

# The Appellate Body Crisis: Insider Perceptions and Revealed Preferences

Matteo Fiorini, Bernard M. Hoekman, Maarja Saluste (EUI)  
Petros C. Mavroidis (CLS) & Robert Wolfe (Queen's)

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## What is Our Study About?

### Our null hypotheses:

1. The AB has been disrespecting its institutional mandate (US claim)
  
2. The “AB crisis” is irrelevant to majority of WTO members, because:
  - Disputes are a matter of concern to 32% of membership (including EU members separately)  
    This falls to 18% if we count the EU as one
  - Dispute adjudication is a largely a “cottage industry” of interest to insiders (lawyers, academics etc.)

# How We Go About (Dis-)Proving Our Null Hypotheses

1. Assess revealed preferences of members (DSB delegations' activity)
  - Participation in disputes
  - Interventions in DSB on the AB and DSU reform
  
2. Assess perceptions of stakeholders: WTO members + law firms; business associations & academia (latter 3, have no standing at DSB)
  - On-line anonymous survey (questionnaire) June-September 2019
    - Email sent to all WTO delegations before and after 2019 summer break
  - Sent to ICC, PECC, and circulated to the WEF trade community
  - Participation in our survey is an indicator of revealed preferences

## Main Findings

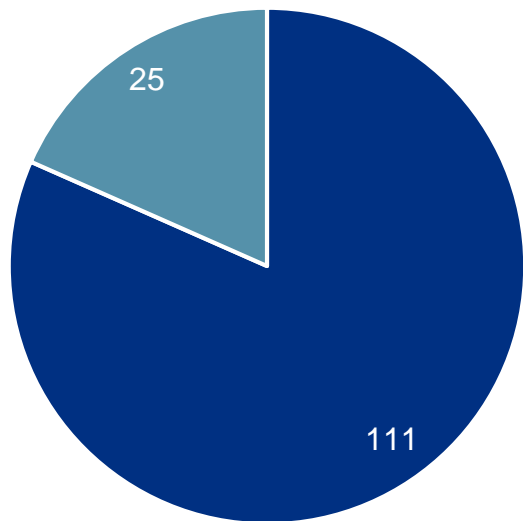
1. Low rate of participation
  - Both in DSB (we check formal meetings), **and** in the survey
  
2. Strong consensus on current structure of dispute adjudication
  - Binding reports; two-instance adjudication (good news for the AB)
  
3. Polarization regarding quality of DS output
  - Agreement on the beneficial role of the AB
  - Disagreement regarding its respect of institutional constraints

First Finding

Crisis? What/Whose Crisis?

## A. Participation in the WTO

## Participation in DS proceedings: Complainants (2017-2019)

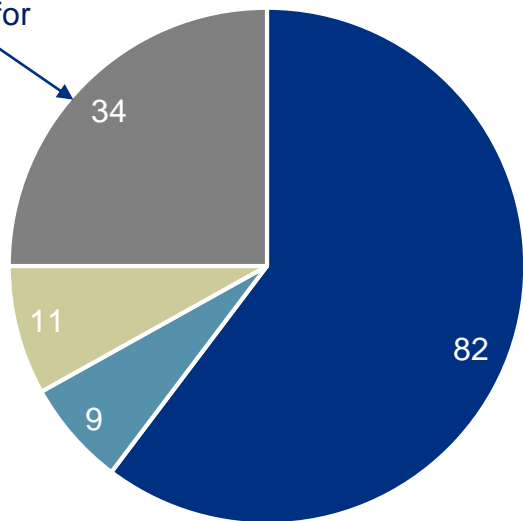


■ No complaint   ■ At least one complaint

- 25 Members have acted as complainants (111 did not)
- The 25 Members account for 80% of world exports
- (Note: We count the EU28 as one member in our measures of participation in the DSU)

