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PROPOSALS, PRACTICES, AND INTERPRETATIONS: EXAMINING THE WTO'S SEQUENCING DILEMMA

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ABSTRACT

*The Sequencing issue between Articles 21 and 22 of the Dispute Settlement Understanding ("**DSU**") arises from a drafting gap that creates ambiguity regarding the order of compliance and retaliation proceedings. Specifically, the issue pertains to whether compliance with WTO rulings under Article 21.5 must be determined before initiating retaliation measures under Article 22.6 of the DSU.*

The recent commitment to reform the DSU, prompted by the Appellate Body crisis, presents a timely opportunity to address longstanding issues and advance meaningful resolution. While member states have proposed various solutions, no single proposal has resolved the issue comprehensively. To mitigate the uncertainty and rising legal costs of dispute settlement, states have increasingly relied on sequencing agreements, i.e., contractual arrangements between disputing parties to coordinate the processes. A thorough analysis of these proposals offers a comprehensive checklist for tackling the

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problem. However, this approach is a matter of convenience and individual choice, rather than a permanent solution.

This paper thus attempts to address the issue at its fundamental level, analyzing the language of both Articles 21 and 22 using interpretative tools of Public International Law. Ultimately, a framework of authoritative interpretation is suggested to bring clarity, avoiding the need for extensive amendments.

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INTRODUCTION

Following the 8th Uruguay Round of Negotiations, the Marrakesh Agreement was signed on 15th April 1994 to establish the World Trade Organization ("**WTO**"). This agreement replaced the dispute settlement mechanism of the General Agreement on Tariffs and Trade ("**GATT**"), 1947with the Understanding on Rules and Procedures Governing the Settlement of Disputes ("**DSU**"), effectively transitioning GATT to an institutional framework from a mere contractual agreement. Despite this transformation, the WTO has since become the leading international organization for promoting trade liberalization and prosperity through a rules-based system.[1] Similarly, the Dispute Settlement Body ("**DSB**"), established with the flaws of the predecessor in mind, has been tasked with managing one of the most extensive caseloads among the international forums.[2]

The reason for DSB's delivery of such an exponential number of reports and findings, far surpassing those of bodies like the International Court of Justice,[3] can be attributed to two key factors. First, economics is inherently influenced by the power dynamics of the stakeholders involved, necessitating a system to ensure compliance; and, secondly, the complexities of GATT are not fully understood by all member nations.

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[1] WORLD TRADE ORGANIZATION SECRETARIAT, A HANDBOOK ON THE WTO DISPUTE SETTLEMENT SYSTEM (2nd ed., Cambridge University Press, 2017).
[2] Marcelo Varella, *The Effectiveness of the Dispute Settlement Body of the World Trade Organization,* 8(2) J. OF INT'L TRADE LAW AND POLICY 100-101 (2009).
[3] Peter Bossche, *Is there a Future for the WTO Appellate Body and WTO Dispute Settlement?* (World Trade Institute, Working Paper No. 01, 2022).

Thus, the DSB has been approached by multiple states to address a diverse range of issues.

However, despite the DSU's significant success, as evidenced by the volume of cases and the speed of their disposal, it is not without errors. In fact, instead of just being plagued by minor loopholes, the DSU as a whole, has become virtually inoperative due to the blockage of the appointment of Appellate Body members by the United States.[4] The appointment of Appellate Body members requires consensus among WTO members, but the United States consistently objects, citing concerns over judicial overreach and the body's failure to strictly adhere to its mandate, effectively halting the process. This setback to an otherwise efficient dispute mechanism is not an unexpected development; rather the imbalance between the legislative and judicial bodies of the WTO has long been recognized,[5] with reforms consistently being proposed to address it. [6]

To restore the glory of the DSB and to strengthen its functioning, the 12th Ministerial Conference in 2022 made a resolution 'to have a fully and well-functioning dispute settlement body which is accessible to all the members by the end of 2024.'[7]Accessibility to the DSU is a highly contested issue given the significant number of disputes brought before the forum by developing and developed countries. This concentration of cases further

[4] Peter Bossche, *Can the WTO Dispute Settlement System Be Revived?* (World Trade Institute, Working Paper No. 03, 2023).
[5] Laude Barfield, *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization,* 2(2) CHICAGO J. INT'L L. 403, 410 (2001).
[6] Bossche, *Supra* note 4.
[7] World Trade Organization, MC12 Outcome Document, WTO Doc. WT/MIN (22)/24, at 4 (June 17, 2022).

