

(As delivered)

IN THE WORLD TRADE ORGANIZATION

Before the Appellate Body

Korea – Anti-Dumping Duties on Pneumatic Valves from Japan
(AB-2018-3/DS504)

Oral Statement
by
Norway
as a Third Participant

Geneva

3 – 4 April 2019

MR. CHAIR, MEMBERS OF THE DIVISION,

1. Norway welcomes the opportunity to make a statement before the Appellate Body in this appeal. In this oral statement, Norway will present its views on the legal standard for panel requests under Article 6.2 of the DSU.

THE LEGAL STANDARD OF ARTICLE 6.2 OF THE DSU

2. The relevant part of Article 6.2 of the DSU contains two distinct requirements : that the panel request 1) “identify the specific measures at issue” and 2) “provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly”.
3. The two elements should be addressed separately since the requirements are conceptually different and should not be confused.¹ Although the focus of this statement will be on the second element – the requirements for the legal claims – we briefly recall that, for the first element, the Appellate Body has considered it “sufficient for the Complaining Parties to list the provisions of the specific agreements alleged to have been violated without setting out detailed arguments as to which specific provisions of the measures at issue relate to which specific provisions of those agreements.”².
4. We now turn to the second element described in Article 6.2. From the requirement that the complaining party shall “provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly”, it follows that a full explication of the legal basis is not required, but rather a “summary” that presents the problem clearly. The Appellate Body has confirmed that the “legal basis of the complaint” includes “the specific provision of the covered agreement that contains the obligation alleged to be violated”³.

¹ See for example *Selected Customs Matters* (AB), para. 131 and *Australia – Apples* (AB), paras. 420-421.

² *EC – Bananas III* (AB), para. 141 (emphasis added).

³ *China – HP-SSST* (AB), para. 5.14; *US – Countervailing and Anti-Dumping Measures (China)* (AB), para 4.12; *EC – Selected Customs Matters* (AB), para. 130.

5. Consequently, a minimum prerequisite for presenting the legal basis of the complaint is to identify the covered agreement provision claimed to have been breached. And in many cases the mere listing of provisions will indeed be sufficient. This will, however, not always be the case – and in such cases, further elaboration will be required.
6. One situation in which only listing the provisions may not be sufficient to “present the problem clearly”, is where a single provision contains multiple obligations. The Appellate Body has addressed such situations and specified that “to the extent that a provision contains not one single distinct obligation, but rather multiple obligations, a panel request might need to specify which of the obligations contained in the provision is being challenged”⁴.
7. The rationale behind requiring more elaboration in these instances is that simply listing the provision might leave the respondent without clarity about which obligation it is accused of violating, i.e. about what “the problem is”. Allowing a mere listing of provisions in the panel request in these cases would prejudice the ability of the party complained against to defend itself, which is part of the fundamental due process objective of the panel request.
8. In order to present the problem clearly, the panel request 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”⁵.
9. A panel should, however, caution to not blur the line between claims and arguments. The Appellate Body has underscored that “Article 6.2 of the DSU requires that the claims – not the arguments be set out in a panel request in a way that is sufficient to present the problem clearly”⁶. Arguments, in contrast to claims, are “statements put

⁴ *China – HP-SSST* (AB), para. 5.15; *China – Raw Materials* (AB), para. 220; *US – Products from China* (AB), para. 4.8. (emphasis added).

⁵ *US – Oil Country Tubular Goods Sunset Review* (AB), para. 162.

⁶ *EC – Selected Customs Matters* (AB), para. 152.

forth by a complaining party to demonstrate that the responding party’s measure does indeed infringe upon the identified treaty provision”⁷.

10. The Appellate Body has stated that the brief summary forming the legal basis of the complaint required by Article 6.2 of the DSU “aims to explain succinctly how or why the measure at issue is considered by the complaining Member to be violating the WTO obligations in question”⁸.
11. In Norway’s view, this “how or why” approach cannot be understood as an additional condition requiring a complainant, at the very early stages of dispute settlement, to disclose legal theories to explain why the complainant believes a set of facts breach a legal obligation. Such statements would amount to argumentation. Norway therefore considers the “how and why” to relate to the “legal basis” rather than implying a requirement to provide arguments in support of the claim. The former interpretation simply highlights the complaining party’s obligation to “present the problem clearly” in its panel request, while the latter would go well beyond the core principle set forth in Article 6.2 of the DSU.
12. Finally, Norway would like to underscore that any examination of the sufficiency of a panel request must be considered on a case-by-case basis, where the broadness and complexity of the issue may be relevant factors in determining what is required to “present the problem clearly”.⁹
13. Thank you.

⁷ *China – HP-SSST* (AB), para. 5.14.

⁸ *EC – Selected Customs Matters* (AB), para. 130; *US – Countervailing and Anti-Dumping Measures* (China) (AB), para. 4.9 (emphasis added).

⁹ *US – Countervailing and Anti-Dumping Measures* (China) (AB), para. 4.17.