



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

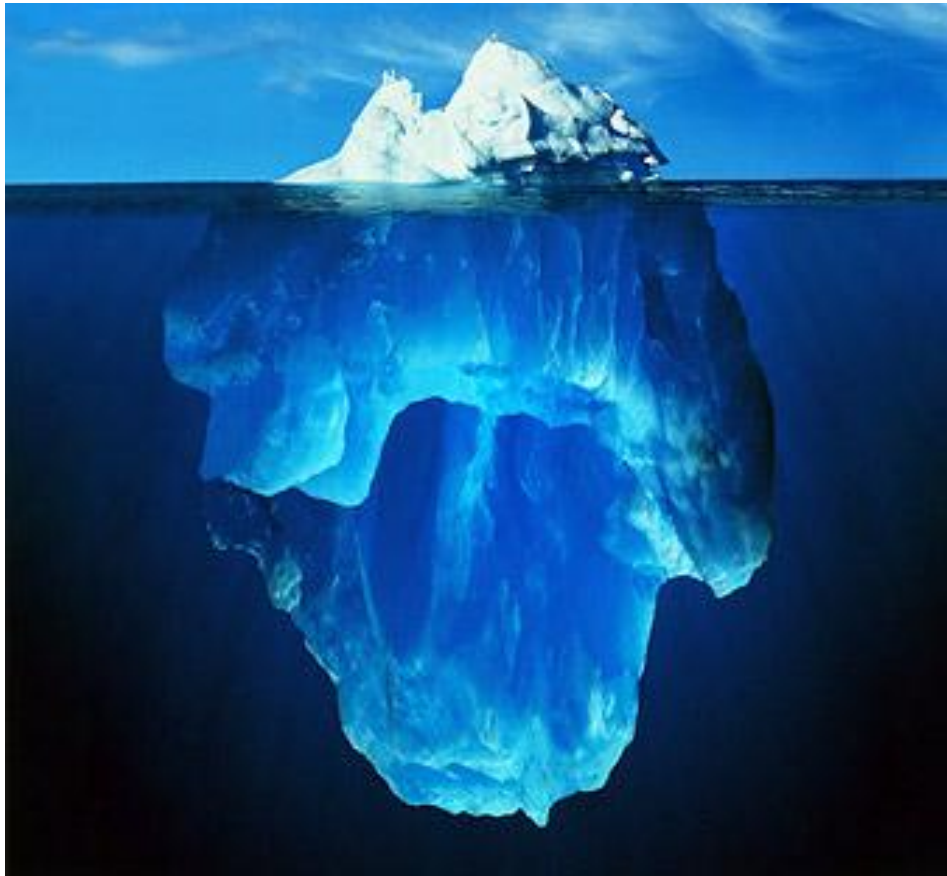
# WTO-ACWL-ICTSD WORKSHOP ON WTO DISPUTE SETTLEMENT

## Pre-Dispute Preparation

New Delhi, 26-28 November 2012

# COMPLAINANT'S PERSPECTIVE

## PHASES OF PREPARATION PROCESS



Panel /Appellate Body reports

Panel/ Appellate Body proceedings  
WTO consultations

Informal approaches

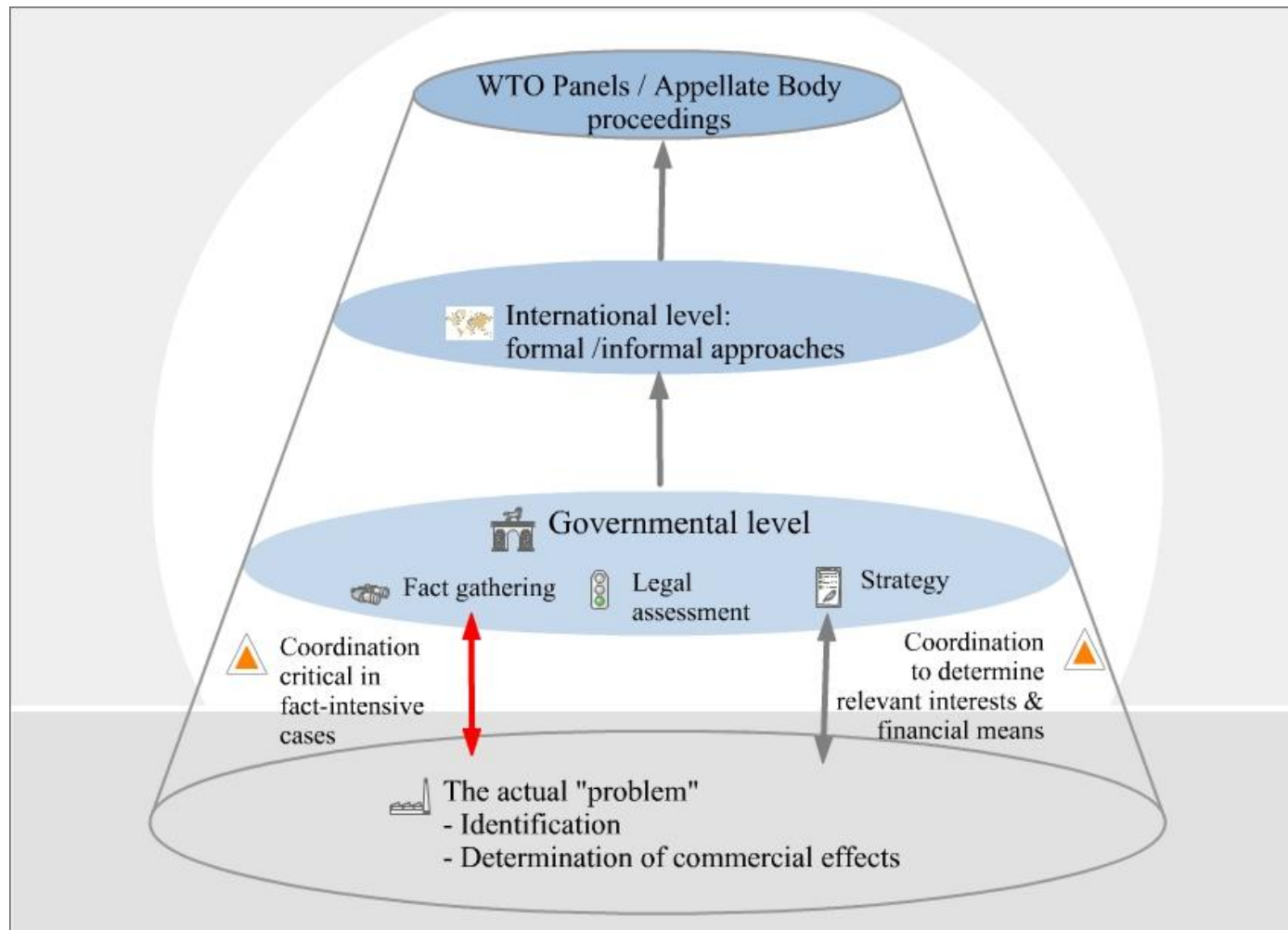
Assessment of the case (viable case?); choice of forum (WTO, regional forum?)

