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WTO Dispute Settlement 1995-2005 Evolution – Experiences – Evaluation

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Program

1. The Need for a Dispute Settlement Mechanism
2. Objectives of WTO Dispute Settlement
3. Dispute Settlement Procedures in the WTO
4. WTO Dispute Settlement between 1995 and 2005
5. Current Reform Efforts: The DSU Review
6. Outlook

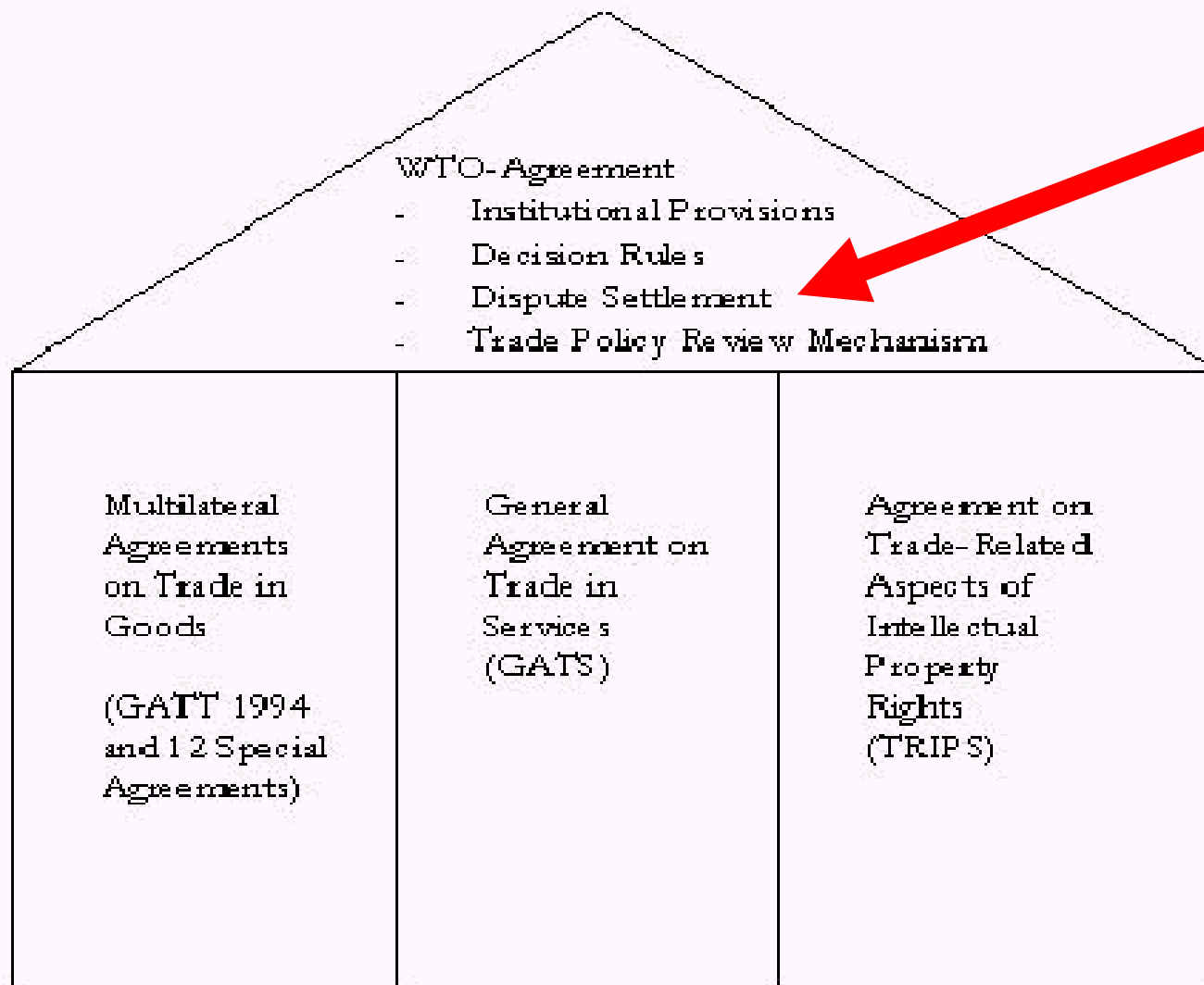
1. The Need for a Dispute Settlement Mechanism *Overview*

- Despite the basic economic insight that free trade is the best policy in the interest of a country, the political process and constitutional deficits leads to protectionist policies.
- International agreements are instruments to overcome the political-economy logic of protectionism.
- Despite international agreements, protectionist pressures from import-competing sectors remain once an agreement is concluded.
- A dispute settlement mechanism which is combined with efficient retaliatory threats can induce compliance with the provisions in international trade agreements.

