



# **The WTO and how it works**

## **WTO Dispute Settlement**

**Dr. Gustav Brink**

# Agenda

- ↪ **What is the WTO?**
- ↪ **How are decisions made in the WTO?**
- ↪ **What are trade remedies and how do they work?**
- ↪ **What is dispute settlement and how does it work?**



**The WTO**



# International trade organisations

- How many international trade organisations are there?
- What are the Bretton Woods institutions and how did they come about?
- What is the WTO and how does it differ from the GATT?
- Is the WTO important for Africa?
- Is the WTO important for South Africa?

# International Trade Institutions (2)

## ∞ GATT/WTO

- ∞ governs the rules of international trade;
- ∞ provides a forum for dispute resolution, all parties = power

## ∞ IBRD – known as the World Bank

- ∞ original mandate to provide capital from countries not devastated by WWII (e.g. US) to shattered economies of Europe and Japan
- ∞ following success this was extended to providing capital to less developed countries

## ∞ IMF – International Monetary Fund

- ∞ key role to maintain exchange rate stability;
- ∞ assisting countries facing balance of payment crises to deal with those crises through access to special drawing rights rather than by resorting to trade restrictions

## ∞ WIPO, ILO, ITU, UNDP, UNCTAD, AICIC, etc.

## Your views for a trade organisation

What would you have in an international trade organisation and in international agreements if you were economically the **strongest** nation in the world?

## Your views for a trade organisation

What would you have in an international trade organisation and in international agreements if you were economically the **weakest** nation in the world?

# Your views for a trade organisation

What would you have in an international trade organisation and in international agreements as **South Africa**?



# Globalisation

- ❧ **What are the benefits of globalisation?**
  - ❧ **Static gains due to better resource allocation in line with comparative advantage (definition of comparative advantage: the ability to produce a good or render a service at a lower opportunity cost than other);**
  - ❧ **cost savings due to economies of scale and enhanced product variety;**
  - ❧ **dynamic gains from technology transfer;**
  - ❧ **cost reductions from learning-by-doing;**
  - ❧ **reduced unproductive rent-seeking activity associated with reduced trade restraints**

# Globalisation (2)

- **What are the costs of globalisation?**
  - **Financial Integration exposes developing countries to external shocks (Asian, Mexican, Brazilian, Argentinean, South African crises)**
  - **Regional job losses owing to inefficient use of resources or lack of comparative advantages**
  - **Domination by larger [more efficient] economies (US, EU, China) at expense of smaller economies (*WTO - Upland Cotton case*)**

# What is GATT/WTO?

- **Short background**
- **Havana Charter signed in 1947**
- **Not ratified by US government by 1951**
- **ITO never established, so GATT as an agreement continued**
- **Through 8 negotiation rounds aimed at liberalising world trade (next slides)**

# What is GATT/WTO?

- **Doha Development Round 2001-present:**
  - 164 Members, 21 observers
  - dealing with developmental issues
  - Special decisions taken on TRIPS compulsory licensing; and on agricultural safeguards
  - Last Ministerial Conference in Nairobi, next in December in Buenos Aires
  - DDA does not address all covered Agreements (e.g. anti-dumping and safeguards, but not CVD)
  - only affects approximately \$9 billion of trade

# What is GATT/WTO?

## ☞ GATT contains five fundamental principles:

- ☞ trade to be conducted on non-discriminatory basis
- ☞ domestic industries should be protected only through tariffs and not through quantitative controls (exceptions apply)
- ☞ prohibition of discrimination against importers through internal taxes and regulations
- ☞ in case of disputes parties should enter into consultations aimed at avoiding or minimising injury to the trade interests of the parties concerned, the machinery of which is supplied by the WTO DSU
- ☞ WTO is NOT about free trade, but about FREER trade

# From GATT to WTO

- **What are the major differences between GATT and the WTO?**
  - **CONTRACTING PARTIES** versus members (international treaty versus organisation)
  - **Scope: goods only versus goods, services and IP**
  - **WTO** is single undertaking, i.e. all members bound by all Agreements (Art II.2)
  - **Positive versus negative consensus in dispute settlement (3 elements)**

# Structure of the WTO (2)

## ☞ The Ministerial conference

☞ Meets at least every two years (1996-Singapore; 1998-Geneva; 1999-Seattle; 2001-Doha; 2003-Cancun; 2005-Hong Kong; 2007-none, 2009 – Geneva mini)

☞ Absolute decision-taking authority

## ☞ The General Council

☞ Meets around 12 times per year

☞ The Councils of Goods, Services and TRIPS

☞ Committees, e.g. on ADP, CVD, SPS, RoO

☞ DSU, Panels and the AB

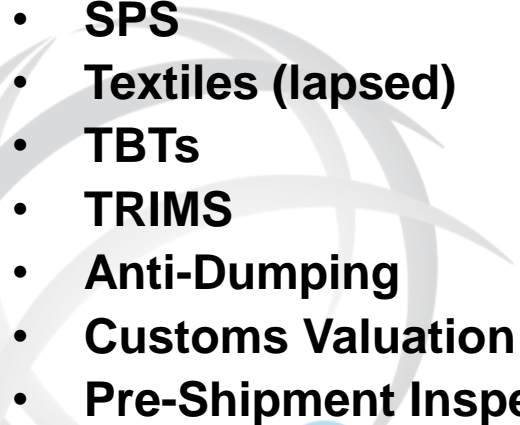
☞ TPRM


# Structure of the WTO (3)

- WTO Agreement with 4 Annexes; Art II.s
- Annex 1 (Multilateral Agreements) has 3 parts:
  - 1A: GATT 1947
  - 1B: GATS
  - 1C: TRIPS
- Annex 2: DSU
- Annex 3: Trade Policy Review Mechanism
- Annex 4: Plurilateral Agreements (not binding on all)

