

# RIETI BBL Seminar Handout

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“The WTO Dispute Settlement System:  
Past, present & future”

October 31, 2013

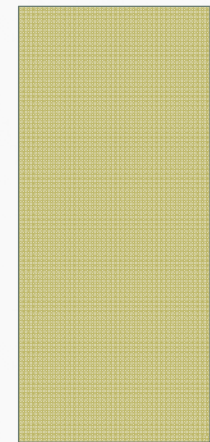
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<http://www.rieti.go.jp/jp/index.html>

# WTO DISPUTE SETTLEMENT: PAST, PRESENT AND FUTURE

Japan  
OCTOBER 2013



# OUTLINE OF PRESENTATION

- Dispute Settlement Under the GATT
- Dispute Settlement Under the WTO
- Dispute Settlement Today
- Dispute Settlement Tomorrow
- Participation by Japan

# THE WAY IT WAS

THE GATT

## Rule of law but not HIGHLY “legalistic”

- First disputes: rulings from the chair in plenary meetings
- Moved to working parties of several members, including claimant and respondent, and eventually (1950s) to panels of 3 neutral members
- Dispute settlement: legal rulings were written by non-lawyers “with an elusive diplomatic vagueness”

# EVOLUTION

- Trade policies were changing as was the approach to dispute settlement
- Increase in number of cases in 1980s
- Dispute settlement needed to respond to new realities
- Calls to strengthen dispute settlement system



# NEED FOR REFORM

- Perceived weaknesses with GATT dispute settlement:
  - uneven quality of panel decisions
  - ability to delay/block DS procedures
  - “more responsive to the interests of the strong than to the interests of the weak”: might means right

# A NEW SYSTEM



# DISPUTE SETTLEMENT IN THE WTO

Marrakesh Declaration  
15 April 1994

In particular, Ministers welcome:

▣ The stronger and clearer legal framework they have adopted for the conduct of international trade, including a **more effective and reliable dispute settlement mechanism**

# A CENTRAL ELEMENT

## ▣ DSU Article 3:

“The dispute settlement system of the WTO is a **central element** in providing **security and predictability** to the multilateral trading system.”

“... the maintenance of a **proper balance** between the **rights** and **obligations** of Members.”

# DISPUTE SETTLEMENT MECHANISM

As of right for Members (no need to seek permission to bring a case)