1. The Need for a Dispute Settlement Mechanism *Functions*

- Provide a (limited) enforcement device and thus a remedy against violations where and if they occur, to restore the politically negotiated balance of rights and obligations.
- Deter from violations of provisions included in trade agreements and increase the predictability of the international trading system.
- Provide multilateral interpretations of trade rules
- Provide a multilateral forum for orderly re-negotiation of commitments respecting countries' sovereignty
- Deter powerful countries from engaging in unilateral retaliatory practices (e.g. Section 301 in the U.S.) instead of choosing the multilateral avenue for enforcement

1. The Need for a Dispute Settlement Mechanism *Positioning the DSU in the WTO System*



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2. Objectives of WTO Dispute Settlement

Basic provision: Art. 3 DSU (Paras. 2, 3, 4)

2. The dispute settlement system of the WTO is a central element in **providing security and predictability to the multilateral trading system**. The Members recognize that it serves to **preserve the rights and obligations of Members** under the covered agreements, and to **clarify the existing provisions** of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB **cannot add to or diminish the rights and obligations** provided in the covered agreements.
3. The **prompt settlement** (...) is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.
4. Recommendations or rulings made by the DSB shall be aimed at achieving a **satisfactory settlement of the matter** in accordance with the rights and obligations under this Understanding and under the covered agreements.

2. Objectives of WTO Dispute Settlement

Basic provision: Art. 3 DSU (Paras. 7 and 9)

7. Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful. The aim of the dispute settlement mechanism is to secure a **positive solution to a dispute**. A **solution mutually acceptable** to the parties to a dispute and consistent with the covered agreements is **clearly to be preferred**. In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to **secure the withdrawal of the measures** concerned if these are found to be inconsistent with the provisions of any of the covered agreements.
9. The provisions of this Understanding are **without prejudice to the rights of Members to seek authoritative interpretation of provisions (...)** under the WTO Agreement or a covered agreement which is a Plurilateral Trade Agreement.

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3. The Dispute Settlement Procedure

The Stages of WTO Dispute Settlement

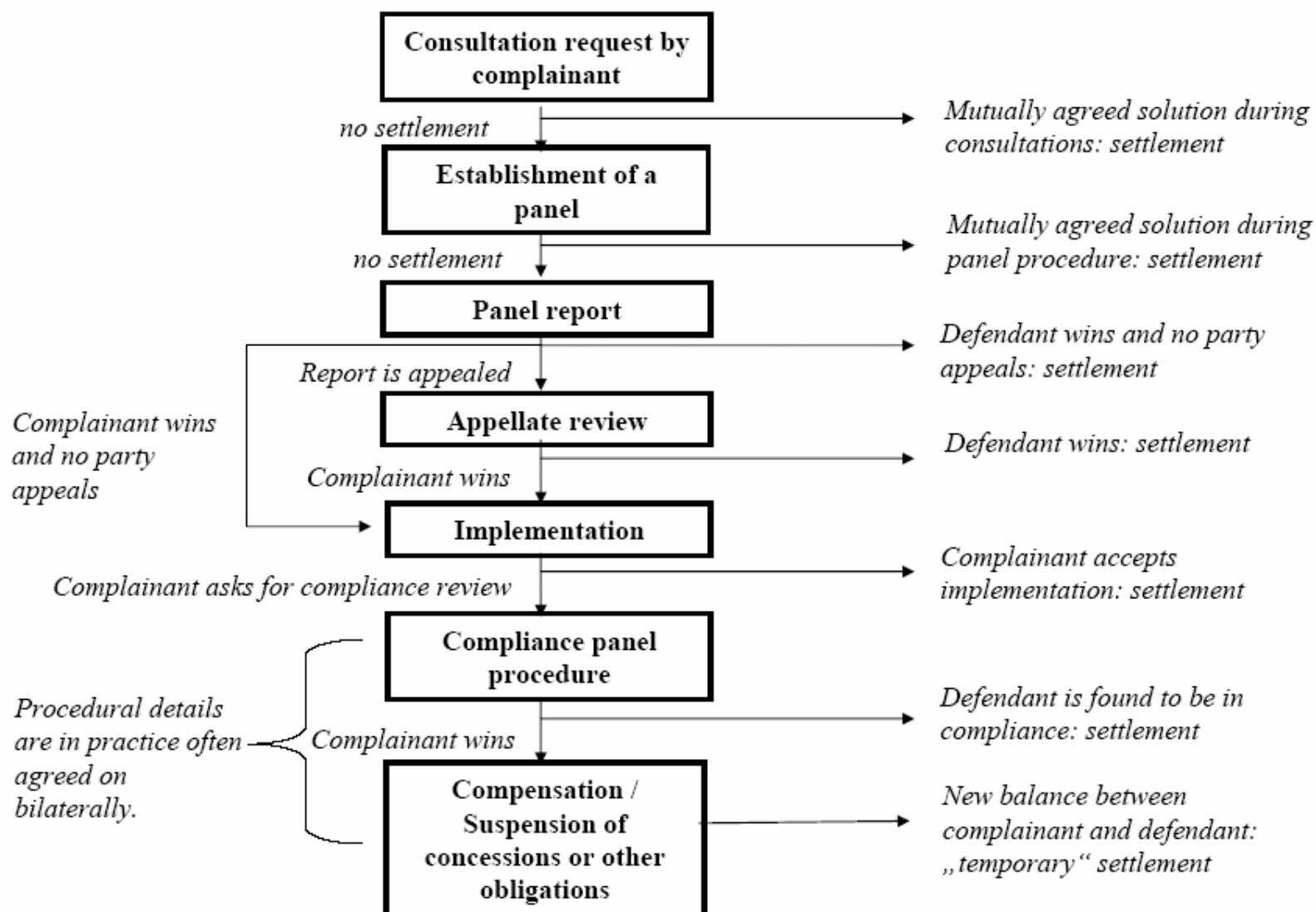
1. Dispute Initiation on the National Level
2. Consultations
3. The Panel Procedure
4. Appellate Review
5. Implementation
6. The Issue of Non-Compliance
7. Disputed Compliance and the Sequencing Issue
8. Simplified Graphic Summary