highlights the disparity in the number of cases brought by non-developed countries, raising concerns about unequal access to the system. Additionally, there are ongoing concerns about the overall functioning of the DSU, including its fairness and effectiveness in addressing the needs of all WTO members. It is, therefore, crucial to understand that hindrances to the functioning of DSU are multifaceted and not just limited to the appellate review issue. It encompasses matters like the role of *amicus curiae* the extent to which external parties can submit opinions in disputes, third-party rights ensuring meaningful participation and representation for countries not directly involved in disputes, and the lack of a remand mechanism, which limits the ability to send back to panels for further examination of facts or legal interpretations.

While there is no doubt that the DSU has room for improvement to address such issues, with the first review conducted just four years after its inception.[8] But in practice, irrespective of these issues, the accuracy and finality of the Panel and Appellate Body reports are not questioned. Instead, countries have indicated their intention to comply with the reports of the Panel, as evidenced by the high level of adherence to the outcomes of the adjudicated disputes.[9]

However, the appropriate level of compliance has always been a matter of contention.[10] As an ancillary result of the disagreement, the issue of sequencing has emerged during the compliance stage of the report. This

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[8] *Supra* note 1, at 183.
[9] *Supra* note 1, at 3.
[10] John H. Jackson, *Dispute Settlement and the WTO - Emerging Problems,* 1(3) J. INT'L ECONOMIC L. 329, 340 (1998).

issue is rooted in the ambiguities in the text of the DSU and was highlighted for the first time in the European Communities — Regime for the Importation, Sale and Distribution of Bananas ("***EC—Bananas III***") dispute.[11] It has been more than two decades since the issue was flagged, yet no amendments to the DSU have been made to address it. Instead, independent approaches have been pursued, leaving the issue unresolved and its resolution unpredictable.

Therefore, in the backdrop of ongoing reforms to the DSU, this paper aims to address specifically this lacuna of sequencing in the dispute settlement system. It seeks to mitigate the uncertainty of the dispute mechanism for its member states, particularly affecting non-developed states, whose representation is often limited due to significant financial burdens associated with WTO litigation.

To achieve this, the paper begins by contextualizing the problem in Part II, which outlines the factors contributing to the issue of sequencing and establishes the parameters for assessing the viability of the proposals presented in the subsequent parts. Part III then addresses the comprehensive proposals submitted by WTO member nations to resolve the issue, while Part IV explores how states use contractual agreements to establish a specific order of the DSU provisions. Part V examines scholarly suggestions for interpreting the DSU provisions in light of Public International Law to resolve the sequencing issue without modifying the

[11] Appellate Body Report, *European Communities — Regime for the Importation, Sale and Distribution of Bananas,* WTO Doc. WT/DS27/AB/R (1997) (adopted Sept. 25, 1997).

DSU text. Finally, Part VI concludes by suggesting an authoritative interpretation as a viable solution to ensure effective dispute resolution.

A. ISSUE OF SEQUENCING

The sequencing issue in the WTO's DSU arises primarily during the compliance stage of the DSB's recommendations and rulings.[12]

Article 21 of the DSU outlines the process for implementing WTO dispute rulings, requiring the 'party found in violation' of a trade agreement to bring its measures into compliance within a 'reasonable period'.

If there is a disagreement over whether the violating party has complied, Article 21.5 provides a mechanism for the affected party to request the establishment of a compliance panel. This panel examines whether the measures adopted by the violating party align with the DSB's recommendations and rulings. The aim of Article 21.5 is to ensure that rulings are fully implemented and disputes over compliance are resolved.

Meanwhile, Article 22 of the DSU addresses the situation when a member fails to comply with a WTO ruling within the prescribed reasonable period – the prevailing party may seek to impose trade sanctions or compensation.

Under Article 22.6, if the parties cannot agree on compensation or the level of retaliation, the matter can be referred to the DSB for arbitration.

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[12] Vera Grytz & Carolin Mülaler, *Sequencing: Ad Hoc Solutions to a Systemic Problem* in THE WTO DISPUTE SETTLEMENT MECHANISM: A DEVELOPING COUNTRY PERSPECTIVE 195 (Alberto Júnior et al., eds., Springer 2019).

An arbitration determines the permissible level of retaliation, ensuring that the sanctions imposed are proportional to the harm caused by the violation.

