University of St.Gallen

The WTO Dispute Settlement System: Objectives - Procedures - Experience

Workshop at the "Model WTO" 2003

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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 2002
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 a possibility to overcome the political-economy logic of protectionism.
- Despite international agreements, protectionist pressures from import-competing sectors remain.
- 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
- Deter from violations of provisions included in trade agreements
- 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

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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

- Issues: When should which case be brought against whom?
- 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], the 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 limited legal control.

3. The Dispute Settlement Procedure
Consultations

- First multilateral stage of dispute settlement
- The complainant country (C) has the right to ask the defendant country (D) to enter into consultations regarding D's trade measures.
- D has to answer the consultation request within 10 days and shall enter into consultations within 30 days. Consultations are confidential
- If a mutually acceptable solution has been found, it shall be notified to the Dispute Settlement Body (General Council meeting in "dispute settlement mode")
- If D has not entered into consultations or if no mutually acceptable solution has been found within 60 days, C may ask the DSB for the establishment of a panel.

☛ Consultations are the most "political element" in the DSU.
They can be characterised as "bargaining in the shadow of the law".

3. The Dispute Settlement Procedure
The Panel Procedure

- Terms of reference: Panels shall examine, in the light of the relevant legal provisions, the matter referred to the DSB, and make such findings that will assist the DSB in giving rulings.
- Panels consist of three trade experts. They are composed ad hoc. Nationals of disputing parties cannot serve as panelists.
- Panel procedures include written submissions and oral hearings
- Panels are established by the DSB on request of C unless the DSB decides by consensus not to establish a panel. Factually, agenda control rests with C unlike under GATT 1947
- Panels shall submit their reports within 6 months. This period may be extended if parties continue consultations during the panel stage.
- The DSB shall adopt panel reports within 60 days after the circulation, unless at least one party appeals or DSB decides by consensus not to adopt the report.
- Further rules deal with third party participation, the panel's right to seek information, confidentiality of proceedings, and interim review.

3. The Dispute Settlement Procedure
Appellate Review

- A standing "Appellate Body" (AB) comprised of seven jurists shall hear appeals from panel cases. Three members shall serve on any one case.
- Appeals are limited to issues of law and legal interpretations. In other terms, the AB shall not re-engage in fact finding.
- Proceedings shall normally not exceed 60 days.
- Appellate Body proceedings are confidential.
- The AB may i.) uphold, ii.) modify, or iii.) reverse panel findings.
- The AB report shall be adopted by the DSB within 30 days unless the DSB decides by consensus not to adopt it.

3. The Dispute Settlement Procedure
Implementation

- At a DSB meeting held 30 days after adoption of the reports, D shall inform the DSB of its intentions in respect of implementation.
- Countries should implement recommendations immediately. If immediate implementation is "impracticable", D shall have a "reasonable period of time" (RPT) to do so.
- The RPT may be proposed by D, may be agreed between the parties to a dispute within 45 days, or may be determined through binding arbitration within 90 days. The RPT should not exceed 15 months.
- Six months after the establishment of the RPT, the issue of implementation is placed on the DSB agenda where it remains until the issue is resolved. D must provide written status reports.
- Compensation or suspension of concessions are temporary measures if recommendations are not implemented in time.