3. The Dispute Settlement Procedure

Dispute Initiation on the National Level

- Objective: Identify the issues that should be brought to dispute settlement.
- The initiation of a dispute is governed by national legal and/or political mechanisms
- Only few countries have transparent and publicly known procedures with regard to dispute initiation (e.g.: U.S. [Section 301], EU [Trade Barriers Regulation])
- National initiation procedures vary with regard to
 - * the relative weight of political and legal elements;
 - * participation of the private sector;
 - * the extent of government control and judicial supervision.
- Despite legal elements, even the most rule-oriented procedure (Section 301 in the U.S.) remains largely driven by politics and is subject to only limited legal control.

3. The Dispute Settlement Procedure *Simplified Graphic Summary*



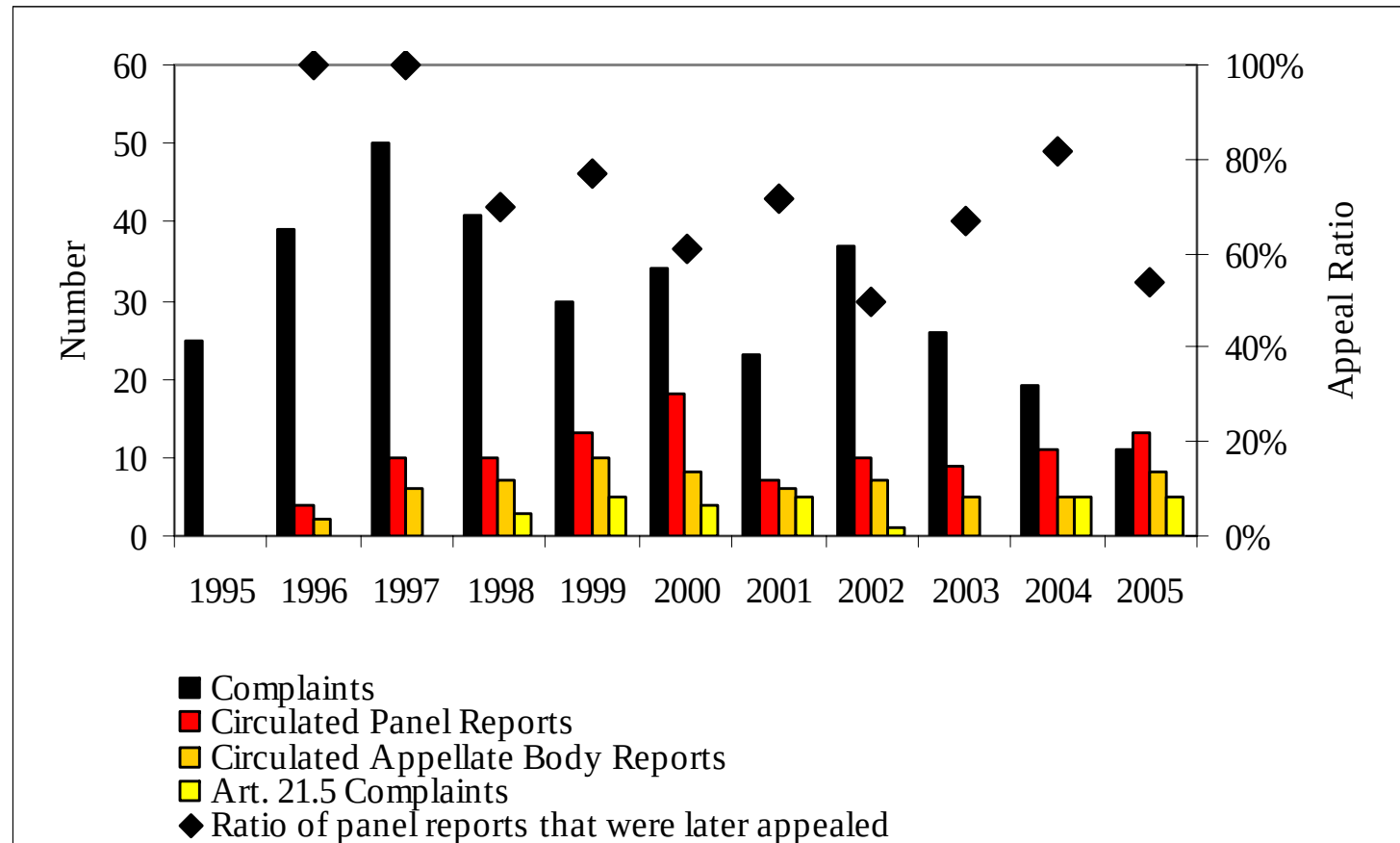
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4.