The language of Article 21 and 22 of the DSU allows for simultaneous proceedings on compliance and retaliation, therefore, the complexity lies in deciding whether to only initiate a compliance panel under Article 21.5 of the DSU or simultaneously seek retaliation under Article 22 of the DSU, particularly as the expiration of the Reasonable Period of Time ("**RPT**") approaches.

The key issue in such a situation arises from the tight timing constraints.[13] A request under Article 22.2 of the DSU must be made within 20 days of the expiration of the RPT,[14] and authorization for the suspension of concessions and obligations must occur within 30 days of the expiry of the RPT.[15] From the respondent's perspective, arbitration to determine the level of nullification and impairment must be completed within 60 days of the RPT's expiration.[16] Thus, if a party must await a compliance report before considering retaliation, a time conundrum arises as the compliance panel has up to 90 days to circulate its report,[17] potentially longer if

[13] Matilda Brolin, *Procedural Agreements in WTO Disputes: Addressing the Sequencing Problem,* 85(1) NORDIC J. INT'L L.65, 68 (2016).
[14] Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 22.2, April 15, 1994, WTO Agreement, Annex 2, WTO Doc. LT/UR/A-2/DS/U/1 (1994).
[15] Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 22.6, April 15, 1994, WTO Agreement, Annex 2, WTO Doc. LT/UR/A-2/DS/U/1 (1994).
[16] *Id.*
[17] Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 21.5, April 15, 1994, WTO Agreement, Annex 2, WTO Doc. LT/UR/A-2/DS/U/1 (1994).

extensions or appeals occur and this would in turn lead to exhaustion of the window period provided for seeking retaliation.[18] As a result, this situation can lead to the possibility of an authorization for suspension being granted before the panel has assessed the compliance of the measures.[19]

This places the disputing parties into a dilemma: either pursue retaliation without a compliance report or risk missing the window for authorization under Article 22.2 and 22.6.

There is also a critical need to avoid an endless cycle of recourse to compliance reviews,[20] where new measures are continuously introduced after old ones are found to violate WTO obligations.[21] This lack of clear sequencing between Articles 21.5 and 22.6 of the DSU can lead to significant delays, and endless loops of litigation,[22] as parties might struggle to reach an agreement on compliance before considering compensation or retaliation. However, bypassing this process by assuming non-compliance and unilaterally seeking authorization of suspension is also precluded.[23]

The *EC—Bananas III* Case,[24] involved a dispute between the European Union and several Latin American countries, along with the United States, over the EU's preferential banana import regime for former

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[18] Gorbylev *et.al*, *Retaliation under the WTO Agreement: The "Sequencing Problem",* 14(2) ESTEY CTR. J. INT'L L. & TRADE POLICY 118, 122 (2013).
[19] Grytz & Müller, *supra* note 12, at 192.
[20] *Supra* note 11, at 6.
[21] Kym Anderson, *Peculiarities of Retaliation in WTO Dispute Settlement,* 1(2) WORLD TRADE REV.123 (2002).
[22] *Id.*
[23] Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 23.2, April 15, 1994, WTO Agreement, Annex 2, WTO Doc. LT/UR/A-2/DS/U/1 (1994).
[24] *Supra* note 11.

colonies. The WTO ruled that the regime violated trade rules, leading to a series of compliance reviews and ongoing disputes about whether the EU's revised measures met the ruling.

This dispute is an illustrative example of the sequencing issue, wherein two requests for compliance reviews of the reviewed measures at the end of the reasonable period of time ("**RPT**") could have interfered and prevented retaliation by the complaining party if it had waited for the compliance report.[25] This ambiguity not only hinders timely dispute resolution but also complicates the effective navigation of the dispute resolution process by WTO members.

B. SUMMARY OF THE ISSUE

Here, *first* the arbitrator is expected to authorize suspension within a shorter time frame; however, making this decision without a compliance report results in unilateral action. *Second,* conversely awaiting a panel report can trap the complaining party in an endless loop of compliance reviews, or *third,* lead to a lapse of rights under Article 22.2 or Article 22.6 of the DSU due to stringent time frames. This sequencing issue thus presents a significant challenge to the effective and timely resolution of disputes within the WTO framework. As a result, in practice, parties often conduct parallel proceedings under Articles 21.5, 22.2 and 22.6 of the DSU.

[25] Grytz & Müller, *Supra* note 12.

