

WTO Dispute Settlement Mechanism: Overview

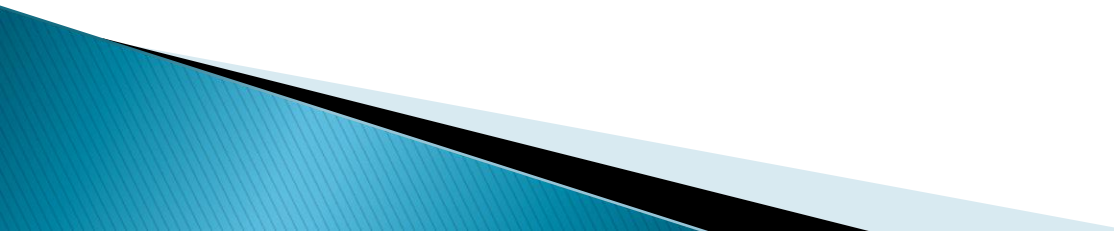


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Aims of the WTO Dispute Settlement Mechanism (DSM)

- ▶ True worth of an agreement can only be assessed in terms of its enforceability
- ▶ For an international agreement, enforcement can not be ensured through national courts and other enforcement instruments/agencies; it needs an international agreement between the parties, an agreement that binds them under international law
- ▶ WTO Dispute Settlement Mechanism (DSM) serves that purpose of
 - Securing compliance with the covered Agreements
 - Preserving the rights and obligations of Members under the covered agreements

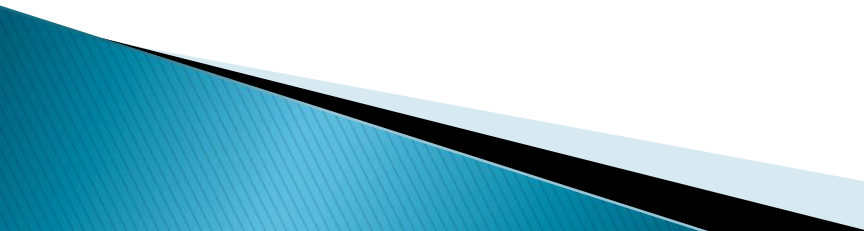
Introduction to DSM...contd.

- ▶ Legal basis in the **Understanding on Rules and Procedures Governing the Settlement of Disputes**, or the DSU.
 - ▶ Its origin lies in Articles XXII and XXIII of the GATT, and is the result of the evolution of rules, procedures and practices developed over the 50 years of the life of GATT.
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Introduction to DSM...contd.

- ▶ Although parties to the WTO are governments, its rules protect rights of economic operators in our economies
 - ▶ They need predictability of market access and the relevant economic policies
 - ▶ It comes from the (relatively) rapid resolution of disputes (strict timelines) and strict enforcement through (threatened or actual) imposition of trade sanctions
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Introduction to DSM...contd.

- ▶ The potential for a dispute arises when a WTO Member adopts a policy or measure that another Member considers inconsistent with its WTO obligations
 - ▶ While the preferred option is a **mutually agreed solution**, in its absence the complaining party is guaranteed a rule-based procedure to challenge the measure
 - ▶ If the complainant prevails, the preferred option for the defendant is withdrawal of the measure, since not doing so will invite multilaterally authorized sanctions
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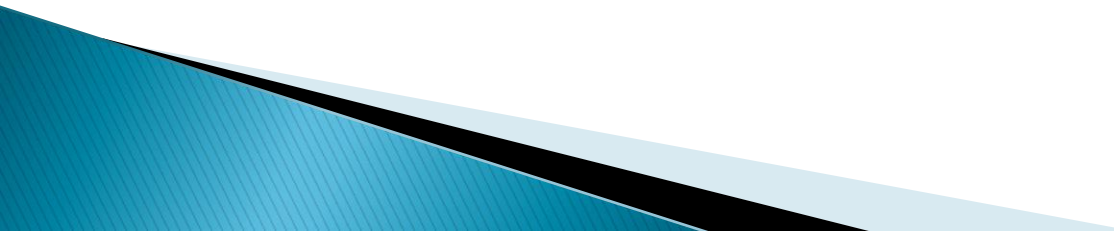
Objectives of the DSM

to secure a “positive solution” to disputes
(Art. 3.7 DSU)

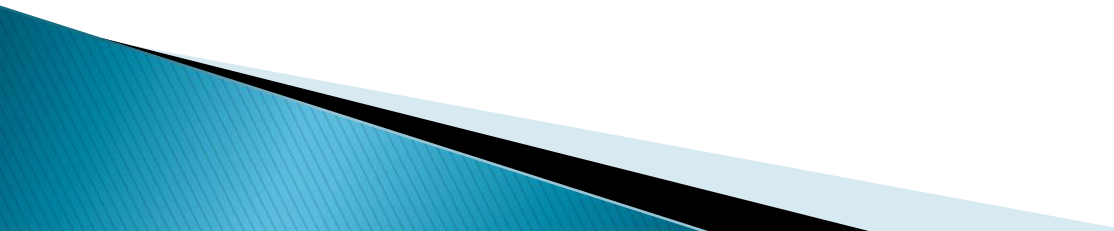
through a mutually agreed solution if
possible...