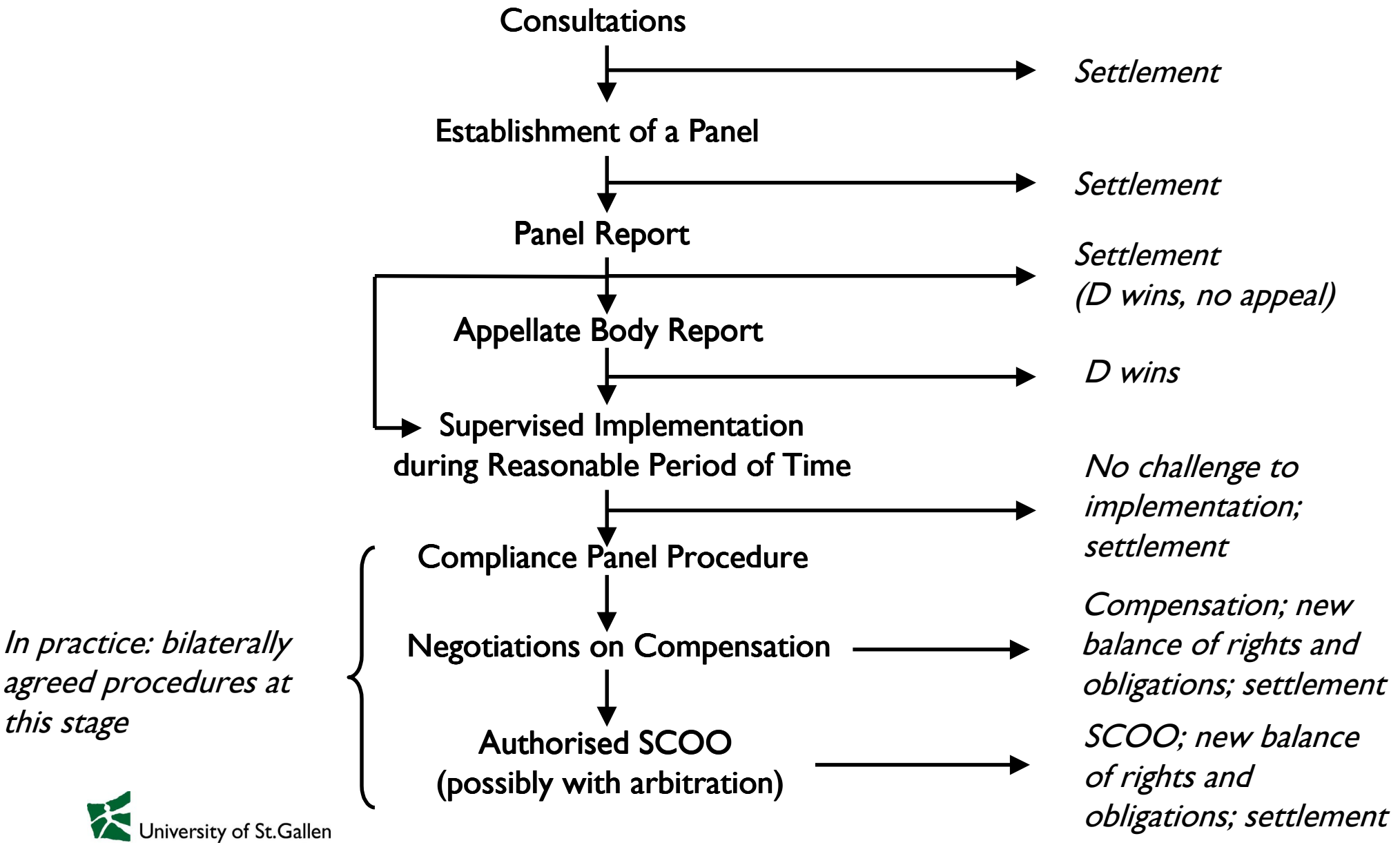
3. The Dispute Settlement Procedure
The Issue of Non-Compliance

- In case rulings are not implemented within the RPT, D shall enter into negotiations with C on mutually acceptable compensation.
- If no such compensation has been agreed upon within 20 days after expiry of the RPT, C may seek authorisation from the DSB to suspend concessions or obligations vis-à-vis D.
- The suspension of concessions should take place preferrably i.) in the same sector; or ii.) in a different sector under the same agreement if i.) is impracticable; or iii.) under other agreement if ii.) is impracticable
- The level of suspension shall be equivalent to the level of nullification and impairment; if D objects to the level of suspension proposed, binding arbitration shall be carried out by the arbitrator (original panel or to be appointed by Director General).

3. The Dispute Settlement Procedure
Disputed Compliance and the Sequencing Issue

- If C doubts whether D has correctly implemented the DSB recommendations, C may have recourse to the panel procedure to challenge the implementing measure. Recourse should be made to the original panel, and this "compliance panel" should circulate its report within 90 days.
- The DSU has some ambiguities and gaps with regard to the sequencing of steps in the implementation stage (e.g.: Must C await the compliance report before it may ask the DSB for the authorisation to suspend concessions? May compliance panel report be appealed from?) In the application of these provisions, parties have developed a practice to fill these gaps through bilateral agreements (e.g. FSC Case).