WTO Dispute Settlement Between 1995 and 2005

Use of the Dispute Settlement Mechanism I

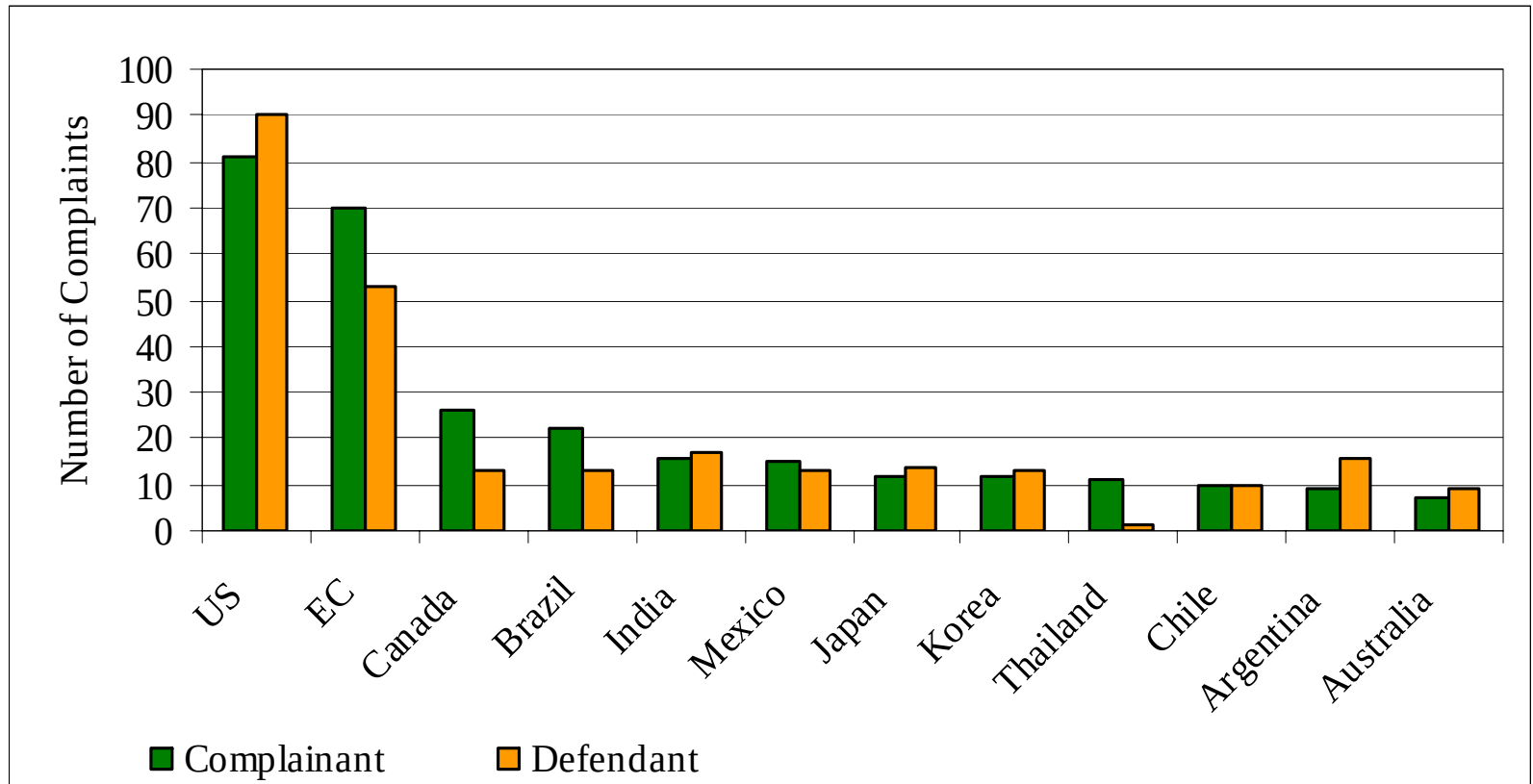


Data Source: Dispute Settlement Commentary (<http://www.worldtradelaw.net>) as of 15 March 2006

4.

