

The Appellate Body Crisis: Insider Perceptions and Revealed Preferences

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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)

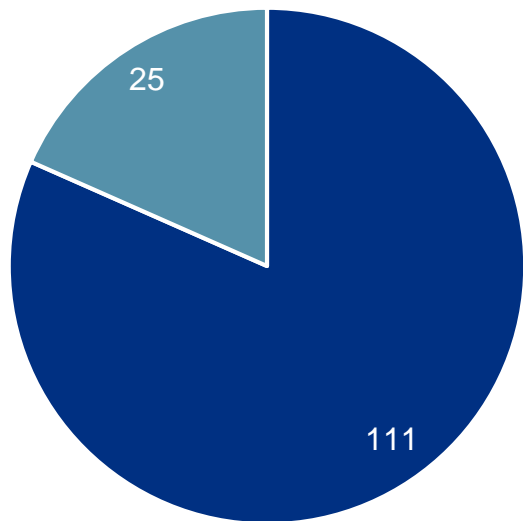
3. Polarization regarding quality of DS output
 - Agreement on the beneficial role of the AB
 - Disagreement regarding its respect of institutional constraints

First Finding

Crisis? What/Whose Crisis?

A. Participation in the WTO

Participation in DS proceedings: Complainants (2017-2019)

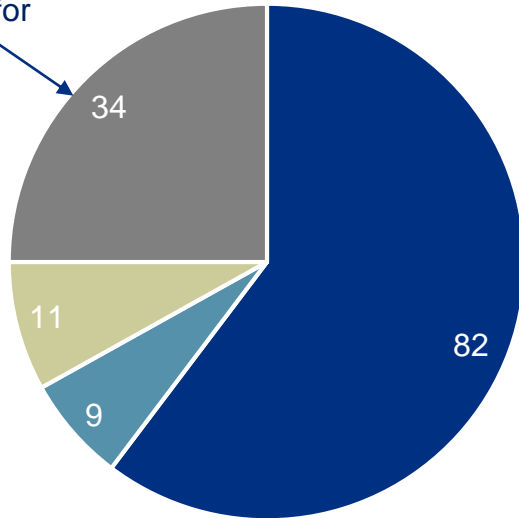


■ No complaint ■ At least one complaint

- 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

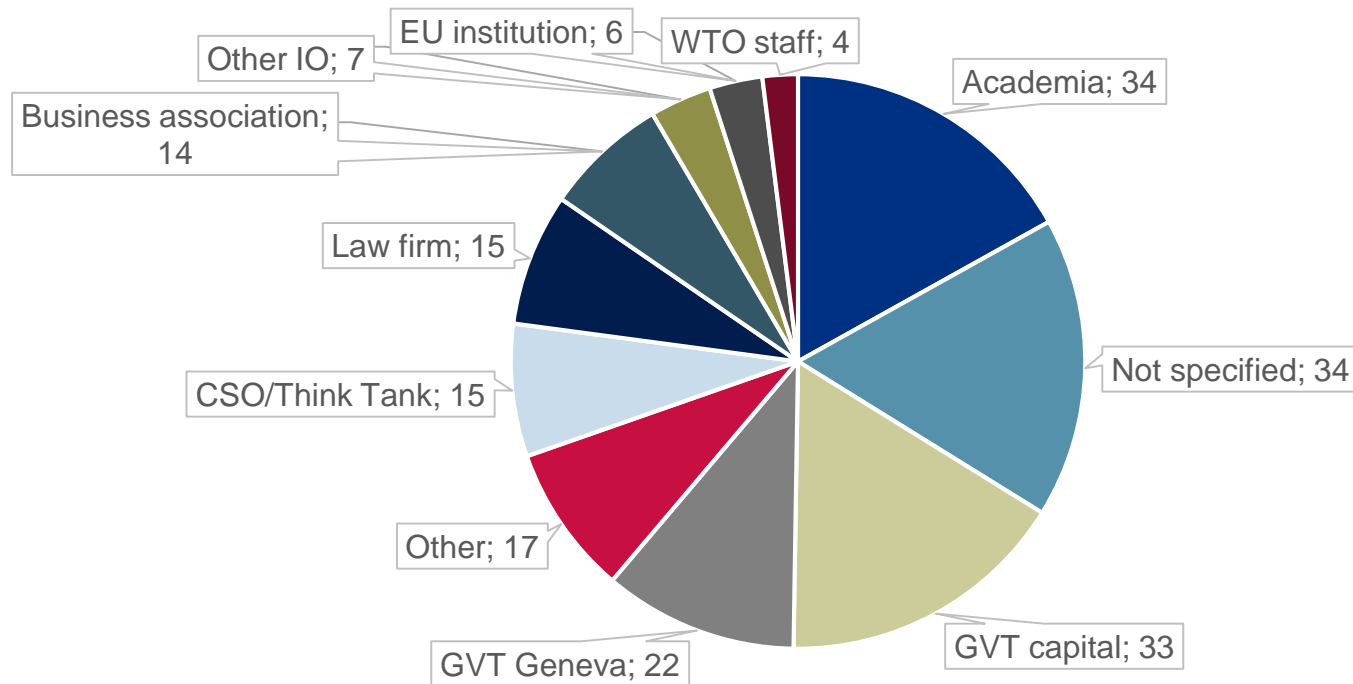


■ 0 ■ 1 ■ from 2 to 5 ■ 6 or more

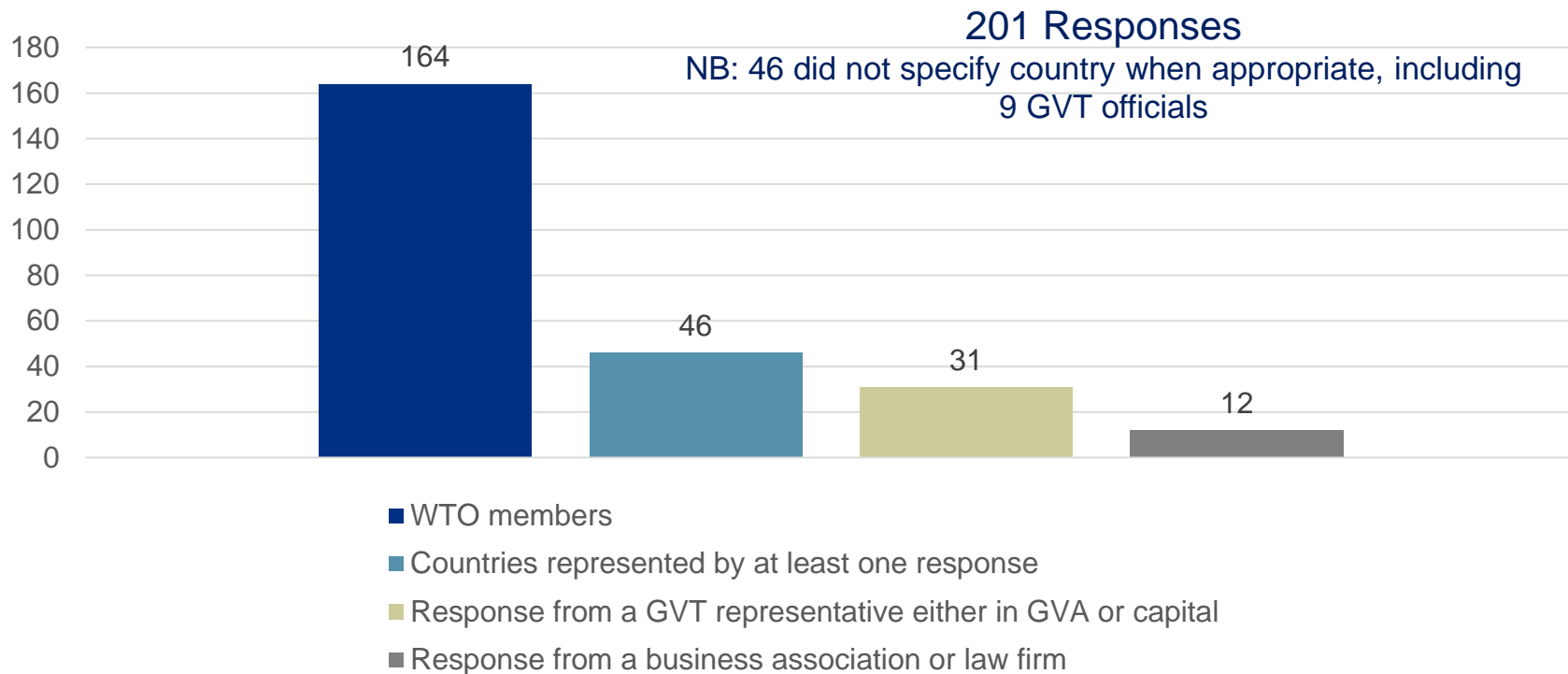
- 854 interventions, 2017-2019
- 82 Members (60%) never spoke
- 34 Members intervened 6 or more times
- [Note: We have no information about participation in the informal process led by Amb. Walker]