...If not, recourse to panel/Appellate process

Key Features

- ▶ State–State Dispute settlement mechanism
 - ▶ Compulsory jurisdiction
 - ▶ Detailed procedures and deadlines
 - ▶ Quasi–automaticity in the proceedings
 - ▶ Panel and Appellate review
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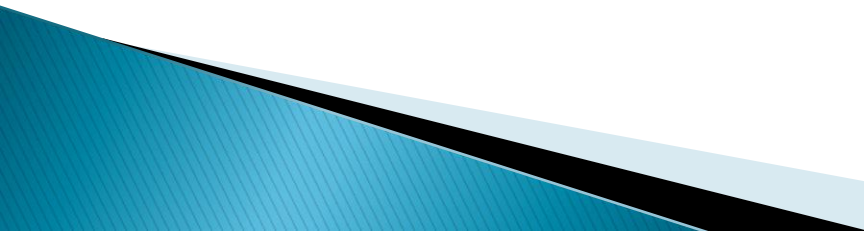
Main Players

- ▶ The Parties: WTO Members only
 - ▶ The DSB (all the Members)
 - ▶ The Panel (3 or 5 panellists, ad hoc)
 - ▶ AB (7 persons)
 - ▶ WTO Secretariat
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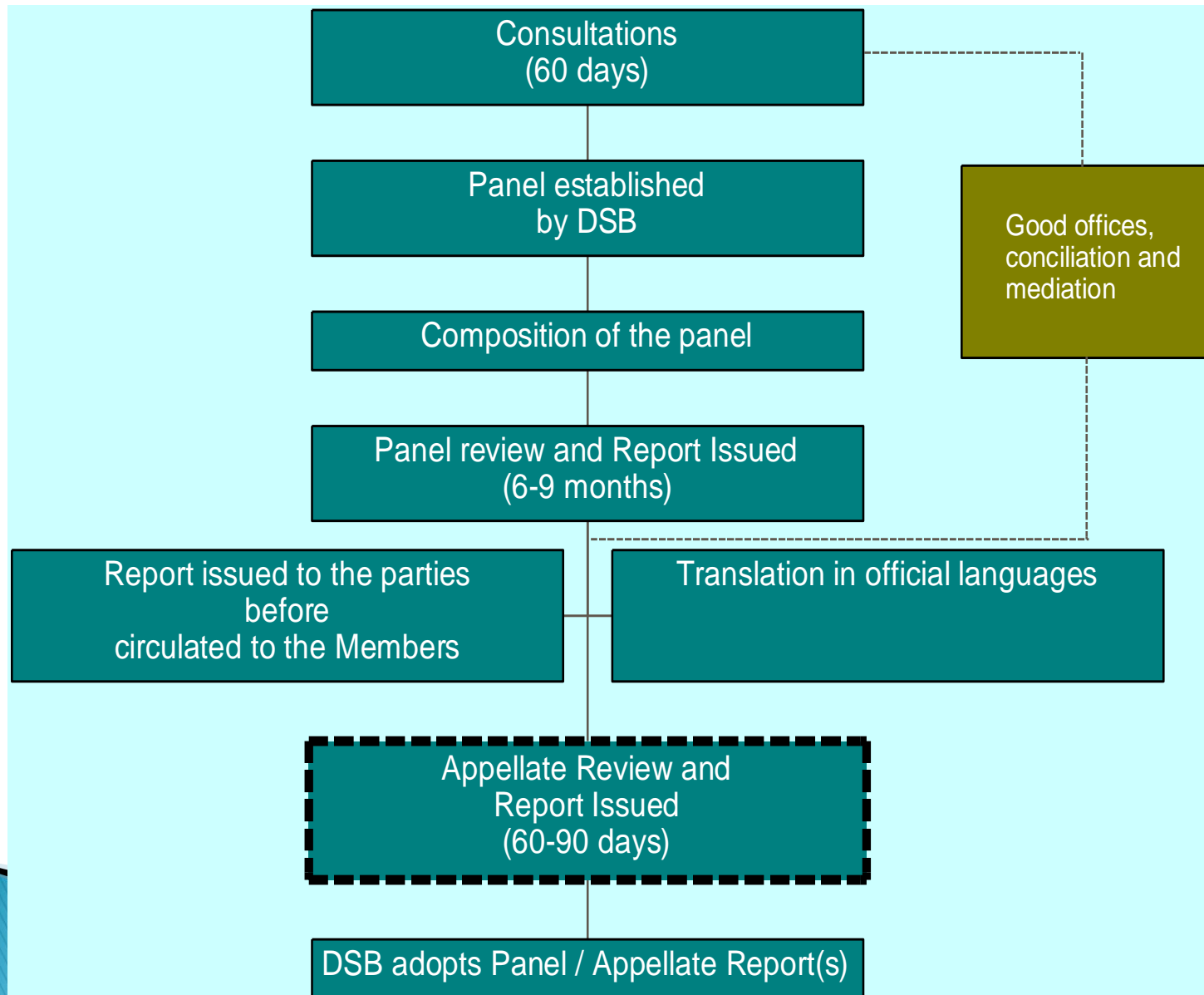
STAGES IN THE DISPUTE SETTLEMENT MECHANISM

