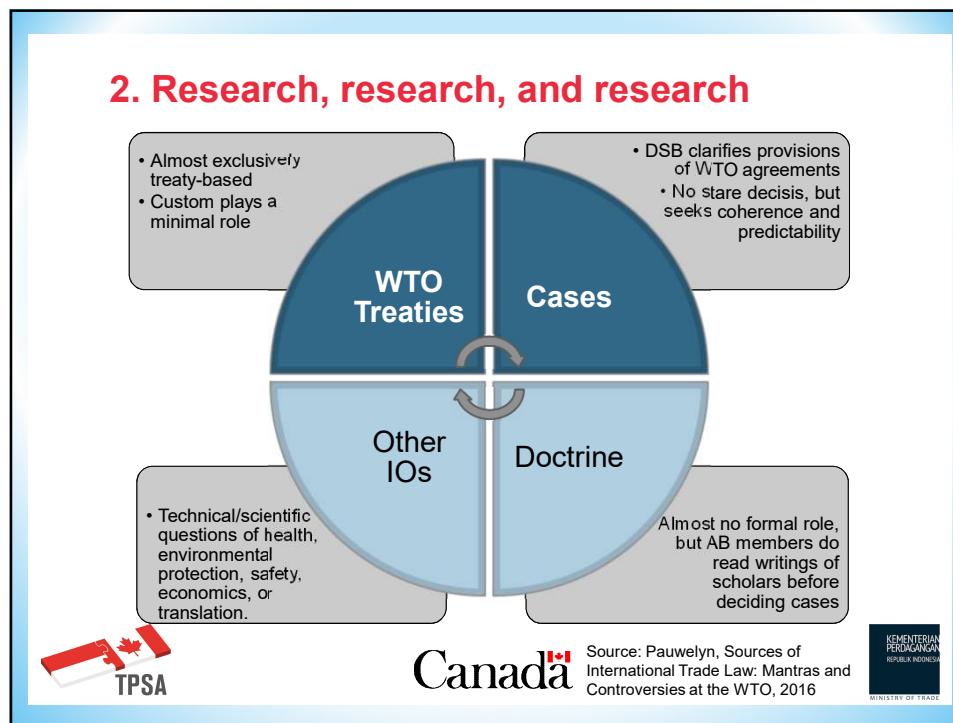
#### And what not to do...

- **Do not disregard “unfavorable” facts:** you may either explain why they are irrelevant or why they do not weaken your argument
- **Do not make unreasonable assumptions:** if certain facts are missing, you cannot build your case on unsupported favorable assumptions



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## 2. Research, research, and research

**Find jurisprudence or decisions by Agreement/Article**

Place your mouse over the short names below to see the full title of each Agreement. Clicking the links will take you to a table of contents for that Agreement, broken down by Article and paragraph. In each case the legal text of the Article is followed by jurisprudence or decisions in chronological order.

[WTO Agreement](#) | [GATT 1994](#) | [Agriculture](#) | [SPS](#) | [Textiles](#) | [TBT](#) | [TRIMs](#) | [Anti-dumping](#) | [Customs Valuation](#) | [Pre-shipment Inspection](#) | [Rules of Origin](#) | [Import Licensing](#) | [SCM](#) | [Safeguards](#) | [GATS](#) | [TRIPS](#) | [DSU](#) | [TPRM](#) | [Civil Aircraft](#) | [Government Procurement](#)

**Find jurisprudence or decisions by index of terms**

Examples: "anti-dumping", "footwear", "like products", "notification procedure".

A	B	C	D	E	F	G	H	I	J	K	L
M	N	O	P	Q	R	S	T	U	V	W	Z

**Cases**

**WTO Analytical Index — Guide to WTO Law and Practice**

## 2. Research, research, and research

**WorldTradeLaw.net**

WorldTradeLaw.net offers both a free resource library of current trade news and resources, as well as a subscription service (the DSC Service), which provides summary and analysis of all WTO reports and arbitrations, a current keyword index, a database of dispute settlement tables and statistics, and a user-friendly search tool for WTO cases, legal texts, and other documents.