## Participation in Discussions about DSB Reform, AB Appointments, Related Policy Issues

These 34 members account for 85% of world exports



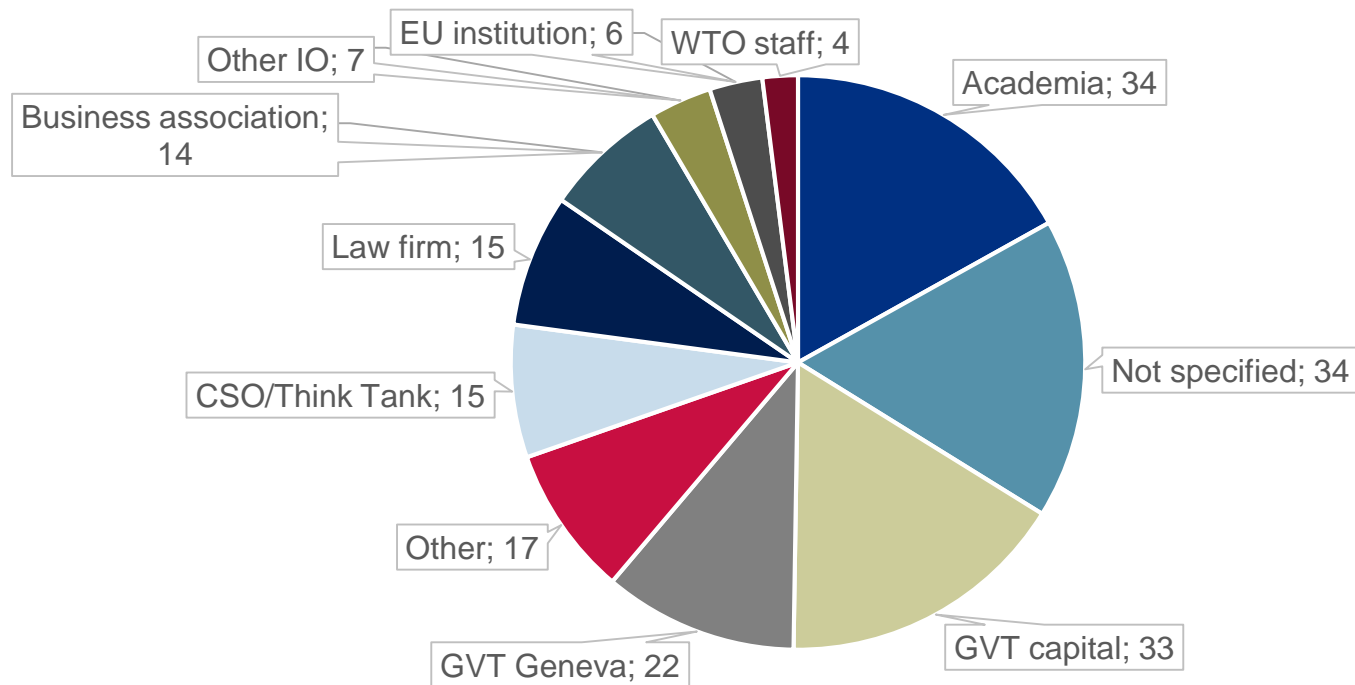
■ 0 ■ 1 ■ from 2 to 5 ■ 6 or more

- 854 interventions, 2017-2019
- 82 Members (60%) never spoke
- 34 Members intervened 6 or more times
- [Note: We have no information about participation in the informal process led by Amb. Walker]