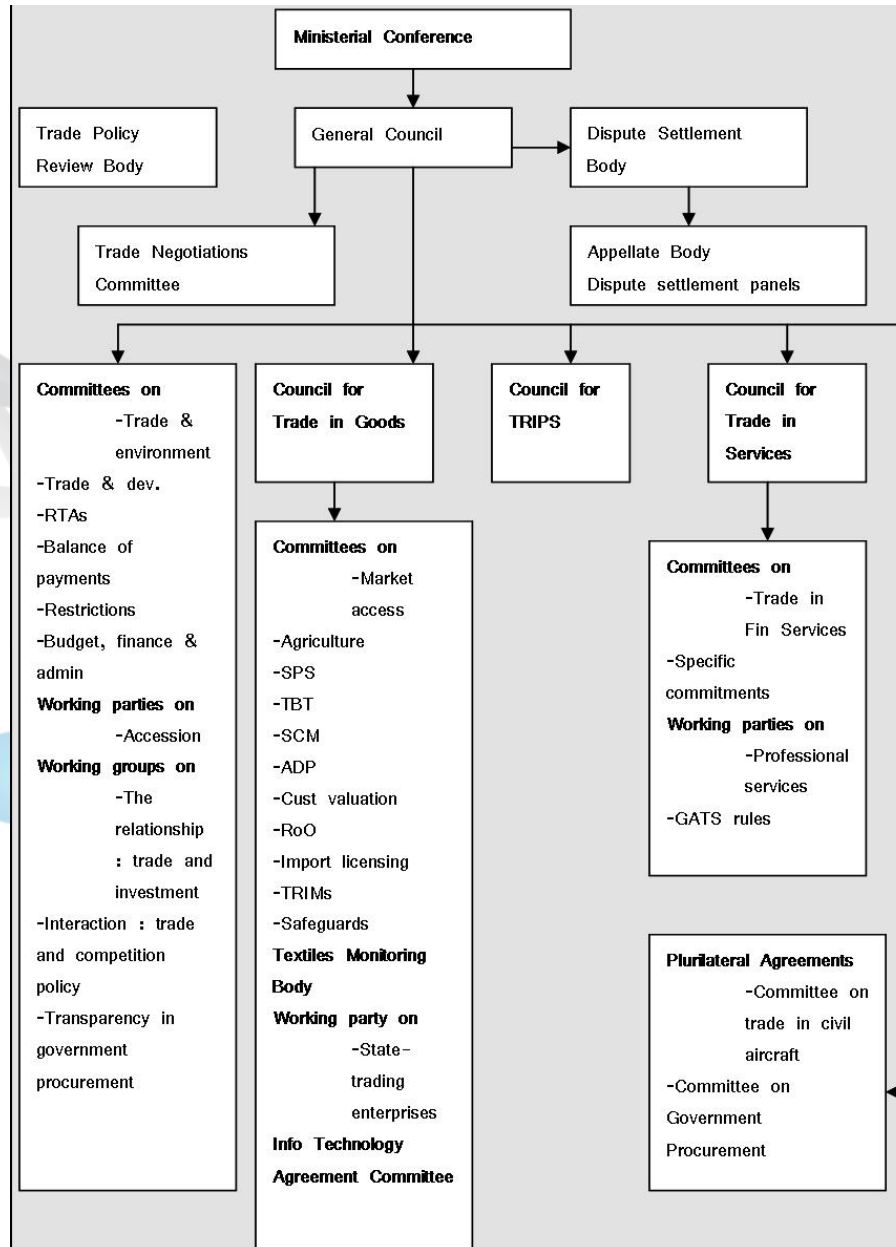


# WTO covered Agreements

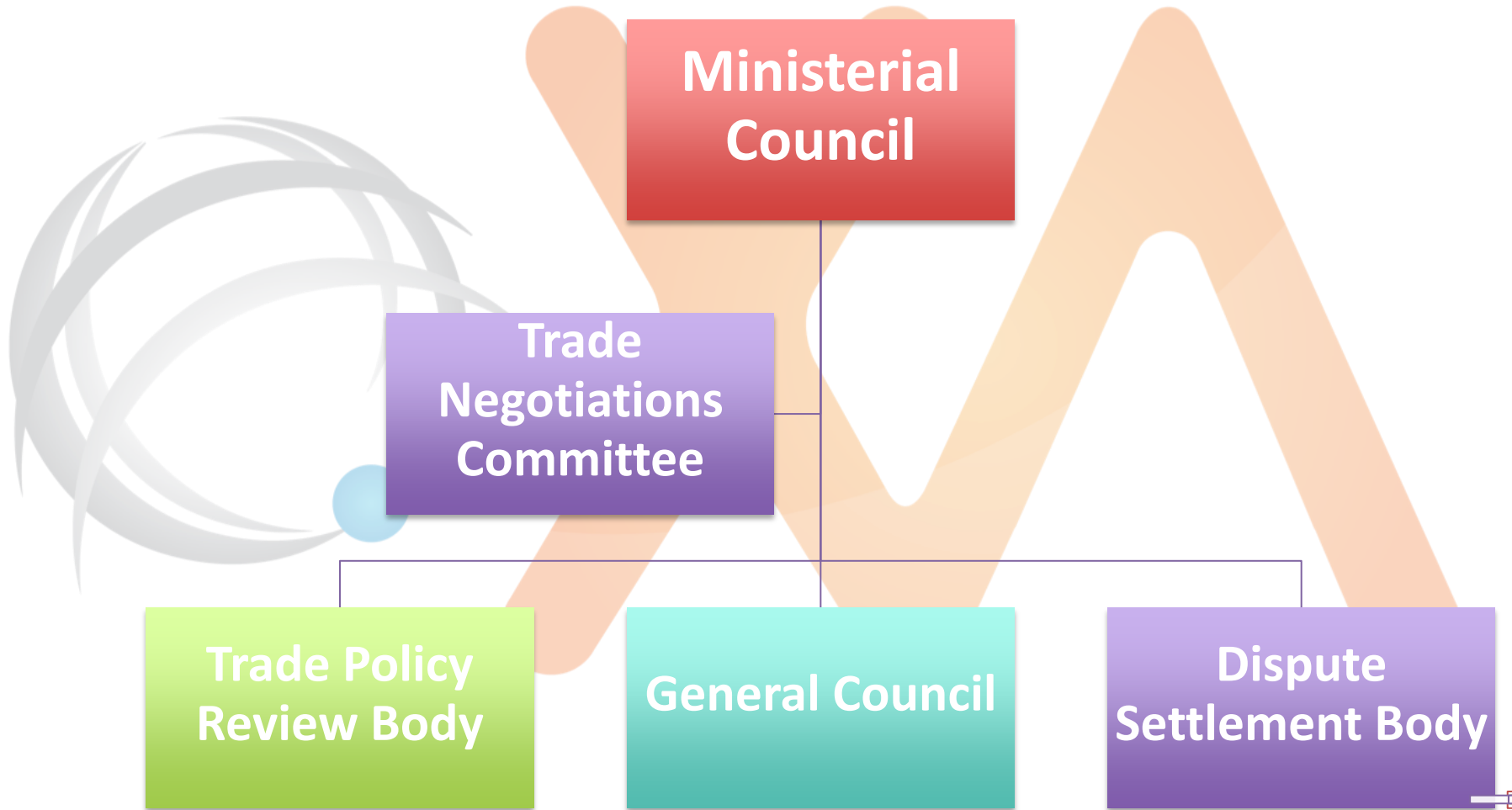
- 
- A stylized graphic of a globe with grey curved lines representing latitude and longitude, and a small blue circle at the bottom right.
- **Agriculture**
  - **SPS**
  - **Textiles (lapsed)**
  - **TBTs**
  - **TRIMS**
  - **Anti-Dumping**
  - **Customs Valuation**
  - **Pre-Shipment Inspection**

- 
- A large, stylized orange graphic resembling a double-headed arrow or a wide 'X' shape, positioned in the background behind the two lists of agreements.
- **Rules of Origin**
  - **Import licensing**
  - **SCM**
  - **Safeguards**
  - **GATS**
  - **TRIPS**
  - **DSU**
  - **TPRM**
  - **Plurilateral**