Gathering evidence

Identification of the problem

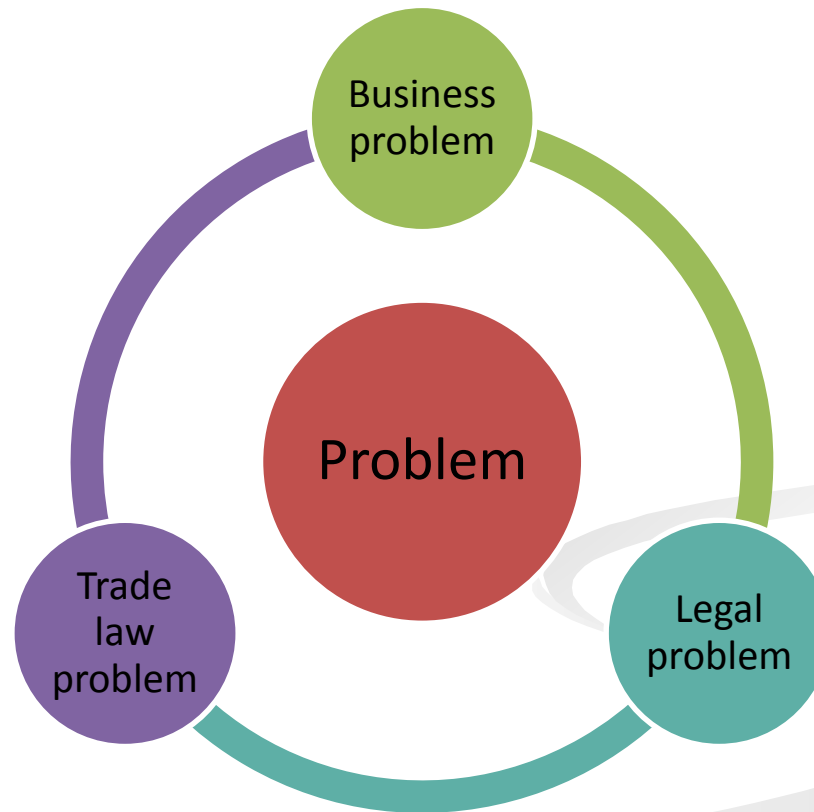
# COMPLAINANT'S PERSPECTIVE

## PHASES OF PREPARATION PROCESS



# COMPLAINANT'S PERSPECTIVE

## IDENTIFICATION OF THE PROBLEM



# COMPLAINANT'S PERSPECTIVE

## IDENTIFICATION OF THE PROBLEM

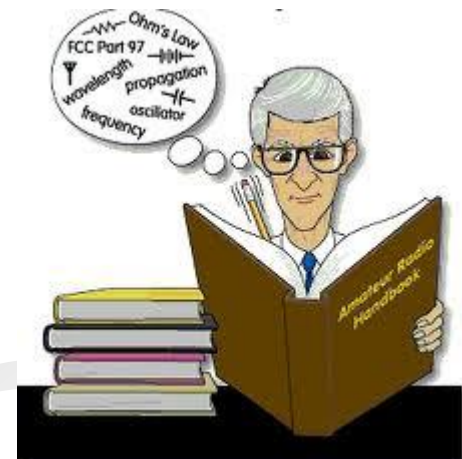
- Paying attention to the “business”:
  - Exports, domestic sales impeded
  - Inability to operate/obtain licenses / bureaucratic obstacles.
  - Discovery of sanitary or technical problems in competing products
  - Piracy or unfair competition in the market
  - Adverse business effects (*e.g.* decline in sales, market share, profits, etc)