WTO Dispute Settlement Between 1995 and 2005

Use of the Dispute Settlement Mechanism II

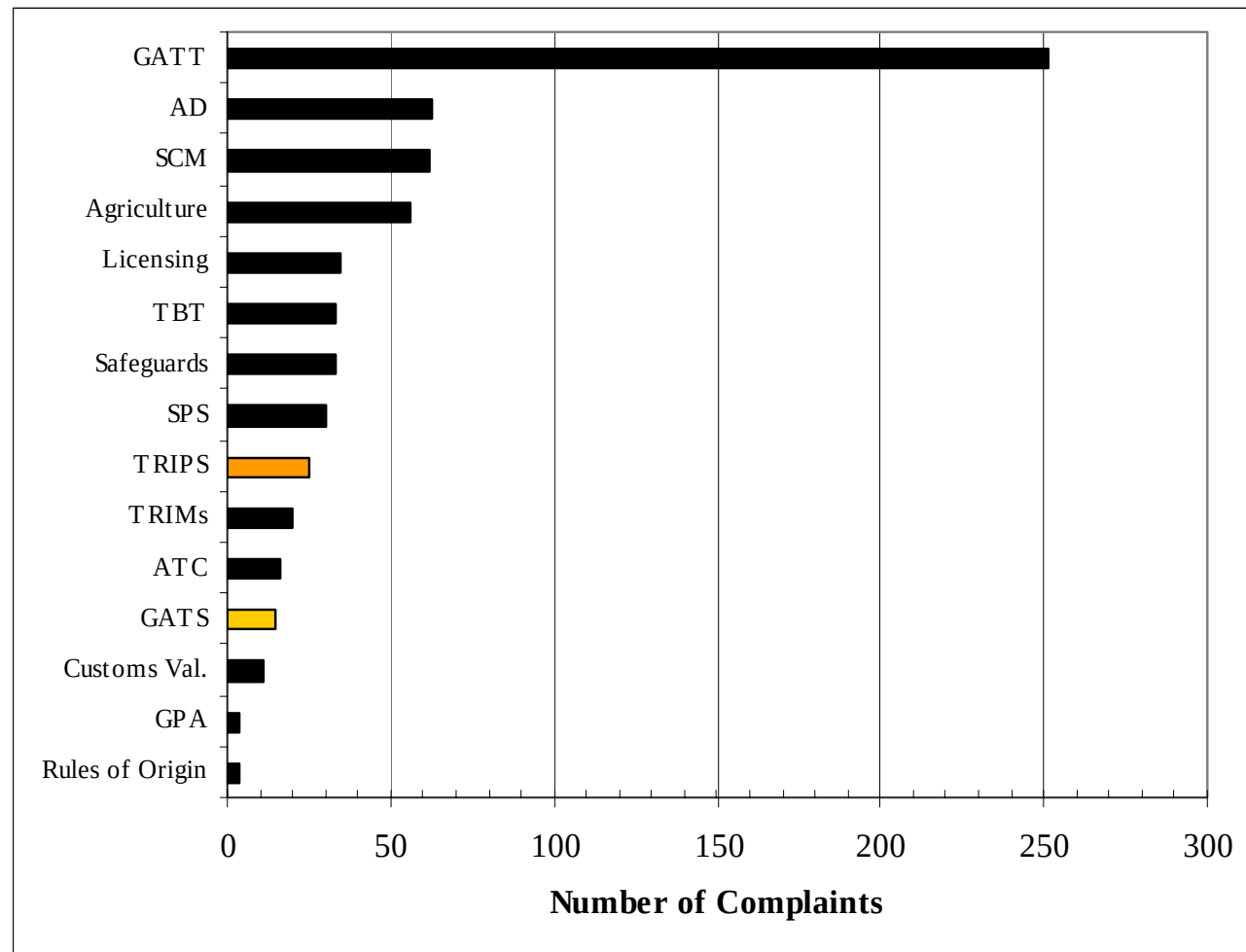


Data Source: Dispute Settlement Commentary (<http://www.worldtradelaw.net>) as of 15 March 2006

4.