B. Participation in Our Survey

Professional Affiliation of Survey Respondents



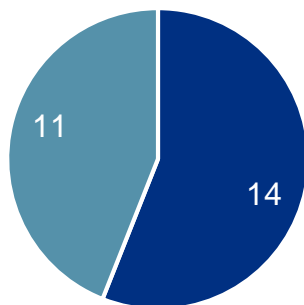
Low Response Rate



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

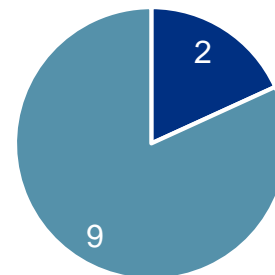
Note: (1) not all of these countries responded to our survey
(2) we do not know the country for 9 GVT respondents

44% responses from government



■ Yes ■ No

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



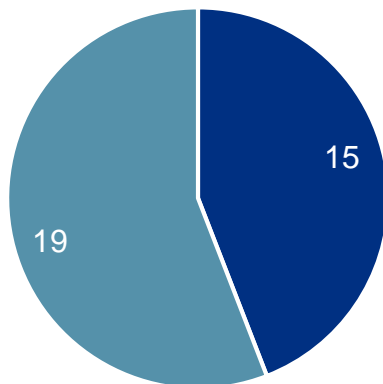
■ Yes ■ No

Response Rate of Members Participating in DSB Reform Debates, Intervening on AB Appointments and Related Policy Issues