- ▶ WTO dispute settlement can be divided into five major stages – **consultation, panel, Appellate Body, adoption and implementation/compliance**: each is governed by specified timeframes set forth in the DSU
- ▶ **Consultation** – Once a complaint has been filed, there is a mandatory 60-day consultation period
- ▶ **Panel** – If consultations fail to result in a mutually satisfactory solution, the complaining party has a right to seek establishment of a panel to adjudicate the case and make findings of fact and law; this right is exercised by reverse consensus at the stage of the second request to establish a Panel
- ▶ Panels must issue their reports in 6–9 months

STAGES IN THE DISPUTE SETTLEMENT MECHANISM

- ▶ **Appellate Body** – Issues of law covered in the Panel report and legal interpretation developed by it may be appealed before the Appellate Body
 - ▶ AB must issue report within 90 days
 - ▶ **Adoption** – Panel/AB reports are adopted by DSB through reverse consensus; DSB has other roles too
 - ▶ **Implementation/Compliance** – Responding party usually given a reasonable period of time (RPT) to bring its measures into compliance with WTO obligations. Compliance can be adjudicated before a compliance panel. Failure to comply can lead to authorization of retaliation by DSB, a decision taken by reverse consensus. Level of retaliation is subject to arbitration.
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Main Stages



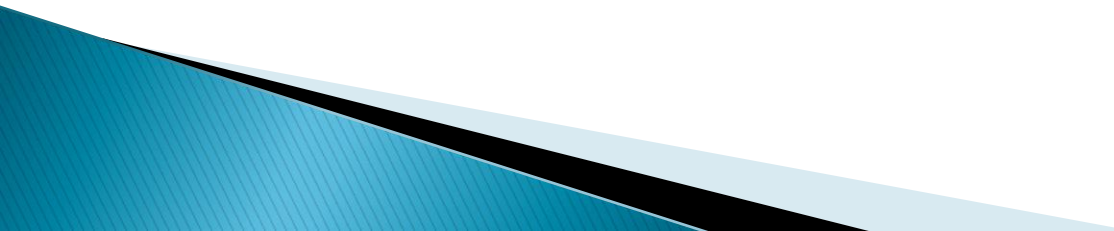
INSTITUTIONS INVOLVED IN THE DISPUTE SETTLEMENT MECHANISM

- ▶ **Dispute Settlement Body** – Political body comprised of all 159 Members that oversees operation of dispute settlement system, including constitution of panels, adoption of panel/AB reports, authorization of retaliatory measures, and surveillance of cases for which compliance not yet achieved

DSB is assisted by the Legal Affairs and Council Divisions of the WTO Secretariat

- ▶ **Panels** – Ad hoc 3–person adjudicatory bodies established for each dispute

INSTITUTIONS INVOLVED IN THE DISPUTE SETTLEMENT MECHANISM

- ▶ **WTO Secretariat** – Assists in composition and operation of panels, provides technical assistance, reports to the DG
 - ▶ **Appellate Body** – Composed of seven members serving four-year terms, renewable once
Three of the seven AB members serve on one case
 - ▶ **Appellate Body Secretariat** – Assists Appellate Body, is separate from the WTO Secretariat and reports to the AB, not the DG
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BROAD PARTICIPATION

- ▣ **100** Members have participated in some capacity in WTO dispute settlement
 - = **63 %** of membership
- ▣ **82** Members as third parties

