



Dispute Settlement in the WTO

Dr Gustav Brink

Agenda

- ↪ **What is DS?**
- ↪ **The legal basis for DS in the WTO**
- ↪ **Who uses DS and why/why not?**
- ↪ **The basics of DS**
- ↪ **DS case study: *China – HP SSST***

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

- ❧ 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....



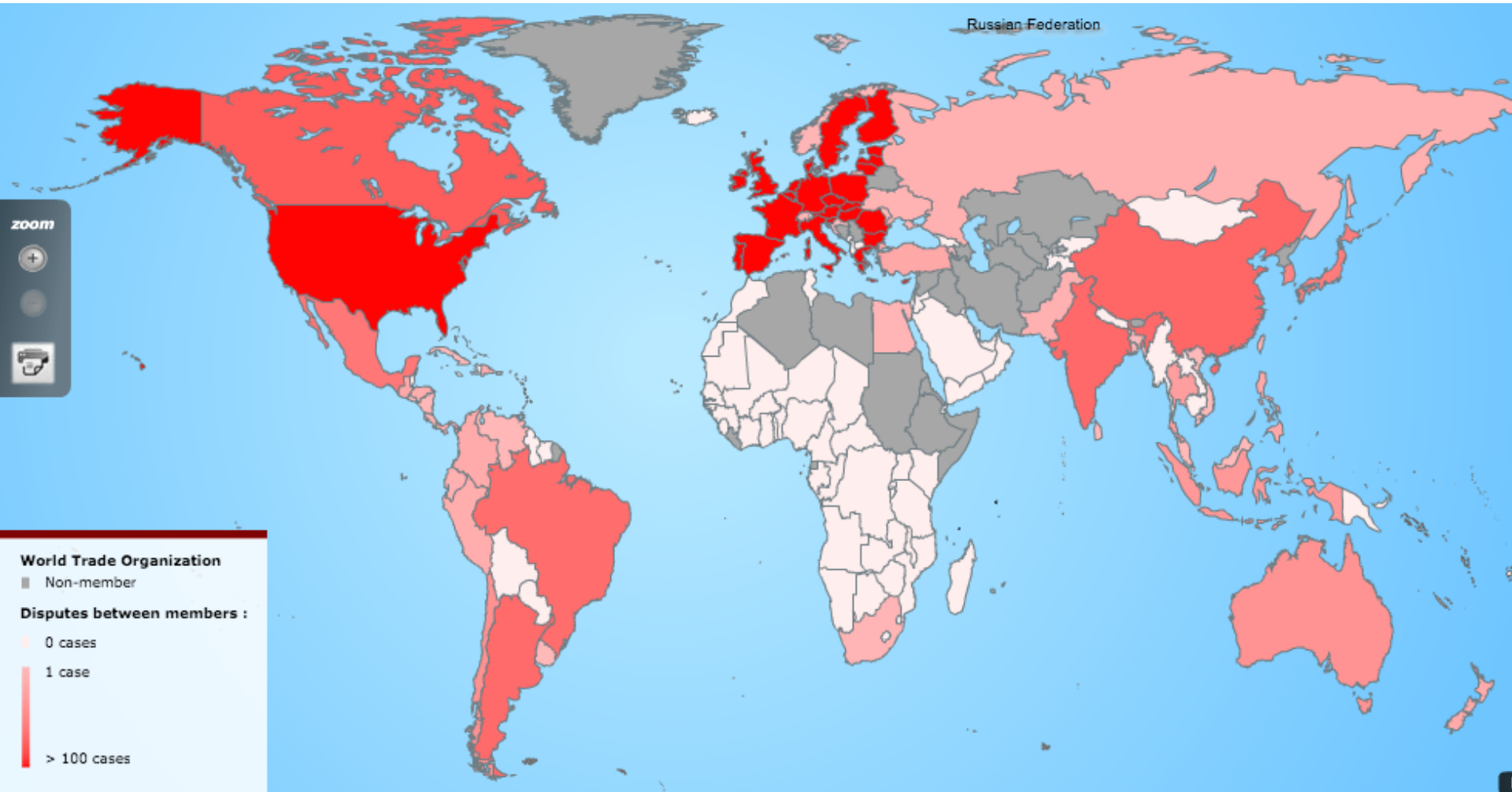
Informal disputes

Formal complaints

Panels

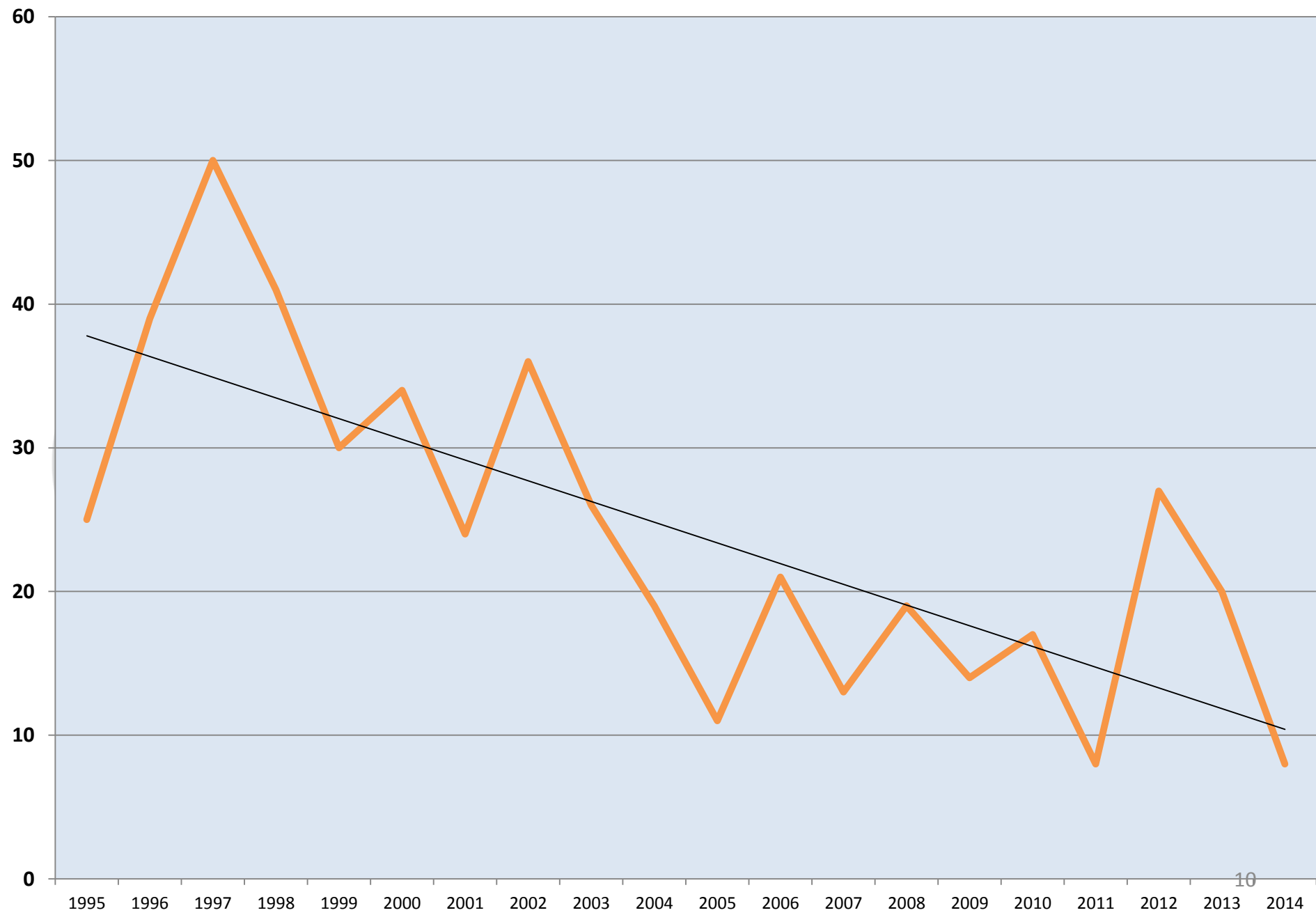
Appeals

Who uses DS?



