



**Regional Training of Trainers
on how to design, negotiate, and implement FTAs**

Session 1B: Trade-Related Legal Skills

December 2022



Overview

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**The Limits of
the Law**

02

**The Uses of
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**Summing
Up**

The Limits of the Law

For the purposes of international trade negotiations, there are a number of important practical limitations to the law that officials and their political leaders need to be aware of

01

The limits posed by sovereignty

Economies have a great deal of autonomy in deciding how strictly they wish to comply with the treaty obligations they enter into.

02

Limited enforceability

International law can rarely be enforced, which means governments ultimately retain the choice to comply or not to comply

03

Legal ambiguity

The meaning of the law is susceptible to various interpretations, and its meaning can change over time.

04

Policy space is built into all commitments

Many governments are weary of limiting their policy space, which is why treaty commitments are caveated with many loopholes and exceptions.

The Limits of the Law - Caveat

01

Even if there are limits on the extent to which international treaty obligations can be enforced, there is a cost to failing to uphold and comply with international treaty commitments.

01

Systemic interest in broad-based compliance

All parties to an agreement and all participants in a given legal system have an interest in it working properly.

02

No compulsion but limited coercion and co-optation

Many Trade agreements come with dispute settlement provisions that also provide mechanisms to encourage compliance.

03

Reputational costs to non-compliance

Governments that regularly flout their legal obligations and fail to faithfully comply with their commitments in trade agreements can suffer costly reputational damage.

The Limits of the Law – Some Examples

A number of examples from the WTO case law serve to show both the limits of the law but also the systemic interest in compliance

EC- Hormones



01

A health-related ban on the sale and import of hormone-treated beef is retained even after it is declared WTO-inconsistent.

US- Gambling



02

The U.S refuses to implement a WTO dispute settlement ruling and does so with impunity and to the detriment of both the winning party and the system as a whole.

Indonesia - Autos



03

Indonesia loses a politically sensitive case at the WTO and is ultimately coerced into full compliance by the IMF.

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The Uses of the Law

Entering into what are supposed to be binding treating commitments with respect to how open your economy is supposed to be, has a number of benefits.

01

They support a more predictable trading environment

This benefits firms who have offensive interests in export markets, but also other firms that rely on imported inputs and components for their own final products.

02

They afford credibility for domestic reforms

When governments want to enact pro-competitive reforms in the face of domestic opposition, treaty commitments can help make these reforms irreversible.

03

They raise the cost of arbitrary policy and regulatory interventions

When political leaders are pressured to intervene in the domestic market to favour domestic firms, international treaty commitments can place limits on these actions.

The Uses of the Law – Some Examples

02

Some examples of the constraints that trade rules and disciplines can place on policymakers serve to demonstrate some of the uses of the law in a trade policy context

Tariff Bindings



01

Tariff bindings provide predictability in that they proscribe governments from imposing tariffs above a certain level.

Subsidy Rules



02

Subsidy rules proscribe governments from intervening unfairly to provide benefits to domestic firms to the detriment of foreign competitors.

National Treatment



03

The rules on national treatment proscribe a government from treating domestic products more favorably than imported ones in a range of policy areas.

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Main Trade-Law Principles

A basic grasp of some of the most commonly invoked legal principles in international law and trade law can be useful when negotiating trade agreements.

“Pacta sunt servanda”

This is a principle of contract law that states agreements must be kept, meaning that once an economy enters into an obligation, it should abide by the commitments this obligation imposes on it.

Balance of rights and obligations

In trade agreements, parties exchange a series of mutual benefits that grant them both rights but also impose certain obligations on them.

Non-discrimination

A fundamental principle of international trade, non-discrimination requires that economies not discriminate between or against their trading partners.

Least-Trade Restrictiveness

This slightly newer principle is a variation on the notion of proportionality, and requires economies, when they impose measures that do negatively impact trade, to choose and apply measures so as to be minimally trade restrictive.