# COMPLAINANT'S PERSPECTIVE

## IDENTIFICATION OF THE PROBLEM

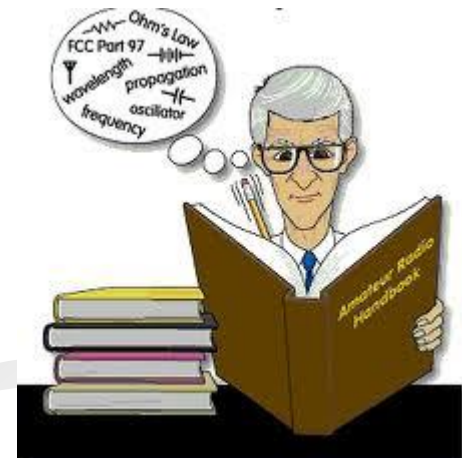
- How to conduct the investigation?:
  - Understand business model involved and competition in the market.
  - Gather information from the relevant business units.
  - Talk to key business players.
  - Research on market performance, including imports data.
  - Gather information on regulatory framework.



# COMPLAINANT'S PERSPECTIVE

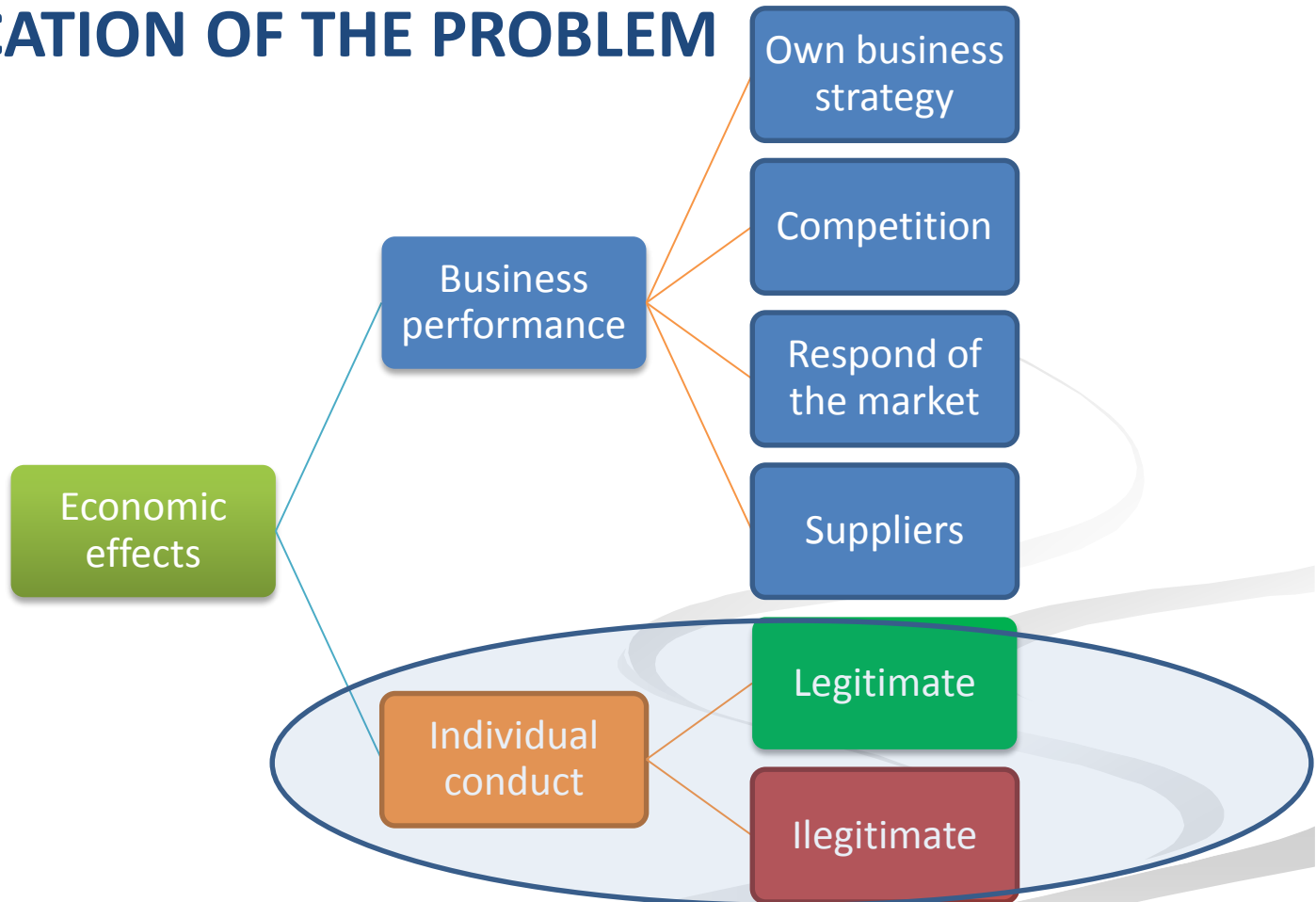
## IDENTIFICATION OF THE PROBLEM

- Who may be involved in conducting this investigation:
  - Affected business, trade associations
  - Relevant governmental agencies
  - Trade and customs consultants and lawyers