Automaticity

Customary rules of interpretation of public international law

Appellate Body

# DISPUTE SETTLEMENT MECHANISM

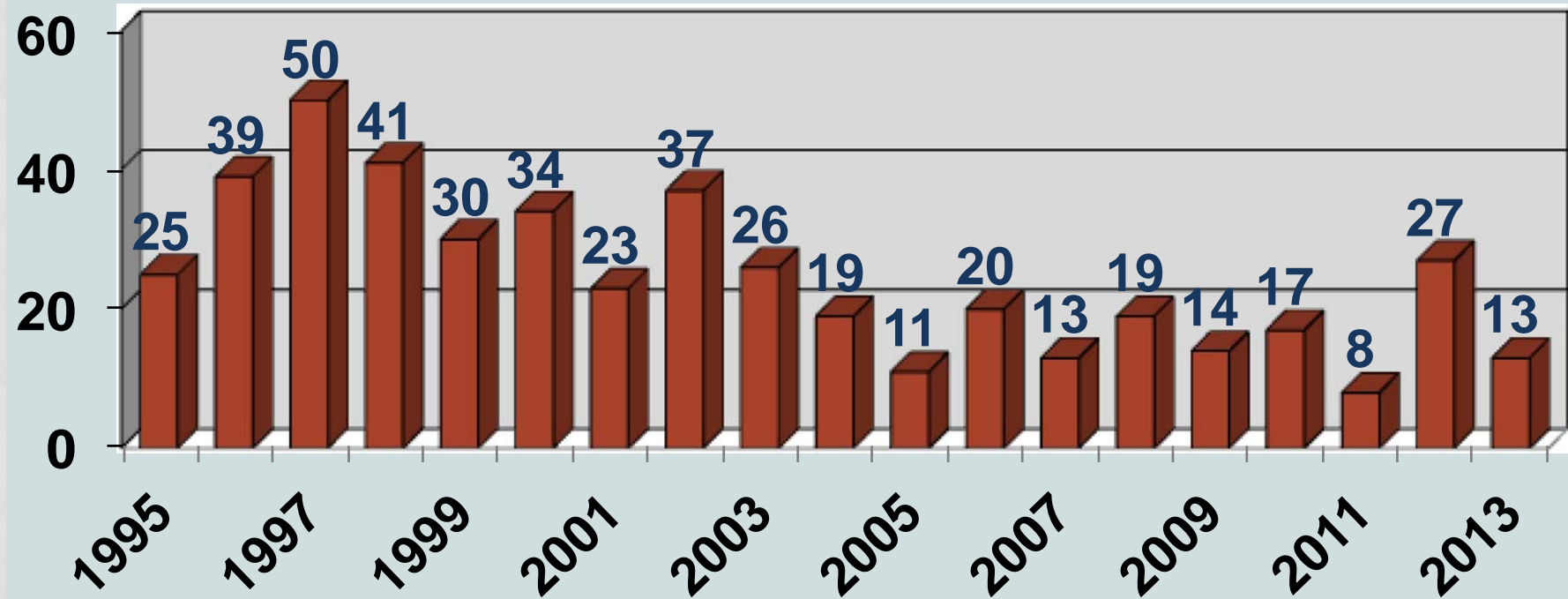
## Phases

- **Consultations** (seek to resolve) – 60 days
- **Panel** (3 persons chosen ad hoc)
  - written submissions
  - 2 hearings
  - Interim report
  - Final report
- **Appeal**: standing Appellate Body of 7 members
  - Written submissions
  - Hearing
- **Compliance**