Right to Regulate

Even in areas where economies have taken commitments and entered into trade obligations, it is generally recognized that they retain a right to regulate, particularly to protect and uphold so-called higher-order public interests.

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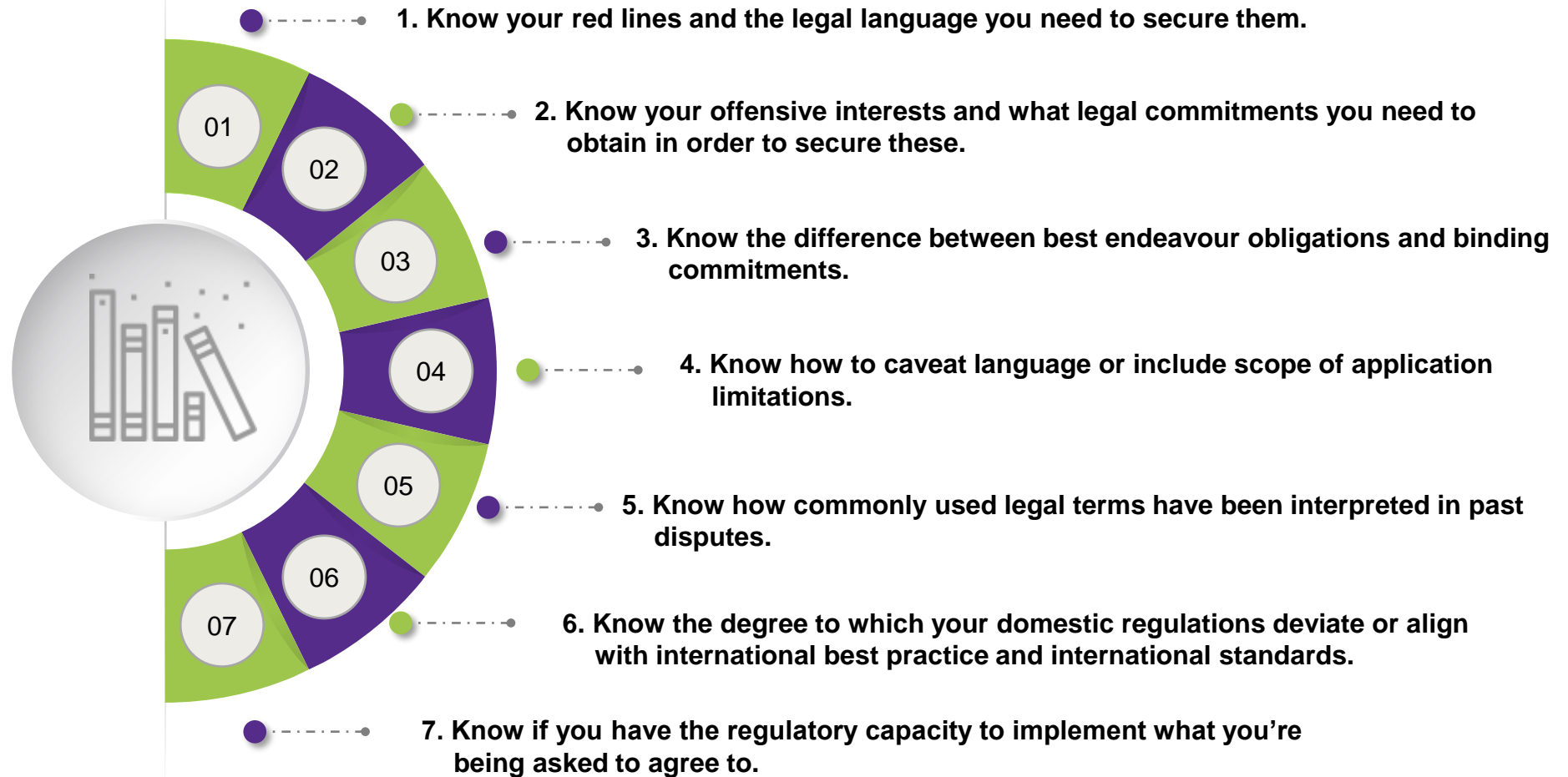
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Seven things to know



Securing Red Lines

Example 1: Obtain a derogation

Article 14.8: Personal Information Protection⁵

⁵ Brunei Darussalam and Viet Nam are not required to apply this Article before the date on which that Party implements its legal framework that provides for the protection of personal data of the users of electronic commerce.