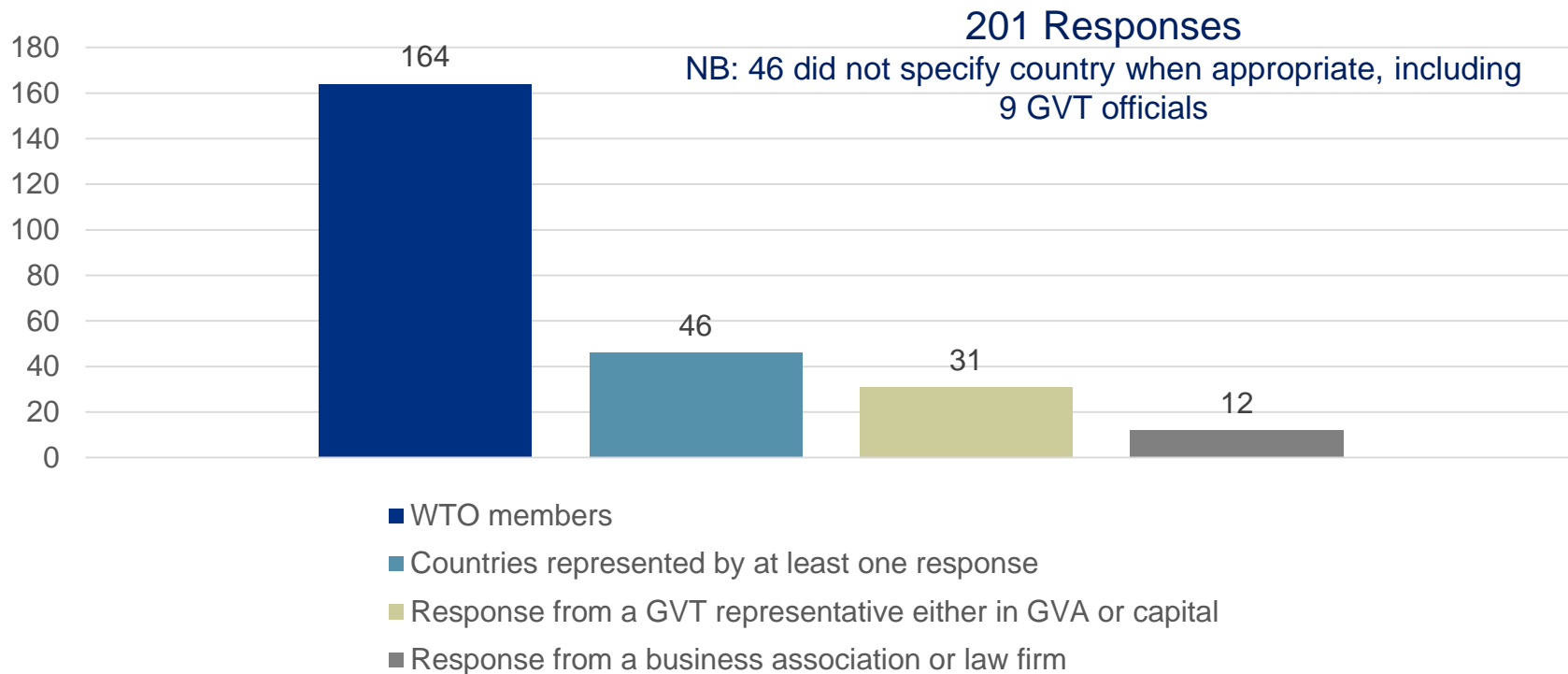


## B. Participation in Our Survey

# Professional Affiliation of Survey Respondents



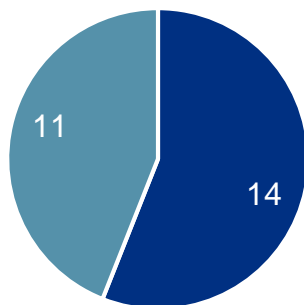
## Low Response Rate



## Survey Participation of the 25 WTO Members that were DS Complainants in 2017-19

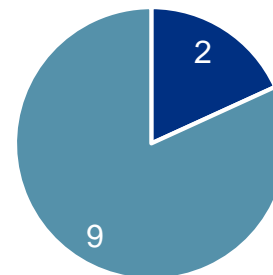
Note: (1) not all of these countries responded to our survey  
(2) we do not know the country for 9 GVT respondents

44% responses from government



■ Yes ■ No

Of the 11 with no GVT response, 2 business or law firms took survey



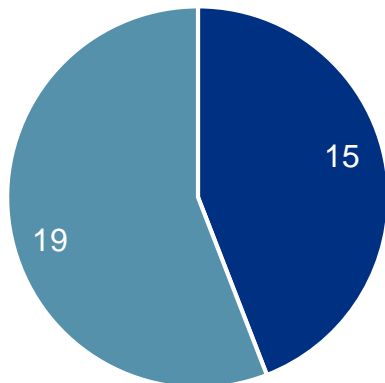
■ Yes ■ No

## Survey Participation of Members Participating in DSB Reform Debates, Intervening on AB Appointments and Related Policy Issues