Out of 34 members with 6 or more interventions

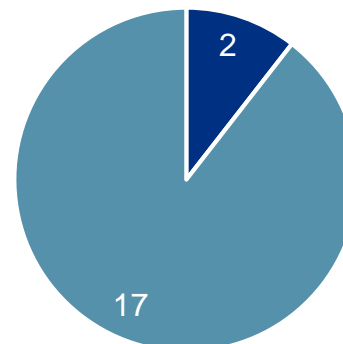
44% Responses from GVT

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

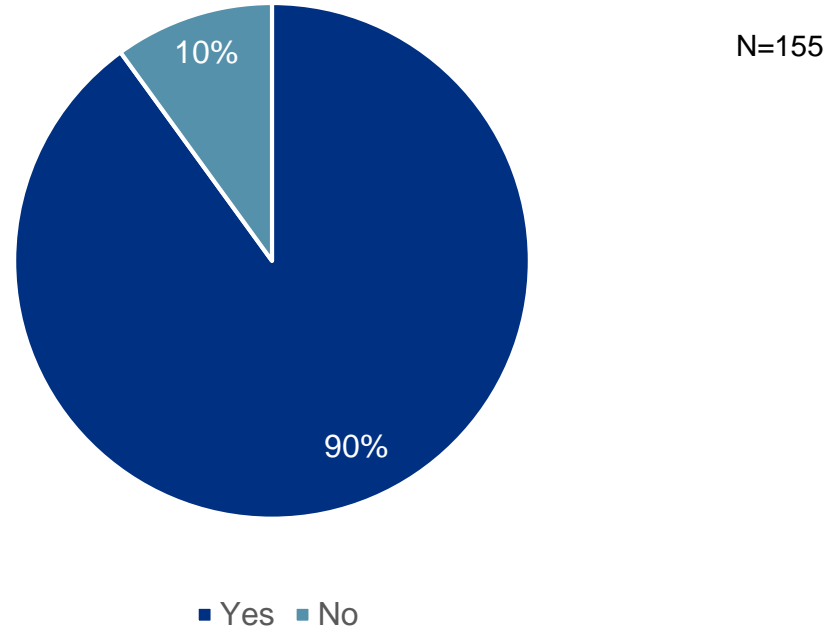


■ Yes ■ No

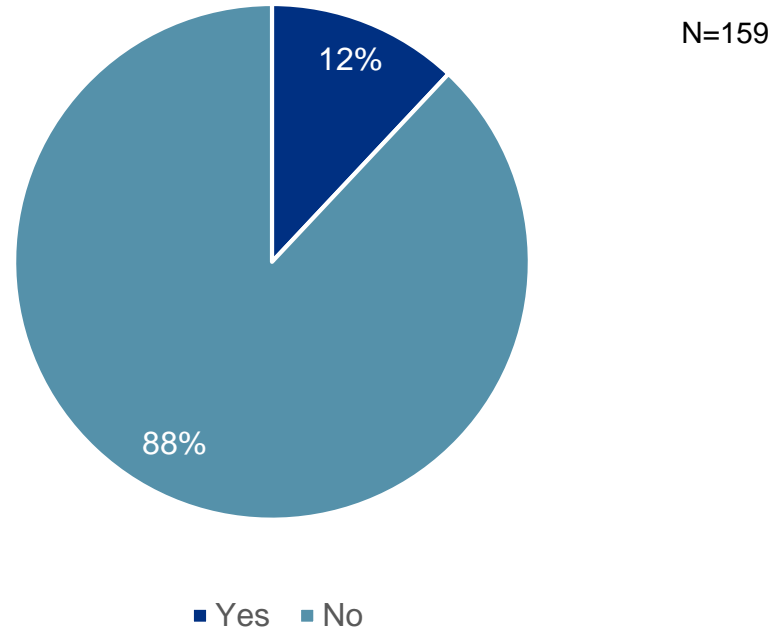
Second Finding

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

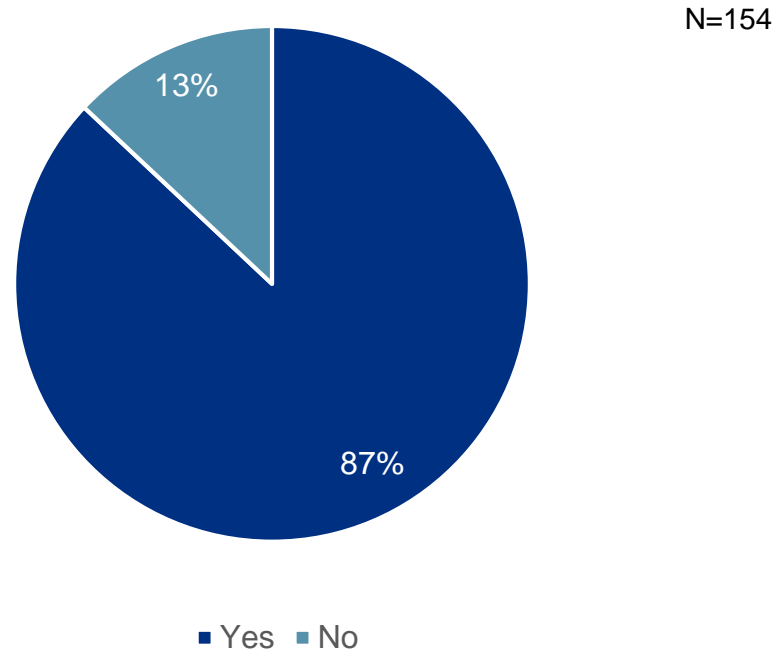
Is Compulsory Third-Party Adjudication Necessary for a Well-Functioning Multilateral Trading System?



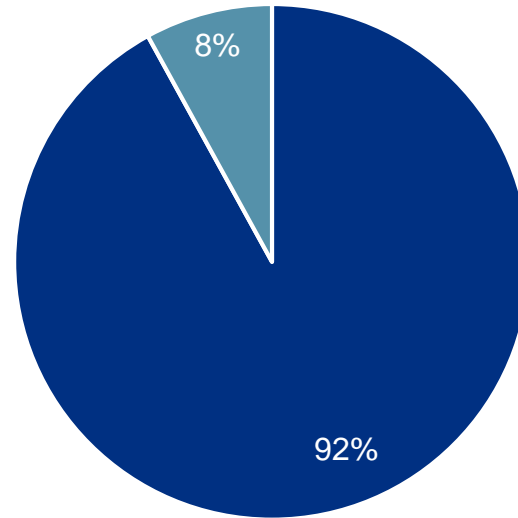
Does the AB Impasse Largely Concern the EU and the US (So, Rest of Membership Can Stay Out?)