Example 2: Get the provision in question excluded from dispute settlement

Article 12.14: Location of Computing Facilities

3. Nothing in this Article shall prevent a Party from adopting or maintaining:
 - (b) any measure that it considers necessary for the protection of its essential security interests. Such measures shall not be disputed by other Parties.

Legal Skills and Negotiation - Examples

04

Securing Offensive Interests



THE HON ANDREW ROBB AO MP

MINISTER FOR TRADE AND INVESTMENT

4 February 2016

The Honourable Chrystia Freeland
Minister of International Trade
Canada

Dear Minister

I have the honour to acknowledge receipt of your letter of 4 February 2016, which reads as follows:

"In connection with the signing on 4 February 2016 of the Trans-Pacific Partnership Agreement (the Agreement), I have the honour to confirm the following understandings reached between the Government of Canada and the Government of Australia during the course of negotiation of the Agreement:

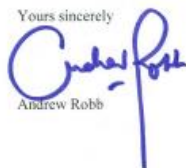
Canada confirms that Australian dairy products, including those imported under HS Chapter 3504 such as milk protein concentrates, can be utilised in dairy processing in Canada to the fullest extent possible, including in cheesemaking.

Nothing in this understanding is intended to derogate from any rights or obligations under the WTO SPS Agreement and the WTO TBT Agreement.

I have the further honour of proposing that this letter, equally valid in English and French, and your letter in reply confirming that your Government shares this understanding, will constitute an understanding between our Governments which will come into effect on the first date on which the Agreement is in force for both Canada and Australia."

I have the further honour to confirm that the above reflects the mutual understandings reached between the Government of Australia and the Government of Canada during the course of negotiations on the Agreement, and that your letter, equally valid in English and French, and this letter in reply constitute a Memorandum of Understanding between the Government of Australia and the Government of Canada that will come into effect on the date on which the Agreement enters into force for both Canada and Australia.

Yours sincerely


Andrew Robb



Government
of Canada

Gouvernement
du Canada

4 February 2016

The Honourable Andrew Robb
Minister for Trade and Investment
Australia

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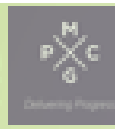
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Sincerely,



The Honourable Chrystia Freeland
Minister of International Trade
Canada



Legal Skills and Negotiation - Examples

Best Endeavour Obligations versus Binding Commitments

Article 14.9: Paperless Trading

Each Party shall endeavour to:

- (a) make trade administration documents available to the public in electronic form; and
- (b) accept trade administration documents submitted electronically as the legal equivalent of the paper version of those documents.

Article 14.3: Customs Duties

1. No Party shall impose customs duties on electronic transmissions, including content transmitted electronically, between a person of one Party and a person of another Party.

Caveat Language and Scope of Application Limitations

Article 14.13: Location of Computing Facilities

1. The Parties recognise that each Party may have its own regulatory requirements regarding the use of computing facilities, including requirements that seek to ensure the security and confidentiality of communications.
2. No Party shall require a covered person to use or locate computing facilities in that Party's territory as a condition for conducting business in that territory.
3. Nothing in this Article shall prevent a Party from adopting or maintaining measures inconsistent with paragraph 2 to achieve a legitimate public policy objective, provided that the measure:
 - (a) is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; and
 - (b) does not impose restrictions on the use or location of computing facilities greater than are required to achieve the objective.

Article 14.17: Source Code

1. No Party shall require the transfer of, or access to, source code of software owned by a person of another Party, as a condition for the import, distribution, sale or use of such software, or of products containing such software, in its territory.
2. For the purposes of this Article, software subject to paragraph 1 is limited to mass-market software or products containing such software and does not include software used for critical infrastructure.