Source: www.wto.org

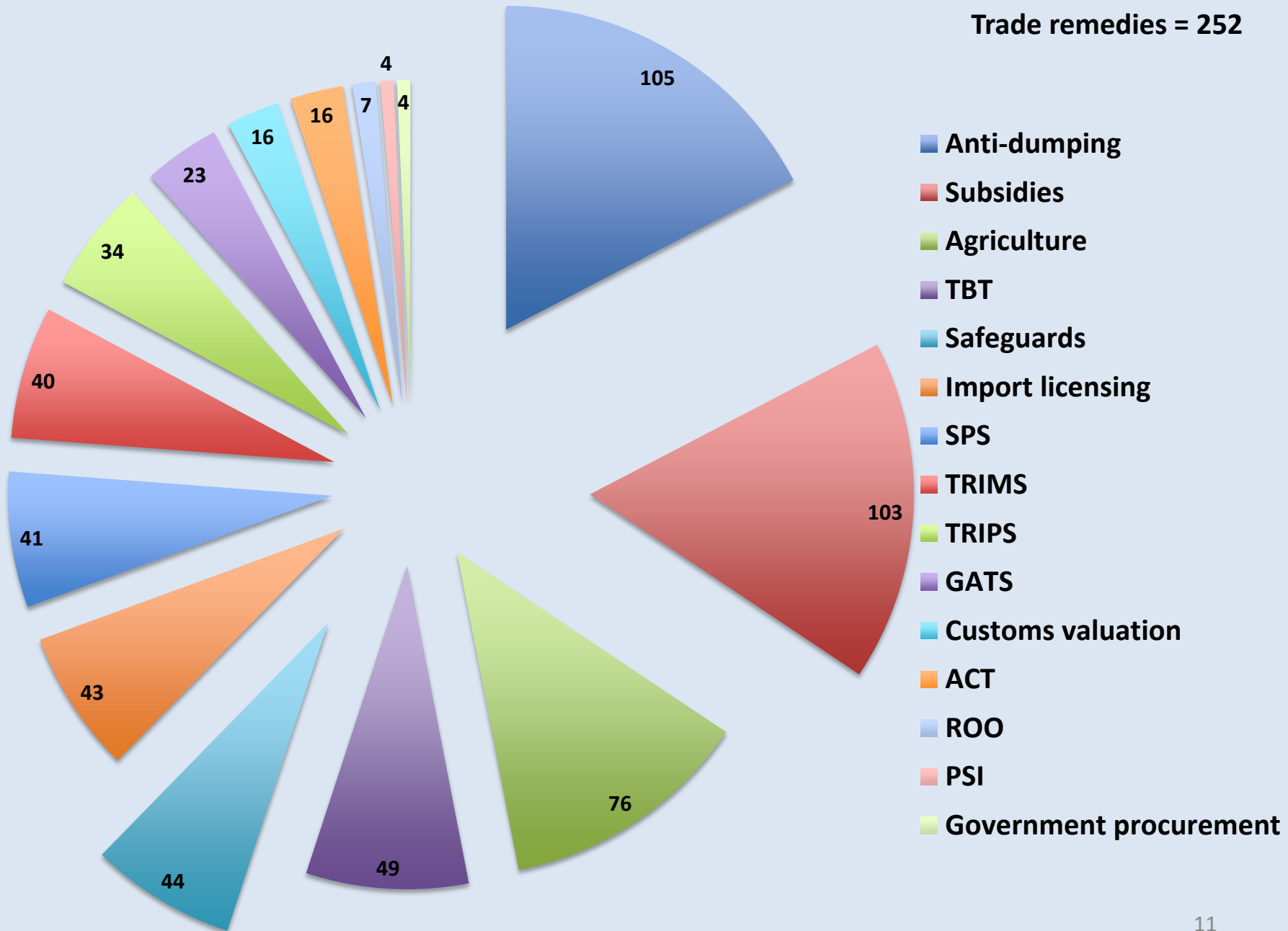
Disputes by year



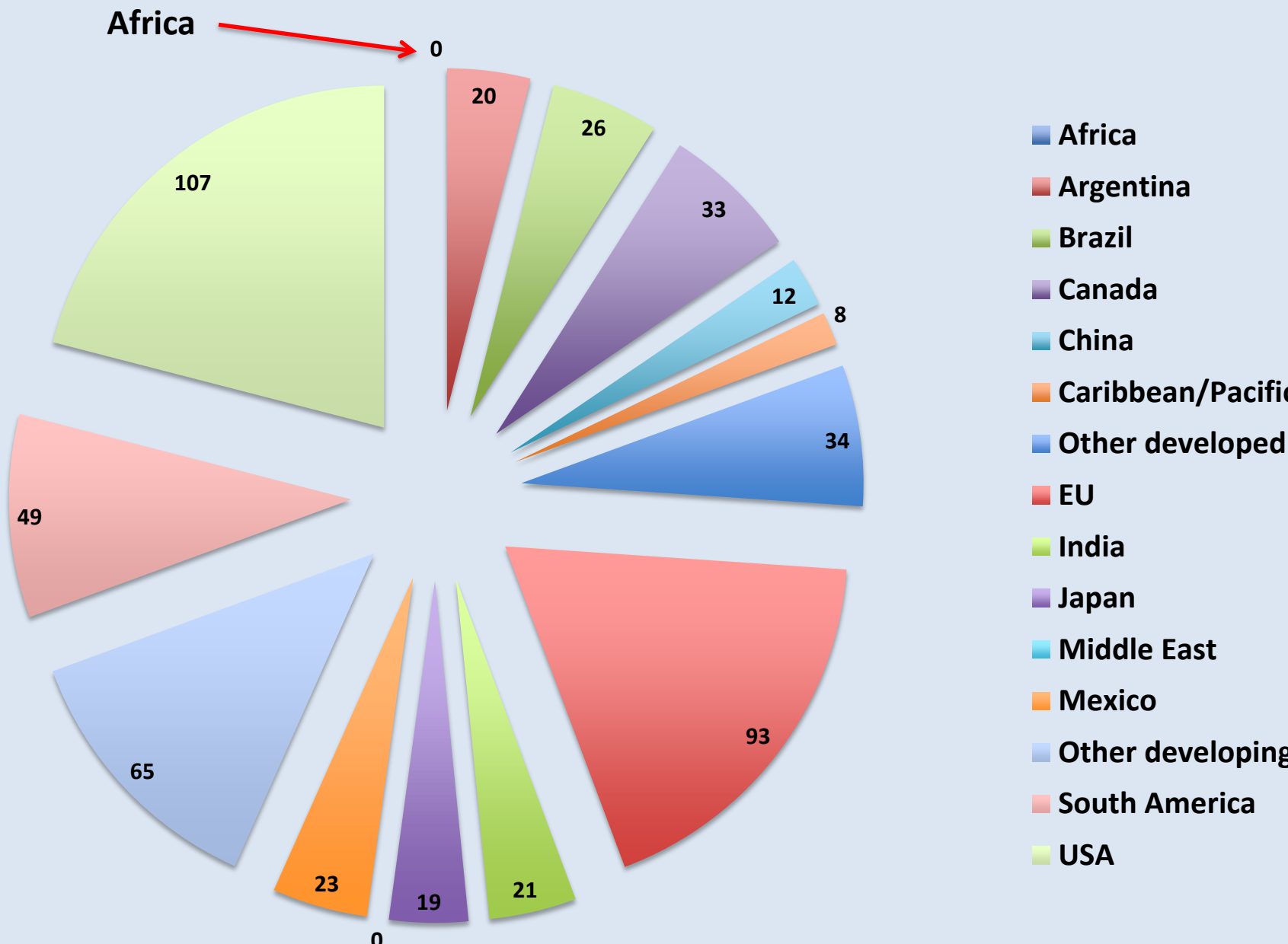
Disputes by Agreement

Total = 605

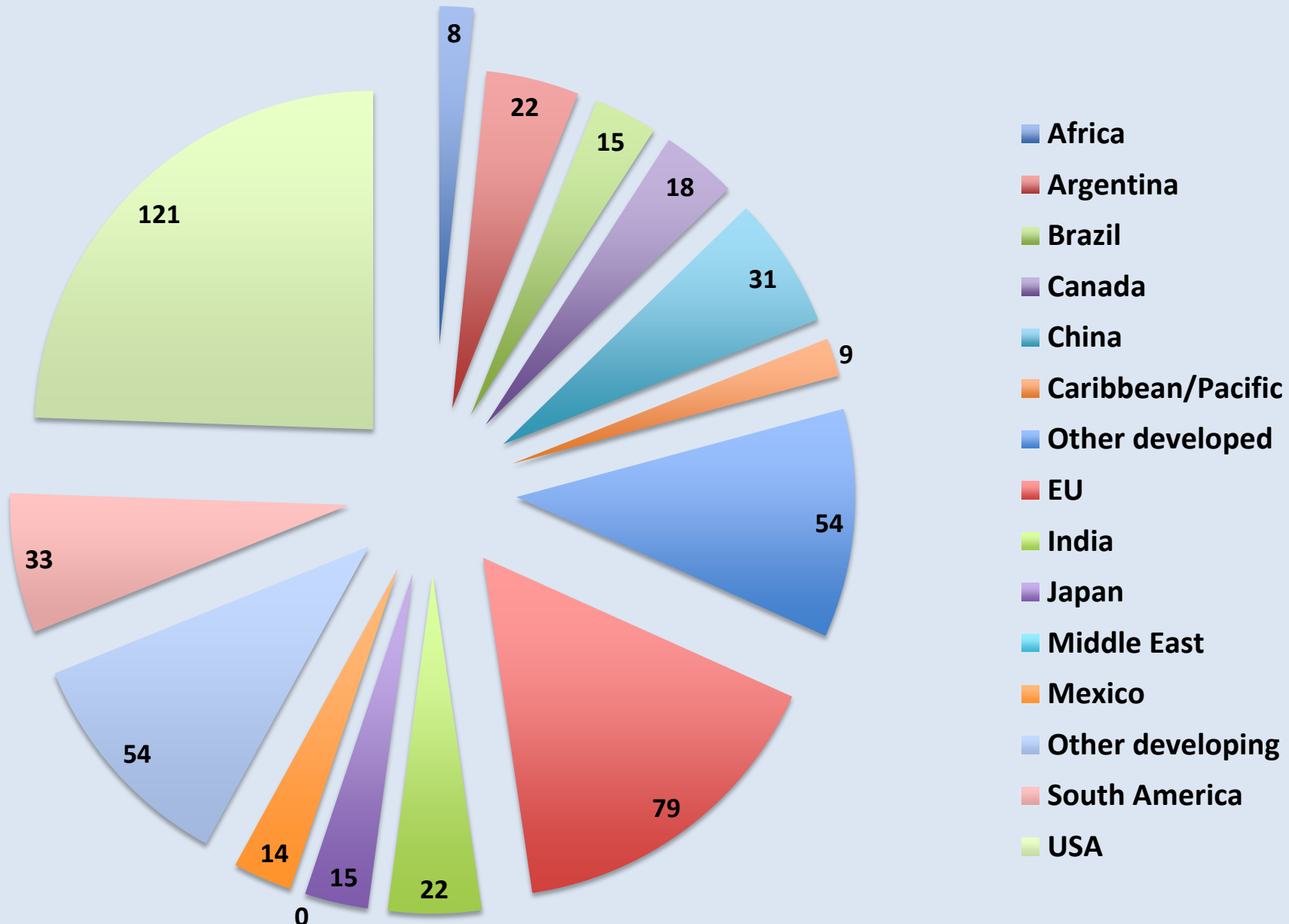
Trade remedies = 252