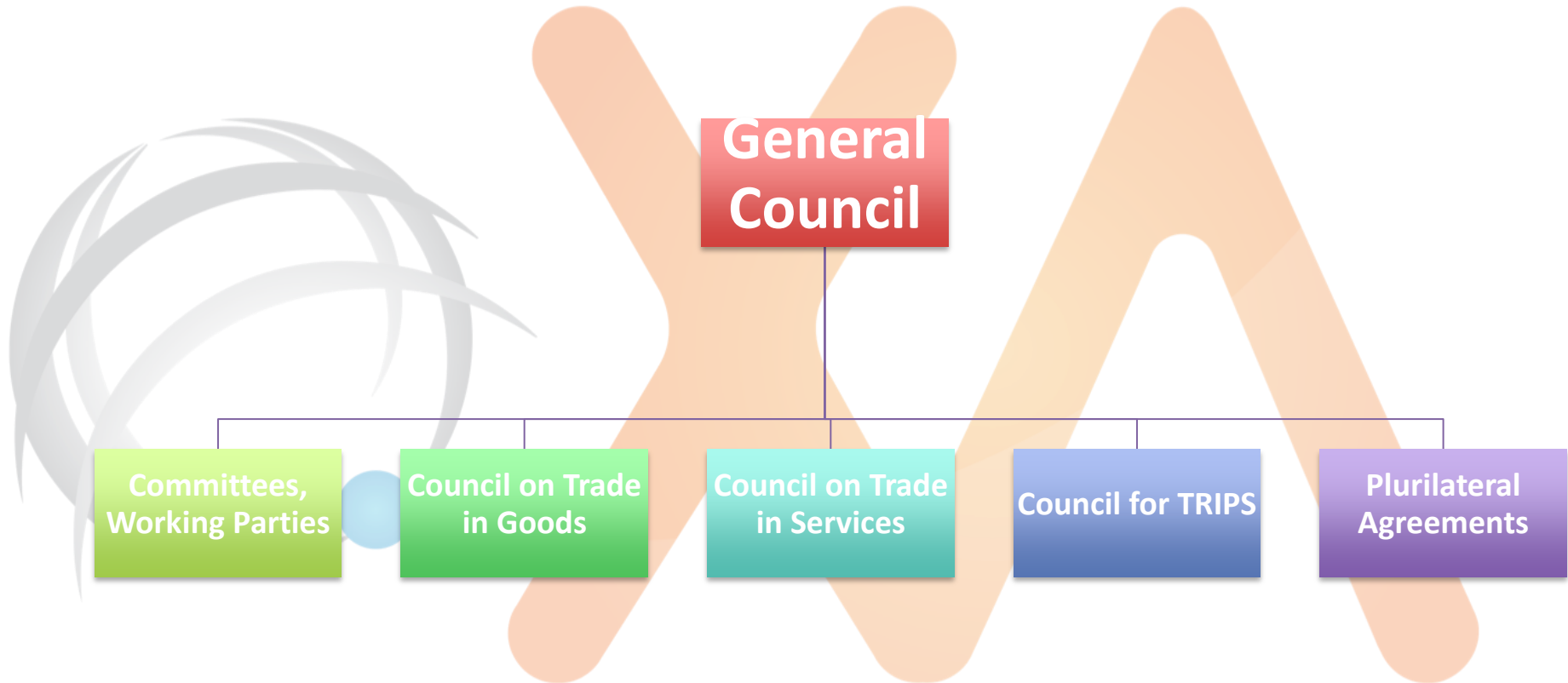
# Structure of the WTO



# Structure of the WTO



# Structure of the WTO





**Council on  
Trade in  
Goods**

Market Access

Agriculture

SPS

TBTs

SCM

ADP

Customs Valuation

Rules of Origin

Import Licensing

TRIMS

Safeguards



Committees  
and Working  
Groups

Trade and Environment

Trade and Development

RTAs

Balance of Payments

Restrictions

Budget, Finance and  
Administration

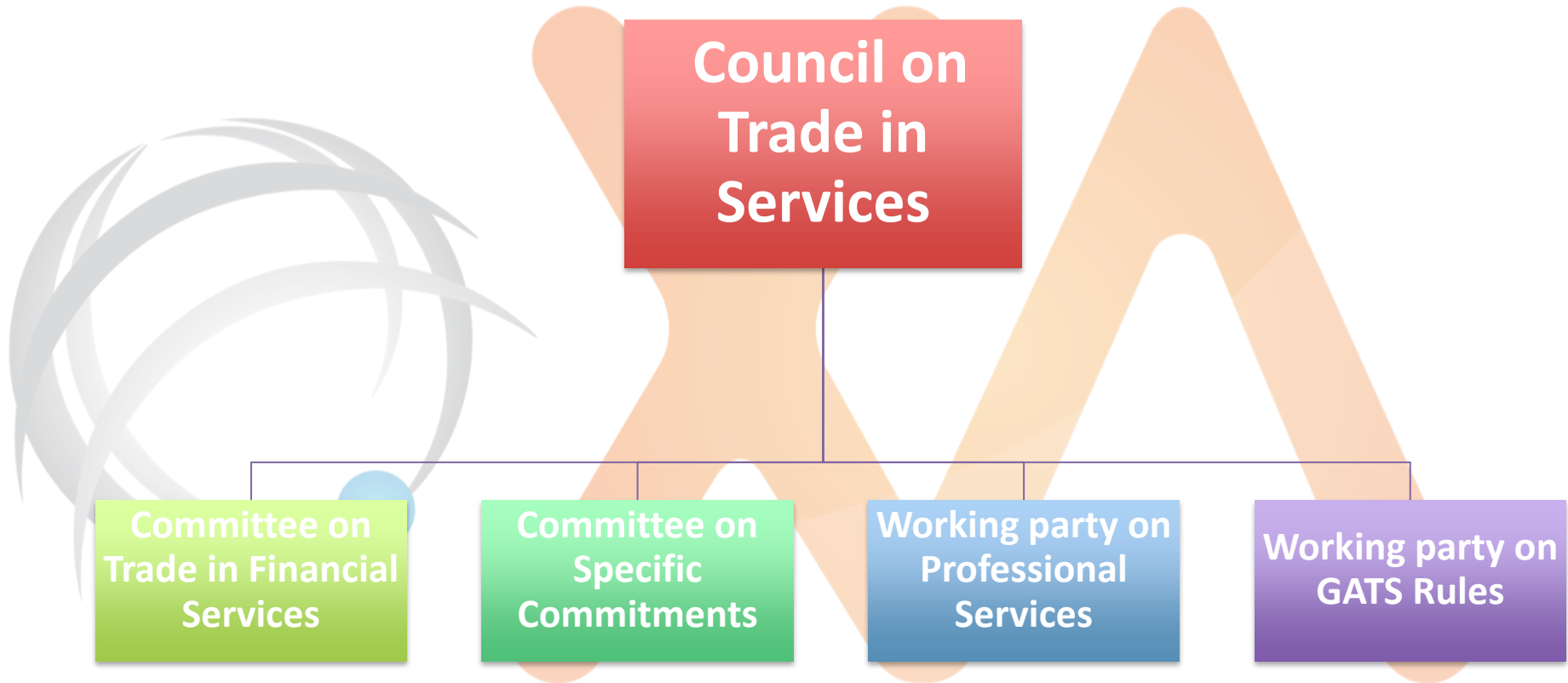
Working Party on Accessions

WG on Trade and Investment

WG on Trade and  
Competition Policy

WG on Transparency in  
Government Procurement

# Structure of the WTO



# Decision-making process

- What is decision-making by consensus?
- Can any Member veto a WTO decision?
- How many votes does South Africa have? And the US? China? The EU?
- Should the number of votes a Member has depend on its share of world trade or the size of its population?



# Decision-making process (2)

☞ Decisions are normally made through consensus, but what does this mean?

☞ Art IX:1 of WTO Agreement: Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting

☞ Footnote 1: The body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting when the decision is taken, *formally* objects to the proposed decision.

☞ What does this mean?

# Decision-making process (3)

- In theory, decision-making by consensus give each country, including ZA, *veto power*.
- In practice, veto power only used where decision affects
  - Important national interests
  - Important economic interests
  - Other important interests

# Decision-making process (4)

- ∞ In practice: “some countries that have difficulty with a particular decision will nevertheless remain silent out of deference to countries with a substantially higher stake in the pragmatic economic consequences of a decision” – John Jackson
- ∞ Decision-making by consensus in practice involves a degree of deference to economic power
- ∞ Problem: decision-making by consensus “reinforces conservative tendencies in the system. Proposals for change can be adopted only if unopposed, creating the potential for paralysis” – Hoekman and Kostecky

# Decision-making process: Special procedures (1)

- Special procedures apply to the following types of decisions:
  - Decisions by the DSB
  - Authoritative interpretations
  - Accessions
  - Waivers
  - Amendments
  - Annual budget and financial regulations

# Decisions by the DSB

- Decisions by DSB are taken in accordance with Art 2.4 of the DSU
- A party can block a *first* request for the establishment of a Panel
- Decisions are made by **negative** or **reverse** consensus, i.e. unless every Member disagrees with the finding of the DSB, such finding stands
- Art 3.2 DSU: No decision of the DSB can add to or subtract from the rights and obligations of any Member: *Japan – Alcoholic Beverages II*
- Decisions in theory apply only to the Members involved in the dispute

# Authoritative interpretations

∞ What is difference between “authoritative interpretations” under Article IX:2 and “amendments” under Art X (slide 38)?

∞ Art IX:2 WTO –

∞ *The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements... In the case of an interpretation of a Multilateral Trade Agreement in Annex 1, they shall exercise their authority on the basis of a recommendation by the Council overseeing the functioning of that Agreement. The decision to adopt an interpretation shall be taken by a **three-fourths majority of the Members***

- ∞ Authoritative interpretations are binding on all Members and may affect their rights and obligations
- ∞ Amendments: on request of any Member and as agreed to at GC

# Accessions, waivers & budget

- ☞ Art XII:2 WTO – accessions done on consensus, but if not possible on basis of two-thirds majority of Members
- ☞ Art IX:3 WTO – waivers can only be granted at a Ministerial Conference
  - ☞ Must be approved by at least 75% of Members, unless specifically provided for otherwise. In 1995 Members decided that waivers would only be granted on consensus basis
- ☞ Art VII:3 WTO – budget adopted by two-thirds majority

## Amendments to covered Agreements (2)

- What does this mean?
  - Any Member or the relevant Council can propose amendments
  - If no consensus is reached, 2/3 majority is required
  - Once adopted the proposal is submitted to Members for acceptance in terms of their national constitutional requirements
  - Amendments are only effective in respect of those Members that have accepted them



## Amendments to covered Agreements (3)

- But: Art X:2 – certain provisions can only be amended by consensus, incl. MFN, tariff schedules, decision-making process, DSU – these amendments are **not** submitted to Members for ratification
  - Any amendment to DSU binding on all Members
- Art X:3 – Member that refuses to accept certain amendments may be expelled