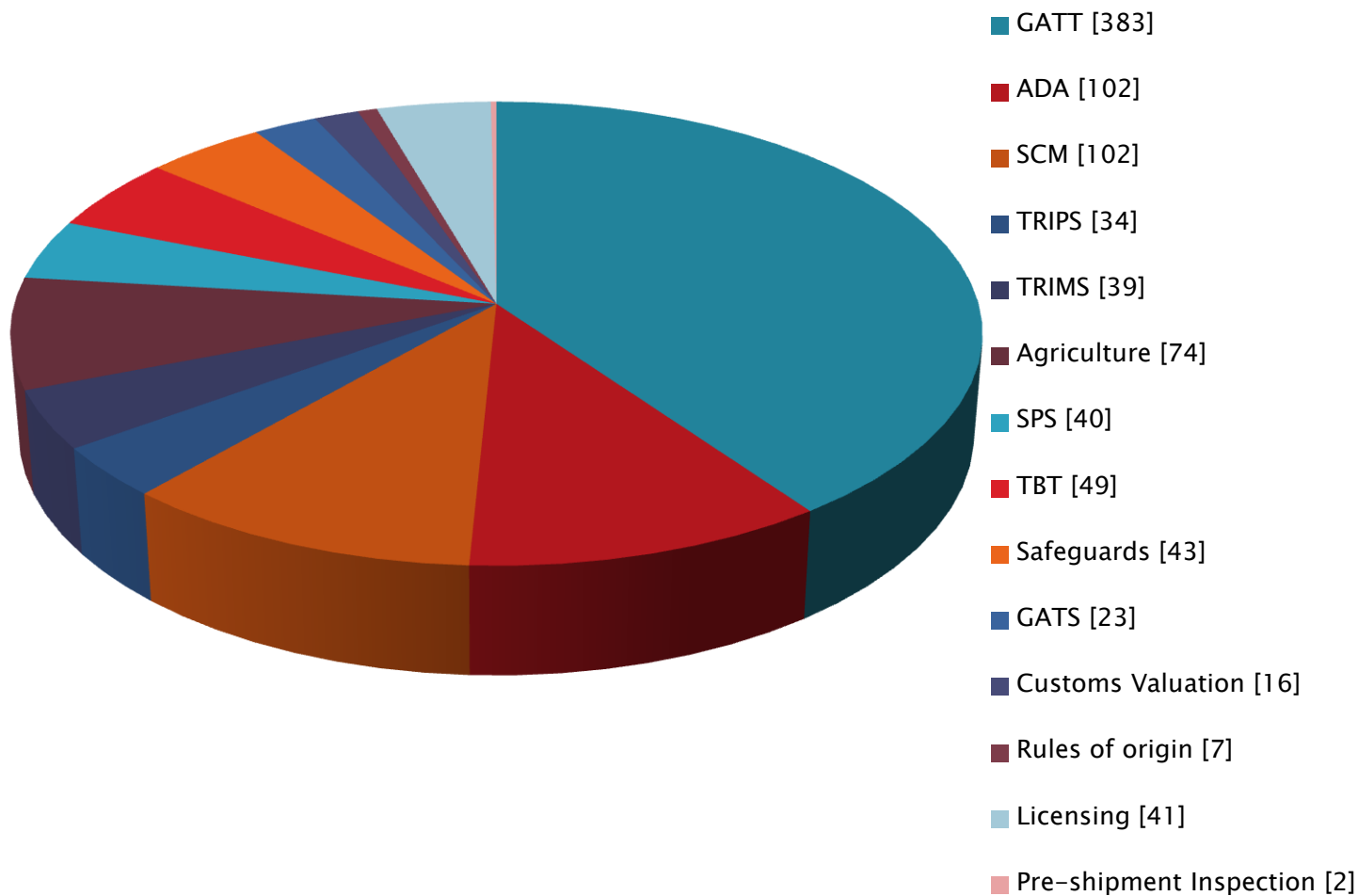
Statistics on consultations

(January 27, 2014)

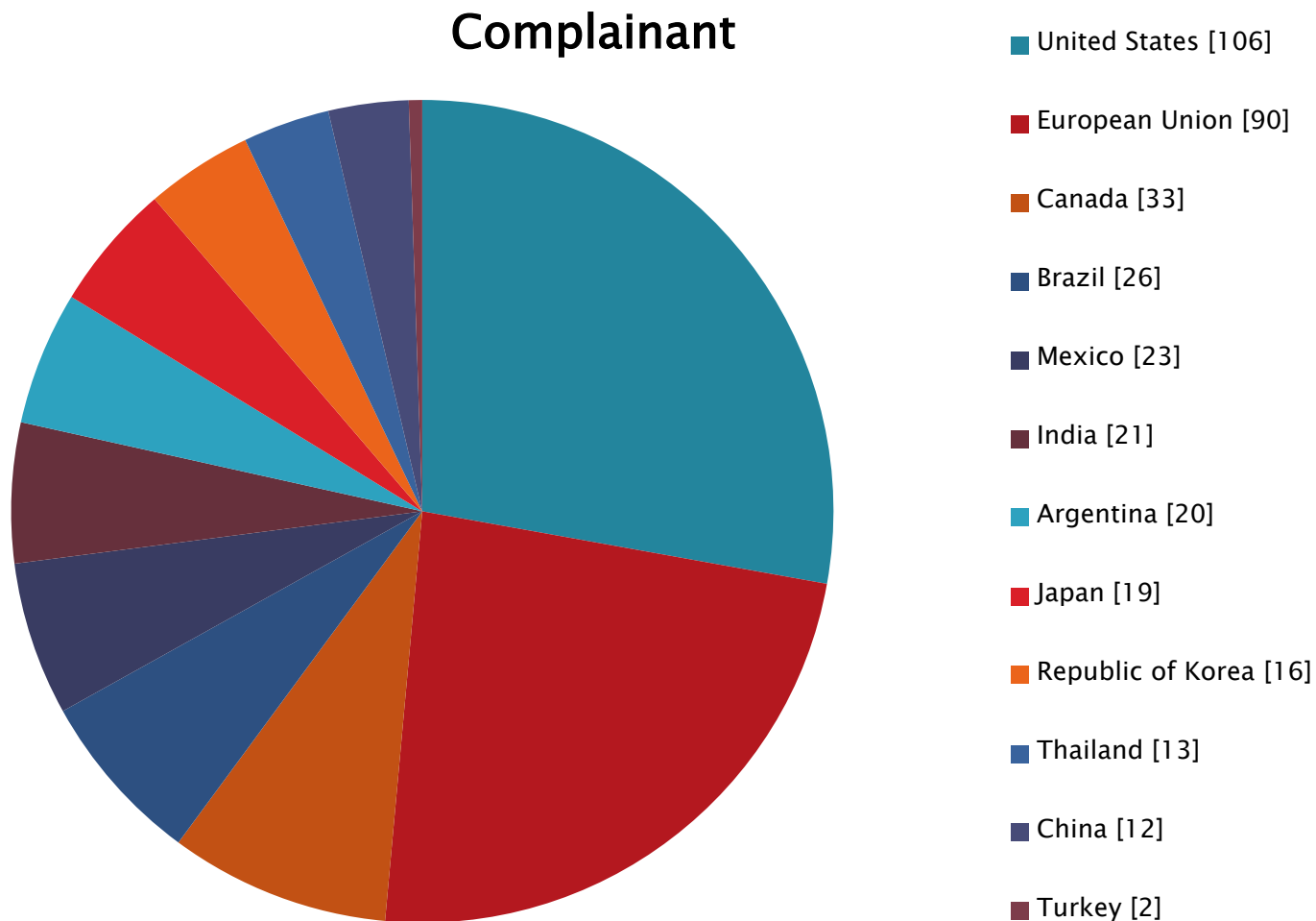
- ▶ Request for consultations: 474
- ▶ Mutually Agreed Solution notified in consultations phase (rough estimate): 40