# COMPLAINANT'S PERSPECTIVE

## IDENTIFICATION OF THE PROBLEM

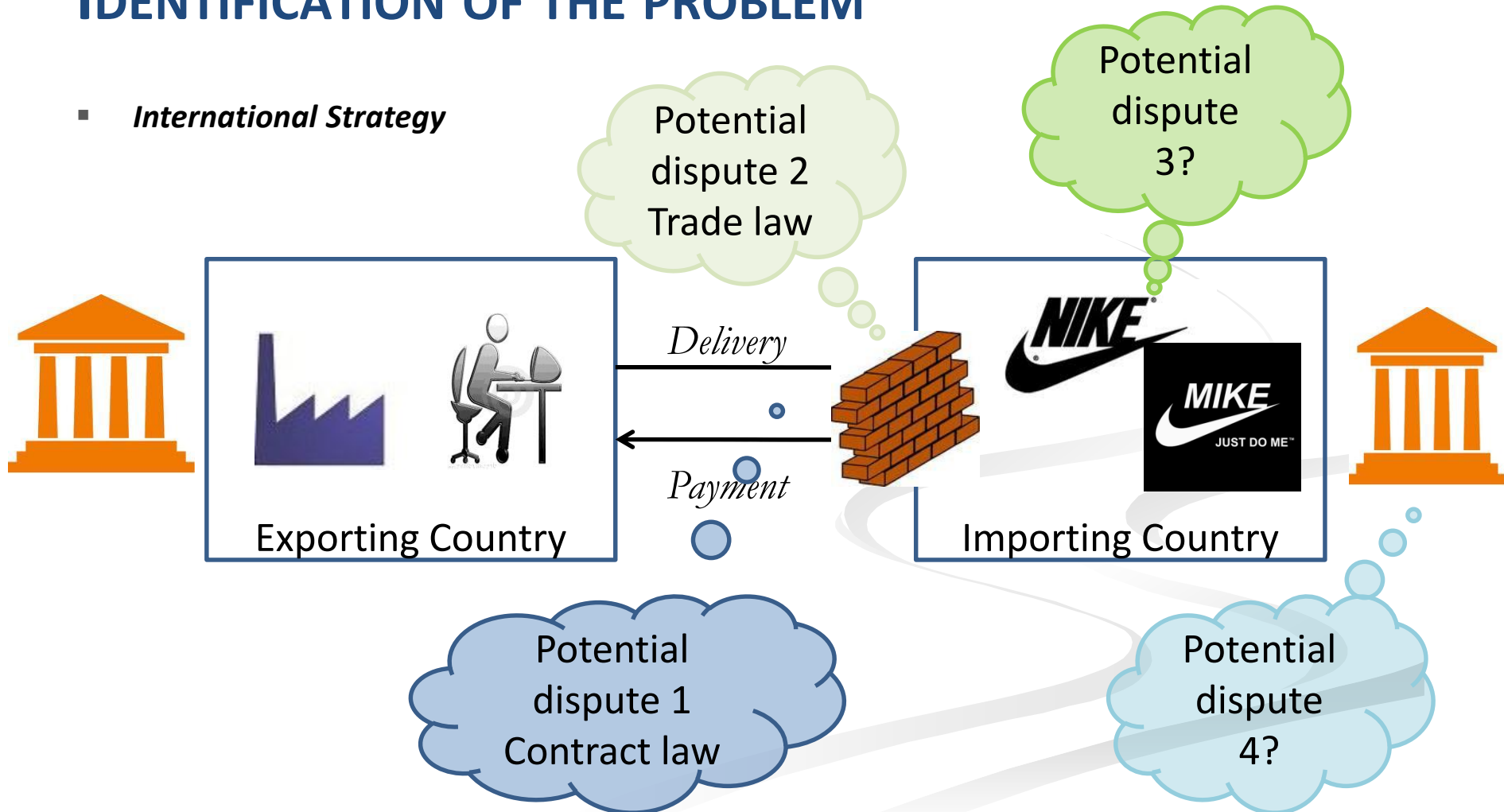




# COMPLAINANT'S PERSPECTIVE

## IDENTIFICATION OF THE PROBLEM

- *International Strategy*



# COMPLAINANT'S PERSPECTIVE

## IDENTIFICATION OF THE PROBLEM

- International Strategy

Potential dispute	Matter	Area of law	Domestic dispute	Int'l dispute
1	Terms of contract	Contract/ Commercial law	Yes	Yes
2	Trade barriers	Trade law	Yes	Yes
3	Unfair competition	Intellectual property/unfair comp. Law	Yes	Yes?
4	Payment of taxes	Tax law	Yes	Yes?

# COMPLAINANT'S PERSPECTIVE

## IDENTIFICATION OF THE PROBLEM

- Action Attributable:

Act or omission by:

(a) a contractual party,

(b) a government , and/or,

(c) others (*e.g.* competitors).

- Trade law concerns: effects are irrelevant (exceptions: serious prejudice and nulification or impairment cases).