Is Dispute Settlement Valuable to Clarify Rules by Establishing Precedent?



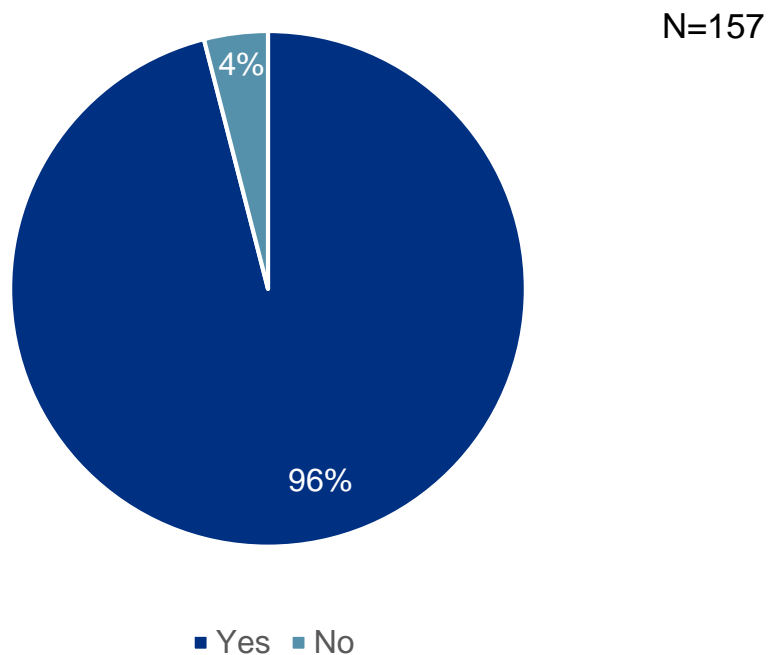
Is Dispute Settlement Valuable for Ensuring Predictability?



N=155

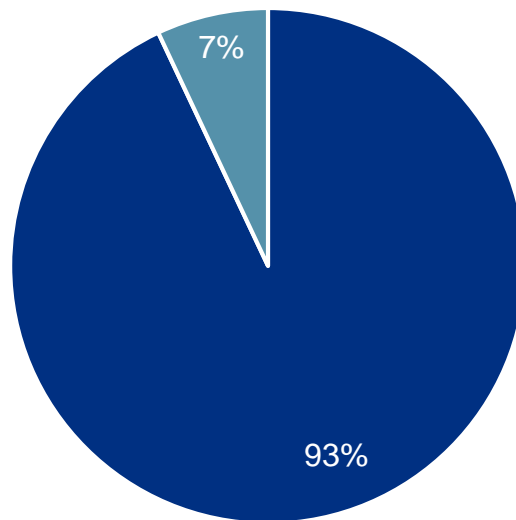
■ Yes ■ No

Is Dispute Settlement Valuable for Enforcing Commitments?