Out of 34 members with 6 or more interventions

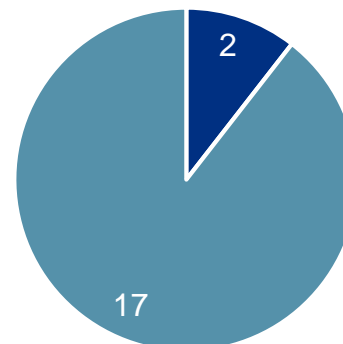
44% Responses from GVT

NB: we do not know the country for 9 GVT respondents



■ Yes ■ No

Out of the 19 with no GVT response, 2 business or law firms took survey

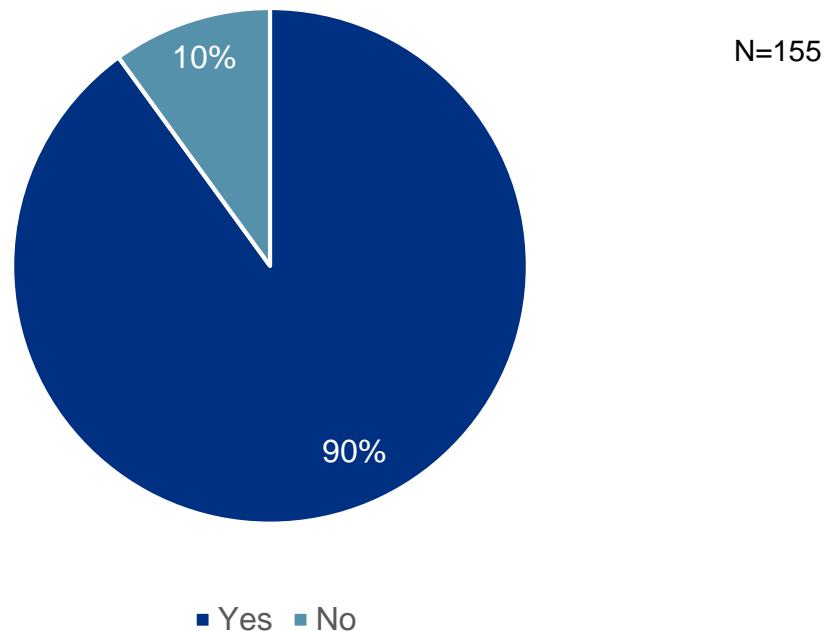


■ Yes ■ No

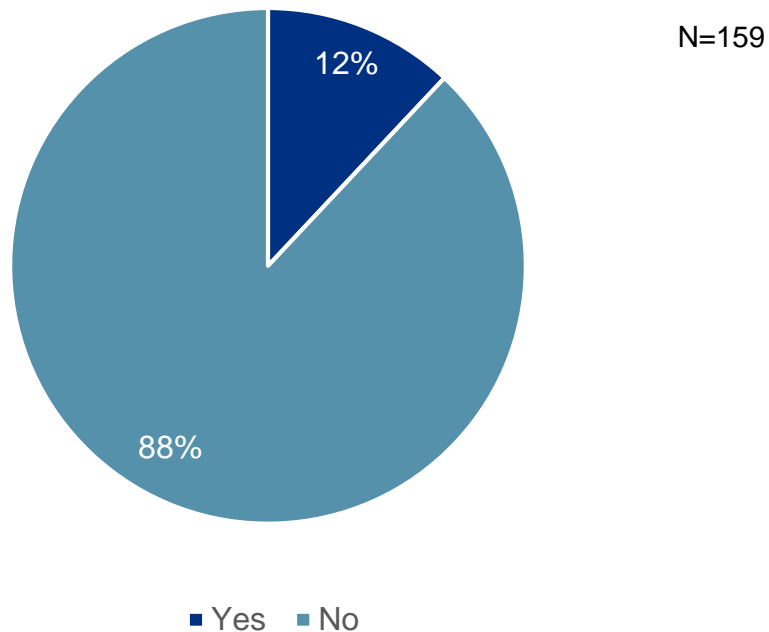
## Second Finding

**Consensus** (Almost) on Two-Instance  
Compulsory Third-Party Adjudication