# EXPERIENCE UNDER NEW SYSTEM

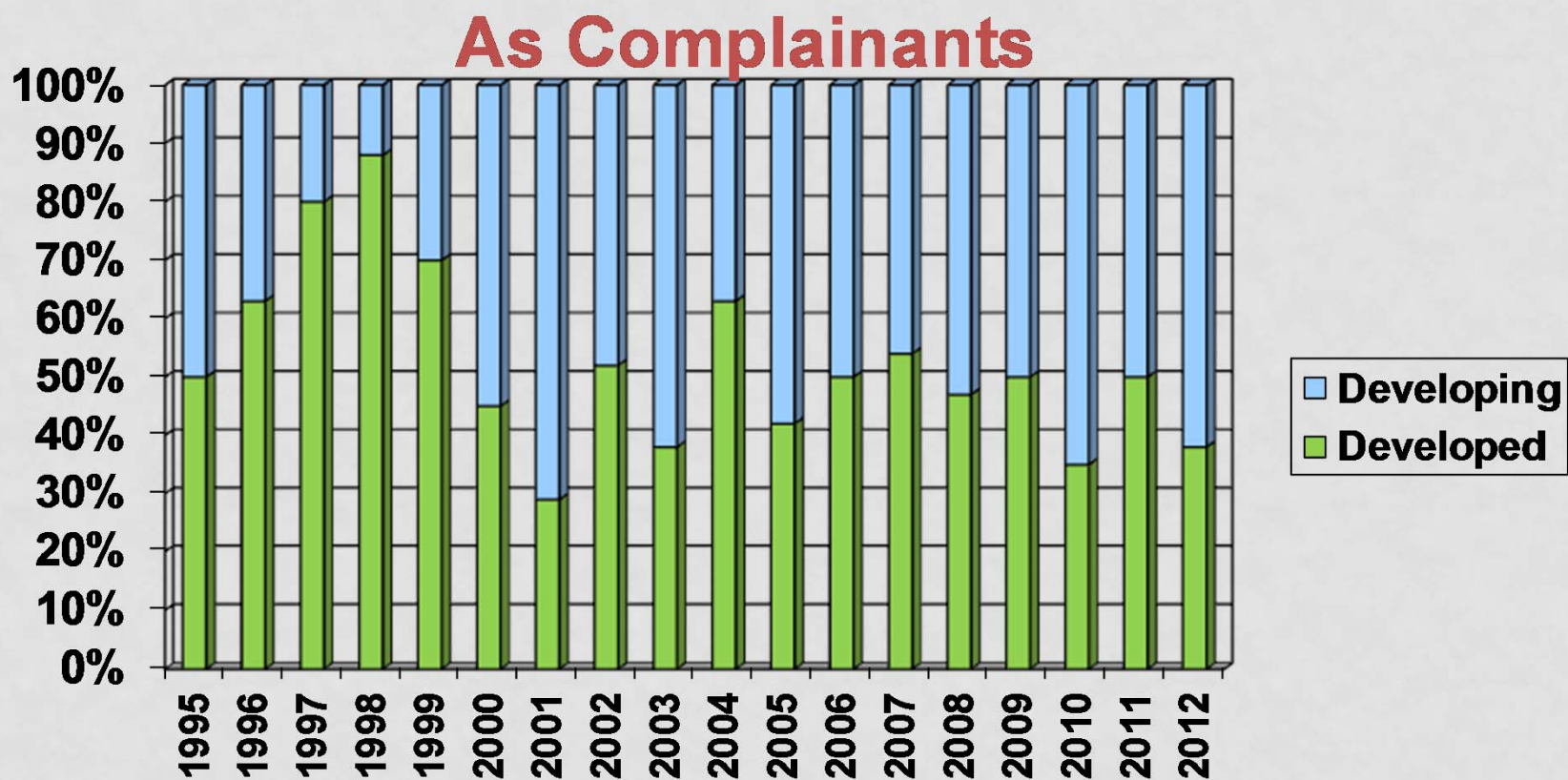
1995-2013

## Requests for Consultations (Total 467 since 1995)





# DEVELOPED AND DEVELOPING MEMBERS HAVE CONFIDENCE IN THE SYSTEM



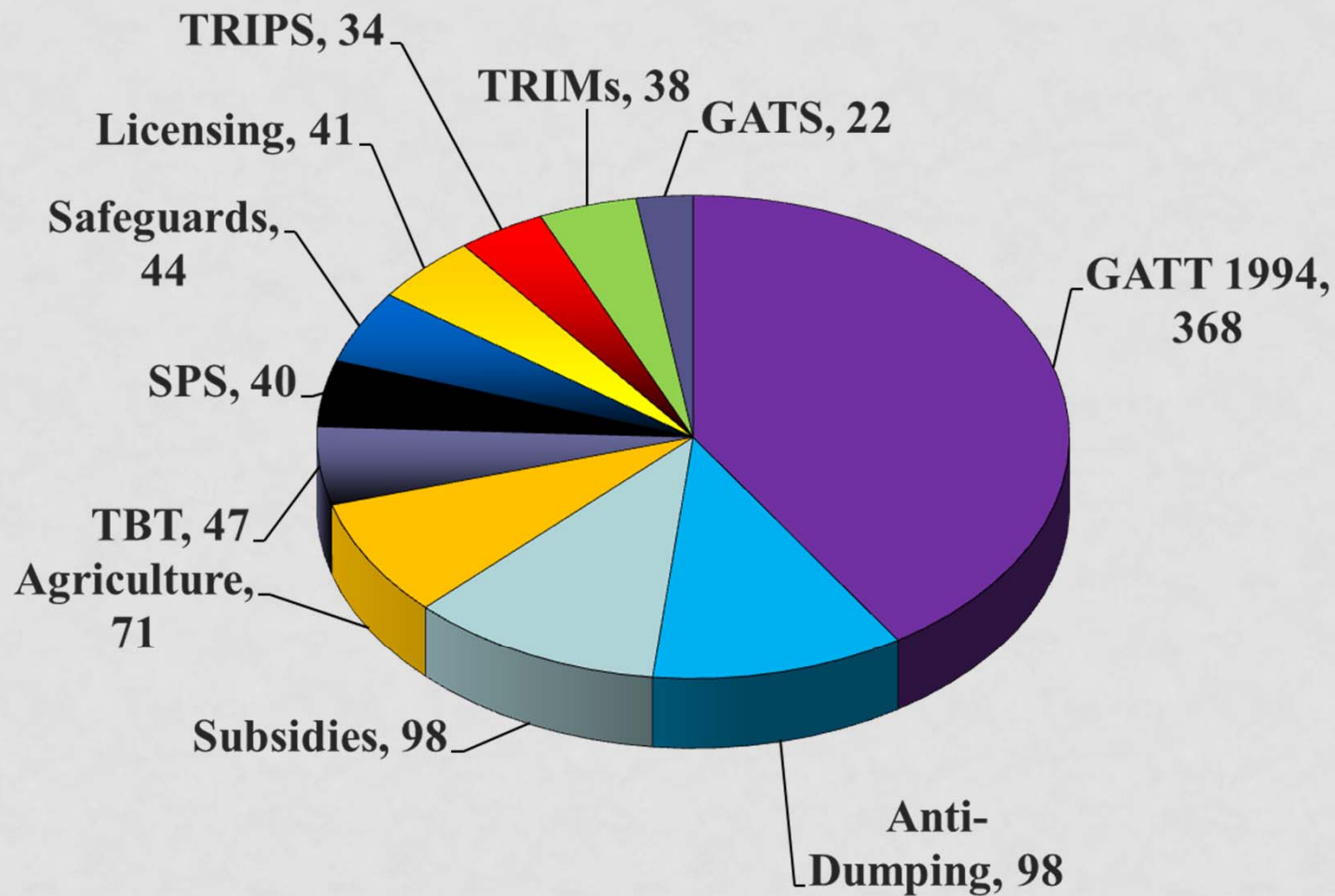
# BROAD PARTICIPATION

➤ **100 Members** have participated in some capacity in WTO dispute settlement

= **63 %** of Membership

Member	Cases Initiated	Member	Cases Defended
US	106	US	120
EU	89	EU	74
Canada	33	China	31
Brazil	26	Argentina	22
Mexico	23	India	22
India	21	Canada	17
Argentina	19	Japan	15
Japan	18	Brazil	14
Korea	16	Korea	14
Thailand	13	Mexico	14

# Consultations According to Agreement at Issue



# TOTAL DS ACTIVITY

Requests for consultations:		<b>467</b>
Panels established:	208	
Panel reports adopted:		<b>176**</b>
Appellate Body reports adopted:		<b>110**</b>
Article 22.6 arbitrations circulated:		19
Article 25 arbitration awards circulated:		1