WTO Dispute Settlement Between 1995 and 2005

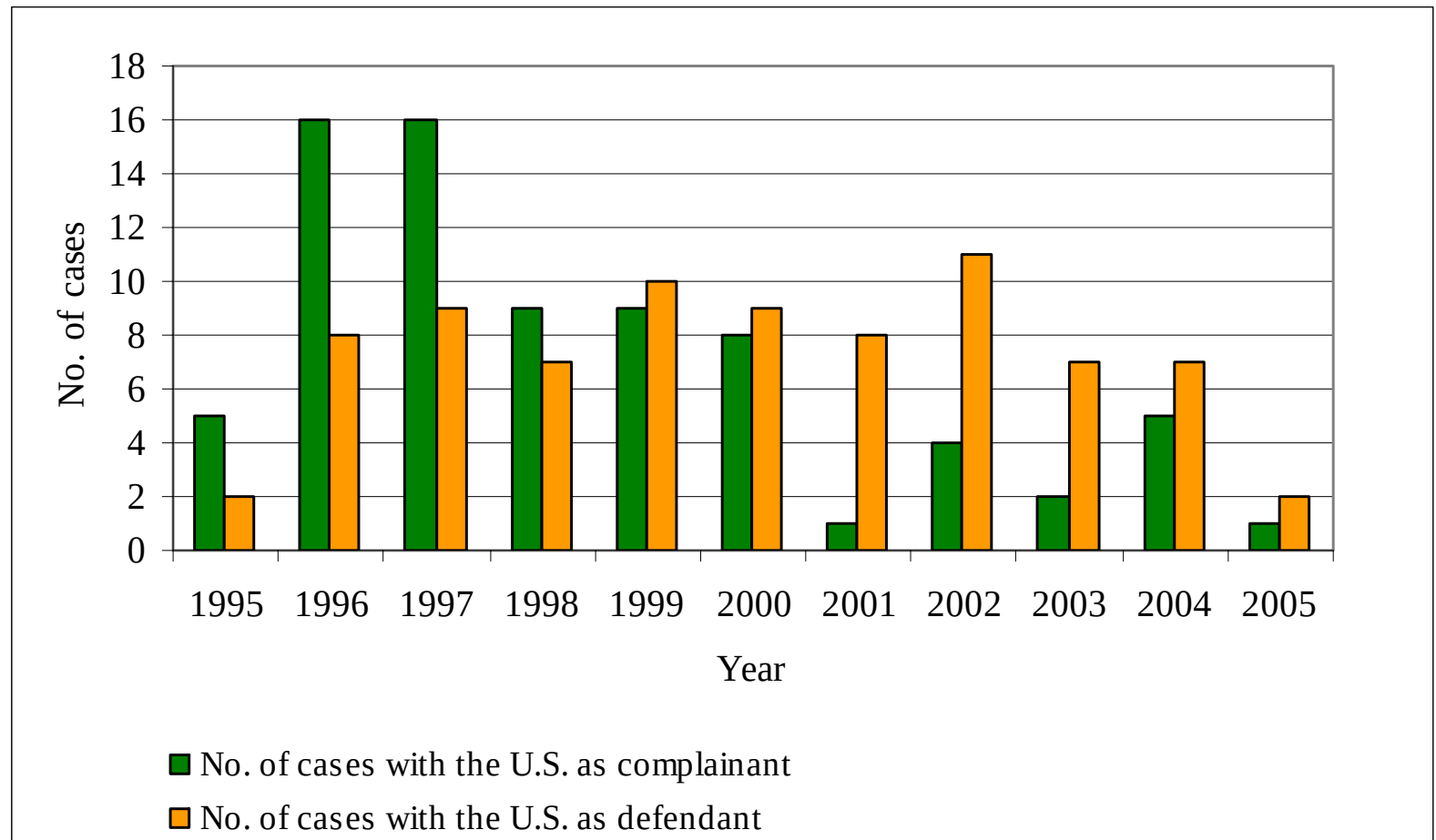
Use of the Dispute Settlement Mechanism III



4.