## Is Compulsory Third-Party Adjudication Necessary for a Well-Functioning Multilateral Trading System?

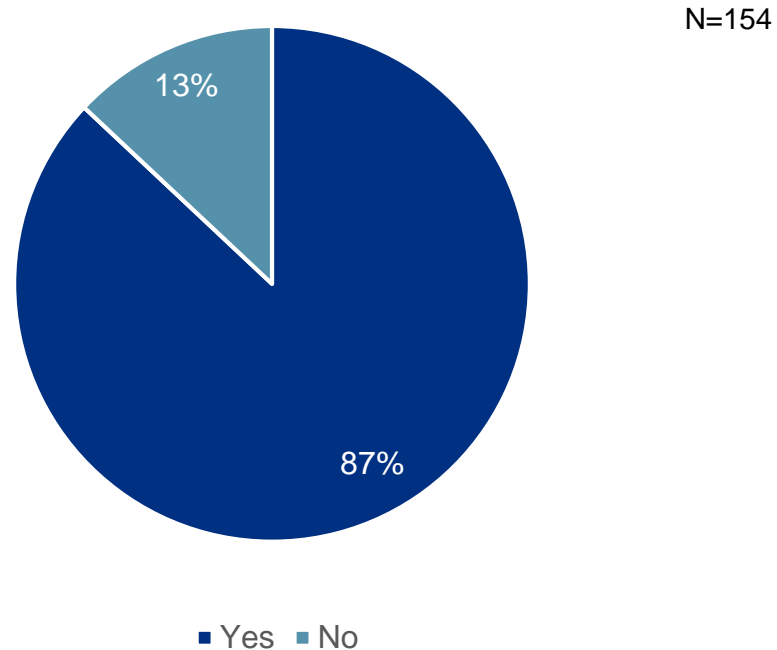


## Does the AB Impasse Largely Concern the EU and the US (So, Rest of Membership Can Stay Out?)

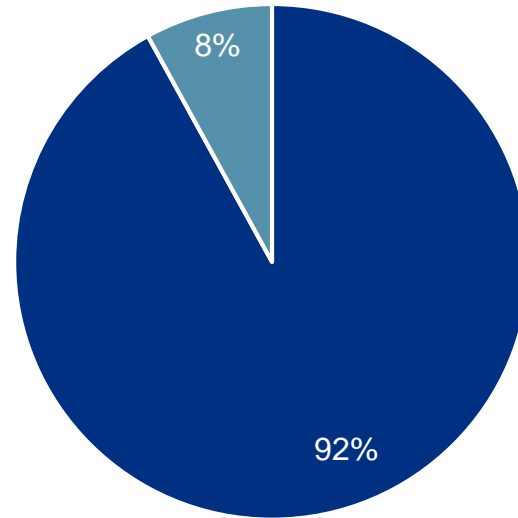




## Is Dispute Settlement Valuable to Clarify Rules by Establishing Precedent?



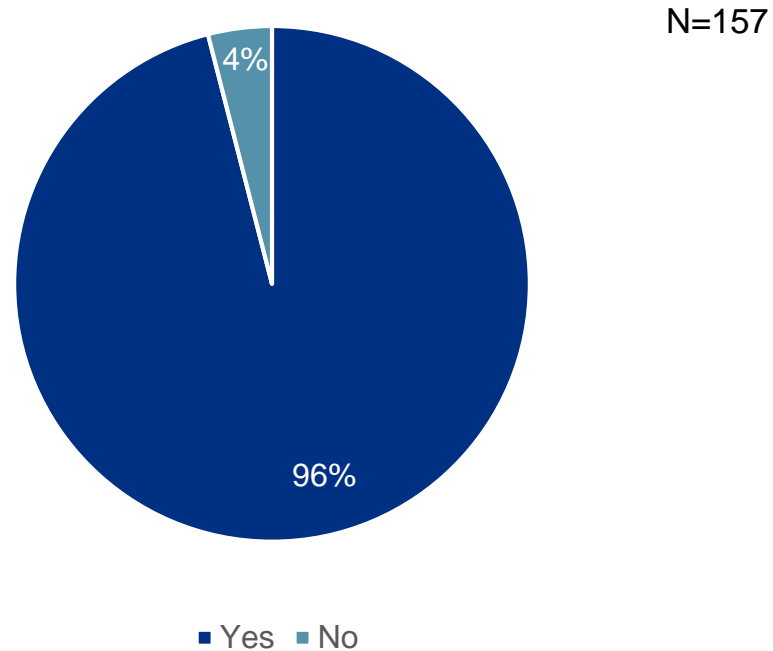
## Is Dispute Settlement Valuable for Ensuring Predictability?