V. STATE PROPOSALS TO THE WTO

Various states have submitted comprehensive proposals to the WTO to address the issue of sequencing. Such proposals deal with the problem in a three-pronged manner;

i) They alleviate concerns about losing the right to retaliate due to the expiry of the reasonable time period.

This has been addressed, firstly, by proposing omission of two prerequisites; a) the requirement to initiate the negotiations under Article 22.2 within the expiry of RPT,[26] and b) the requirement to suspend concessions or other obligations within 30 days of the expiry of RPT.[27] Secondly, in this proposal, the time frame for Article 22.6 arbitration has been adjusted, replacing the 60-day deadline after the RPT's expiry with a reference point based on when the request was made or when the compliance report was circulated. For example, 45/60 days after the request,[28] or 20 days after the compliance panel report has been circulated.[29]

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[26] Dispute Settlement Body Special Session, *Textual Contribution to the Negotiations on Improvements and Clarifications of The Dispute Settlement Understanding*, Non-Paper Presented by Argentina, Brazil, Canada, India, New Zealand & Norway, WTO Doc. JOB (04)/52, at 3 (May 19, 2004).

[27] Dispute Settlement Body Special Session, *Amendment of the Understanding on Rules and Procedures Governing the Settlement of Disputes*, Proposal by Japan, WTO Doc.TN/DS/W/32, at 7 (Ian. 22, 2003); *Supra* note 26, at 4.

[28] *Id.*

[29] Dispute Settlement Body Special Session, *Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding*, Proposal by Ecuador, WTO Doc. TN/DS/W/33, at 2 (Jan. 23, 2003).

However, some proposals have missed this detail and have not eliminated these requirements.[30]

ii) They provide a clear pathway for moving forward with Article 22.

This has been addressed, by suggesting that WTO Members may cross-refer the articles by either modifying Article 22 to allow a party to request authorization for suspension only if the compliance panel under Article 21.5 has determined that the member concerned has failed to comply,[31] or they may add Article 22 *bis* which establishes sufficient conditions for moving forward with a request under Article 22.2.[32]

Typically, these conditions would include implicit requirements where the respondent's failure to adhere to procedural obligations indicates non-compliance. However, the last sub-clause mandates a demonstration of non-compliance under Article 21.5 to proceed with retaliation. Moreover, a framework is suggested for parties to request arbitration to determine the level of nullification or impairment before seeking authorization for the suspension of concessions.[33]

iii) They prevent parties from being stuck in a loop of inadequate reforms.

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[30] Dispute Settlement Body Special Session, *Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding*, Communication from Australia, WTO Doc. TN/DS/W/49, at 6 (Feb. 17, 2003).
[31] *Id.*
[32] *See* Non-Paper by Argentina and others, *supra* notes 26-27 & 29; Proposal by Japan, *supra* note 27; Proposal by Ecuador, *supra* note 29, at 4.
[33] Dispute Settlement Body Special, *Text for the African Group Proposals on Dispute Settlement Understanding Negotiations*, Communication from Kenya, WTO Doc.TN/DS/W/42, at 4 (Jan. 24, 2003).

This has been addressed only in a few proposals. First, the proposal by Japan achieves this by adding a provision after paragraph 1 of Article 22, emphasizing the pursuit of negotiations after a panel under Article 21.5 reports a lack of compliance, unless full compliance is assured.[34]

Second, a proposal by Argentina, Brazil, Canada, India, New Zealand and Norway (the "**Indian block**") addresses this by clarifying that members are not entitled to an additional under the dispute settlement procedures, thus eliminating the scope for new reforms once the time given to the concerned party has lapsed.[35]

In addition to these changes, there have been proposals to sequence and mandate consultations; a) before establishing the compliance panel,[36] or b) before requesting suspension and after the compliance panel has issued its report.[37] The Indian block, on the other hand, explicitly stated that such consultations are not required for the compliance process.[38]

A. VIABILITY OF THE PROPOSALS

In conclusion, while these amendments address the issue of sequencing, no single proposal fully captures intricate details of the required language. The proposals by Japan, the European Union, and the proposal by the Indian block come closest to addressing all the issues. However, the

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[34] *Supra* note 27, at 6.
[35] *Supra* note 26.
[36] Dispute Settlement Body Special Session, *Contribution of the European Communities and its Member States to the Improvement and Clarification of the WTO Dispute Settlement Understanding*, Communication from the European Communities, WTO Doc. TN/DS/W/38, at 8 (Jan. 23, 2003).
[37] *Supra* note 29, at 4.
[38] *Supra* note 26.

following considerations should further enhance the outcome of the solution:

a) Specifically for the issue of preventing inadequate reforms, the terminology "*full confidence"* proposed is inherently ambiguous. Incorporating language from proposals such as that of the Indian block would be a better option
b) The proposal by Ecuador, which requires the establishment of arbitration to determine the level of nullification before seeking suspension, should ensure that due considering is given to the developing nations.
c) Given the disparity in the number of disputes filed by high-income economies versus low-income economies, the proposal for mandatory consultations should also be given due consideration.