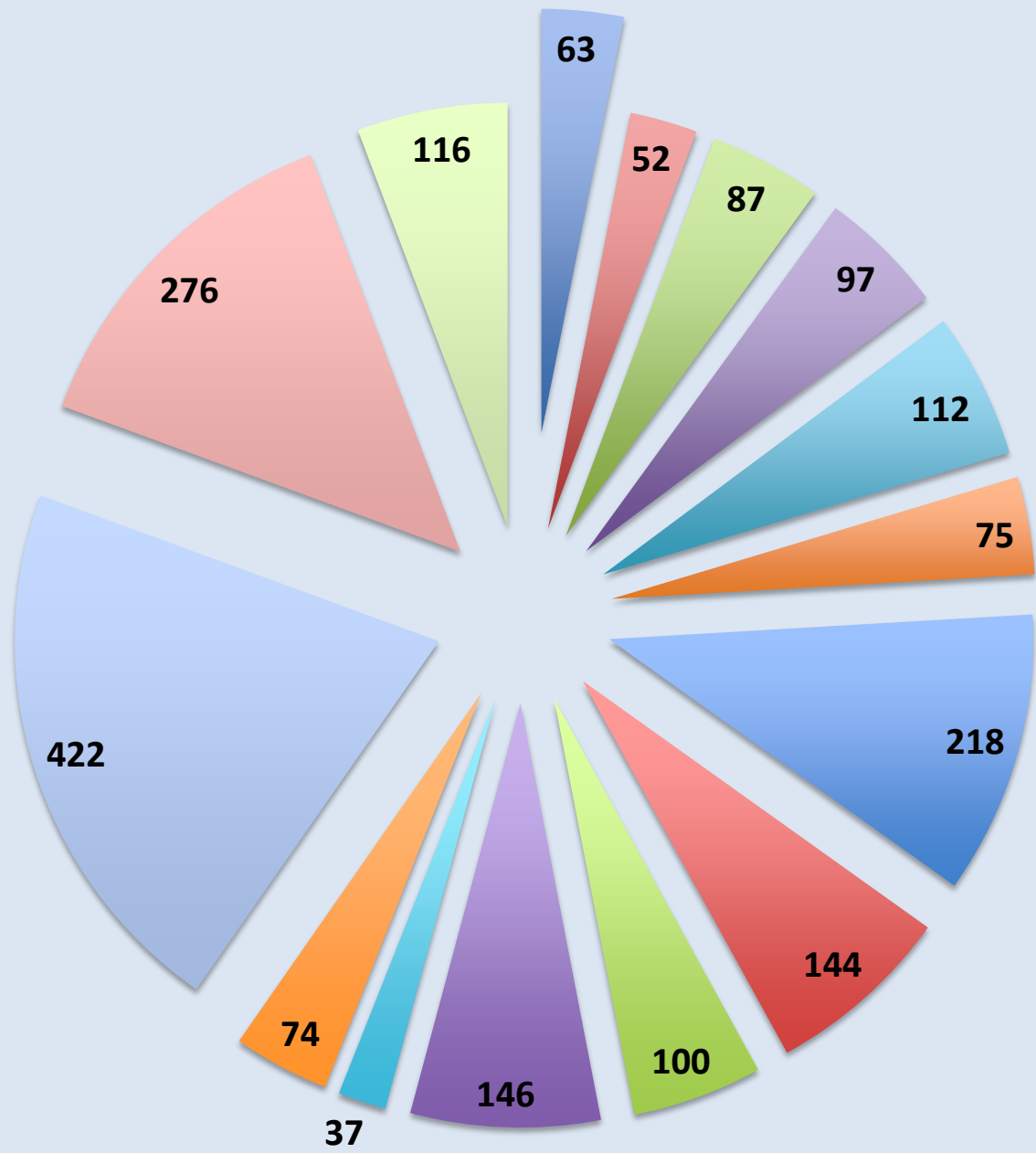
As complainant



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
- Names nominated by Members to be placed on a roster
- Secretariat propose names of Panellist 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
- 8 South African panellists to date – 7 in trade remedies

PANEL PHASE (3)

- Parties : Provision made for multiple complainants; but all different disputes
- Third parties – having a substantial interest
 - Opportunity to be heard
 - Opportunity to make written submissions
 - Usually during one session of the first substantive panel meeting
 - Extended third party rights
 - Submissions shall be reflected in Final Report

PANEL PHASE (4)