**Dispute settlement**

# What is dispute settlement?

- ∞ WTO Agreement: Annex 1A, 1B, 1C, 2, 3 and 4 – basic rules of international trade
- ∞ Rule of law applies (more bureaucracy under GATT)
- ∞ Sometimes Members violate benefits or rights of other parties – may declare dispute to enforce rights under WTO Agreement

# Legal basis for DS

## ❧ GATT Art XXIII: Nullification or impairment

- ❧ Failure of another Member to carry out its obligations;
- ❧ Application by another Member of any measure, whether or not in conflict with provisions of the Agreement;
- ❧ Existence of “any other situation”;

## ❧ DSU (Annex 2)

- ❧ Specific provisions in technical agreements

# Legal basis for DS (2)

- ✧ **DSU: Provides general rules regarding DS**
  - ✧ **Consultations (Art 4);**
  - ✧ **Establishment of panels (Art 6);**
  - ✧ **Standard terms of reference (Art 7);**
  - ✧ **Composition of panels (Art 8);**
  - ✧ **Procedure for multiple complainants (Art 9);**
  - ✧ **Third parties (Art 10);**
  - ✧ **Function of panels (Art 11):**
    - ✧ **make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with relevant covered agreements, and make such other findings as will assist the DSB in making recommendations or in giving the rulings provided for in the covered agreements.**

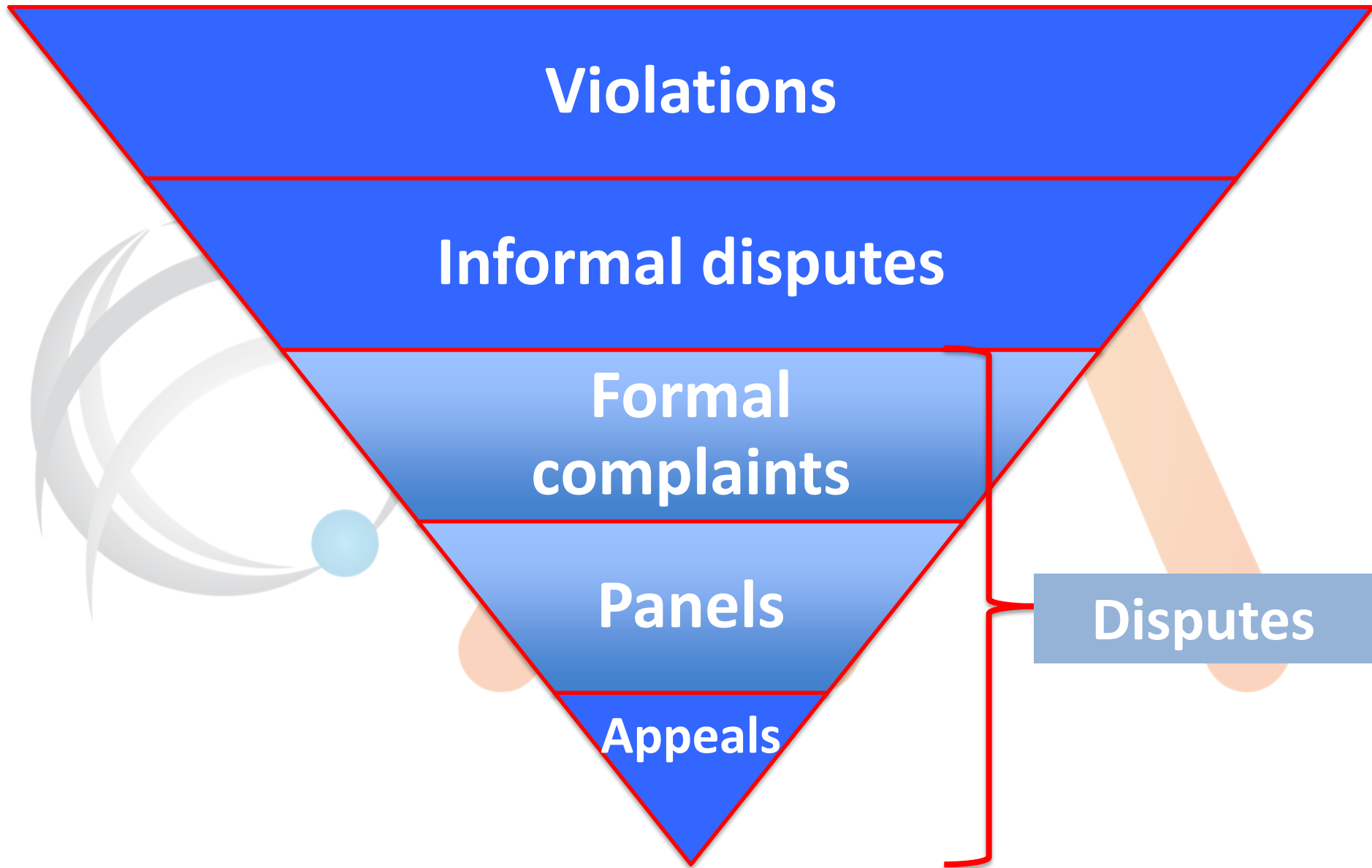
# Legal basis for DS (3)

- ∞ **Panel procedures (Art 12);**
  - ∞ **Annex 3 standard procedures**
  - ∞ **First written submissions**
  - ∞ **Panel meeting with parties, incl. third parties**
  - ∞ **Second written submissions**
  - ∞ **Panel meeting with parties**
  - ∞ **Normal time frame: max 6 months from composition to issuing report to parties (urgent cases 3 months; max 9 months)**
  - ∞ **May suspend work *at request of the complaining party* for up to 12 months**
- ∞ **Right to seek information (Art 13);**
- ∞ **Confidentiality (Art 14);**
- ∞ **Adoption of panel reports (Art 16);**
  - ∞ **Parties have 20 days after circulation to consider**
  - ∞ **Adopted within 60 days unless appealed**

# Legal basis for DS (4)

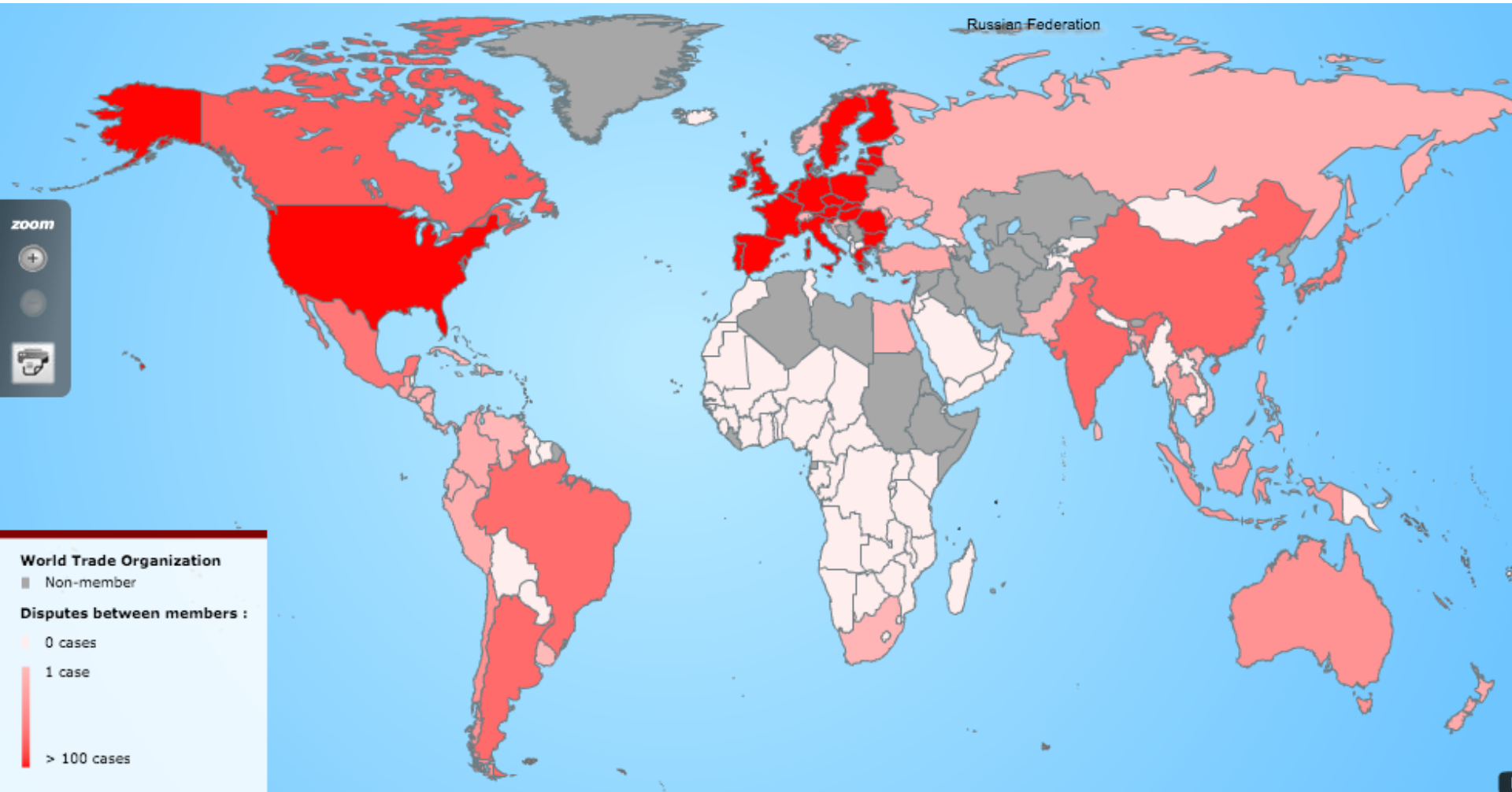
- ∞ **Appellate Body (Art 17);**
  - ∞ 7 standing members (ad hoc)
  - ∞ 3 per appeal
  - ∞ 60 days from appeal to circulation of AB report
  - ∞ Limited to issues of law covered in panel report and legal interpretations developed by the panel
  - ∞ In practice – also complete analyses left open by panel where required and possible
- ∞ **No ex parte communication with panel/AB (Art 18);**
- ∞ **Recommendations (Art 19);**
  - ∞ Shall recommend that Member bring its measure into conformity
  - ∞ May suggest ways in which Member could implement