3. The Dispute Settlement Procedure
Simplified Graphic Summary

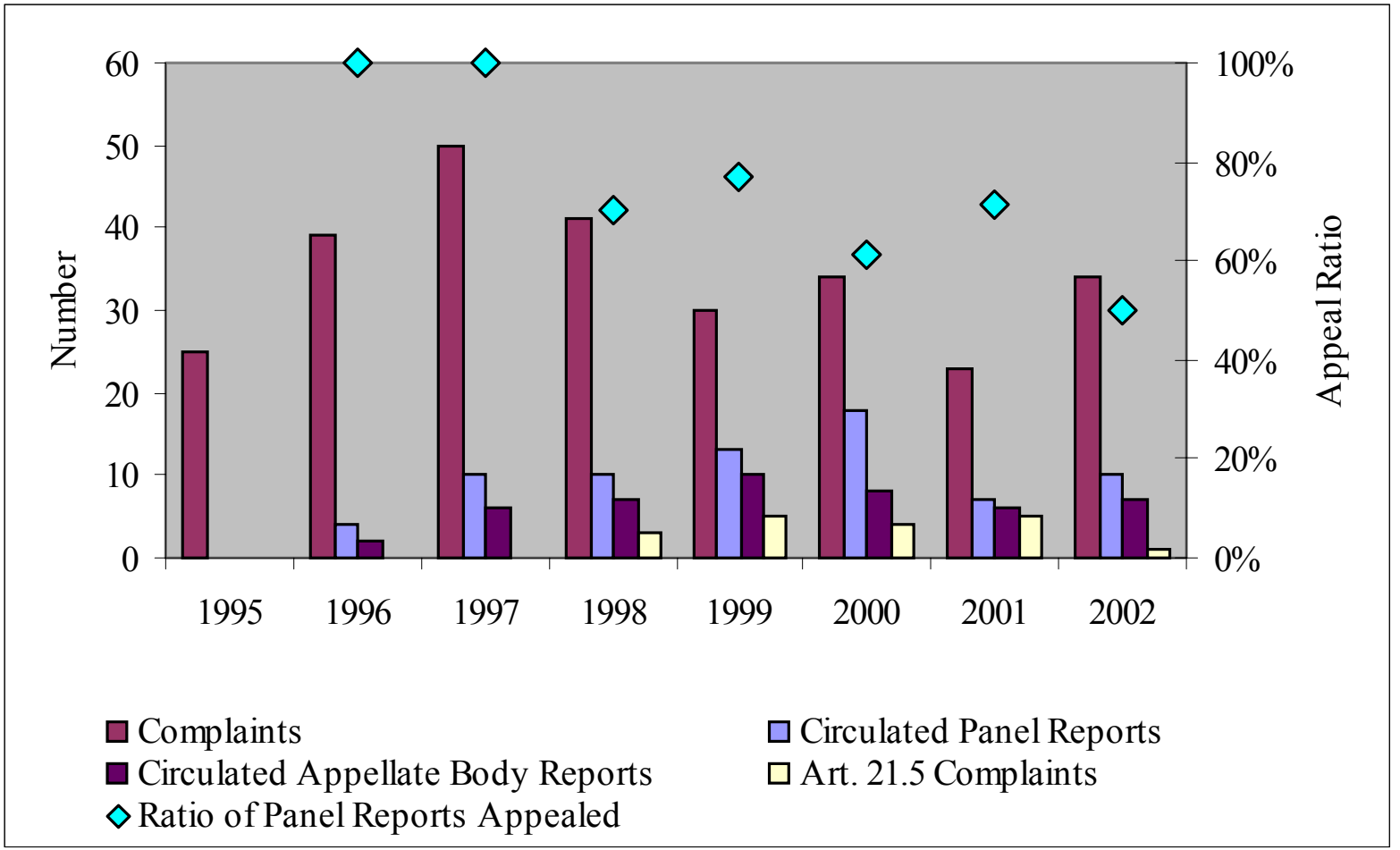


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WTO Dispute Settlement Between 1995 and 2002