The Panel procedure

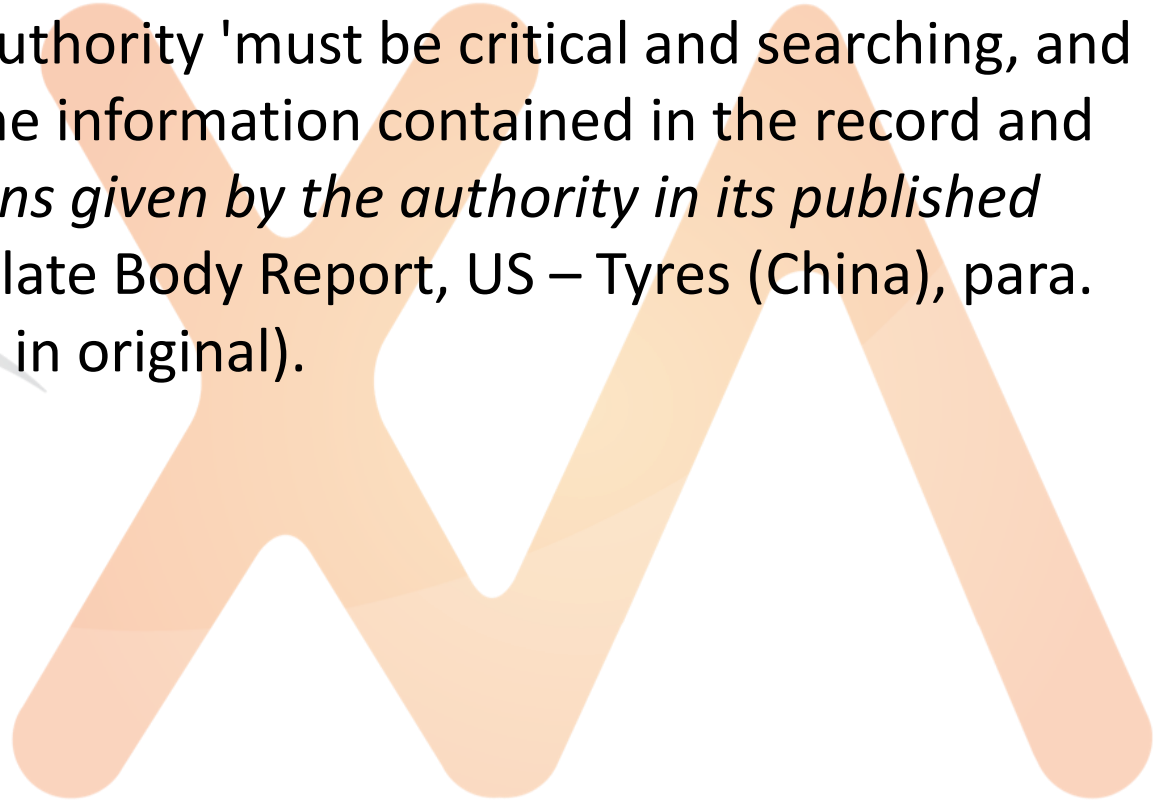
- Filing of submissions (4-9 weeks after date of composition)
– **in practice now more than 12 months**
- Oral presentations during first meeting (1-2 weeks after respondent has filed submission)
- Filing of rebuttals (2-3 weeks after first substantive meeting)
- Second meeting of the parties (1-2 weeks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

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
- Current process of nominations

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 giving details of the operating system and web browser you are using.

HP SSST

JAPAN

- Complaint 20 Dec 2012
- Consult: 31/1-1/2/2013
- Panel request: 11 Apr 2013
- Panel est.: 24 May 2013
- Panel composed: 17 July 2013
- 1st meeting: 25-26 Feb 2014
- 2nd 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
- Proposed new deadline: 14 October 2015

EU

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

Background information

- China imposed ADDs on HP SSST – 3 products (grades A, B, C)
- Nearly 90% of all sales were grade A and nearly no grade C sales
- Grades B and C can be used in all grade A applications, and C in lieu of B, but not other way round
- Significant price differences between grades
- No imports of grade A, yet highest domestic sales of grade A
- Problems with injury determination between different grades

Panel requests

- See separate documents



Issues raised (selection)

- Dumping: “reasonable SGA costs” – Annex 6.3 v 6.5
- Whether Art 3.2 requires an “effect” to be established for price undercutting, or only mathematical comparison – paras 7.123-7.126
- Extending findings for grades B and C to grade A – paras 7.136-7.140
- Scope of Art 3.4 injury finding – paras 7.152-7.153
- Weighing positive and negative injury factors – paras 7.
- Causality linked to market share – para. 7.181
- Causality – injury caused by other factors – paras 7.201&7.203
- Essential facts – para. 7.252
- Confidentiality issues, incl. confidential expert report
- Failure to provide proper explanations for findings
- Provisional measures imposed for 6 months – China did not defend



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



Gustav Brink – gustav@xa.co.za/gustav.brink@gmail.com

Donald MacKay – donald@xa.co.za