**\*\*Includes Article 21.5 reports**

# COMPARE

**WTO: 467 in 19 years**

**176/110 adopted**

**GATT: 300 in 48 years**

• **ICJ: 154 in 66 years**

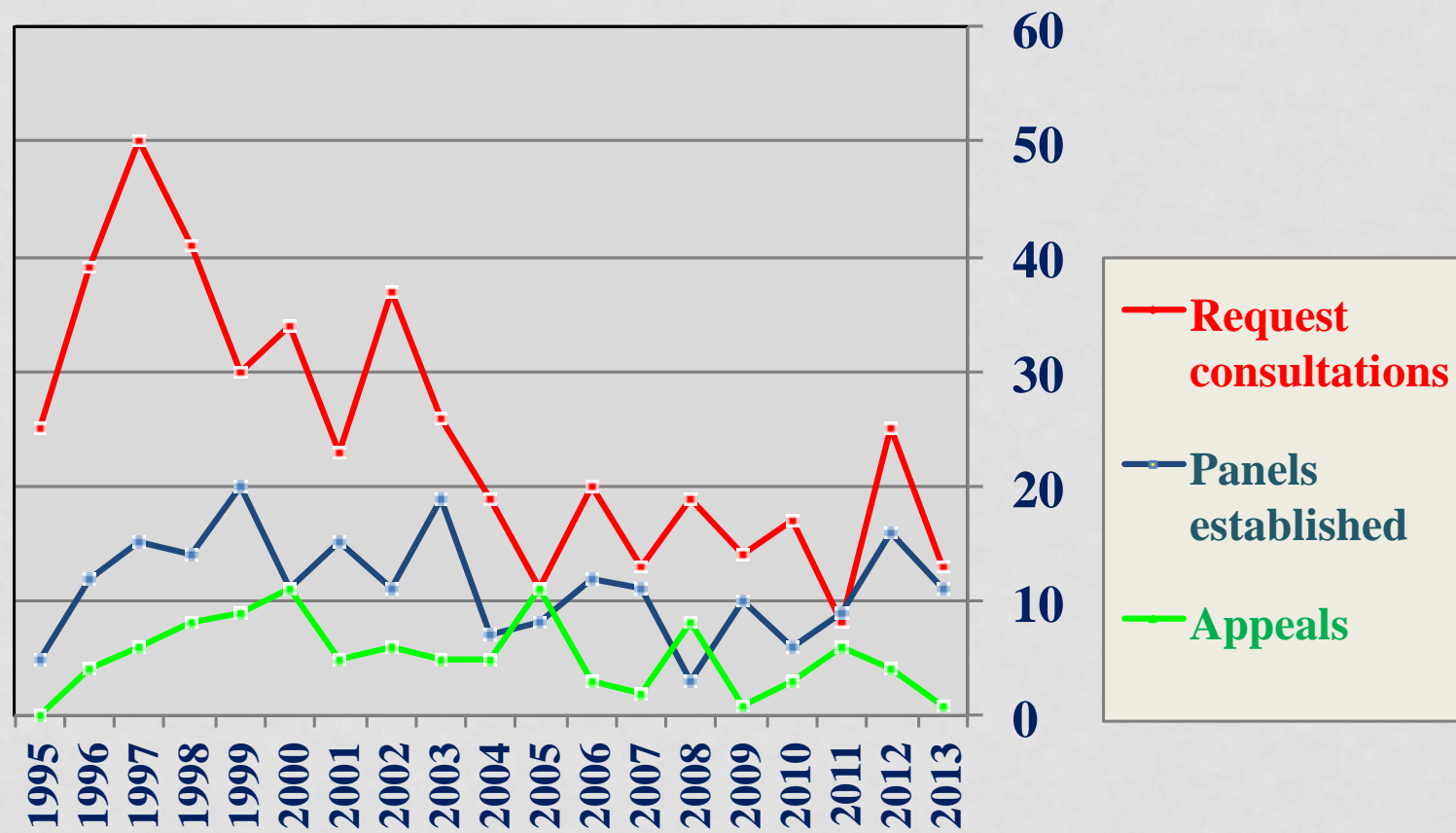
• **ITLOS: 22 in 17 years**

• **NAFTA: 3 in 20 years**



# WHY SO SUCCESSFUL?

# IT'S EFFECTIVE



# TIMELY RESULTS

**Panel process** = 1 year (except SPS)  
after composition

**Appeal** = 3 months

ICJ = 4 years

ECJ = 2 years

NAFTA Chapter Twenty = 3 years

NAFTA Chapter Eleven = 5 years

ICSID = 3 ½ years

# COMPLIANCE

- High compliance rate (about **90%**)
- Unique surveillance requirements
- No Member has ever denied responsibility to comply or otherwise address non-compliance
- Only 18 retaliations authorized by DSB
  - 176 panel reports
  - 110 Appellate Body Reports

# RESPECTED BODY OF LAW

## PROCEDURAL

- Burden of proof
- Standard of review
- Due process

## SUBSTANTIVE

- Numerous difficult and sensitive cases – remove irritants
- « Treasure trove » on treaty interpretation
- Security and predictability: not precedent but law is followed