# COMPLAINANT'S PERSPECTIVE

## IDENTIFICATION OF THE PROBLEM

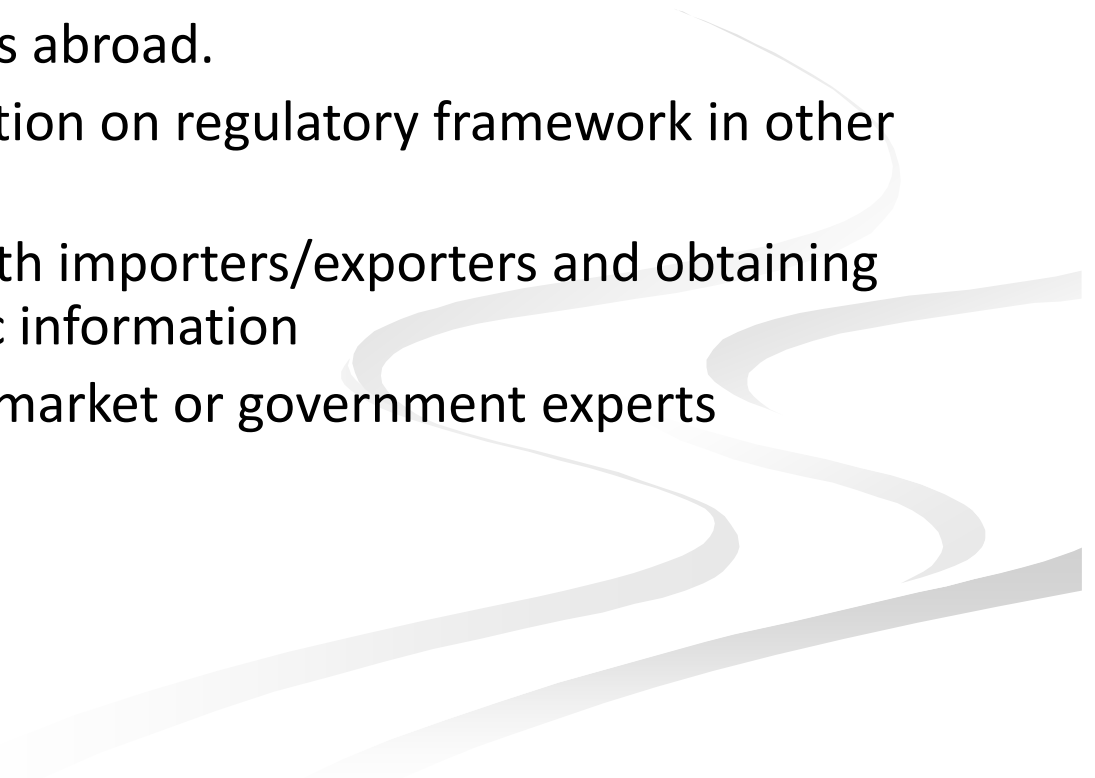
- Act or omission attributable to a government

*See, Appellate Body Report, US – Corrosion-resistant steel, para. 81.*

- Act or omission
  - Law, regulation, requirement
    - Mandatory
    - Non-mandatory
  - Practice
    - Specific instances
    - Continued practice
  - Omission: failure to comply with a duty

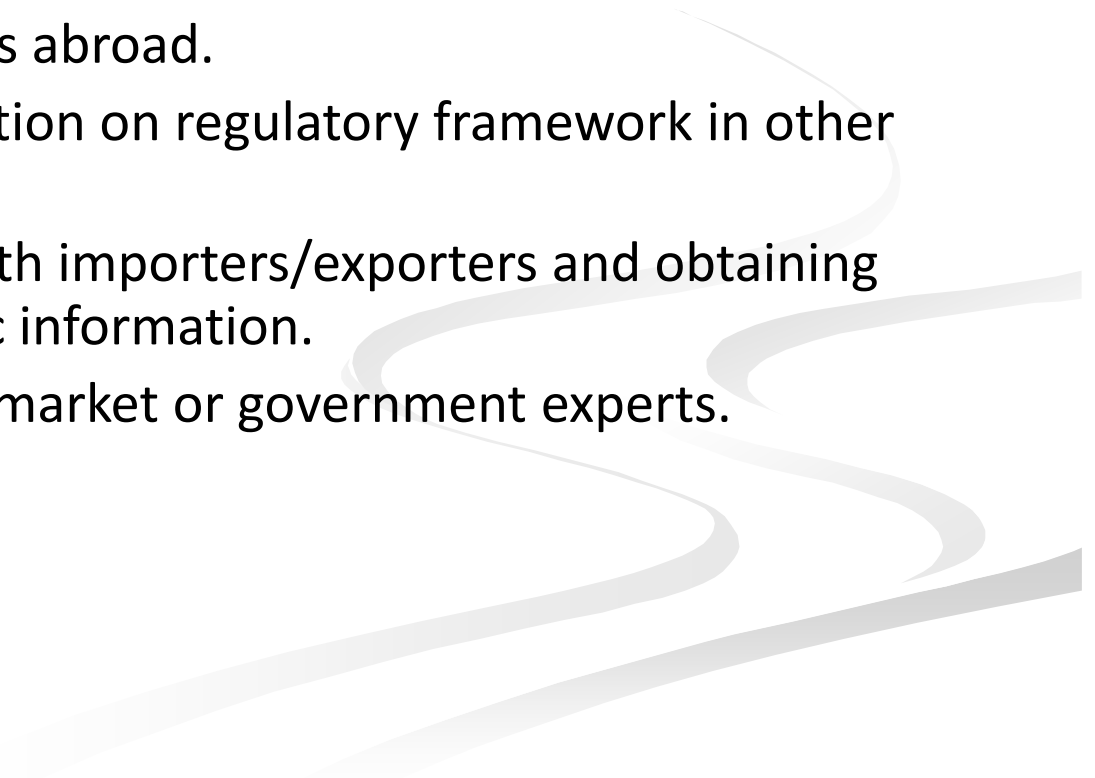
# COMPLAINANT'S PERSPECTIVE

## IDENTIFICATION OF THE PROBLEM

- Conducting research on the attributable measure:
    - Gathering factual data with the assistance of Embassies/Missions abroad.
    - Gathering information on regulatory framework in other country.
    - Getting in touch with importers/exporters and obtaining transaction-specific information
    - Talking to relevant market or government experts
- 