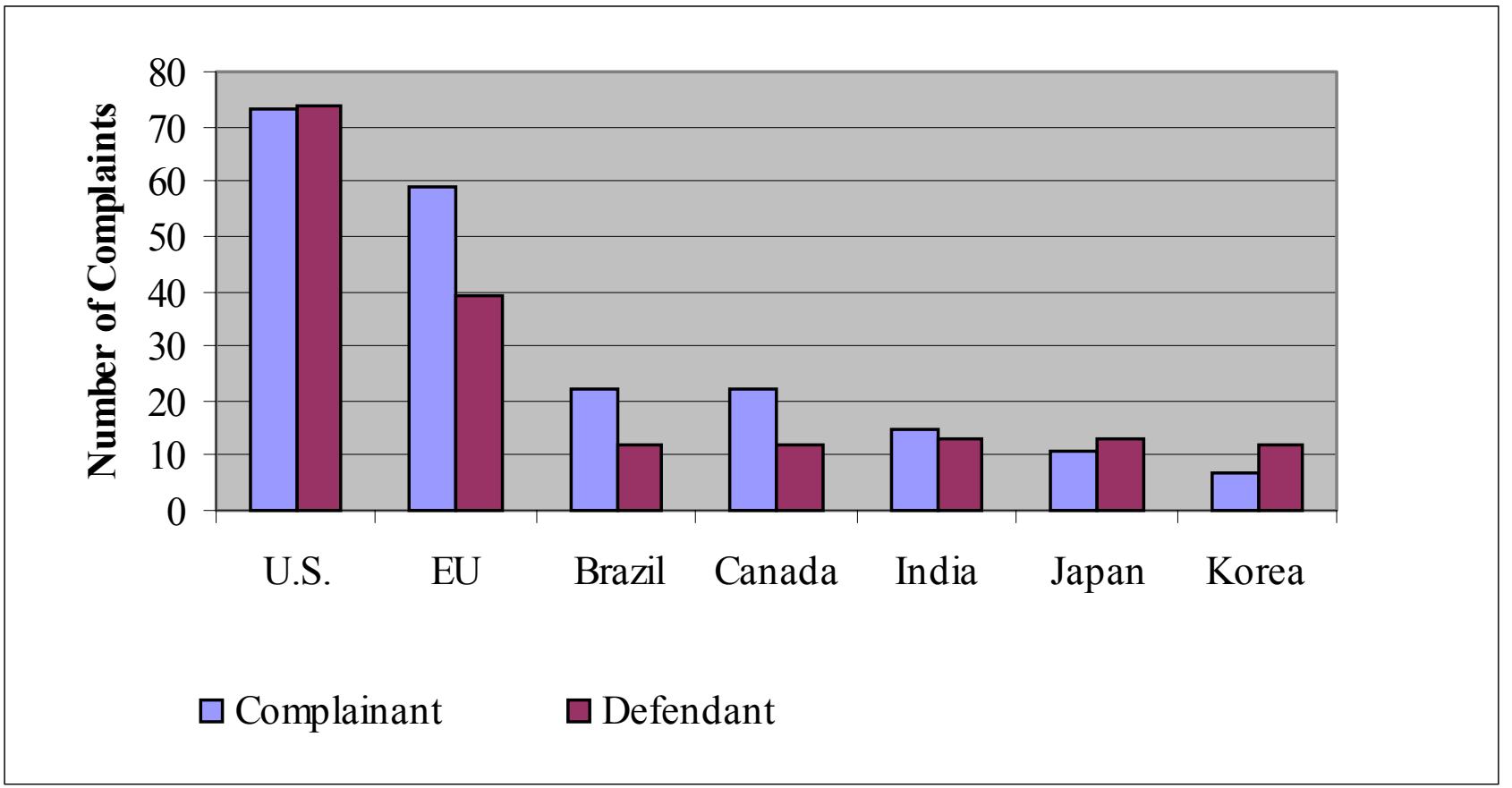
Use of the Dispute Settlement Mechanism I