# Dispute settlement process....

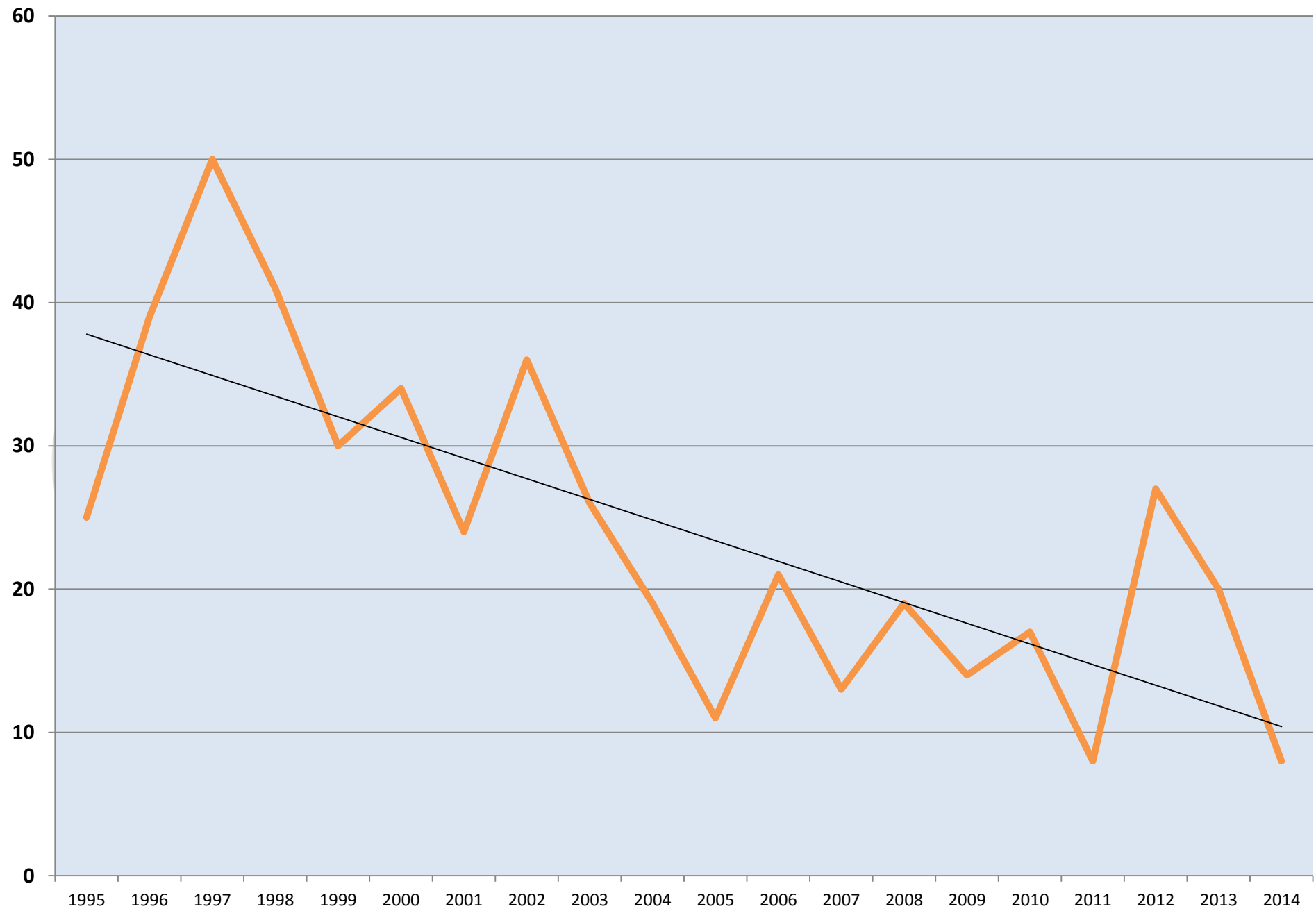




# Who uses DS?



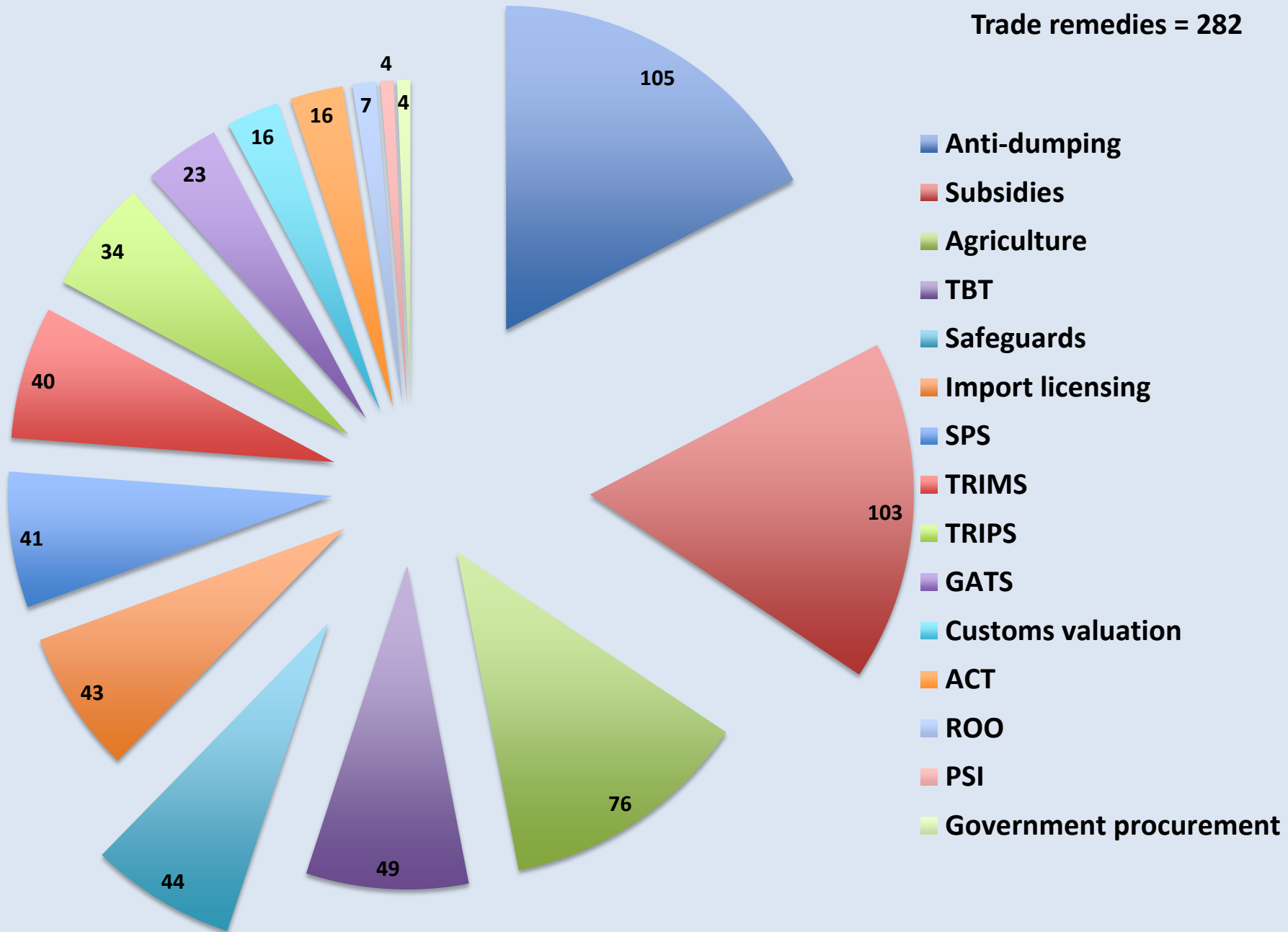
# Disputes by year



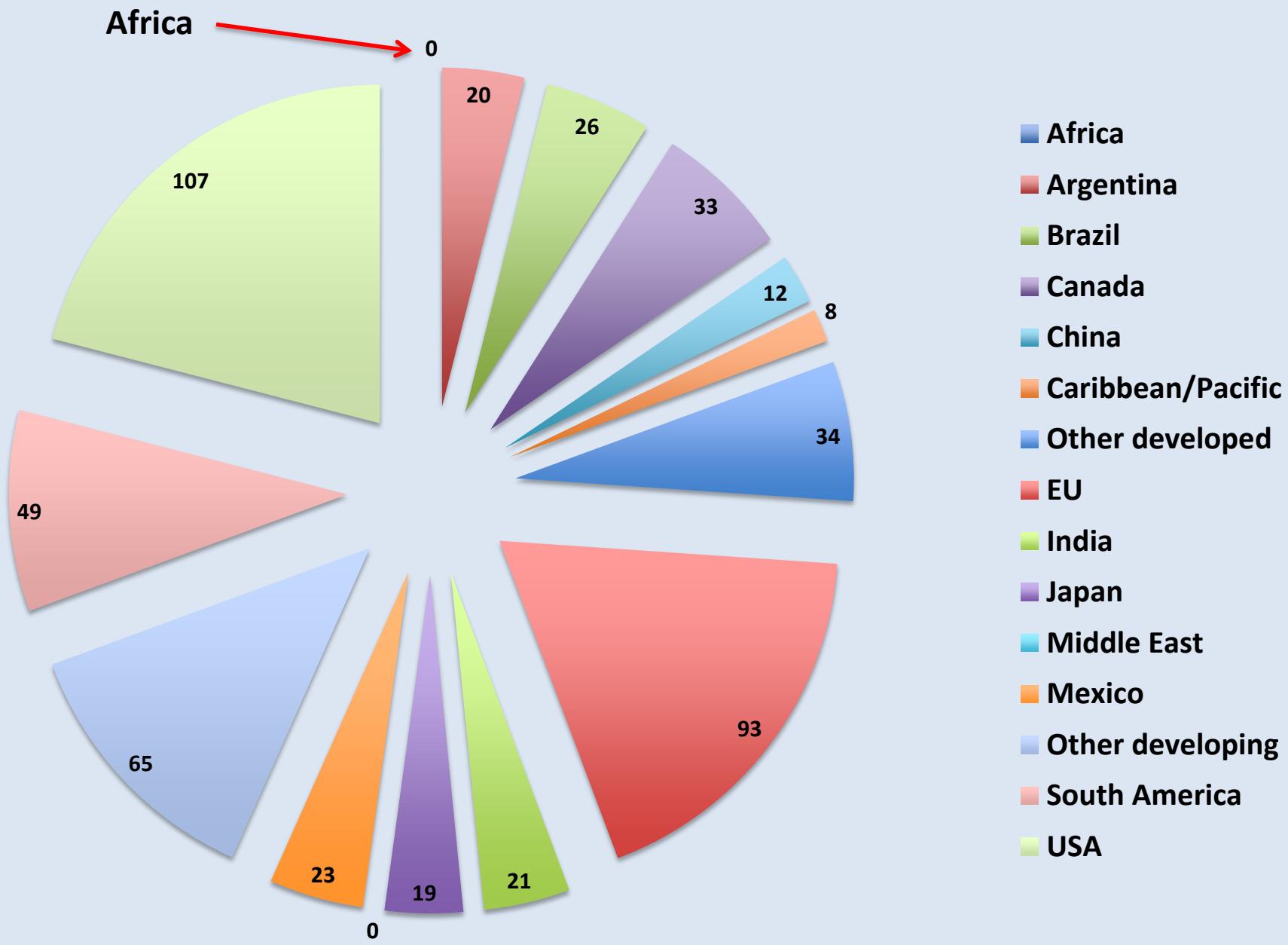
# Disputes by Agreement

Total = 624

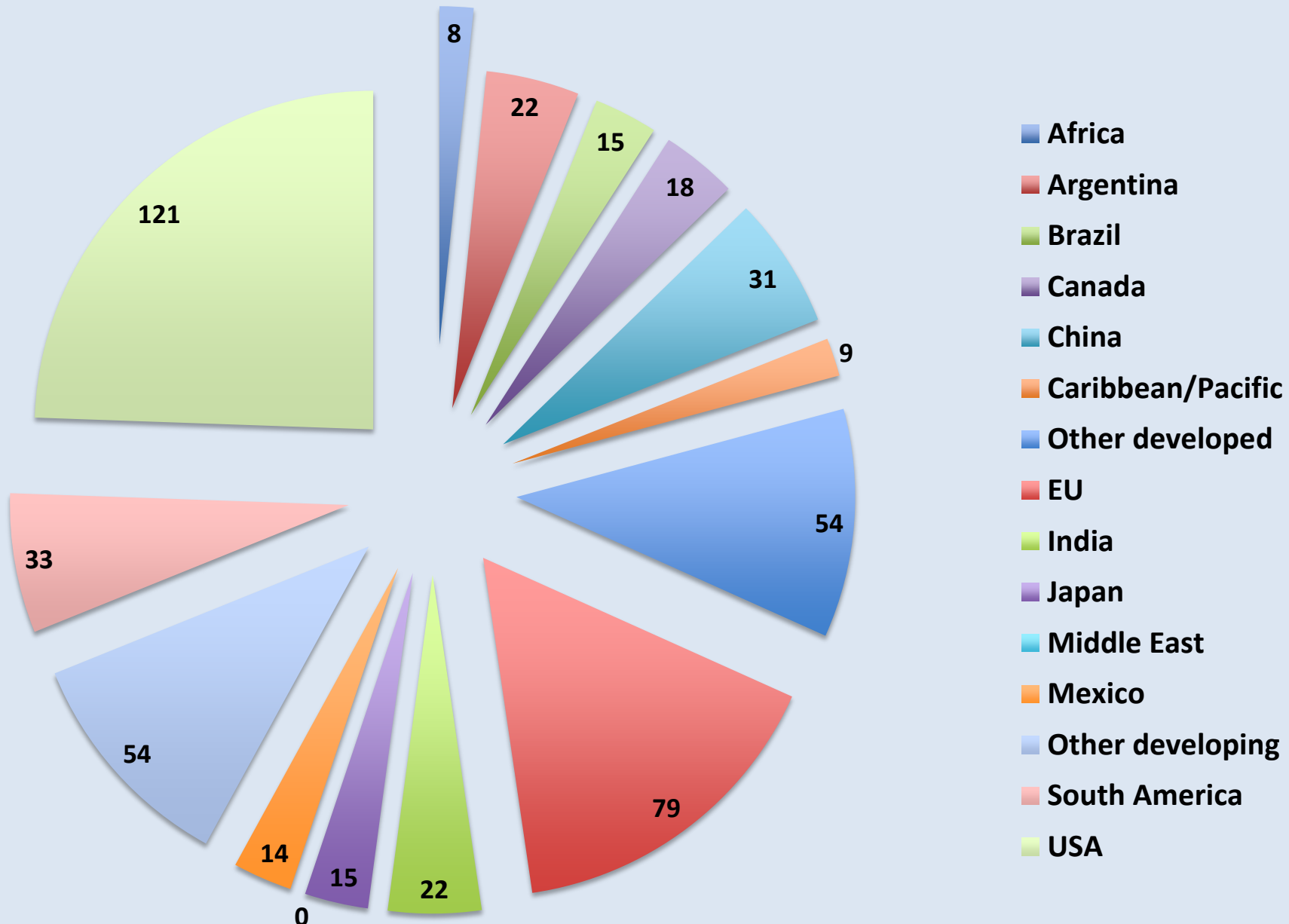
Trade remedies = 282



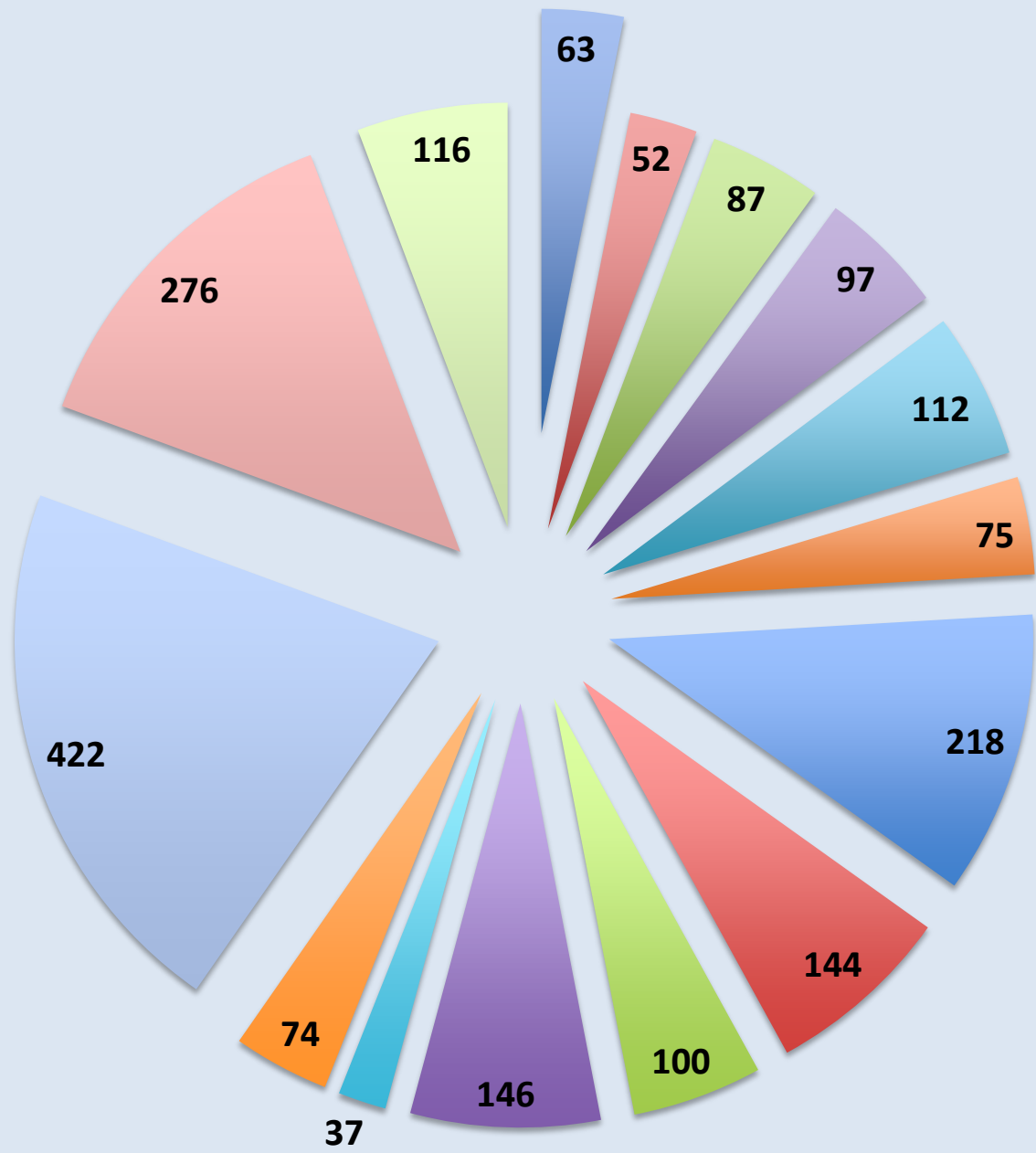
# As complainant



# As respondent



# As third party



- Africa
- Argentina
- Brazil
- Canada
- China
- Caribbean/Pacific
- Other developed
- EU
- India
- Japan
- Middle East
- Mexico
- Other developing
- South America
- USA

# The basics of DS

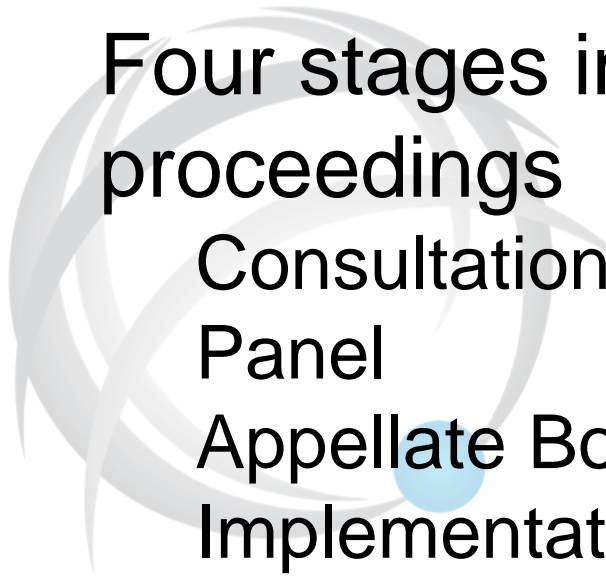
Four stages in WTO dispute settlement proceedings

Consultations

Panel

Appellate Body

Implementation



# Consultation stage

Mandatory

Written request for consultations

Reasons

Measures at issue