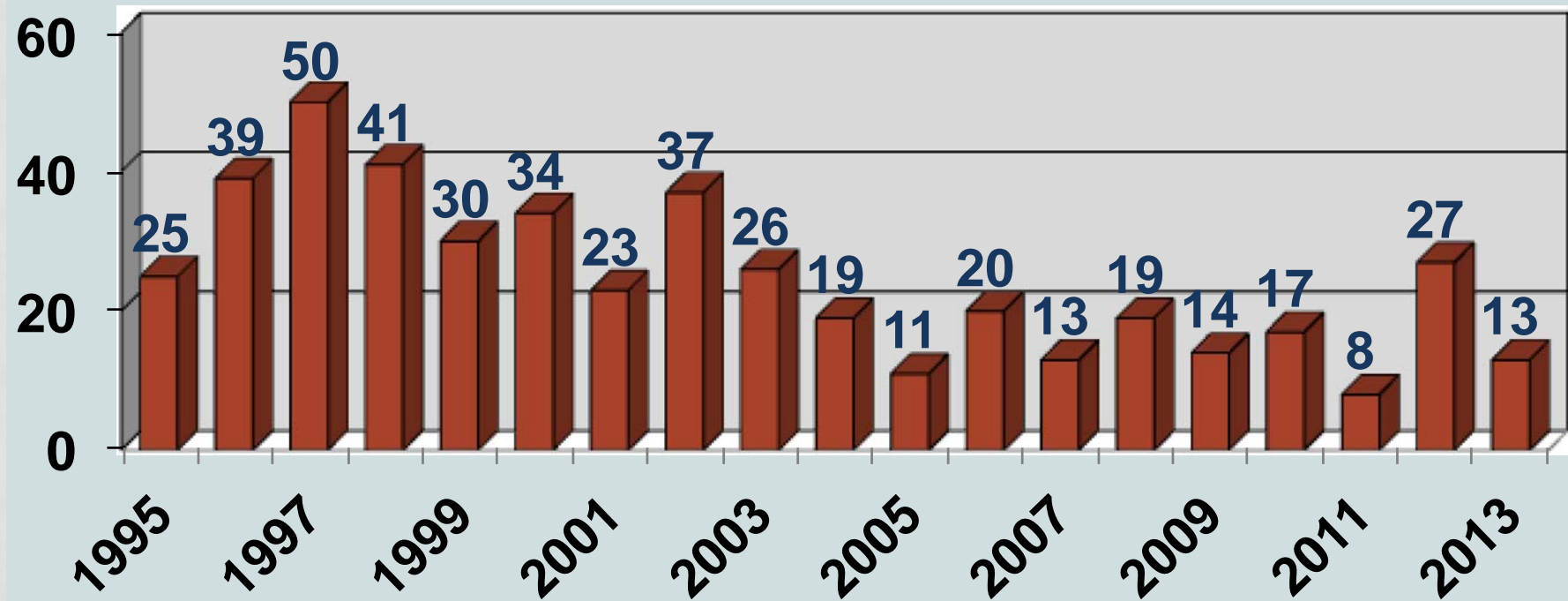
# PREFERRED TO RTA

- Many systems modelled after WTO
- RTA members bring cases to WTO instead
  - **Instead of NAFTA**
    - Canada – Periodicals (US)
    - Mexico – Soft Drinks (US)
    - Mexico – Telecomms (US)
    - Several on softwood lumber (US & Canada)
  - US & CAFTA-DR
    - Polypropelene Bags (DR, El Salvador, Costa Rica, Nicaragua)
  - MERCOSUR
    - Brazil and Argentina
    - Chile and Argentina
  - ALADI
  - ASEAN



# THE SYSTEM TODAY

## Requests for Consultations (Total 467 since 1995)



# active panels

China – HP-SSST (EU, **Japan**)

China – Rare Earths (**US, EC, Japan**)

China – AD and CVD on Autos (US)

Rules

LAD

US – CVD Measures on Certain Products(China)

US – Boeing (compliance panel) (EU)

US – CVD on Carbon Steel Products (India)

US – Shrimp II (Viet Nam)

**US -- CVD and AD (China)**

**US – Animals (Argentina)**

**US – COOL (Canada, Mexico)**

# ACTIVE PANELS

EC – Seal Products (Canada, Norway)  
EC – Airbus (compliance panel) (US)

India – Agricultural Products (US)

Argentina – Import Measures (US, EU, **Japan**)

Peru – Agricultural Products (Guatemala)

Rules

LAD

# COMING SOON

## Panels Established / Not Yet Composed

LAD

- Australia – Tobacco Plain Packaging (Ukraine)
- Australia – Tobacco Plain Packaging (Honduras)
- Argentina – Goods and Services (Panama)
- Colombia – Textiles (Panama)
- EU – Fatty Alcohols (Indonesia)
- Indonesia – Horticultural and Animal Products (US)