In addition to these amendments to the DSU, Canada has reiterated the role of sequencing agreements in addressing the issue by establishing the pre-requisite of a compliance panel report before moving forward with a request for retaliation.[39]

The use of such sequencing agreements was highlighted in the Australia — Measures Affecting Importation of Salmon ("***Australia—Salmon***") dispute, where the parties agreed to a sequencing framework to

[39] World Trade Organization, *Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes*, WTO Doc. JOB/DSB/1/Add.6 (Aug. 3, 2016).

address the issue of retaliation only after the compliance panel's report was issued.[40]

Since then, there have been significant developments on this issue, and contemporary forms of sequencing agreements may provide valuable insights into contractual language that could help address the existing lacunae between Article 21 and Article 22 of the DSU.

VI. PRACTICE OF SEQUENCING AGREEMENTS

In addressing the issue of sequencing, states often resort to contractually agreeing on a specific order of events within the dispute resolution mechanism. However, the primary limitation of such agreements is that, regardless of the contracting parties, they cannot be relied upon for future disputes, as these agreements are tailored to suit the specific circumstances of the dispute at hand.[41] Consequently, this approach permits varying sequences of proceedings across different disputes. Typically, these agreements address the issue through two primary ways: **[A]** by facilitating the suspension of arbitration proceedings, and **[B]** by enabling a waiver of the Reasonable Time Period argument. Additionally, a third type of sequencing agreement combines these two approaches, offering greater flexibility but less certainty regarding the order of the events.

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[40] Appellate Body Report, *Australia: Measures Affecting Importation of Salmon*, WTO Doc. WT/DS18/AB/R (Oct. 20, 1998) (adopted on Nov. 6, 1998).
[41] Brolin, *supra* note 13, at 70.

A. SUSPENSION OF ARBITRATION

Such agreements do not set new time frames beyond those outlined in the DSU but rely on its provisions. To ensure that a party does not lose the opportunity to retaliate, they incorporate several positive actions.

According to these agreements, a request for authorization of suspension must be made within the prescribed 30-day time frame.[42] Following the authorization for suspension, the responding party submits a request for arbitration to determine the level of nullification.[43] Then, both parties mutually decide to request a halt in proceedings and resumption of work after the compliance panel determine any failure on the part of the respondent.[44] Moreover, specific additional conditions for resumption may be included, tailored to the parties and dispute in question. Conclusively, the parties cooperate to ensure that the arbitration panel delivers and circulates its report within a set time frame after the resumption, usually 60 days.[45]

For the first instance, in the *Australia — Salmon* dispute,[46] the parties agreed as follows: *"Canada and Australia agreed that the arbitration*

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[42] European Communities - Measures Affecting the Approval and Marketing of Biotech Products, Understanding between the European Communities and the United States Regarding Procedures under Articles 21 and 22 of the DSU, WTO Doc. WT/DS291/38, at 3 (Jan. 17, 2008);United States: Subsidies on Upland Cotton, Understanding between Brazil and the United States Regarding Procedures under Articles 21 and 22 of the DSU and Article 4 of the SCM Agreement, WTO Doc. WT/DS267/22, at 2 (July 8, 2005).
[43] *Id.*
[44] *Id.*
[45] United States - Anti-Dumping Measures on Certain Oil Country Tubular Goods from Korea, Understanding between the Republic of Korea and the United States Regarding Procedures Under Articles 21 and 22 of the DSU, WTO Doc. WT/DS488/16, at 2 (Feb. 10, 2020).
[46] *Supra* note 40.

proceedings would be held in abeyance until after the circulation of the panel report under Article 21.5."[47]

This agreement, however, differed in one critical aspect, i.e.it explicitly allowed the arbitration to start regardless of whether either party appealed the compliance panel's report. This could potentially result in simultaneous proceedings under Article 21.5 and arbitration under 22.6, thereby complicating the sequencing process.