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U.S. - Anti-Dumping Methodologies (China) May 11, 2017	Search GATT/WTO Panel & AB Reports <input type="text"/> <b>GO</b>	> What are DSCs? > DSCs for Panels/AB > DSCs for Arbitrations > DSCs for GATT Panels > DSCs for Selected NAFTA Ch. 11 Cases > DSCs for NAFTA Ch. 20 Cases
China - Cellulose Pulp Apr 25, 2017	> Panel Report > DSC	
U.S. - Tuna II (Mexico) Apr 25, 2017	> Decision > DSC	
U.S. - Washing Machines Apr 19, 2017	> Award > DSC	
EU - Poultry Meat (China) Mar 28, 2017	> Panel Report > DSC	
<b>ONGOING WTO DISPUTES</b>		

**World Trade Law**

**Cases**

## 2. Research, research, and research

- Use doctrine to check whether your arguments are credible
- Quote “teachings of the most highly qualified publicists” only as a last resort
- Look for references – especially cases – quoted in the doctrine

Doctrine



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## 3. Brainstorm on all possible arguments

### Step 1: Think

- Intuitively, who you think should win this case?
- Based on your current knowledge, think of some arguments

### Step 2: Discuss

- Share your impressions with your colleagues
- Discuss with them to improve your initial arguments

### Step 3: Prioritize

- Make a list of arguments supporting your position
- Agree on which arguments are “stronger” and which other ones are “weaker”



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Source: Kee, The Art of Argument:  
A Guide to Mooting, Cambridge  
University Press, 2006





## PART 2

# WINNING A TRADE REMEDY CASE

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- Keep in mind your objective and audience
- Typical anti-dumping case
- Typical safeguard case

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## Keep in mind your objective and audience

### Objective: Winning the case

- Be pragmatic: in real life or in a moot court, it's unlikely that one side will win all points/arguments. Focus on **winning on key issues**.
- **Argue on all issues**, but do not waste too much time/words on weak points
- **Adapt your strategy**: Depending on whether you are representing the Applicant or the Respondent, your strategy will have to be totally different.
- Always keep in mind on which side is put the burden of proof



Source: Kee, The Art of Argument:  
A Guide to Mooting, Cambridge  
University Press, 2006

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### Audience: Panelists or AB Members

- A central objective of the WTO DSB is to provide **security and predictability** to the multilateral trading system
- "Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements." Thus, the DSB must **apply existing law, without making law**
- Regardless which side you are representing, as counsel, you **better rely upon WTO jurisprudence** rather than other "sources of law"



Source: WTO, "Functions, objectives  
and key features of the dispute  
settlement system, WTO Website

## Typical anti-dumping case

### Applicant

- The Applicant is the Party in which territory the **exporter(s) are subjected to anti-dumping measures** imposed by the Respondent
- The Applicant's **objective** is to demonstrate that the Respondent's measures violate the AD Agreement or Article VI GATT (1994)
- The Applicant hopes to **eliminate the Respondent's measures** so that its trader(s) can export without AD duties