# panel requests pending before dsb

LAD

- Australia—Tobacco Plain Packaging (Dominican Republic)
- Russia – Recycling Fee on Motor Vehicles (EU)
- EU and a member state—Importation of Biodiesels (Argentina)



# IN CONSULTATIONS

Rules

LAD

- Australia – Tobacco Plain Packaging (Cuba)
- Australia – Tobacco Plain Packaging (Indonesia)
- EU – Biodiesel Industry (Argentina)
- India – Solar Cells (US)
- Indonesia – Horticultural Products, Animals (US)
- Indonesia – Horticultural Products, Animals (New Zealand)
- Russia – Recycling Fee on Motor Vehicles (**Japan**)
- US – AD and CVD on Washers (Korea)

# Subjects of today's disputes

- Aircraft disputes still in the system (Boeing, Airbus)
- Newer entrants (China, Russia, Viet Nam)
- Argentina as complainant & respondent
- Energy / green subsidies (e.g. FIT case)
- Health issues (tobacco packaging, clove cigarettes, export restrictions on rare earths)
- Public policy (tuna labels, COOL, seal ban)
- Protectionism fallout from banking crisis?

# Today's disputes are different

- Expanding body of law
- Multi-party is the norm
- Evidentiary requirements more rigorous
- Regulatory measures (technical expertise)
- Language – more in Spanish now
- Language of evidence (Chinese, Russian)
- Specialized
- Increasing use of private sector counsel

# CHINA ACCESSION 2001

Claimant	Respondent	Third Party
11	31	102
8 against US 3 against EU	US, EU, Japan, Canada, Mexico, Guatemala	Almost every dispute since China's accession

# RUSSIA ACCESSION 2012

## Respondent

2

- Recycling Fee on Motor Vehicles (EU and **Japan**)

## Third Party

8

- US—CV and AD Measures on Certain Products from China
- US—Countervailing Measures (China)
- EC—Seal Products (Norway, Canada)
- China—Rare Earths (US, EU, **Japan**)
- China—HP-SSST (**Japan**, EU)

## DS ACTIVITY: RECENTLY ACCEDED MEMBERS

Member	Complainant	Respondent	Third Party
Moldova (2001)	1	1	1
<b>China (2001)</b>	<b>11</b>	<b>31</b>	<b>102</b>
Chinese Taipei (2002)	3	0	76
Armenia (2003)	0	1	0
Saudi Arabia (2005)	0	0	19
Viet Nam (2007)	2	0	16
Ukraine (2008)	3	1	1
Russia (2012)	0	2	8



# AUSTRALIA – PLAIN PACKAGING

- 5 complainants:
  - Ukraine, Honduras, Dominican Republic, Cuba, Indonesia
  - In Ukraine's case: 35 third parties
  - In Honduras' case: 28 third parties
  - DR: still in DSB
  - Cuba and Indonesia: still at consultations phase

# JAPAN AND WTO DISPUTE SETTLEMENT

## Dispute settlement activity: Japan

Since 1995, involved in **170** disputes:

Claimant	Respondent	Third Party
18	15	137

Member	Cases Initiated	Member	Cases Defended
US	106	US	120
EU	89	EU	74
Canada	33	China	31
Brazil	26	Argentina	22
Mexico	23	India	22
India	21	Canada	17
Argentina	19	Japan	15
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Korea	16	Korea	14
Thailand	13	Mexico	14

# DISPUTE SETTLEMENT ACTIVITY: JAPAN

Complainant	Respondent	Third Party
18	15	137
Claims brought against Argentina, Brazil, Canada, China, EU, Indonesia, Russia, US	Claims brought by Canada, EU, Korea, US	
Trade remedies, Autos, Steel, FIT, IT Products, Rare earths, etc	Alcoholic Beverages, Film, Apples, Laver, DRAMS	

## Dispute settlement activity: Japan

**Current activity:** total **29** disputes

Complainant	Respondent	Third Party
9 (=3 panels, 1 consultation)	0	19 (= 16 panels)