N=155

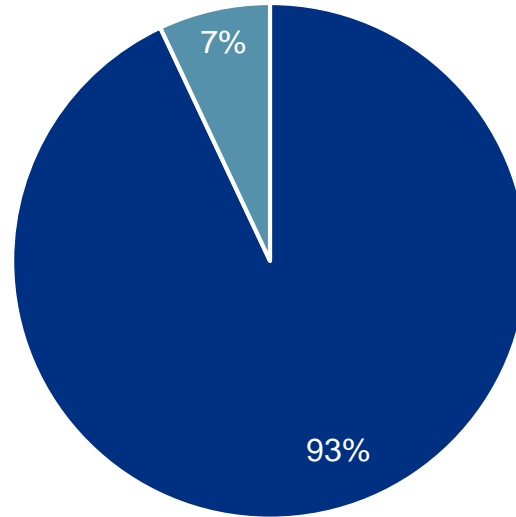
■ Yes ■ No

## Is Dispute Settlement Valuable for Enforcing Commitments?



## Does the WTO Need the AB to Ensure Coherence in Case Law?

N=155

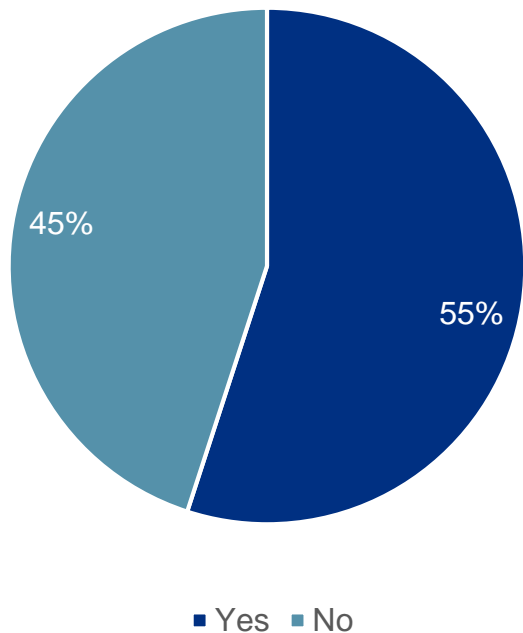


■ Yes ■ No

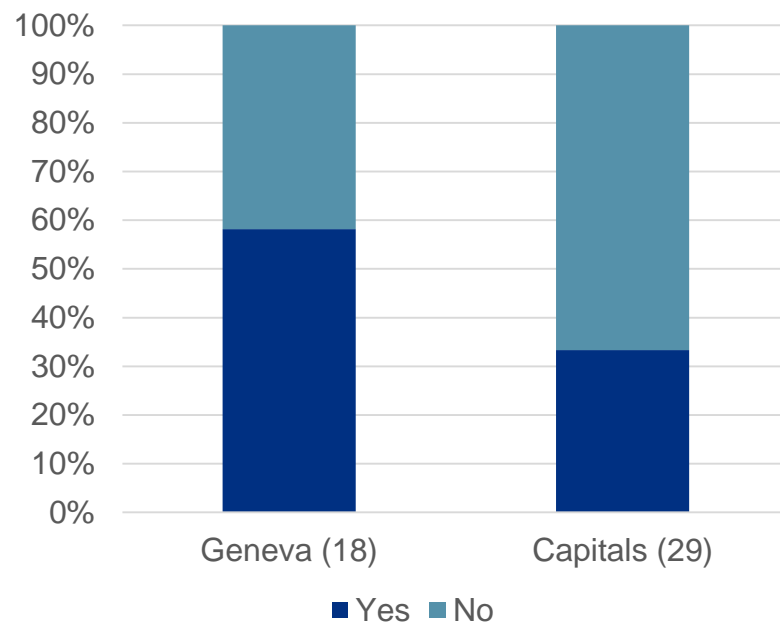
## Third Finding

**Polarization:** Dispute Settlement Does Not Consistently Deliver High-Quality Outcomes

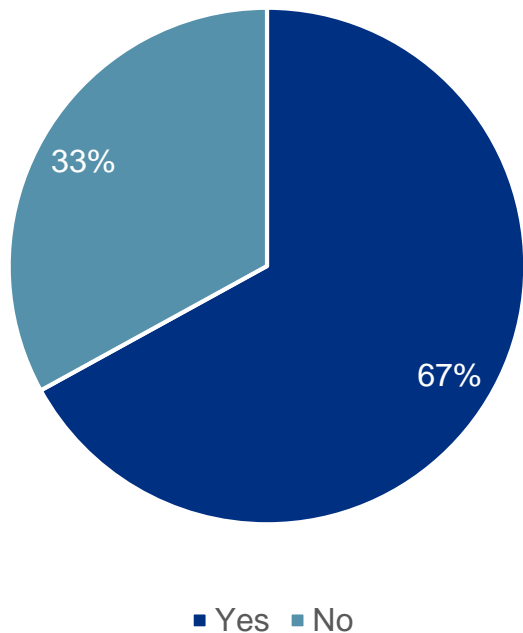
## Are Panel Reports Sometimes Biased?