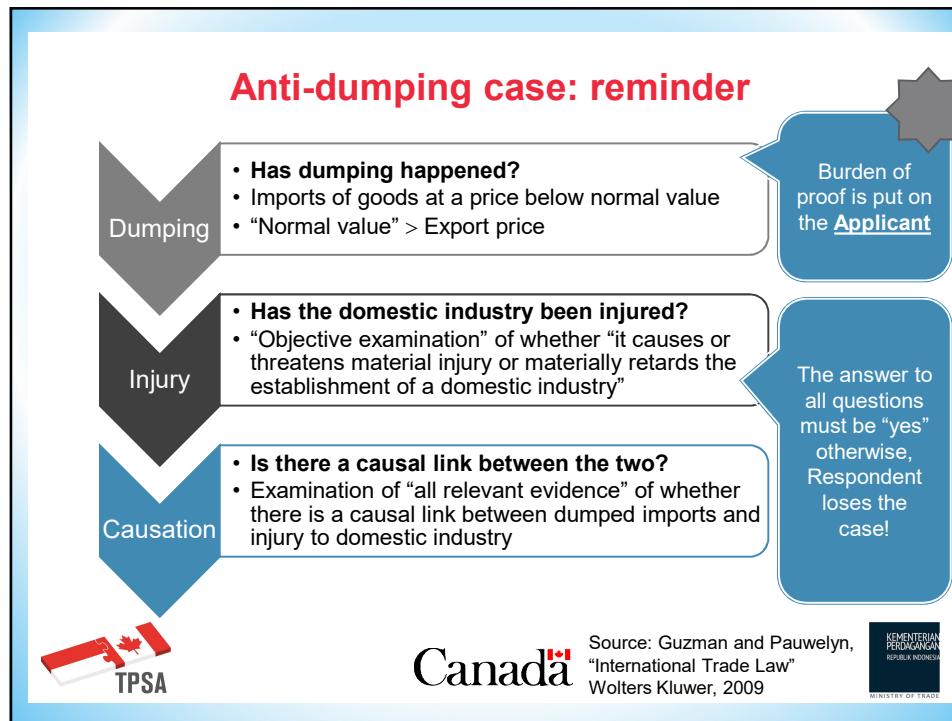
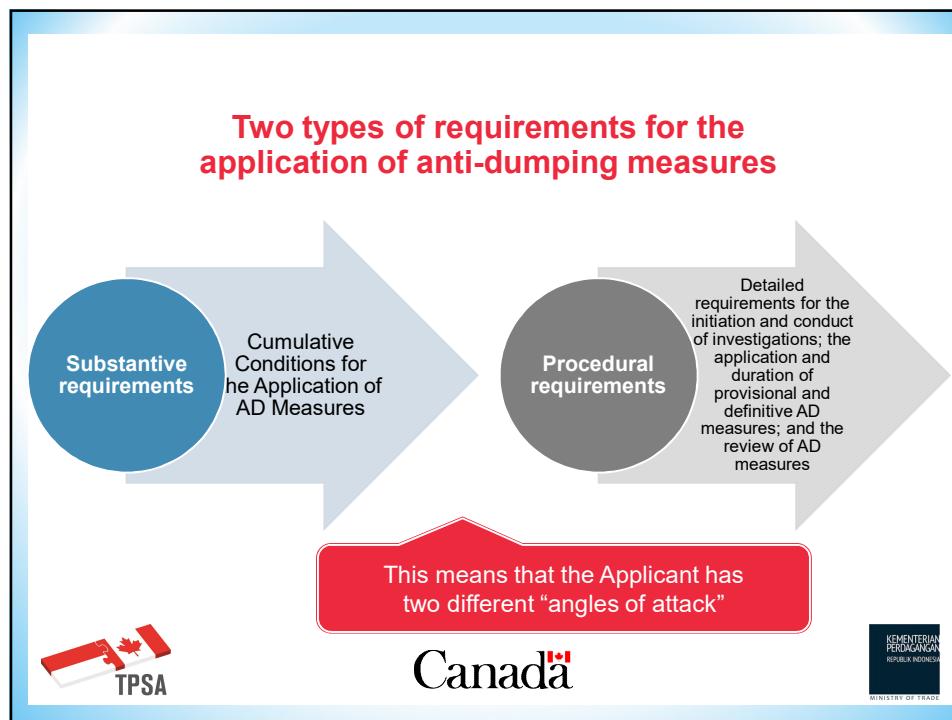


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### Respondent

- The Respondent is the **Party imposing anti-dumping measures**
- The Respondent's objective is to show that its **measures are consistent with the AD Agreement** and GATT (1994) Article VI
- The Respondent hopes to **maintain its AD measures** protecting its domestic industry from the Applicant's dumped products





## Typical anti-dumping case

**Dumping**

- Has dumping happened?
- Imports of goods at a price below normal value
- "Normal value" > Export price

**The Applicant ...**

- Will want to use a method of calculation that will set a **low "normal value"**, which reduces the potential dumping margin close to 0.