Legal Skills and Negotiation - Examples

Commonly Used Terms and their Interpretations

Article XX

General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health;
- (c) relating to the importations or exportations of gold or silver;

PART II

*Article III**

National Treatment on Internal Taxation and Regulation

1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.*
2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.*
4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

International Standards and Best Practices

Article 3

Harmonization

1. To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement, and in particular in paragraph 3.
2. Sanitary or phytosanitary measures which conform to international standards, guidelines or recommendations shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994.
3. Members may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5.² Notwithstanding the above, all measures which result in a level of sanitary or phytosanitary protection different from that which would be achieved by measures based on international standards, guidelines or recommendations shall not be inconsistent with any other provision of this Agreement.

² For the purposes of paragraph 3 of Article 3, there is a scientific justification if, on the basis of an examination and evaluation of available scientific information in conformity with the relevant provisions of this Agreement, a Member determines that the relevant international standards, guidelines or recommendations are not sufficient to achieve its appropriate level of sanitary or phytosanitary protection.

Article 2

Preparation, Adoption and Application of Technical Regulations by Central Government Bodies

- 2.4 Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.
- 2.5 A Member preparing, adopting or applying a technical regulation which may have a significant effect on trade of other Members shall, upon the request of another Member, explain the justification for that technical regulation in terms of the provisions of paragraphs 2 to 4. Whenever a technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 2, and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade.

Legal Skills and Negotiation - Examples

Regulatory Capacity

CHAPTER 16

COMPETITION POLICY

Article 16.1: Competition Law and Authorities and Anticompetitive Business Conduct¹

1. Each Party shall adopt or maintain national competition laws that proscribe anticompetitive business conduct, with the objective of promoting economic efficiency and consumer welfare, and shall take appropriate action with respect to that conduct. These laws should take into account the *APEC Principles to Enhance Competition and Regulatory Reform*, done at Auckland, September 13, 1999.

2. Each Party shall endeavour to apply its national competition laws to all commercial activities in its territory.² However, each Party may provide for certain exemptions from the application of its national competition laws provided that those exemptions are transparent and are based on public policy grounds or public interest grounds.

3. Each Party shall maintain an authority or authorities responsible for the enforcement of its national competition laws (national competition authorities). Each Party shall provide that it is the enforcement policy of that authority or authorities to act in accordance with the objectives set out in paragraph 1 and not to discriminate on the basis of nationality.

Article 4.10: Advance Rulings

1. Each Party shall, prior to the importation of a good from a Party into its territory, issue a written advance ruling to an importer, exporter, or any person with a justifiable cause, or a representative thereof, who has submitted a written request containing all necessary information, with regard to:
 - (a) tariff classification;
 - (b) whether the good is an originating good in accordance with Chapter 3 (Rules of Origin);
 - (c) the appropriate method or criteria, and the application thereof, to be used for determining the customs value under a particular set of facts, in accordance with the Customs Valuation Agreement; and
 - (d) such other matters as the Parties may agree.