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

N=155

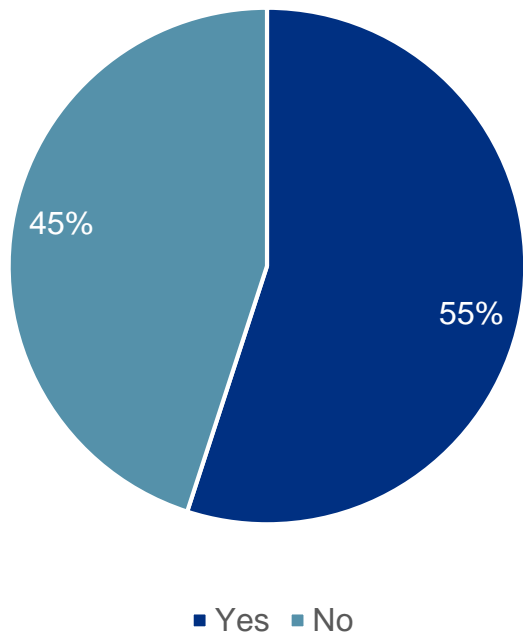


■ Yes ■ No

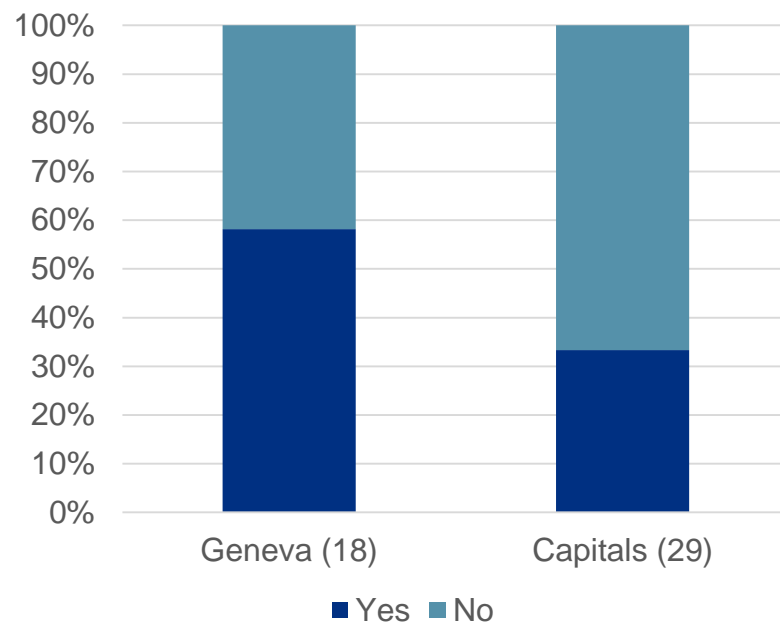
Third Finding

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

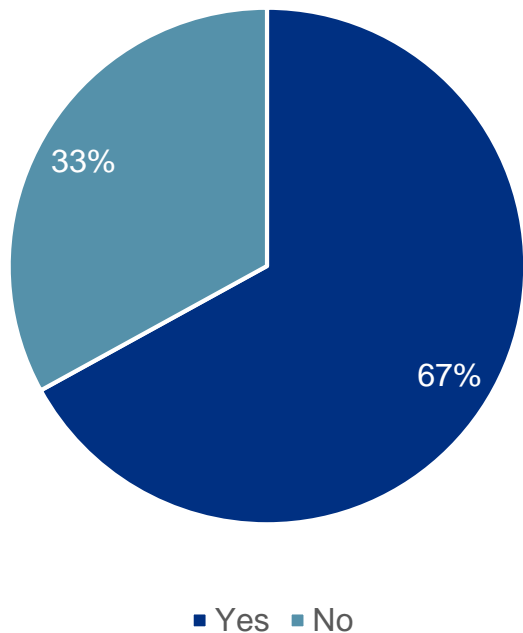
Are Panel Reports Sometimes Biased?