Statistics on Consultations

(As of January 27, 2014)

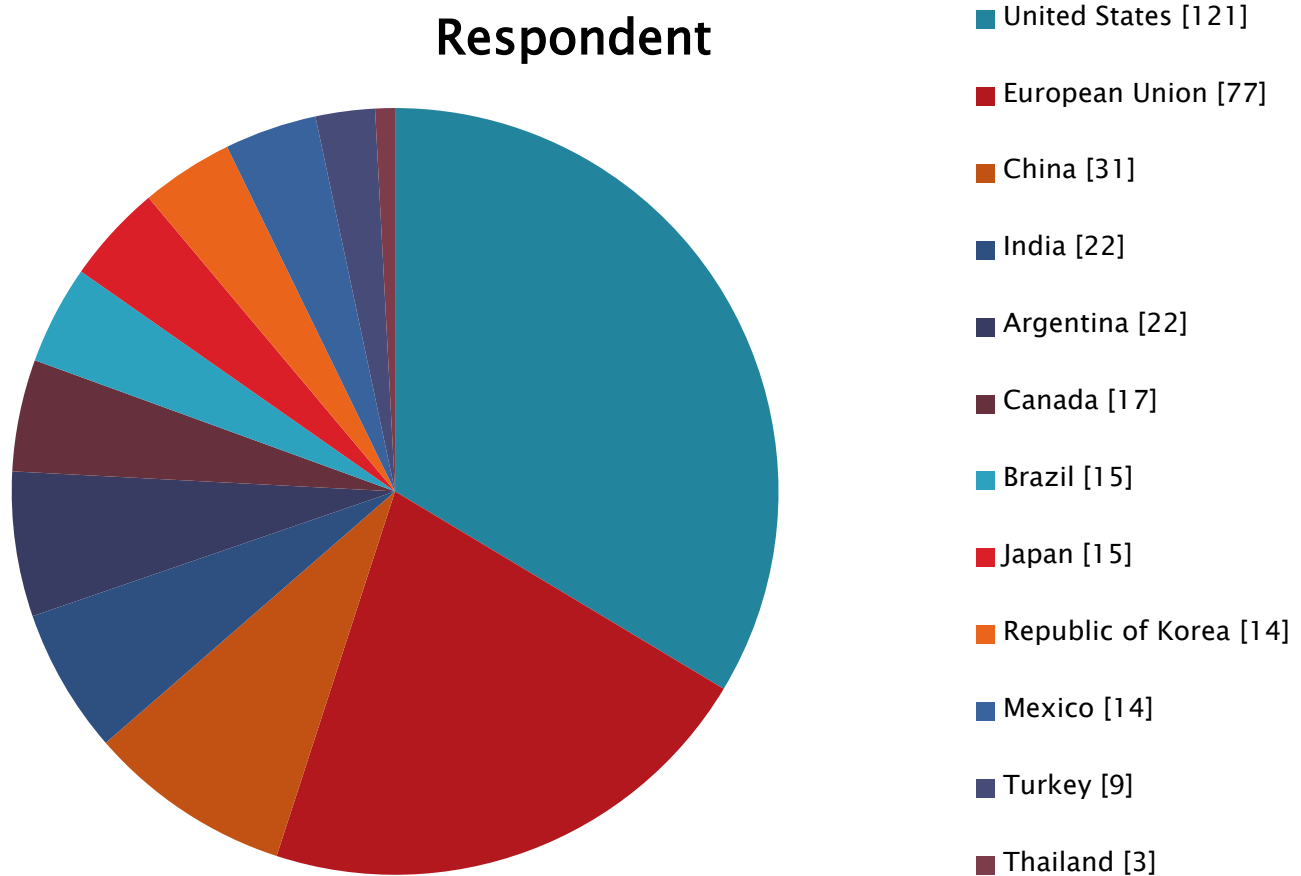


Most Frequent Complainants at the WTO As of January 27, 2014



Most Frequent Respondents at the WTO

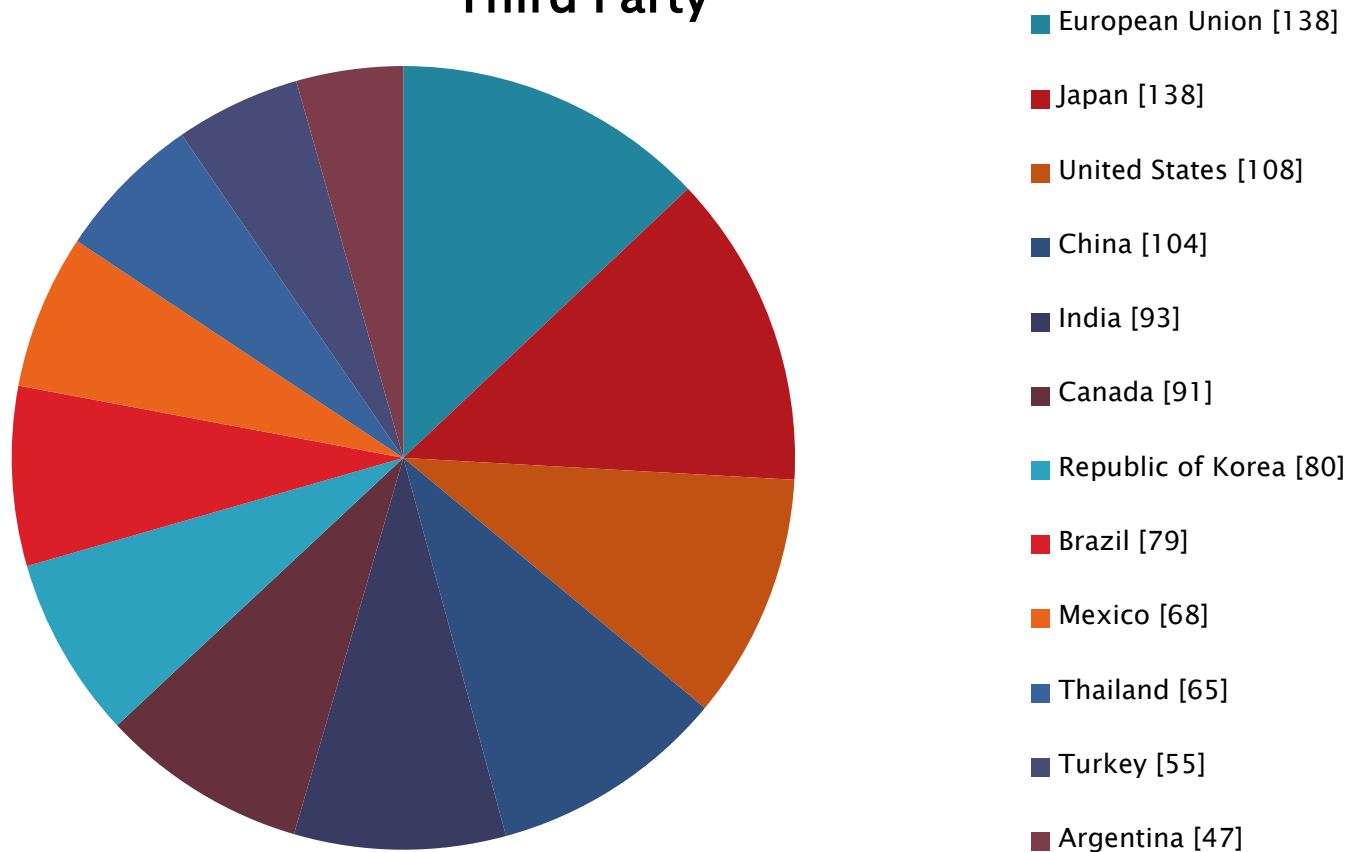
As of January 27, 2014



Most Frequent Third Parties at the WTO

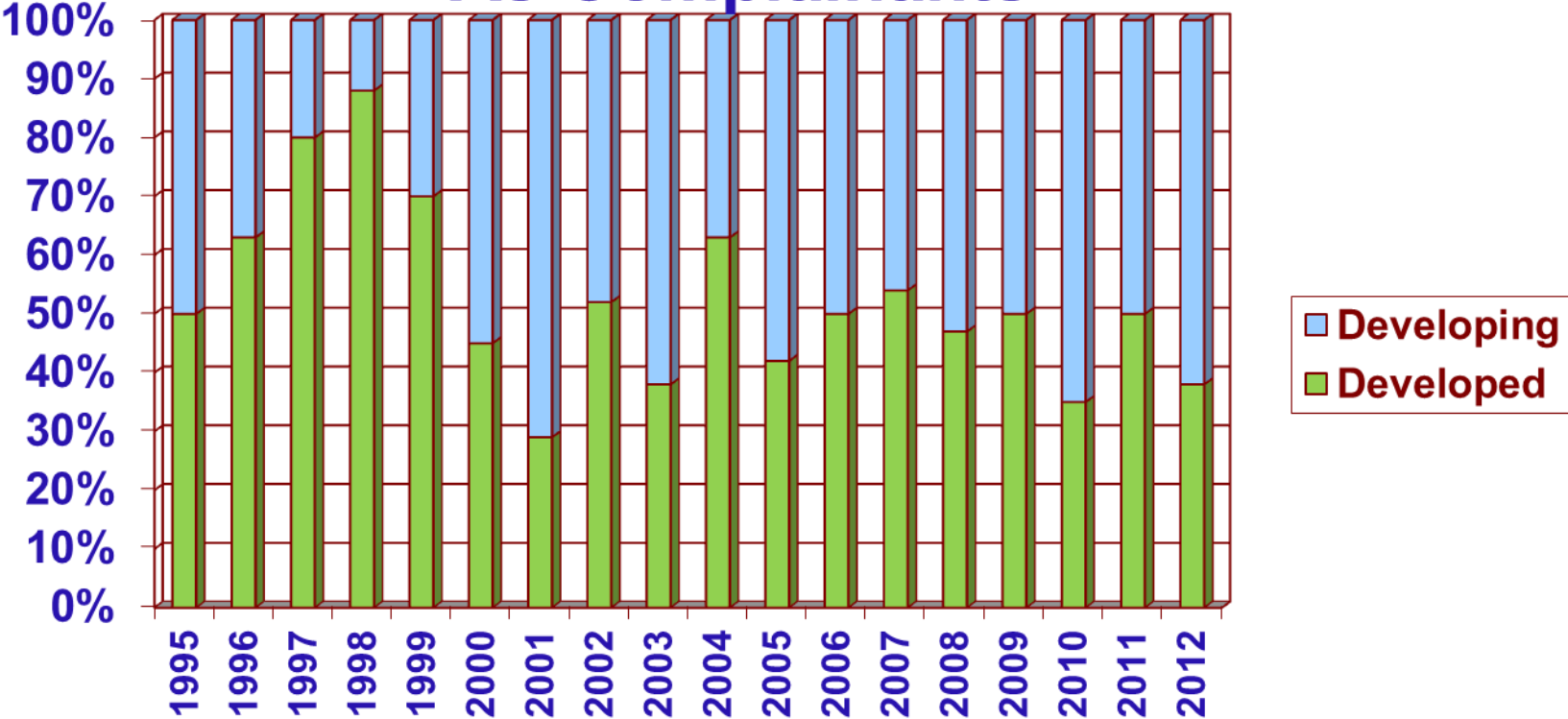
As of January 27, 2014

Third Party



BOTH DEVELOPED AND DEVELOPING MEMBERS HAVE CONFIDENCE IN THE SYSTEM

As Complainants

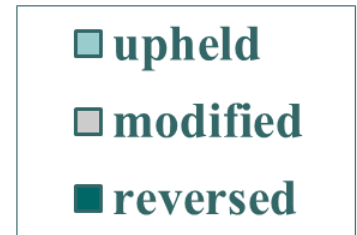
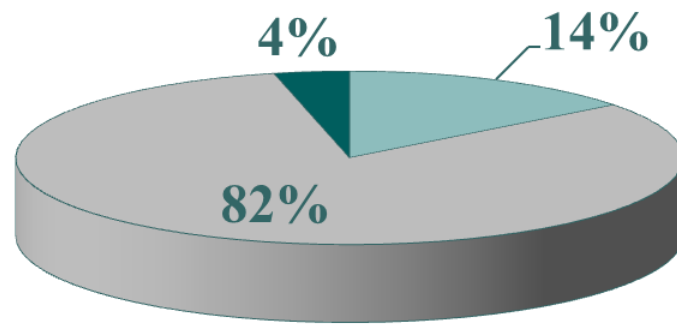


Disputes

(1995 – upto 1 January, 2013)