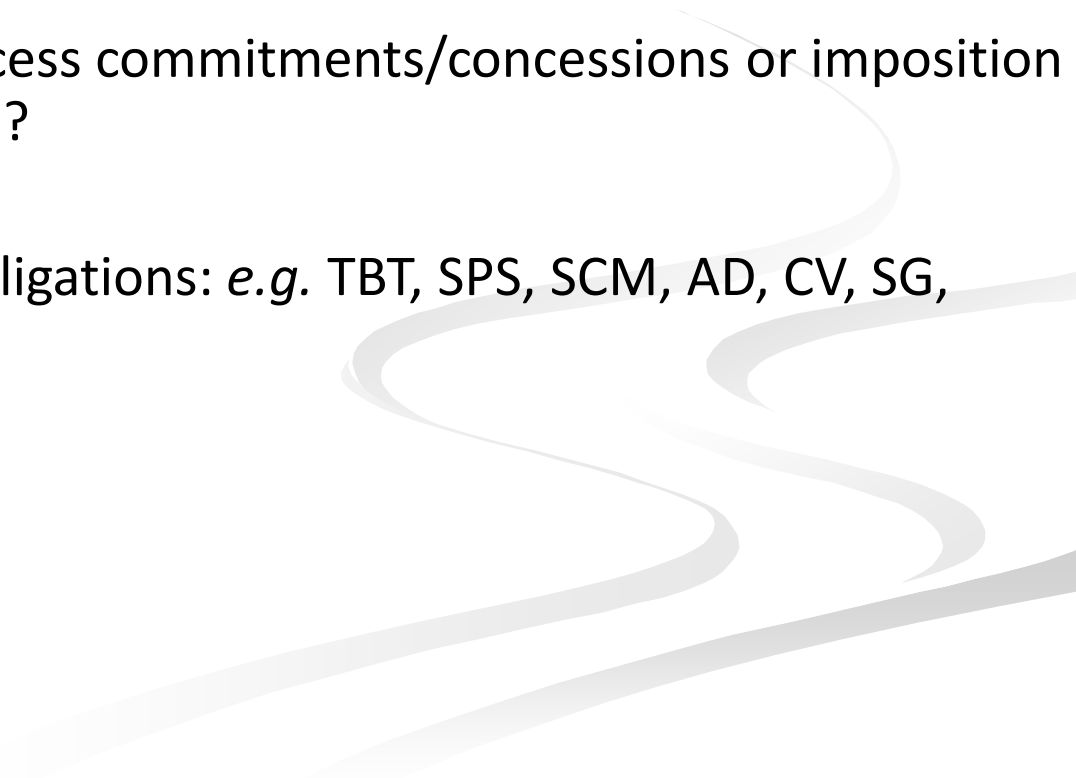
# COMPLAINANT'S PERSPECTIVE

## IDENTIFICATION OF THE PROBLEM

- Conducting research on the attributable measure:
    - Gathering factual data with the assistance of Embassies/Missions abroad.
    - Gathering information on regulatory framework in other country.
    - Getting in touch with importers/exporters and obtaining transaction-specific information.
    - Talking to relevant market or government experts.
- 