**The Respondent...**

- Use a method of calculation that will set a **high "normal value"**, and thus an important dumping margin in line with the AD duties.
- May suggest to **exclude certain sales** that are not conducted "in the ordinary course of trade", e.g. trade with affiliated customer.
- May suggest to use an alternative method of calculating "normal value" if such a method resulted in higher dumping margins

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Source: WTO, "Functions, objectives and key features of the dispute settlement system, WTO Website"

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## Typical anti-dumping case

**Injury**

- Has the domestic industry been injured?
- "Objective examination" of whether "it causes or threatens material injury or materially retards the establishment of a domestic industry"

**The Applicant ...**

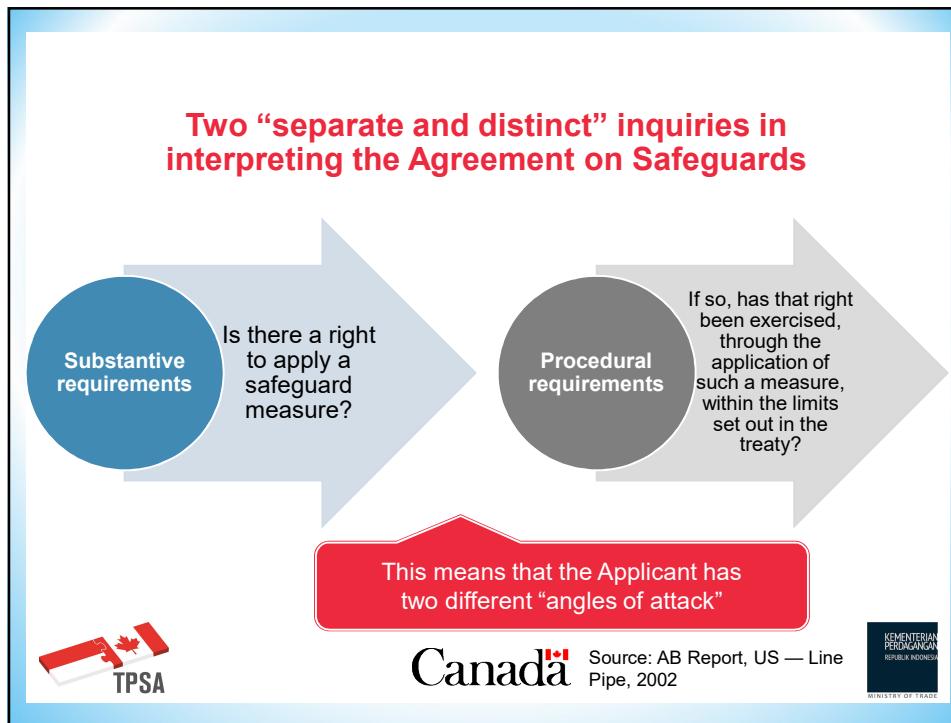
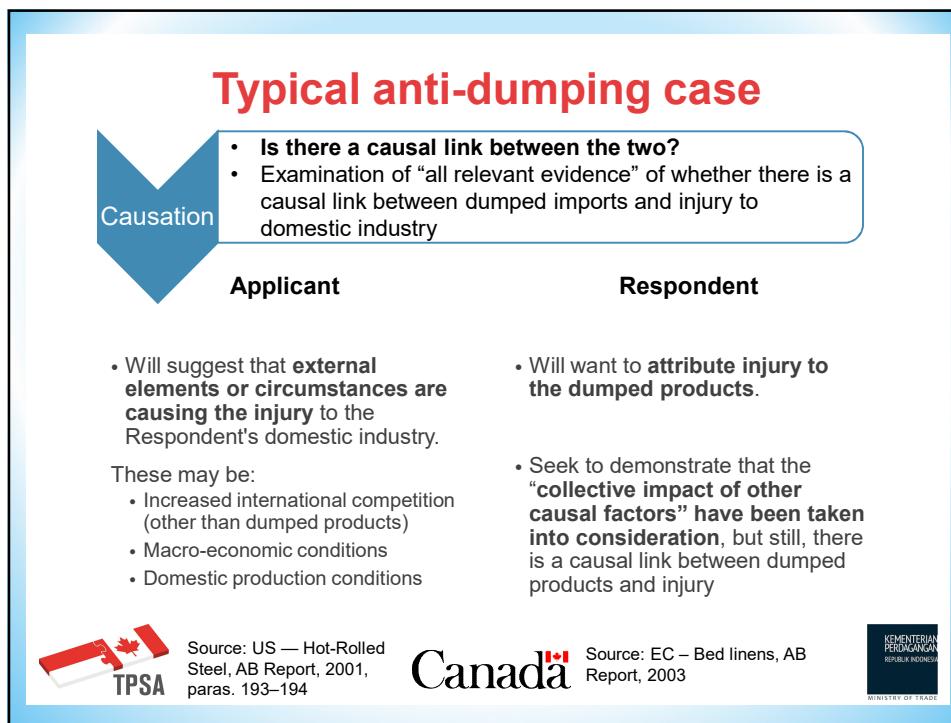
- Will suggest to **give more weight to certain factors** that show no or little injury to the domestic industry
- May argue that the Respondent's investigating **authorities failed to conduct an "objective" evaluation** of relevant economic factors.