WTO Dispute Settlement Between 1995 and 2005

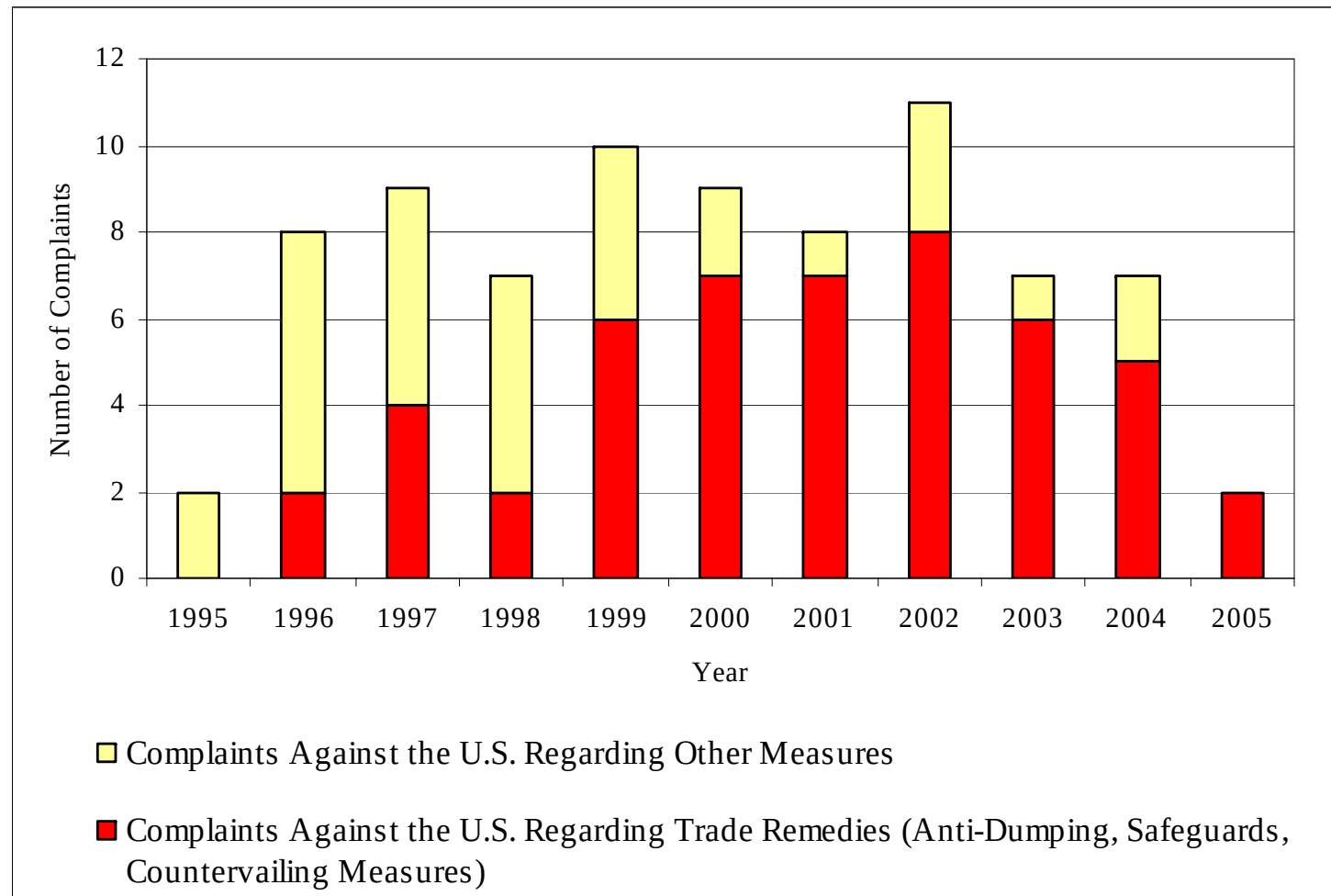
Use of the Dispute Settlement Mechanism IV



4.

WTO Dispute Settlement Between 1995 and 2005

Use of the Dispute Settlement Mechanism V



4. WTO Dispute Settlement Between 1995 and 2005

Experience with the Functioning of the DSU I

Overall impression

- There is a general sense of satisfaction with the functioning of the DSU – also underlined by the intense use of the system.

Strengths

- The removal of blocking possibilities (establishment of panels and adoption of reports) that had existed under the old GATT has increased complainant control of the procedure.
- Explicit time frames exist for all procedural steps.
- The appellate review system is regarded for a model for other areas of public international law.