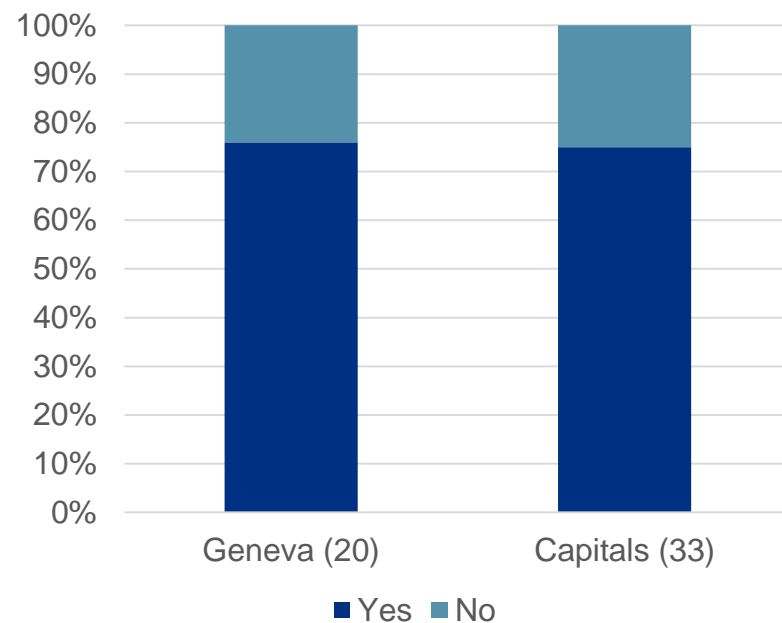
### Responses by GVT officials



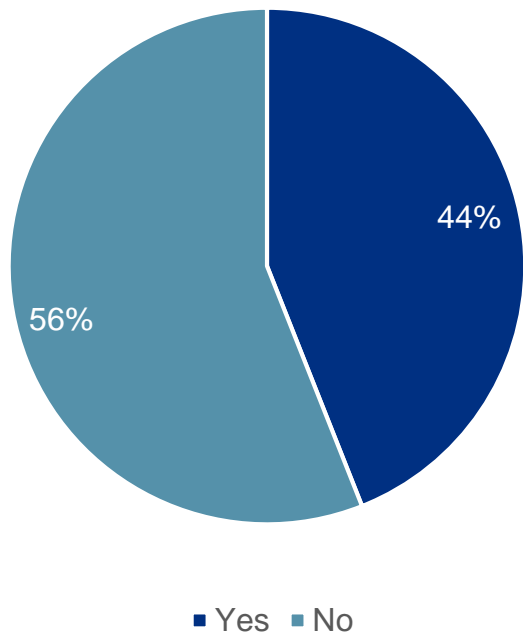
## Has the AB Provided Coherent Case Law?