Legal basis

Good faith

Confidential

Possibility for other Members to join

Good offices, mediation and conciliation assistance

Mutually agreed solution must be notified:

Must be consistent with WTO Agreements

Must not nullify/ impair benefits of other Members

Must not impede the attainment of any of the objectives of WTO Agreements



# PANEL PHASE (1)

- Established by the DSB
- Upon the request of a party
- Request
  - In writing
  - Indicate whether consultations were held
  - Identify the specific measure at issue
  - Summarise legal basis
- The request must provide the terms of reference for the Panel to be established
  - AD: *the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective.*
  - TOR: By agreement between the parties within 20 days failing which standard TOR applies

# PANEL PHASE (2)

## Composition:

- Well-qualified governmental/non-governmental individuals
- Secretariat proposes names of panellists to parties
- Failing which the chairperson of the DSB appoints
- Number: 3
- Serve in personal capacity
- Selection must ensure independence of members with sufficient background and wide spectrum of experience
- Must be at least one member from developing country if a developing country involved
- May not be from any party to the dispute (incl. third parties)
- 8 South African panellists to date – 7 in trade remedies

# PANEL PHASE (3)

- Parties : Provision made for multiple complainants; but all different disputes; yet single process
- Third parties – having a substantial interest
  - Opportunity to be heard
  - Opportunity to make written and oral submissions
  - Submissions shall be reflected in Final Report