Data Source: Dispute Settlement Commentary (http://www.worldtradelaw.net)

WTO Dispute Settlement Between 1995 and 2002

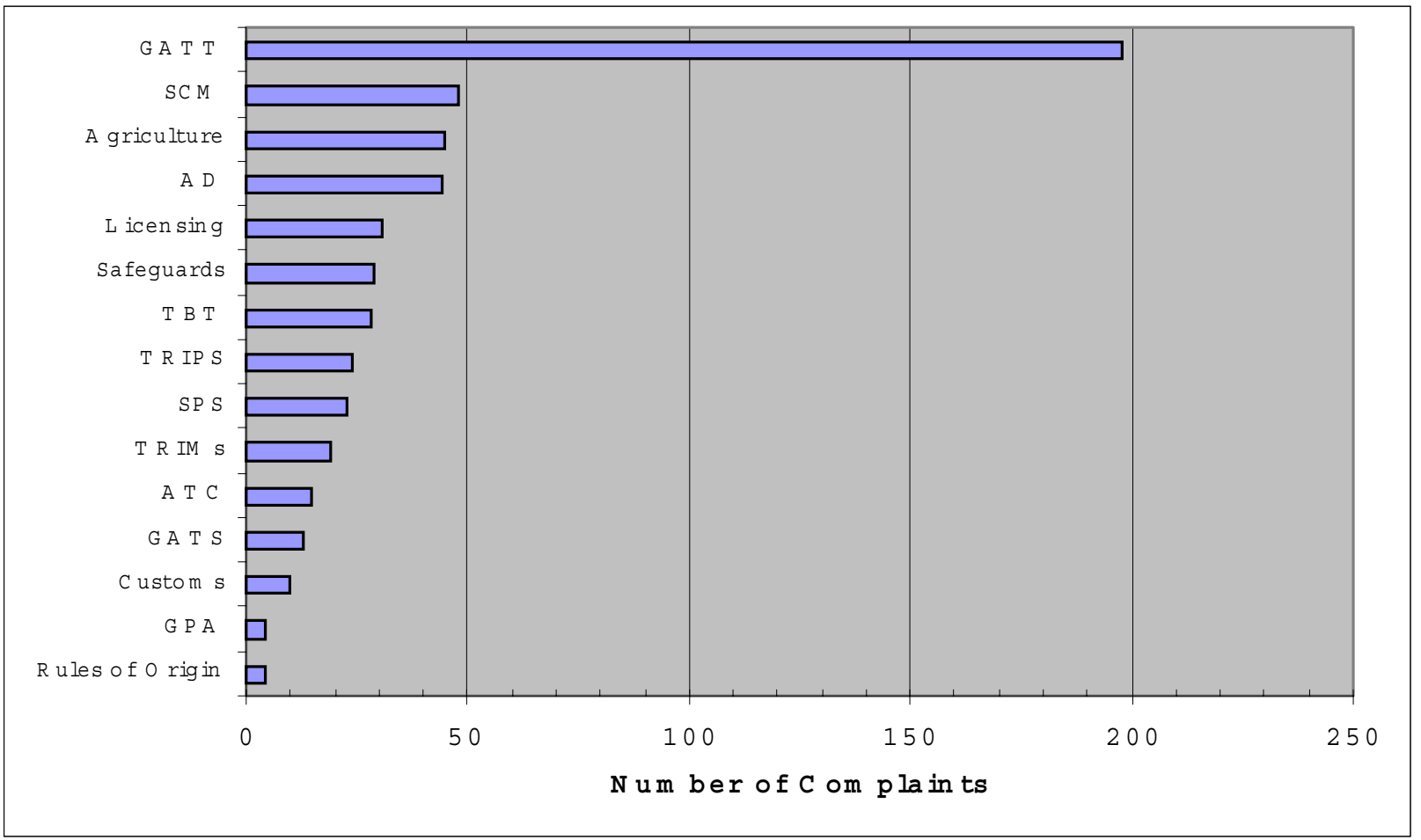
Use of the Dispute Settlement Mechanism II