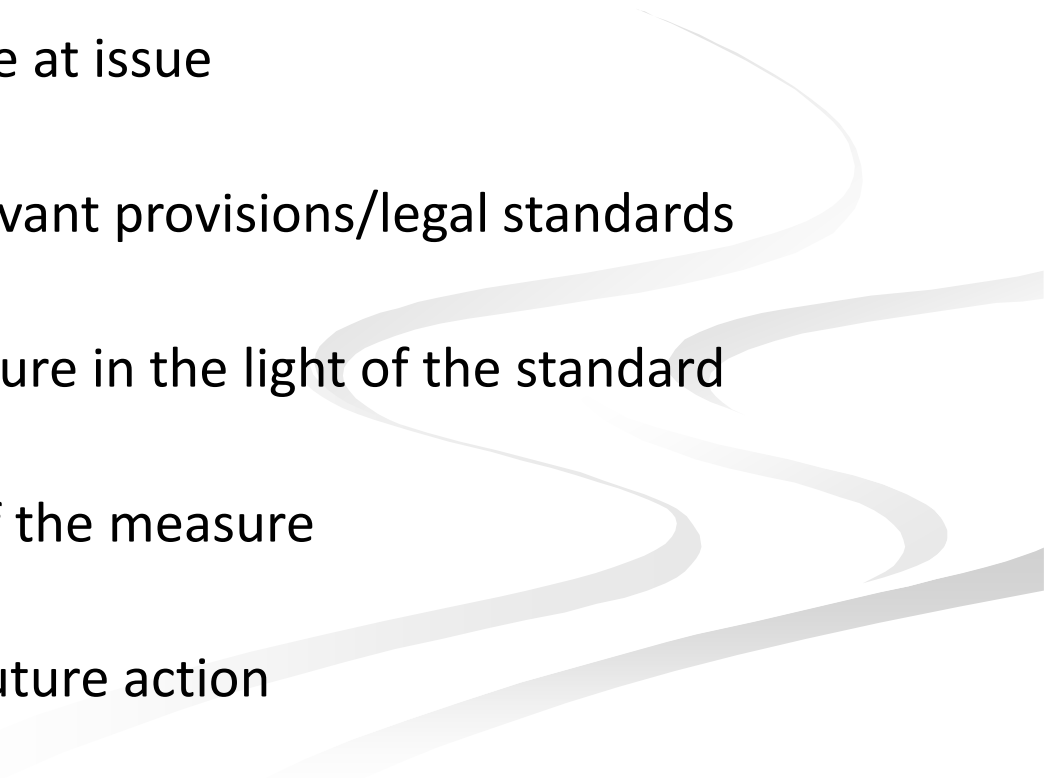
# COMPLAINANT'S PERSPECTIVE

## IDENTIFICATION OF LEGAL PRINCIPLES

- Violation of MFN, National treatment?
  - Violation of market access commitments/concessions or imposition of restrictions on trade?
  - Violation of specific obligations: *e.g.* TBT, SPS, SCM, AD, CV, SG, TRIPs agreements.
- 

# COMPLAINANT'S PERSPECTIVE

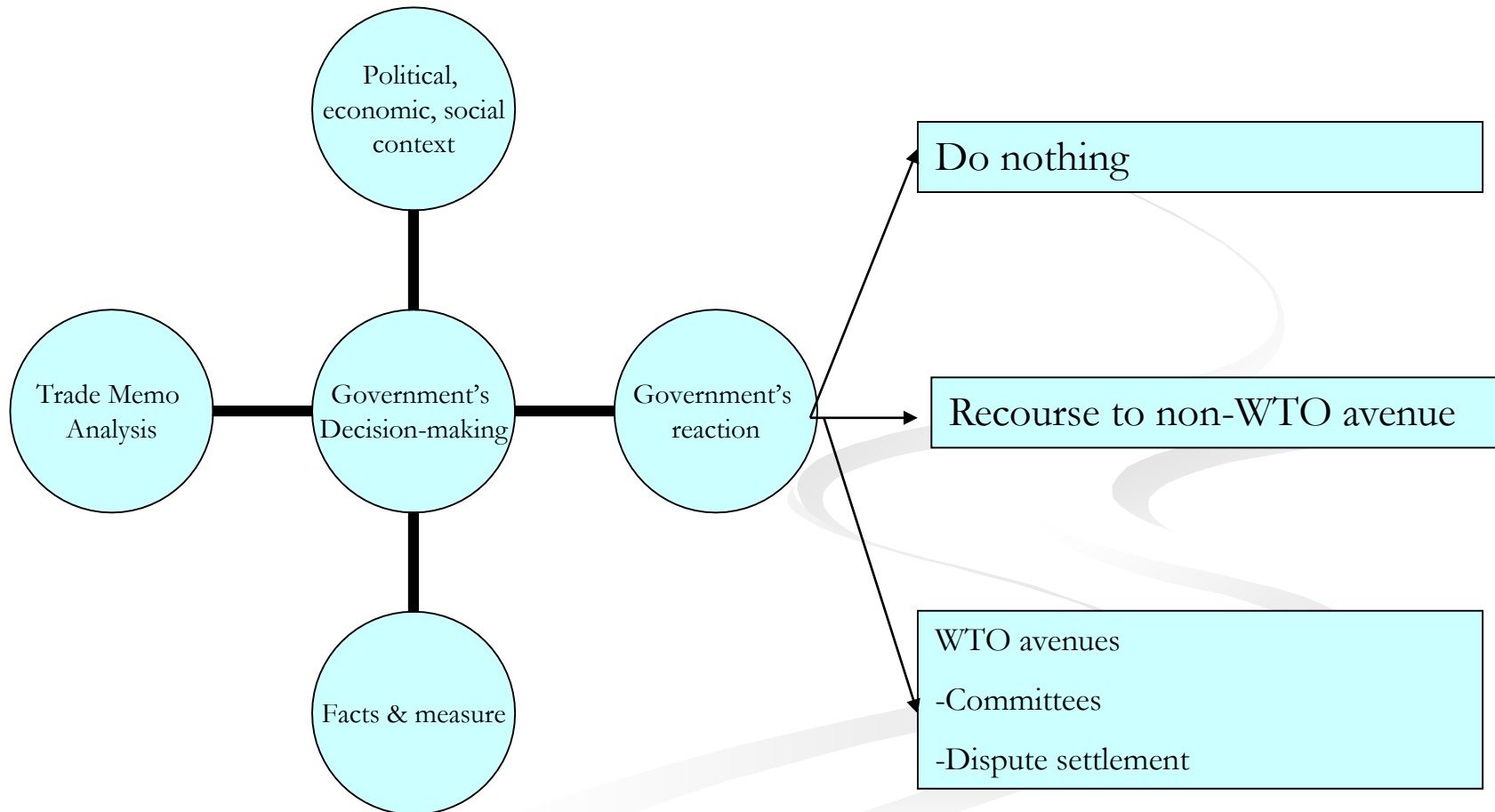
## LEGAL MEMO ADDRESSING TRADE CONCERNS

- Introduction of facts and historical context
  - Identification of measure at issue
  - Identification of the relevant provisions/legal standards
  - Assessment of the measure in the light of the standard
  - Conclusion on legality of the measure
  - Recommendations for future action
- 
- A decorative graphic consisting of several overlapping, wavy, light gray lines that flow from the right side of the slide towards the left, partially overlapping the text of the list.