▶ Requests for consultations	450
▶ Mutually agreed solutions:	98
▶ Panels established:	195/243
▶ Panels composed:	165/211
▶ Panel reports adopted:	144
▶ Appellate Body reports adopted:	90
▶ Compliance panels:	29
▶ Appeals of compliance panels:	19
▶ Arbitrations on "retaliation" :	19
▶ Authorizations to "retaliate" :	17

Outcomes of Appeals



Asia: Participation in WTO Disputes

Country	Complainant	Respondent	Third Party	Total
Japan	21	22	91	158
China	10	29	92	131
India	21	22	79	121
South Korea	15	14	68	97
Chinese Taipei	3	0	71	74
Thailand	13	3	57	73
Philippines	5	6	9	20
Indonesia	6	4	8	18
Vietnam	2	0	15	17

Special and Differential Treatment

- ▶ All stages – particular consideration to special situation of LDCs
 - DSB shall pay particular attention to matters affecting developing countries interest (Art. 21.2 DSU)
- ▶ Additional legal advice from Secretariat: Article 27.2

Consultations

- Special attention to particular problems and interests of developing country Members (Article 4.10)
- Extending consultation periods (Article 12.10)

Panel

- ▶ Panel Composition:
 - Panellist from developing country member upon request (Article 8.10)