Data Source: Dispute Settlement Commentary (http://www.worldtradelaw.net)

WTO Dispute Settlement Between 1995 and 2002

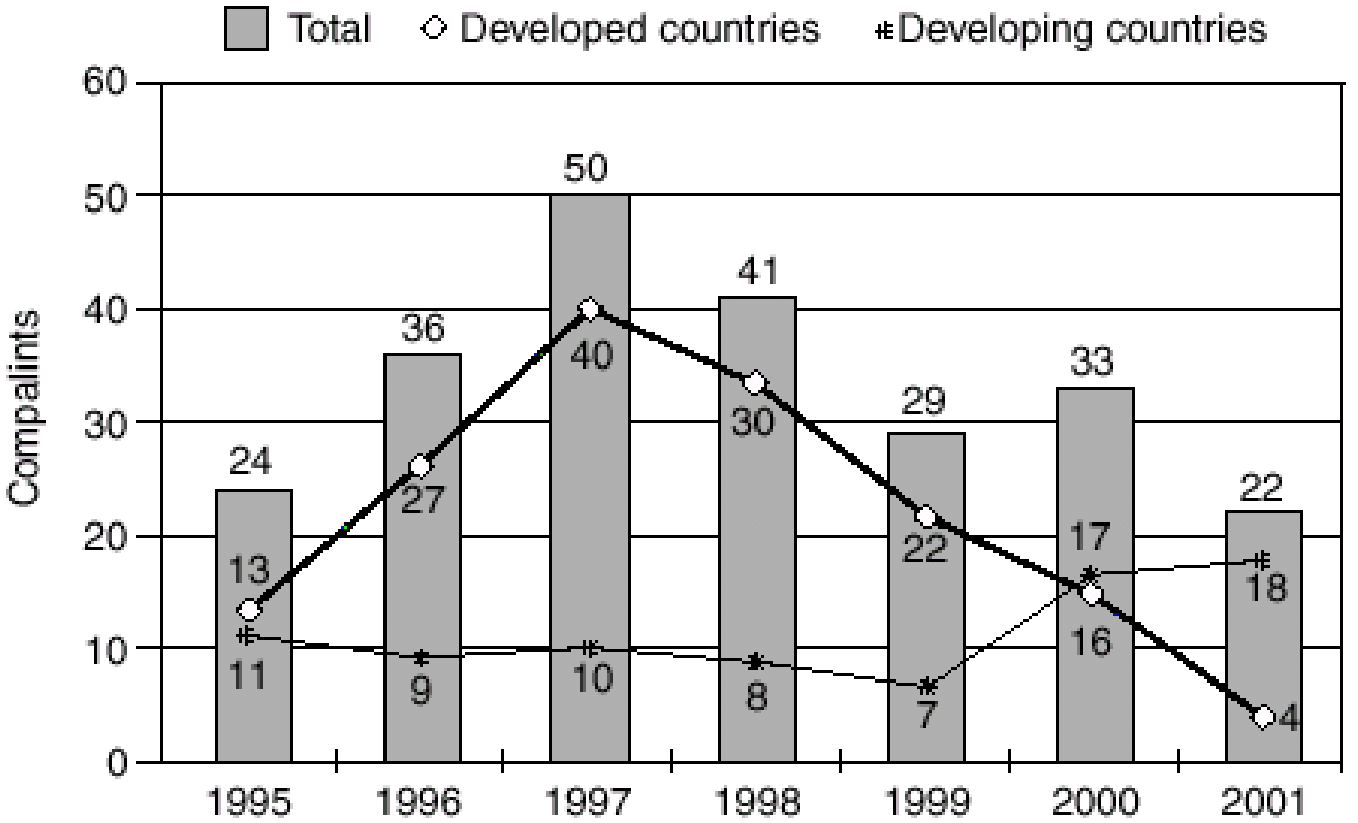
Use of the Dispute Settlement Mechanism III



Data Source: Dispute Settlement Commentary (http://www.worldtradelaw.net)