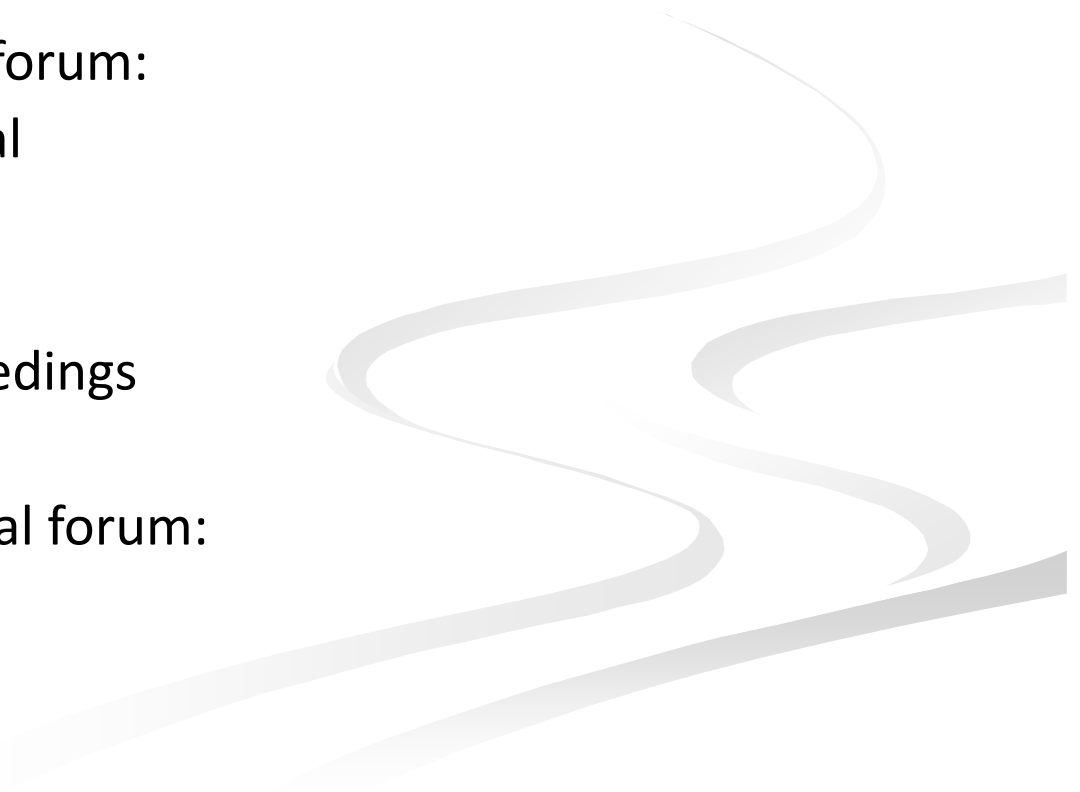
# COMPLAINANT'S PERSPECTIVE

## DECISION-MAKING BY GOVERNMENT



## CHOICE OF FORUM

- Is the matter justiciable?
  - If yes: choose legal forum:
    - Bilateral/regional
    - WTO
    - Int'l arbitration
    - Domestic proceedings
  - If no: choose political forum:
    - Bilateral
    - Multilateral



# COMPLAINANT'S PERSPECTIVE

## CONSIDERATIONS

- Relationship between government and private sector is crucial.
- Government should always be in control of process even though private sector may contribute financially / substantively to the case.
- Decide whether to seek support from other Members with similar interests either as co-complainants or third parties.
- If co-complainants, determine whether your interests and claims are the same? Are those of the various industries the same? Pay special attention to coordination: e.g. Timing, coherence of claims, arguments, and evidence.

## ANTICIPATING A COMPLAINT

How to anticipate a complaint?

- Self-realization
- Complaints by importers
- Complaints by exporting countries
- Committees and councils of the WTO
- TPR
- Disputes involving "twin" measures of other WTO Members

## ASSESSING THE MEASURE

- Conduct own assessment as to:
  - how the measure operates,
  - on what basis the measure is imposed,
  - what levels of trade are affected, and
  - whether the measure the measure is WTO-inconsistent.
- Place emphasis on investigating whether there may be any justifications or defense.
- Assess chances of defending measure successfully before a panel or the Appellate Body.

# RESPONDENT'S PERSPECTIVE

## DETERMINE OPTIONS AVAILABLE

- Withdraw the offending measure:
  - Some measures are easy to eliminate (*e.g.* executive practice).
- Implement an alternative measure:
  - Attempt to achieve «same effects» as impugned measure but in less WTO-inconsistent manner.
- Maintain the measure and defend it in WTO dispute settlement:
  - Establish responsible intra-governmental team
  - Secure competent legal counsel
  - Obtain best expert evidence
  - Ensure adequate budget

# RESPONDENT'S PERSPECTIVE

## CONSIDERATIONS

- Relationship between government and importers, trade associations is critical to identify possible challenges.
- The Mission to the WTO is indispensable to provide early warning of possible challenges (*e.g.*, matters raised in WTO committees).
- Government should always be in control of process even though private sector may contribute financially / substantively to the defense.
- Decide whether to seek support from other Members with similar interests either as third parties.