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Dispute Settlement

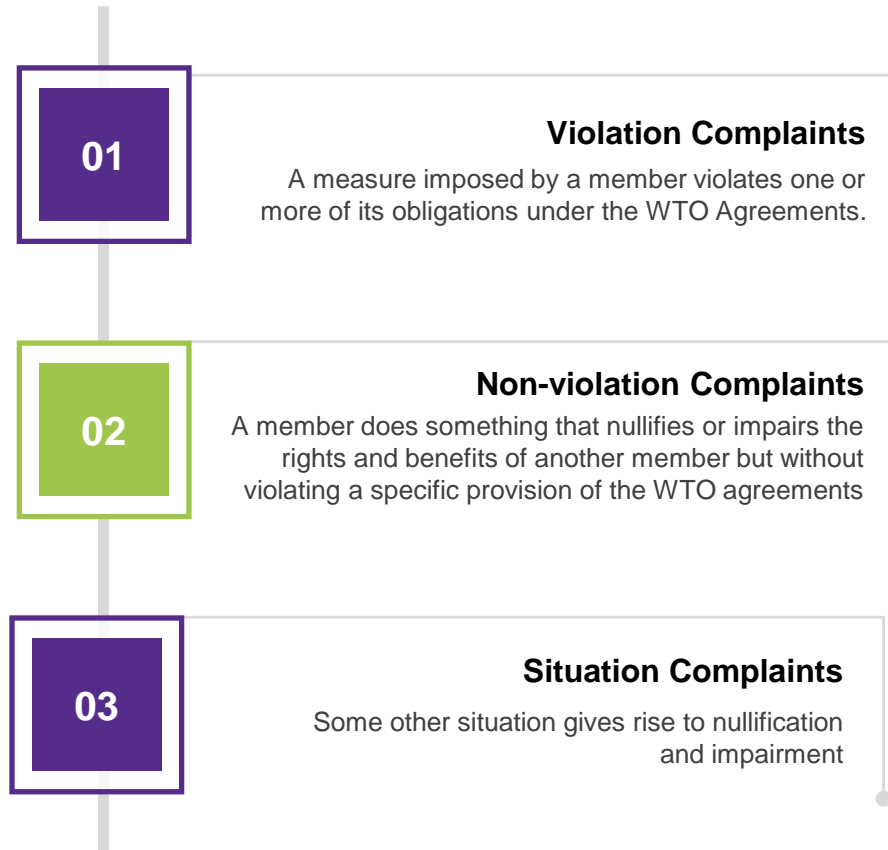
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Six “Fun” Facts



Dispute Settlement

Three “Classical” Grounds for Action under “Nullification and Impairment”



Dispute Settlement

05

More Limited Grounds for Action under FTAs

01 Interpretation and Clarification

The settlement of disputes between parties regarding the interpretation and application of the agreement;