CONSTRAINTS TO EFFECTIVE PARTICIPATION OF DEVELOPING COUNTRIES AND LDCs IN THE DSM



- Low Awareness of trade laws and lack of legal capacity
- Costs and expenses of accessing the DSM
- Weak industry–government interface
- Issues of domestic governance

CONSTRAINTS TO EFFECTIVE PARTICIPATION OF DEVELOPING COUNTRIES AND LDCs IN THE DSM



LACK OF LEGAL CAPACITY

- Lack of officials and lawyers trained in WTO trade law in many Developing countries and LDCs in capitals and in missions
- Lack of domestic law firms that specialize/offer services in WTO law
- Limited ability to identify trade issues/trade barriers
- Insufficient academic/research institutes in the field of WTO law. For example—China has WTO research institutes in most provinces

CONSTRAINTS TO EFFECTIVE PARTICIPATION OF DEVELOPING COUNTRIES AND LDCs IN THE DSM



COSTS AND EXPENSES OF USING THE SYSTEM

- High costs of logistics–travel expenses
- Size of permanent missions in Geneva limited due to lack of resources
- High costs of engaging law firms
- Proposal by LDC Group in the context of DSU Reforms to amend Article 4.10 of DSU– due consideration should be given to the possibility of holding such consultations and other meetings in the capitals of LDCs

CONSTRAINTS TO EFFECTIVE PARTICIPATION OF DEVELOPING COUNTRIES AND LDCs IN THE DSM

INDUSTRY-GOVERNMENT INTERFACE

- Trade barriers effected by another government; industry of other Member feels impact
- No private right of action in the WTO DSM
- Insufficient co-ordination between private sector and government
- Lack of communication, information flow between private sector and government for identifying trade barriers
- Lack of proper channels for interaction between government and private sector

CONSTRAINTS TO EFFECTIVE PARTICIPATION OF DEVELOPING COUNTRIES AND LDCs IN THE DSM



GOVERNANCE ISSUES FACED BY DEVELOPING AND LDC MEMBERS IN USING THE DSM

- Government plays central and vital role in the dispute settlement process
- Lack of proper co-ordination between different departments/ministries in government: co-ordination between line ministry and trade ministry
- Legal capacity of Economic/Trade Ministry dealing with WTO issues
- Hesitation/reluctance to use the DSM—apprehension on political lines; apprehension about remedies, implementation.

SUGGESTIONS FOR BUILDING CAPACITY FOR EFFECTIVE UTILIZATION OF THE WTO DSM

DEVELOPING LEGAL CAPACITY

- Many LDCs yet to take part in DSM
- Participation as third party provides useful experience
- Developing research and academic capacity – programmes on WTO law in law schools, establishing research centers affiliated to the government. Example–China has a WTO research centre in every province
- Internship opportunities in WTO missions at Geneva
- Utilizing training programmes offered by WTO Secretariat, ACWL, other institutes

BUILDING CAPACITY FOR EFFECTIVE UTILIZATION OF THE WTO DSM



DEVELOPING INSTITUTIONAL CAPACITY

- Developing closer links between government and private sector by establishing clear and adequate channels on issues related to WTO law.
- Revolving-door policy in the USA—government officials leave to join private sector and join government again after few years

RESOLVING GOVERNANCE ISSUES

- Need to build capacity/design structures within the government apparatus, e.g. establishing WTO cell in trade ministry/trade department.
- Better co-ordination between the line ministries and the commerce/trade ministries
- Developing communication channel between all stakeholders for identifying and assessing trade barriers.

ACWL



- Established in 2001 by Agreement Establishing the ACWL
- Mission– *“Provide developing countries and LDCs with the legal capacity necessary to enable them to take full advantage of the opportunities offered by the WTO.”*
- Established to help developing countries and LDCs overcome constraints .
- Members–Developing countries 30, LDCs 43 (including the acceding LDCs)
- Co-administered and co-financed by its developed and developing country Members
- Independent of the WTO

Source: ACWL at www.acwl.ch

ACWL



ROLE OF ACWL IN ASSISTING DEVELOPING AND LDCS IN DISPUTE SETTLEMENT

- Provides support in WTO panel, Appellate Body and implementation proceedings and in reaching mutually-agreed solutions.
- Assists in:
 - consultation process
 - Drafting submissions, requests
 - Advising on panel composition, WTO law
 - Appellate process, notification of appeal
 - drafting responses to questions
 - Implementation phase
 - Arbitration proceedings under article 21.3, article 21.5, article 22.6
- Training Programmes, Secondment Programmes for officials from developing countries.
- LDCs not required to become member to use ACWL services at minimal costs

Source: ACWL website at www.acwl.ch

Certain Disputes Where ACWL Has Provided Support

- *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines (To Thailand)*
- *South Africa – Anti-Dumping Measures on Uncoated Woodfree Paper (To Indonesia)*
- *India – Anti-Dumping Measure on Batteries from Bangladesh (To BanglaDesh)*
- *United States – Measures Relating to Shrimp from Thailand (To Thailand)*
- *India – Measures Affecting the Automobile Industry (India)*
- *United States – Transitional Safeguard Measures on Combed Cotton Yarn from Pakistan (Pakistan)*

Source: ACWL website at www.acwl.ch

Thank You