WTO Dispute Settlement Between 1995 and 2002

Use of the Dispute Settlement Mechanism IV



Year	1995	1996	1997	1998	1999	2000	2001
Developed	54%	75%	80%	78%	76%	48%	18%
Developing	46%	25%	20%	20%	24%	52%	82%

Source: Park and Panizzon, 2002

WTO Dispute Settlement Between 1995 and 2002

Results of Analytical Studies I

- The increase in the number of disputes and the changes brought by the 1994 DSU have been overstated in literature. While the Uruguay Round mid-term harvest of 1989 did much to increase the number of disputes, the 1994 DSU did not raise the likelihood of disputes among developed countries. The increase in the number of disputes is in line with the increase in the number of member countries.
- Dispute initiation is subject to positive feedback (probability of a counter-complaint by D against C in the same year rises by 55 times) and bandwagon effects.
- Members of regional trade agreements (RTAs) are seven times less likely to file disputes against one another than other states.
- Empirical data suggests that the GATT dispute settlement system was more accessible for developing countries than the WTO system.

WTO Dispute Settlement Between 1995 and 2002

Results of Analytical Studies II

- The probability that D will make concessions are greatest after a panel has been installed and before it has issued its ruling. Once a ruling is available, the likeliness of concessions being made drops (possible explanation: normative force of rulings).
- Highly democratic countries are more likely to settle co-operatively at the consultations stage.
- More open economies are less likely to settle early.
- Democracies are less likely to comply with adverse rulings.
- Retaliatory power of C is a key factor in inducing compliance by D.

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5. Current Reform Efforts: The DSU Review

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 (1 January 1995)
- 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 has been set for 31 May 2004 by the General Council on 24/25 July 2003. For the time being, the DSU will continue to apply as before.

5. Current Reform Efforts: The DSU Review

Key Proposals and Their Sponsors (I)

- Panel Composition: Should *ad-hoc* panels be replaced by a Permanent Panel Body (EU)?
- Amicus Curiae Briefs: Should panels and the Appellate Body be allowed to consider information (so-called *Amicus Curiae Briefs)* submitted by non-governmental actors such as NGOs, firms, industry associations etc. (pro: EU, US; against: most developing countries).
- Transparency: Should hearings and submissions be made public (U.S., EU, Canada; against: most developing countries)?
- Should the Appellate Body be given remand authority to remand issues to a panel if it is unable to decide on an issue due to insufficient factual findings in the panel report?

5. Current Reform Efforts: The DSU Review

Key Proposals and their Sponsors (II)

- Sequencing Issue: Is a compliance panel necessary before C may request authorisation from the DSB to suspend concessions (EU, Japan and many other countries)?
- Should remedies against non-compliance be made more effective (e.g. collective retaliation, monetary and retroactive compensation)?
- Should carousel retaliation be banned (EU and others)?

5. Current Reform Efforts: The DSU Review

Key Proposals and their Sponsors (III)

- Third Party Rights: Should the rights of third parties be strengthened (Costa Rica and other small and medium-sized countries)?
- Should more flexibility be brought into the system (e.g. Should parties have the right to adopt panel and Appellate Body reports only in part? Should the Appellate Body issue confidential interim reports, and should countries be able to suspend Appellate Body procedures for further negotiations?) Should adjudicative bodies given "guidance" by Members (US)?
- Should developing countries be treated more favourable and provisions on special and differential treatment (S&D) be expanded (legal assistance, longer time-frames, limit of cases brought against developing countries etc.) (most developing countries).

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6. Outlook

- Since the establishment of the GATT in 1947, the dispute settlement mechanism has gradually and pragmatically evolved from a diplomatic towards a more rule-oriented system. Despite its flaws, it is considered as one of the most successful elements of the WTO.
- 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 and the many proposals going into diametrically opposed directions (more flexibility, negotiations and power-orientation vs. more rule-orientation) are an expression of parties' uncertainty with regard to the future course that WTO dispute settlement in particular and the WTO in general should take.
- Reforming a system in use is an extremely difficult task.

Thank you for your attention!