**The Respondent...**

- Will present an **evaluation** of all relevant economic factors showing the existence of an injury to domestic industry
- May want to **justify methodology** of the investing authorities, especially if they undertook an assessment of "particular parts, sectors or segments within a domestic industry"

Source: US — Hot-Rolled Steel, AB Report, 2001, paras. 193–194
**Canada** 
Source: WTO, "Functions, objectives and key features of the dispute settlement system, WTO Website"

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## Typical safeguard case



**Increased Imports**

- Is the product being imported in such increased quantities?
- Increase may be in relative or absolute terms, and must be recent, sudden, sharp, significant enough

**The Applicant ...**

- May argue that the increased imports have not been "sudden enough or recent enough"
- "May suggest that the increase in imports is not "significant enough" both quantitatively and qualitatively to cause or threaten to cause serious injury
- May demonstrate a divergence between an "end-point-to-end-point comparison and in an analysis of intervening trends" over the period.

**The Respondent...**

- Will focus on import quantities data, as opposed to "value of imports", providing an analysis of the rate and amount of the increase in imports, in absolute terms and as a percentage of domestic production
- Will provide as much data possible supporting arguments that there has been an increase in imports



Source: Panel Report, US — Steel Safeguards, 2003



Source: AB Report, Argentina — Footwear (EC), 1999



## Typical safeguard case



**Serious Injury**

- Does it cause or threaten to cause serious injury to the domestic industry?
- At minimum, factors listed under Safeguard Agreement Art. 4.2(a) must be considered to assess the serious injury, i.e. "significant overall impairment"

**The Applicant ...**

- May argue that the investigating authorities failed to consider "all relevant factors", as provided under Art. 4.2(a)
- May suggest that the "injury" fails to meet the "seriousness" requirement
- May cast doubt on the existence of a threat, especially if the Respondent's domestic industry have been resisting to the so-called threatening conditions for a certain time

**The Respondent...**

- Will want to use all relevant data to show the "significant overall impairment" in its domestic industry's position
- May argue that its domestic industry is "injured" and that the injury is threatening to become "serious", because a "threat of serious injury" sets a lower threshold for the right to apply a safeguard measure than "serious injury"



Source: Panel Report, US — Steel Safeguards, 2003



Source: AB report, US — Line Pipe, 2002



## Typical safeguard case



- Is there a causal link between increased imports and serious injury?
- Relationship between the movements of imports and the movement in injury factors is central to a causation analysis

The Applicant ...	The Respondent...
<ul style="list-style-type: none"> <li>• Will point out inconsistencies between movement of imports and in injury factors, as the absence of coincidence create "serious doubts" as to the existence of causal link</li> </ul>	<ul style="list-style-type: none"> <li>• Seek to demonstrate that the increased imports contribute to "bringing about" "producing" or "inducing" the serious injury to the domestic industry</li> <li>• May want to recall that the causal link between imports and serious injury exist, even though other factors are also contributing at the same time to the situation of the domestic industry</li> </ul>



Source: AB Report,  
Argentina – Footwear, 2000



Source: AB Report, US –  
Lamb, 2001



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## PART 3

# PRESENTING AN ORAL ARGUMENT

- 
- Simple and effective structure
  - Topic sentences and signposting
  - Address your weak points







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## Your submission: Simple and effective Structure

Your written submission must include three elements:

- Claim:** You want to convince the Panel/AB that the Respondent has either breached its obligations under WTO agreements, or not. Can be summarized in one sentence (per claim)
- Arguments:** They are statements directly supporting your claim. They cover key elements showing why the Respondent breached the WTO law or not.
- Evidence:** this is your demonstration, including details, qualitative and quantitative data, supporting each of your arguments.