01

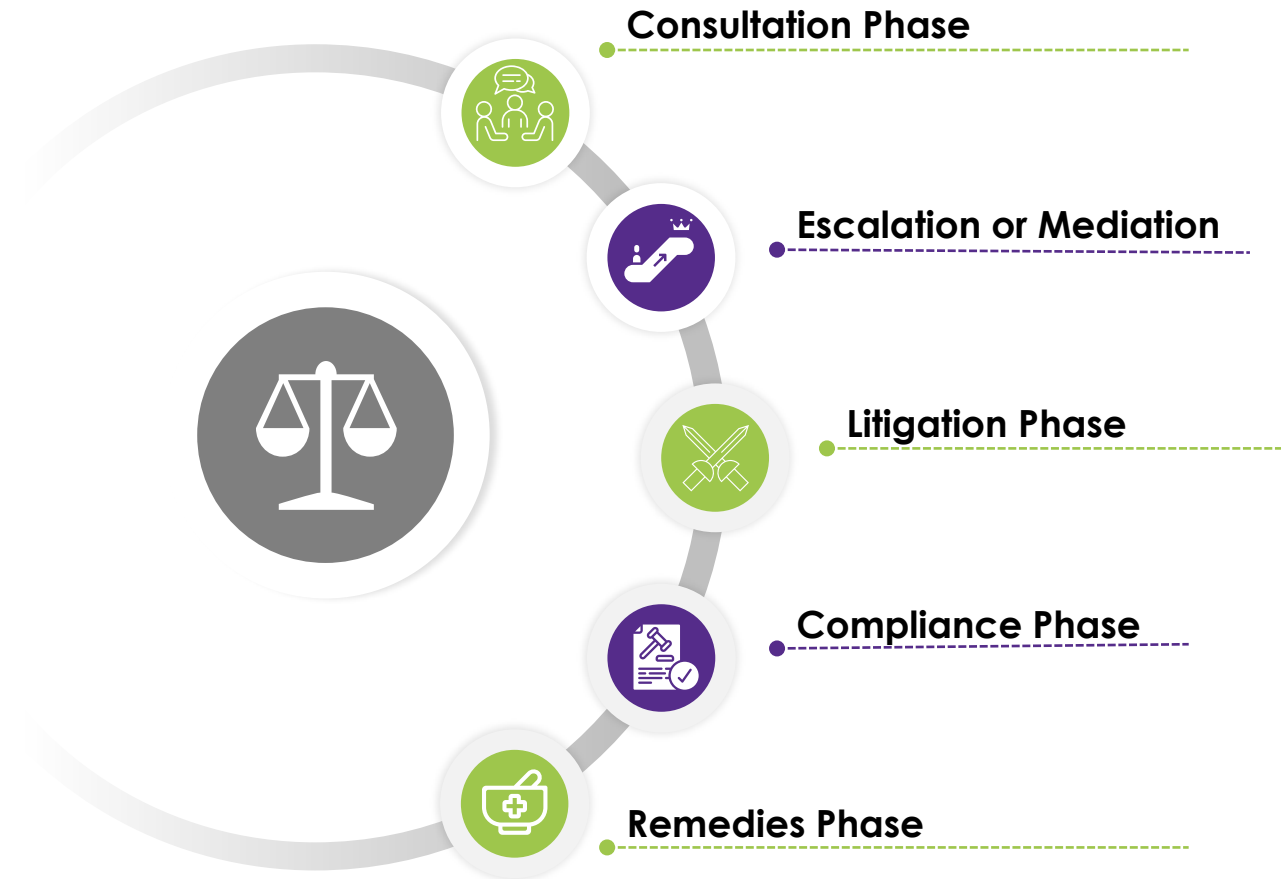
02 Violation Complaints

When one party finds the other party has violated its obligations or failed to faithfully implement the agreement.