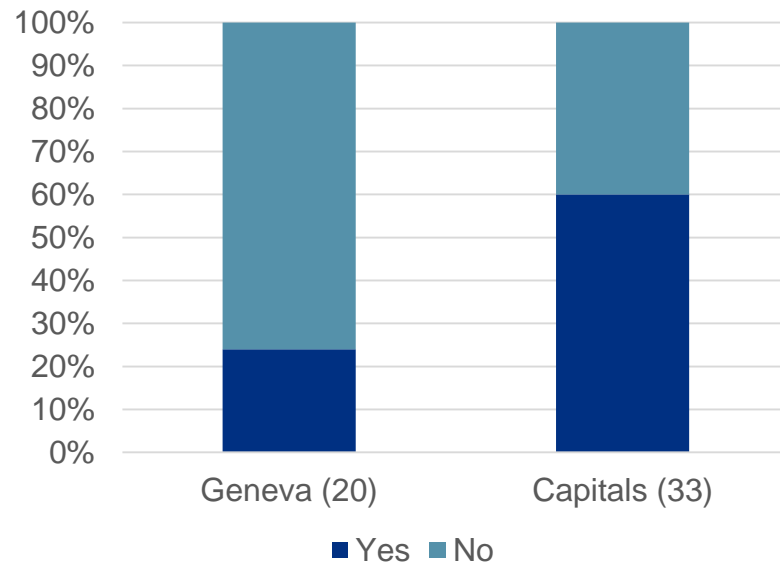
### Responses by GVT officials



## Has the AB Always Acted Consistently with the DSU?

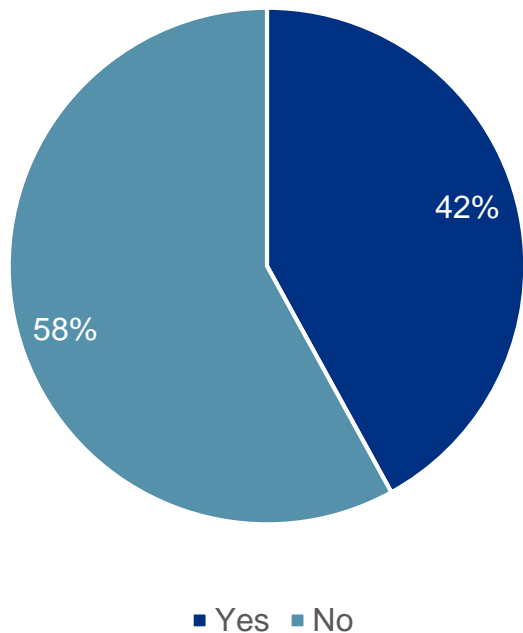


### Responses by GVT Officials

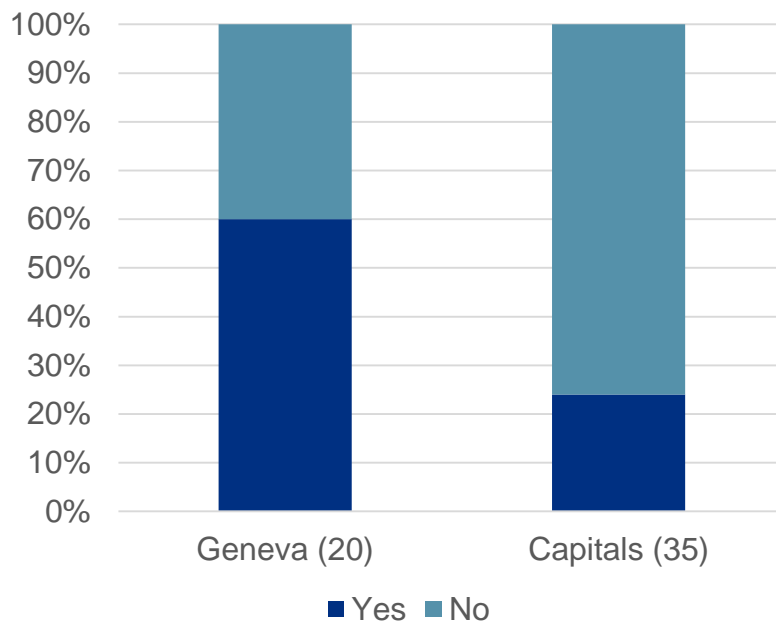




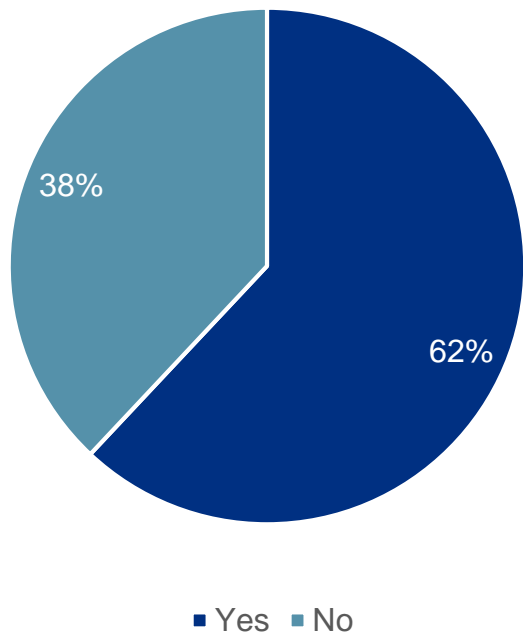
## Has the AB Disrespected its Mandate?



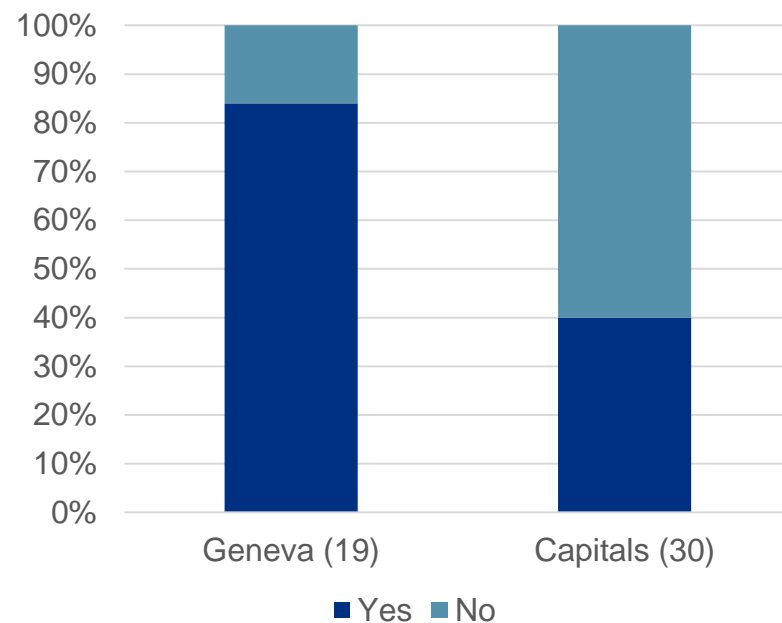
### Responses by GVT officials



## Are AB Reports Written by the WTO Secretariat?



### Responses by GVT officials



## Bottom Line

- The US is not alone, even though criticism voiced might take a different road than that travelled by Trump Administration
- Interest in the issue is moderate (proxy: participation in survey, DSB deliberations)
  - Significant correlation among non-participation in dispute settlement, low participation in DSB debates, and relative disinterest in the survey
- Geneva and capitals are not on the same page
- A strong **consensus** emerges in favour of **a** (as opposed to the actual) two-instance compulsory third-party adjudication regime
- But **polarization** as to the current system
  - Some see no issue with AB workings
  - Some believe AB has gone beyond its mandate

## Implications and some questions

- Before discussing what needs to be done to redress matters, members need to agree on what the issues are
  
- Questions:
  - Should all Members (or only major users) be invited to participate?
  
  - Should consensus be required for Members to review AB output?
  
  - Do other forms of conflict management in WTO, and elsewhere, matter more for many members?
  
  - Is the Secretariat too much present in the kitchen?

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