## Your claim: What's your position?

Applicant	Respondent
<ul style="list-style-type: none"> <li>As Applicant , your claim is that there is that there is a <b>breach of WTO law by the Respondent</b>. For instance:</li> </ul> <ul style="list-style-type: none"> <li><i>“Yet, the practices repeatedly adopted by the USDOC in the ongoing anti-dumping proceeding of shrimp from Viet Nam have frustrated achievement of the general principle of Article 11.1.”</i></li> </ul>	<ul style="list-style-type: none"> <li>As Respondent, your claim is that there is <b>no breach of WTO law</b>. For instance:</li> </ul> <ul style="list-style-type: none"> <li><i>“The Respondent respectfully requests that the Panel rejects the Applicant’s claims that the Respondent has acted inconsistently with the covered agreements.”</i></li> </ul>









Source: US — Shrimp II (Viet Nam), 2014, Written Submission of the Applicant, WT/DS429/R .

Source: US — Shrimp II (Viet Nam), 2014, Written Submission of the Respondent, WT/DS429/R .

**Your arguments:**  
What is directly supporting your claim?

- Your arguments must be aligned to the applicable agreements' requirements. For instance:



1. Vietnam's "As Applied" Claims Regarding Company-Specific Revocation Have No Basis in the AD Agreement
2. Section 129(c)(1) is Not Inconsistent, As Such, with the AD Agreement
3. The Treatment of Multiple Companies as a Single Vietnam-Government Exporter/ Producer was Not Inconsistent with the AD Agreement
4. Vietnam's Claim That the United States Maintains a Zeroing Measure That May Be Challenged "As Such" Under the AD Agreement is Without Merit
5. Vietnam's Claim that The Application of the Zeroing Methodology to Imports of Shrimp From Vietnam in the Fourth, Fifth, and Sixth Administrative Reviews Is, "As Applied", Inconsistent with the AD Agreement Is Incorrect
6. Commerce's Sunset Determination is Not Inconsistent with the AD Agreement

Source: US — Shrimp II (Viet Nam), 2014, Written Submission of the Respondent, WT/DS429/R

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**Your evidence:**  
How can you demonstrate that you are right?

- You must provide a demonstration, with objective qualitative and quantitative data, supporting each of your arguments. For instance:



Vietnam's "As Applied" Claims Regarding Company-Specific Revocation Have No Basis in the AD Agreement

Vietnam's argument concerning an alleged breach of Articles 11.1 and 11.2 does not rest on the text of these provisions. Article 11.1 of the AD Agreement states that "[a]n anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury". With respect to Article 11.2, there is no obligation contained in the text that requires a Member to partially terminate the antidumping duty with respect to individual companies.

Articles 11.1 and 11.2 also do not require revocation based on an absence of dumping for three years. Under U.S. domestic law, individual companies are allowed to request revocation of an antidumping order either on an order-wide or company-specific basis. In this regard, the United States draws the Panel's attention to the report US – Anti-Dumping Measures on Oil Country Tubular Goods, which discusses these domestic law provisions.

(...)