02

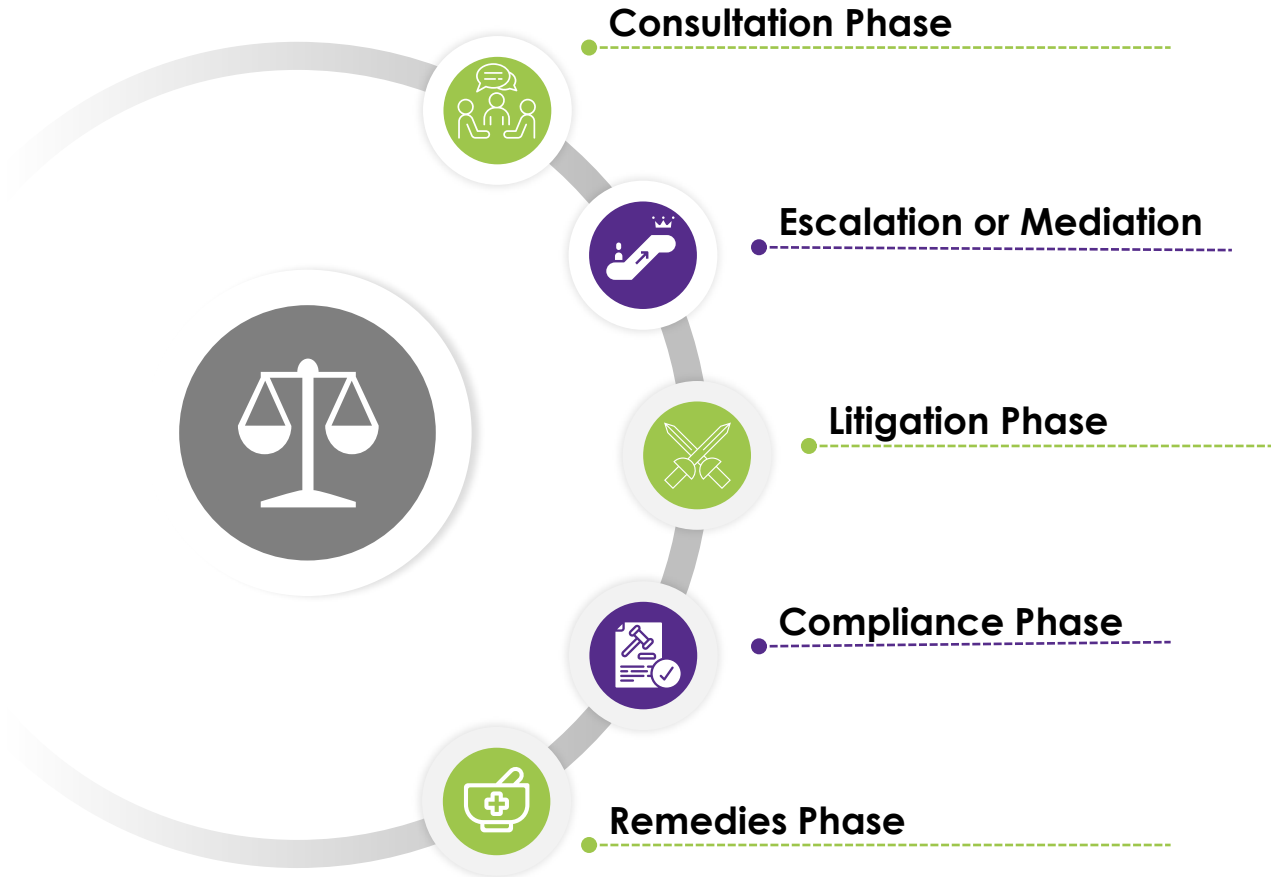
Dispute Settlement

The Main Phases of a Dispute Settlement Proceeding

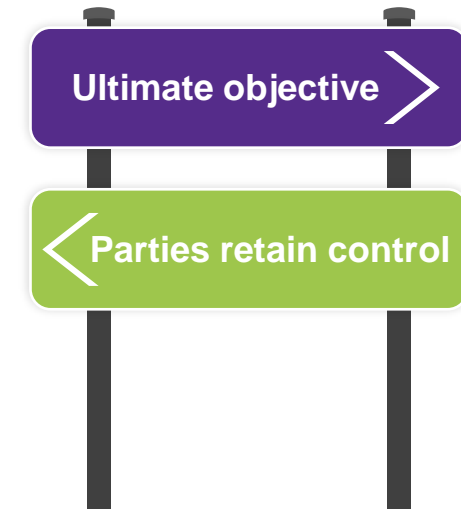


Dispute Settlement

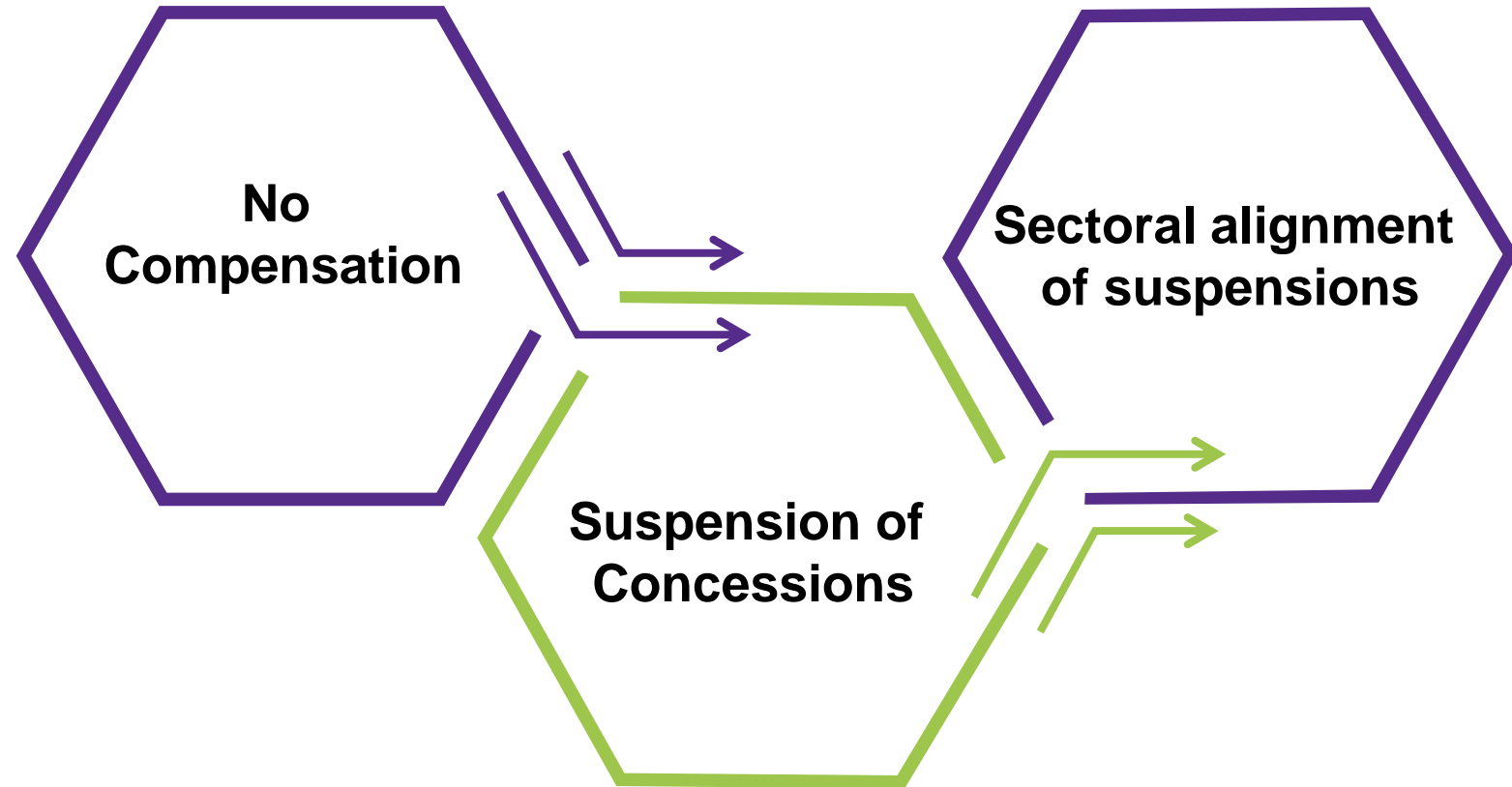
The Main Phases of a Dispute Settlement Proceeding



Two Things to Bear in Mind



Remedies



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Implementation and Legal Effect

Implementation ensures that the negotiated outcomes are effectively honored and that they become law.



Failing to Implement is a Breach of International Law

Failing to implement or implement faithfully can have negative consequences



Ratification

Ratification is the most common way in which an FTA becomes legally binding



Domestic Legislative Changes

Regardless of whether ratification is required, changes to domestic laws are likely to be required.



The Role of Parliament

This makes parliament an important choke point for implementing FTA commitments.



Strategic Positioning

It is good practice to involve and inform parliament in the process of FTA negotiations as early as possible.



01

Summary of Positive Outcomes

This slide is 100% editable. Adapt it to your needs and capture your audience's attention.

02

Prepare to Defend against Critics

This slide is 100% editable. Adapt it to your needs and capture your audience's attention.

03

Legislative Action Plan

This slide is 100% editable. Adapt it to your needs and capture your audience's attention.

04

Administrative Action Plan

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Summing-Up

01



The law is a useful tool but is the servant of sovereign governments and not their master

02



All participants to a given legal system have a systemic interest in broad compliance with that system.

03



International trade law is characterized by a few overarching principles including non-discrimination, the balance of rights and obligations, least trade restrictiveness and the right to regulate.

04



Various legal skills important for the trade negotiator, particularly drafting commitments in language that serves your government's interests

05



Dispute settlement is not common in FTAs but a good understanding of its uses, limits, procedures, costs and who to call for help are essential.

06



Implementation is an important part of trade negotiations and involves cooperation with other executive branch agencies as well as consultations with lawmakers



Thank You!