# PANEL PHASE (4)

## The Panel procedure

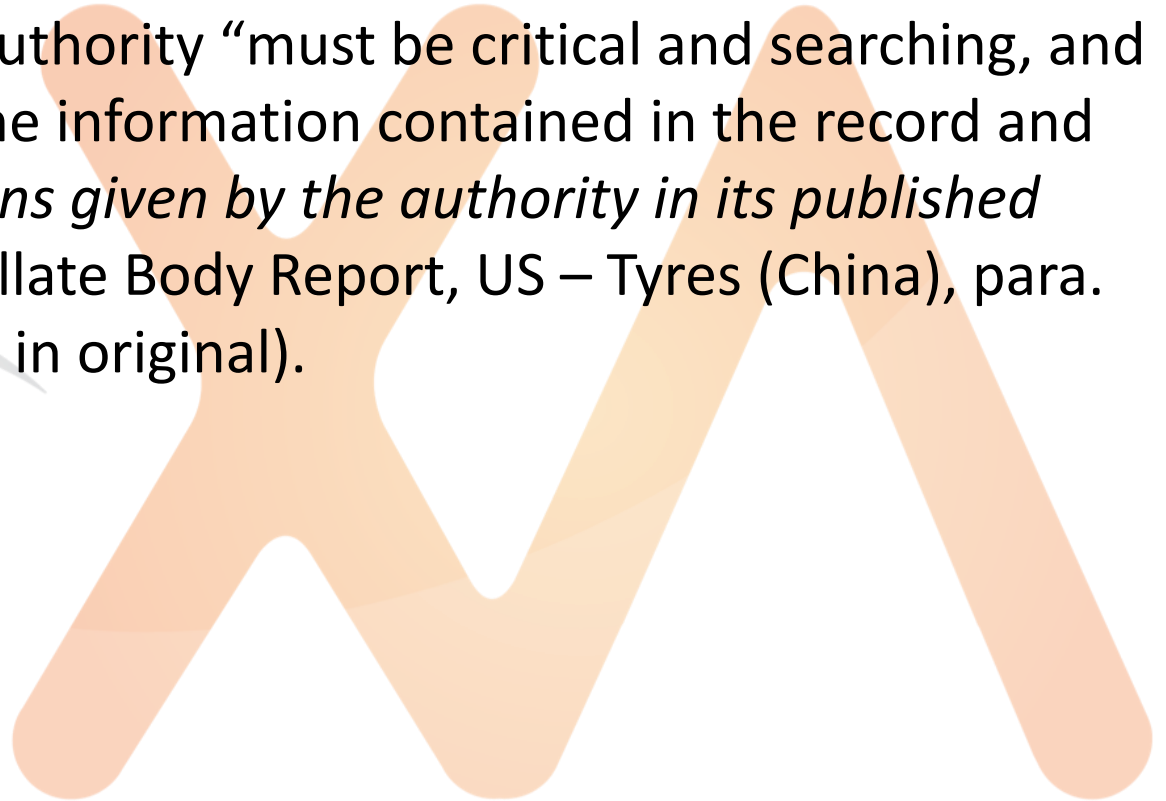
- Filing of submissions (4-9 weeks after date of composition) – **in practice now more than 12 months**
- Oral presentations during first meeting (1-2 weeks after respondent has filed submission)
- Filing of rebuttals (2-3 weeks after first substantive meeting)
- Second meeting of the parties (1-2 weeks after simultaneous filing of rebuttals)
- Procedural Issues:
- Confidentiality – submissions remain confidential even after resolution of the dispute
- What about confidentiality in original investigations?

# PANEL PHASE (5)

- Report:
  - Contents: facts, arguments of the parties, findings of fact, applicability of the legal provisions and basic rationale for findings.
- Interim review:
  - First interim report: only descriptive parts (facts and arguments by parties)
  - Parties can comment
- Then second interim report: descriptive + findings and considerations
  - Parties may request review of report and maybe a meeting to discuss, also comment on each others' submissions
- Issued to parties
- Circulated among all Members of DSB for adoption (negative consensus)

# PANEL FINDINGS

- A panel's examination of the conclusions of an investigating authority “must be critical and searching, and be based on the information contained in the record and the *explanations given by the authority in its published report*” - Appellate Body Report, US – Tyres (China), para. 329 (emphasis in original).



# APPELLATE BODY

- Appellate Body – composition
- 7 persons, but only 3 adjudicate a matter (all discuss informally)
- Appointed for a maximum period of 8 years
- Ad hoc
- Demonstrated expertise in law, international trade law and the subject matter of the agreements generally
- Previous president was a South African

# APPELLATE BODY

- Participants (not parties)
- Only the complaining or responding party can initiate appellate review
- Commences with filing of Notice of Appeal
- Cross-appeal possible
- Third participants may file submissions (within 25 days of Notice of Appeal)



# APPELLATE BODY

- Scope of jurisdiction:
- Limited to
  - issues of law in the Panel Report;
  - the legal interpretations developed by the Panel;
- Uphold, modify or reverse findings of Panel
- No remand
- Completing the analysis – requires sufficient factual findings/undisputed facts in the Report

# IMPLEMENTATION

- After adoption of Report:
- Concerned Member must indicate how it intends to comply (within 30 days after adoption of Report)
- If prompt compliance impractical, then reasonable time period allowed (*no automatic right to reasonable time period – only in compelling cases*):
  - As suggested by Member concerned and approved by DSB (within 30 days from adoption of report)
  - Or as agreed between the Parties (within 45 days from the adoption of report) – Average: 9.25 months
  - Or established through arbitration – 15 months (21(3)(c)) (within 90 days from adoption of Report) – Average : 12 months
  - Most recent: *US – CVMs on certain products from China* – 14.5 months

# Case study

- **China – HP SSST (Japan, EU)**
  - **High performance stainless steel seamless tubes**
  - **First lodged by Japan**
  - **Later also by EU**
    - **Significantly delayed the matter**

DISPUTE SETTLEMENT: DISPUTE DS460

## China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes (“HP-SSST”) from the European Union



This summary has been prepared by the Secretariat under its own responsibility. The summary is for general information only and is not intended to affect the rights and obligations of Members.

**Current status** [back to top](#)

**Panel report circulated on 13 February 2015** ⓘ

**Key facts** [back to top](#)

**Short title:** China – HP-SSST (EU)  
**Complainant:** European Union  
**Respondent:** China  
**Third Parties:** Japan; Korea, Republic of; India; Turkey; United States  
**Agreements cited:** Anti-dumping (Article VI of GATT 1994): Art. 1, 2.2, 2.4, 2.4.2, 3.1, 3.2, 3.4, 3.5, 6.4, 6.5, 6.5.1, 6.7, 6.9, 7.4, 12.2, 12.2.2, Annex I, Annex II  
(as cited in request for consultations)  
GATT 1994: Art. VI  
**Request for Consultations received:** 13 June 2013  
**Panel Report circulated:** 13 February 2015

**See also:**

- > [The basics: how disputes are settled in WTO](#)
- > [Computer based training on dispute settlement](#)
- > [Text of the Dispute Settlement Understanding](#)

**Other disputes involving:**

- > [Stainless Steel](#)
- > [European Union \(formerly EC\)](#)
- > [China](#)
- > [Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994](#)
- > [General Agreement on Tariffs and Trade 1994](#)

**Find all documents from this case**

(Searches Documents Online, most recent documents appear on top)

- > [quick help](#) with downloading
- > [comprehensive help](#) on Documents Online

> [all documents](#)

> **Problems viewing this page?**  
Please contact [webmaster@wto.org](mailto:webmaster@wto.org) giving details of the operating system and web browser you are using.

# HP SSST

## JAPAN

- Complaint 20 Dec 2012
- Consult: 31 Jan – 1 Feb 2013
- Panel request: 11 Apr 2013
- Panel est.: 24 May 2013
- Panel composed: 17 July 2013
- 1<sup>st</sup> meeting: 25-26 Feb 2014
- 2<sup>nd</sup> meeting: 20-21 May 2014
- Descriptive part of report: 18 July 2014
- Interim report: 19 September 2014
- Final report: 7 November 2014
- Appealed: 20 May 2015
- Cross appeal (China): 26 May 2015
- Deadline for AB: 28 July 2015
- AB report: 14 October 2015

## EU

- 13 June 2013
- 17-18 July 2013
- 16 August 2013
- 30 August 2013
- 11 September 2013

**If you have queries or further interest in the subject, please contact:**

**Gustav Brink – [gustav@xa.co.za](mailto:gustav@xa.co.za)/[gustav.brink@gmail.com](mailto:gustav.brink@gmail.com)**