Source: US — Shrimp II (Viet Nam), 2014, Written Submission of the Respondent, WT/DS429/R

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**Your paragraphs: Simple and effective structure**

- Use **titles** summarizing your points
- Choose adequate "**transition words**"
- Draft well-structured paragraphs with:
  - ❖ 1 "topic sentence" as introduction;
  - ❖ 1-3 development sentences providing evidence for the points made
  - ❖ 1 conclusion sentence

Source: Kee, The Art of Argument:  
A Guide to Mooting, Cambridge  
University Press, 2006

**IV. The Treatment of Multiple Companies as a Single Vietnam-Government Exporter/ Producer was Not Inconsistent with the AD Agreement**

A. Vietnam Has Failed to Demonstrate the Existence of a Measure of General and Prospective Application That May Be Challenged "As Such" as Inconsistent with the AD Agreement

17. Vietnam has not established that the alleged NME-wide entity rate "practice" exists and can be a measure. First, Vietnam does not explain how a "practice" can set out a rule or norm of general or prospective application. Second, in relation to the alleged "practice," Vietnam has not demonstrated that Commerce "invariably applies" the alleged "practice" that is subject to its various arguments. Vietnam cites several paragraphs from Commerce's antidumping manual; however, the manual itself clearly states that it "is for the internal training and guidance of Import Administration (IA) personnel only, and the practices set out herein are subject to change without notice. This manual cannot be cited to establish DOC practice". In sum, given Vietnam has failed to establish existence of an alleged "practice" as a measure, Vietnam cannot establish a *prima facie* case for an "as such" inconsistency with the AD Agreement given that it has not brought forward evidence that what it describes as "practice" is a measure.

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**TRANSITION WORDS**

**What are transitions and how are they used?**

- transitions are phrases or words used to connect one idea to the next
- transitions are used by the author to help the reader progress from one significant idea to the next
- transitions also show the relationship within a paragraph (or within a sentence) between the main idea and the support the author gives for those ideas
- different transitions do different things...

Transitions may be "Additive," "Adversative," "Causal," or "Sequential."

Additive Transitions	Adversative Transitions	Causal (not causal) Transitions	Sequential Transitions
<ul style="list-style-type: none"> <li>• Addition</li> <li>• Introduction</li> <li>• Reference</li> <li>• Similarity</li> <li>• Identification</li> <li>• Clarification</li> </ul>	<ul style="list-style-type: none"> <li>• Conflict</li> <li>• Antithesis</li> <li>• Concession</li> <li>• Dismissal</li> <li>• Replacement</li> </ul>	<ul style="list-style-type: none"> <li>• Cause/Reason</li> <li>• Effect/Result</li> <li>• Purpose</li> <li>• Consequence</li> </ul>	<ul style="list-style-type: none"> <li>• Numerical Continuation</li> <li>• Conclusion</li> <li>• Digression</li> <li>• Resumption</li> <li>• Summation</li> </ul>

<https://msu.edu/~jdowell/135/transw.html>

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## Your Paragraphs: Simple and effective structure

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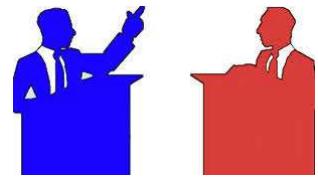
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## Topic sentences and signposting

- 1. **Introduction**
  - Introducing yourself
  - Outlining key facts
  - Make your claim
  - Provide an skeleton of your argument
- 2. **Argument 1**
  - “First of all”
  - Strongest, most convincing Argument
- 3. **Argument 2**
  - “In addition” or “further”
  - Reinforcing your claim
- 4. **Argument 3**
  - “In any case” or “Alternatively”
  - If the Panel/AB does not buy your previous argument, here’s an alternative argument



**“Topic Sentences and Signposting** make an oral argument’s claims clearer. Topic sentences reveal the main point of a paragraph. Signposts, as their name suggests, prepare the reader for a change in the argument’s direction.”

- Source: [Harvard College Writing Center](#)

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## Address your weak points

### Weaknesses of the case

Recognize and acknowledge your weaknesses as this may:

1. Lessen your opponent's submission
2. Enhance your credibility as counsel
3. Give you the opportunity to choose the "right words" instead of leaving the opponent "imposing its perspective"
4. In certain cases, you may even "give up" on a specific point, if this does not affect your overall claim



### Opponent's arguments

Addressing your opponent's arguments can allow you to:

1. Bring the attention of the Panel/AB on argumentation flaws or weaknesses
2. Contradict your opponent on a strong point made during oral pleadings
3. Protect you from a "deadly argument"
4. Make your overall submission much more convincing



Source: Kee, The Art of Argument: A Guide to Mooting, Cambridge University Press, 2006