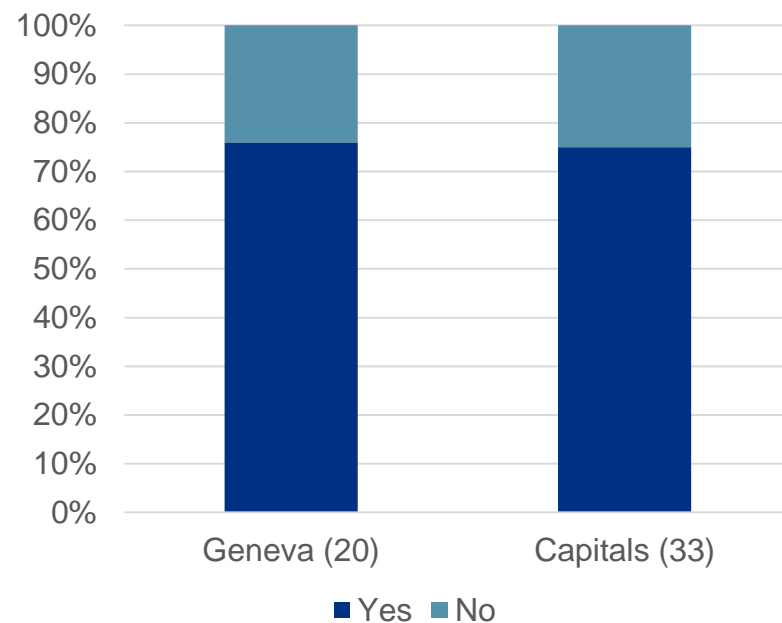
Responses by GVT officials



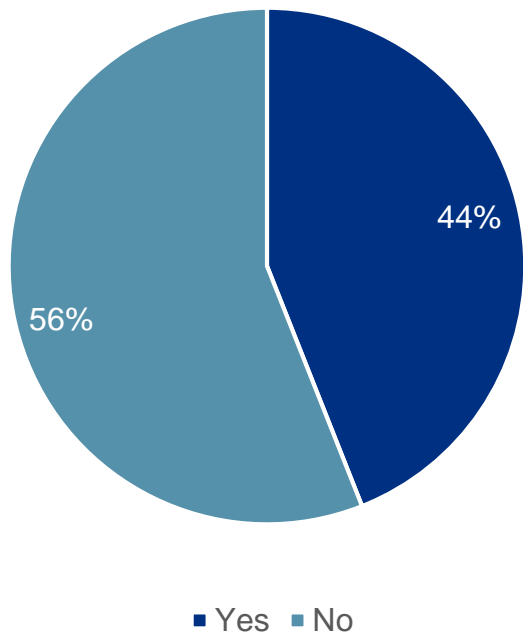
Has the AB Provided Coherent Case Law?