# DISPUTE SETTLEMENT ACTIVITY: JAPAN

## As Complainant (**active**)

- At panel proceedings stage (= **ongoing**)
  - Argentina—Import Measures
    - Co-complainants are US and EU
  - China—HP-SSST (AD on stainless steel tubes)
    - EU has a case on same issue
  - China—Exportation of Rare Earths
    - Co-complainants are US and EU
- At consultations stage:
  - Russia—Recycling Fee on Motor Vehicles
    - EU has similar case but has already asked for panel establishment

# DISPUTE SETTLEMENT ACTIVITY: JAPAN

## As Third Party (**active**)

China—Autos (US) (re AD and CVD)

EC—Seal Products (Canada, Norway) (re import ban)

EC—Large Civil Aircraft (US) (Airbus)

India—Agricultural Products (US) (re poultry SPS)

US—Shrimp II (Viet Nam) (re AD)

US—Large Civil Aircraft (EU) (Boeing)

US—CV and AD Measures (China) (re GATT Art X)

US—CVD Measures on Certain Products (China)

# FURTHER CONTRIBUTION OF JAPAN

- Panelists: **6**
  - Ichiro Araki
  - Naoshi Hirose
  - Mitsuo Matsushita
  - Akio Shimizu
  - Yoichi Suzuki
  - Jun Yokota
- Appellate Body members: **3**
  - Mitsuo Matsushita
  - Yasuhei Taniguchi
  - Shotaro Oshima

# DSU REVIEW: JAPAN'S CONTRIBUTION

- A committed and key participant
- First Chair of negotiations: Ambassador Suzuki
  - 1999: Submitted "Proposed Amendment of DSU" on behalf of 15 Members to Ministerial Conference in Seattle addressing:
    - Surveillance
    - Implementation
    - Sequencing (Articles 21 and 22)
    - Compliance proceedings
    - Retaliation
  - Not adopted due to Seattle meeting general impasse

# DSU NEGOTIATIONS

- Third party rights
- Compliance
- Post-retaliation
- Developing country interests
- Member control
- Remand
- Sequencing
- SCI
- Timeframes
- Transparency



# DSU REVIEW: JAPAN'S CONTRIBUTION

- **Japan's proposals during current phase:**
  - Post-retaliation
  - Sequencing
  - Third party rights at consultations stage
- **Japan has supported proposals on:**
  - transparency



# THE FUTURE?

# FUTURE OF WTO DISPUTE SETTLEMENT

- Active
- Specialized
- Multi-issue/ multi-party
- Preferred to mechanisms in RTAs

# FUTURE OF WTO DISPUTE SETTLEMENT

- Subject matter:
  - regulatory, environment, health, energy, state-owned enterprises, trade remedies

# FUTURE OF WTO DISPUTE SETTLEMENT

- Broad Participation
  - Dominated by: China, EU, US
  - Other big players: Brazil, Canada, India, Japan, Mexico, Russia (?)
- Latin America ?
- Absent players?
  - LDCs, Africa

# CIVIL SOCIETY

- Only Members (states, customs territories) have right to participate
- Discretion for panels to consider other submissions
- Amicus curiae briefs in **36 disputes**
- Issues often generate public interest
  - Shrimp/turtle      Tuna/dolphin      GMOs
  - Seal products      Hormone treated beef

# Open hearings

- traditionally, **confidential** process
  - diplomatic beginnings
  - hearings usually behind closed doors
  - a few members make submissions public
- first “open” hearing in 2005
- 12 panels so far have held **open hearings**
- Appellate Body too



# FUTURE OF WTO DISPUTE SETTLEMENT

- Modernization? (digital filing)
- Traditions?
  - public hearings?
  - private counsel over diplomats/government lawyers?
  - paper evidence
  - Increasing use of Spanish
- Standing panel body?
- Size of Appellate Body?
- Timelines?
- DSU review?

# IN SUM

## WTO DISPUTE SETTLEMENT

- Is used often and regularly
- By a large cross section of developed and developing country Members
- Is responsive to developed and developing
- It works (many disputes resolved before « court » but if not, high rate of compliance)
- It's fast
- Preferred to RTA mechanisms
- Established body of law