4. WTO Dispute Settlement Between 1995 and 2005

Experience with the Functioning of the DSU II

Weaknesses

- Non-compliance and disputed compliance in politically sensitive cases (Bananas, Hormones, Foreign Sales Corporations, Anti-Dumping)
- Retaliation is a poor enforcement device for a variety of reasons.
- Time frames often exist only on paper
- Developing country participation is fairly low
- More recently, there are tensions on account of a systemic imbalance between relatively efficient, quasi-automatic legal decision-making (the DSU) and inefficient, often-blocked political decision-making (due to high hurdles for political decisions).

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5. Current Reform Efforts: The DSU Review

The Negotiations: A History of Missed Deadlines

- A 1994 Ministerial Declaration called for a review of the DSU and a Ministerial Decision to continue, modify, or terminate the DSU within four years after entry into force
- The original December 1998 deadline lapsed, as did an extension until mid-1999. The Seattle Ministerial Conference in December 1999 failed to take the required decision.
- The DSU Review remained in limbo during 2000 and 2001
- It was included again in the agenda of the Doha Round of multilateral trade negotiations (see Ministerial Declaration of November 2001). Negotiations should have been completed by 31 May 2003 and should have yielded an “early harvest”. However, the deadline was missed again.
- A new deadline set for 31 May 2004 was missed again.
- Negotiations currently continue without a new target date.

5. Current Reform Efforts: The DSU Review

Key Proposals and their Sponsors (IV)

Proposals strengthening rule orientation	Proposals strengthening power orientation
• Strengthened notification requirements for mutually acceptable solutions and written reports on the outcome of consultations; • Compliance reviews of mutually agreed solutions; • Reduced time frames; • Creation of a professional permanent panel body (PPB); • Terms of appointment of the Appellate Body; • Regulating sequencing and implementation; • Prohibition of carousel retaliation; • Strengthening enforcement and the cost of non-compliance; • Strengthening third party rights; • Increasing external transparency.	• Automatic lapse or withdrawal of consultations/panel requests; • Calls for separate opinions by individual panellists/Appellate Body Members; • Flexibility during appellate review: interim review and the suspension of the appellate procedures; • Deletion of findings from reports; • Partial adoption procedures; • Additional measures of special and differential treatment of developing countries; • Extension of time-frames by agreement of the parties; • Obliging adjudicating bodies to submit certain issues to the General Council for interpretation.

5. Current Reform Efforts: The DSU Review

The Failure to Conclude the Review: Reasons

- Consensus Requirement for amendments to the DSU
- Diametrically opposed views on certain topics (e.g. carousel retaliation, amicus curiae briefs, etc.)
- Diametrically opposed views on the fundamental direction of reform (negotiatory, diplomacy-oriented approach vs. rules-based, adjudication-oriented approach).
- Evolving context of the DSU negotiations (new material and procedural disputes or reports, new negotiations etc.) makes negotiating positions subject to change and tactical behaviour.
- General Sense of Satisfaction and “Do No Harm” Imperative

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6. Outlook

- There is a general sense of satisfaction with the system, which has been used actively in its first ten years.
- However, there is a danger that the strong imbalance between (effective) rule-oriented dispute settlement and (ineffective) political decision making creates increasing tensions in the WTO. Political mechanisms are in dire need of strengthening.
- The current deadlock of the DSU Review is an expression of Members' uncertainty with regard to the future course that WTO dispute settlement in particular and the WTO in general should take.
- While negotiations are stalled, Members have shown some flexibility in DSU practice and have thus managed to adapt the system to changing needs and circumstances, in line with the pragmatic traditions of the system (“DSU review in practice”).
- Dispute settlement is likely to remain the most active and most successful element of the WTO system.

Further Information

Further research: More contributions on the WTO dispute settlement mechanism are available on the author's websites: <http://www.zimmermann-thomas.de> and <http://www.zimmermann-thomas.ch>.

Article on this topic: Zimmermann, Thomas A.: WTO Dispute Settlement at Ten – Evolution, Experiences and Evaluation; in: Aussenwirtschaft (The Swiss Review of International Economic Relations), Vol. 60 (No. 1), pp. 27-61.

Book on this topic: Zimmermann, Thomas A.: Negotiating the Review of the WTO Dispute Settlement Understanding; London: Cameron May, 2006.

Reference of this presentation in Portuguese: Mecanismo de Resolução de Disputas da Organização Mundial de Comércio (OMC) 1995 – 2005: Evolução - Experiências - Avaliação; Universidade de Fortaleza (Unifor); Fortaleza, Ceará; Brasil; Terça-feira, dia 21 de Março, 19h na sala A1 (Pós-Graduação)