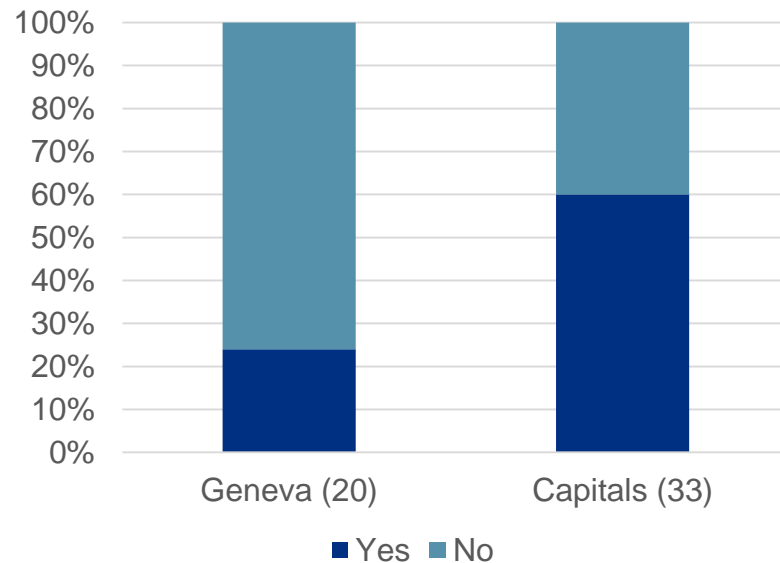
Responses by GVT officials



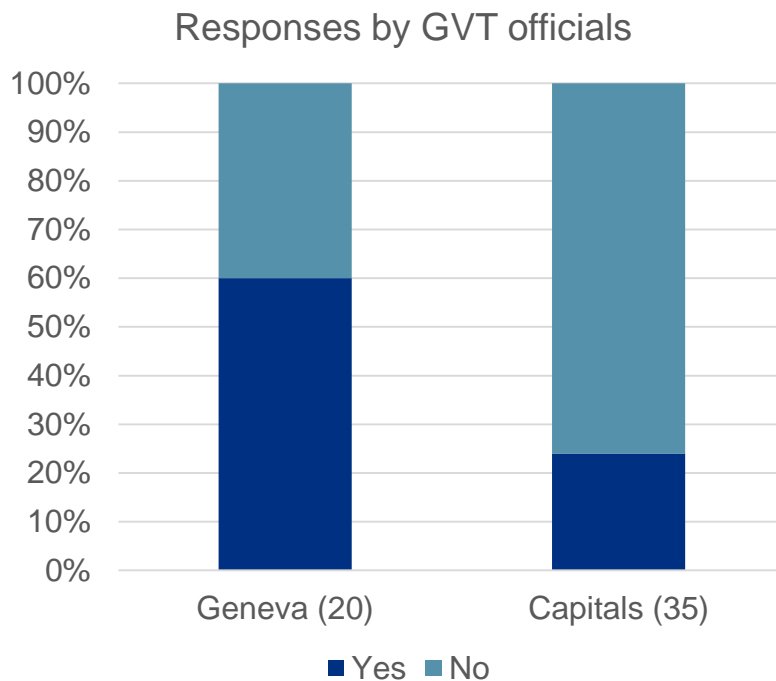
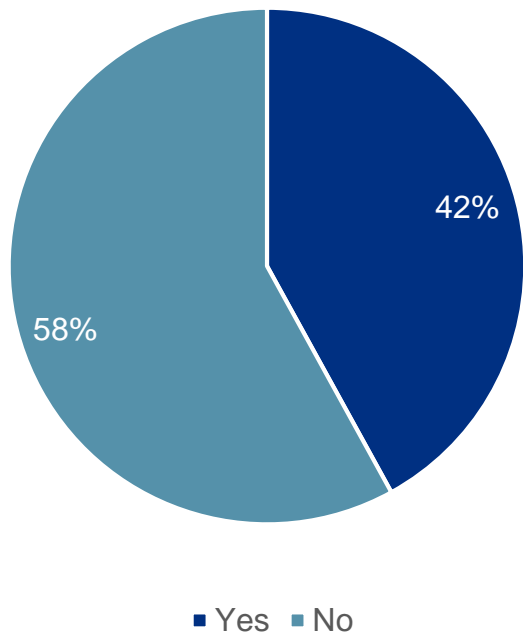
Has the AB Always Acted Consistently with the DSU?



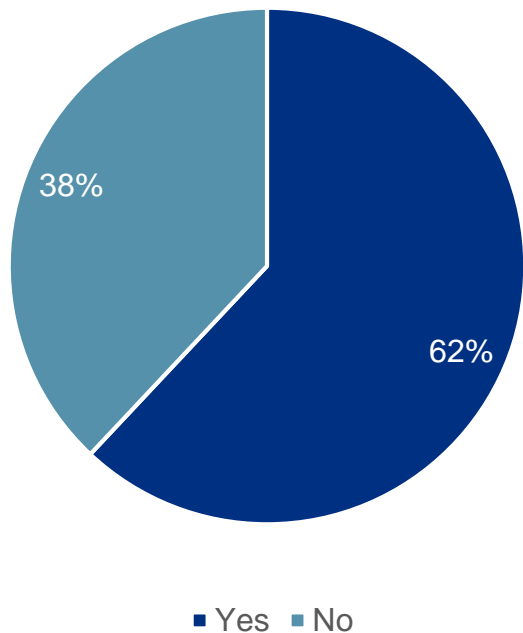
Responses by GVT Officials



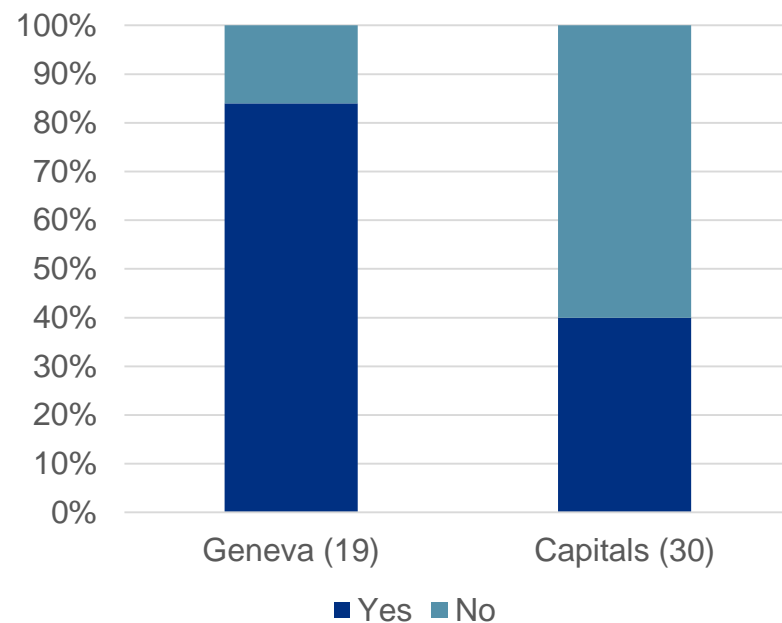
Has the AB Disrespected its Mandate?



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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