Agreements in present day use ensure such possibilities are avoided and instead include additional details for resuming the arbitration panel's proceedings.

For instance, in *EC — Approval and Marketing of Biotech Products,*[48] only the United States was permitted to request the resumption of arbitration. This case involved disagreements over measures imposed by the European Communities on genetically modified products, with sequencing agreements aiming to prevent overlaps between compliance reviews and arbitration by granting specific procedural rights to the complainant. Similarly, in *US — OCTG (Korea),*[49] both parties were allowed to request resumption. This dispute dealt with anti-dumping measures imposed by the United States, and the sequencing agreement emphasized mutual cooperation to avoid procedural conflicts between compliance and retaliation stages. These measures exemplify the tailored nature of modern

[47] Appellate Body Report, Australia - Measures Affecting Importation of Salmon, WTO Doc. WT/DS18/RW, 1.3 (Feb. 18, 2000).
[48] Understanding between the European Communities and the United States, *supra* note 42.
[49] *Supra* note 47.

sequencing agreements to mitigate potential challenges in dispute resolution.

B. ENABLING OF THE 'WAIVER TO ASSERT RPT' ARGUMENT

Such agreements are based on the principle of party autonomy, allowing parties to waive the time period for seeking retaliation. This is ensured through a negative action by the respondent. For this waiver, a compliance panel report is firstly prepared under Article 21.5 a compulsory precursor for a request to be imitated under Article 22.6.[50] Then, the respondent agrees not to assert that the complaining party was precluded from obtaining authorization because the request was made outside the time frame specified under Article 22.6.[51] This waiver is without prejudice to the respondent's right to seek arbitration to address the level of suspension under Article 22.6.[52]

From, the *US —Shrimp,*[53] in 2000, which addressed environmental measures affecting shrimp imports to China — *AD on Stainless Steel (Japan)* dispute,[54] in 2024, involving anti-dumping measures; similar language has

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[50] United States: Import Prohibition of Certain Shrimp and Shrimp Products, Understanding between Malaysia and the United States Regarding Possible Proceedings under Articles 21 and 22 of the DSU, WTO Doc. WT/DS58/16, at 1 (Jan. 12, 2000); Brolin, *supra* note 13, at 71.

[51] China: Certain Measures Affecting Electronic Payment Services, Understanding Between China and the United States Regarding Procedures under Articles 21 and 22 of the DSU, WTO Doc. WT/DS413/10, at 6 (Aug. 21, 2013); Australia: Anti-Dumping Measures on A4 Copy Paper, Understanding between Australia and Indonesia Regarding Procedures under Articles 21 And 22 Of the DSU, WTO Doc. WT/DS529/18, at 7 (Oct. 7, 2020).

[52] *Id.*

[53] Understanding between Malaysia and the United States, *Supra* note 50.

[54] China: Anti-Dumping Measures on Stainless Steel Products from Japan, Understanding Between China and Japan Regarding Procedures under Articles 21 And 22 of the DSU, WTO Doc. WT/DS601/12 (May 29, 2024).

been consistently employed. However, one critical detail often mitted in such agreements is the preservation of the opportunity for negotiations subsequent to the compliance panel report. As the time frame for negotiations remains unaltered, such requests must still be made before the expiry of the RPT, leaving a potential gap in resolving disputes effectively.

C. VIABILITY OF THE SEQUENCING AGREEMENTS

The approach of signing different agreements for different disputes is prone to certain issues. First, since parties devise their own variations of procedures for sequencing, this diversity reduces the system's predictability for resolving disputes.[55]

Second, as a general rule, smaller and weaker members benefit from a more rule-based system rather than bilateral ad hoc arrangements.[56] Procedural agreements require the consent of both parties,[57] not as a one-time consent but as dispute specific agreements. In disputes marked by power imbalances due to differences in the negotiating strength, smaller and less powerful members may feel compelled to accept to terms imposed by larger, more experienced members.[58]

Third, these agreements create another legal lacuna in context of Article 10 of the DSU, which provides for third-party rights. Third party can only raise their interests during the panel process, but Article 22.6

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[55] Cherise Valles &Brendan McGivern, *The Right to Retaliate under the WTO Agreement: The Sequencing Problem*, 34(2) J. WORLD TRADE 63, 84 (2000).
[56] Y Suzuki, *"Sequencing" and Compliance, in* REFORM AND DEVELOPMENT OF THE WTO DISPUTE SETTLEMENT SYSTEM 391 (Dencho Georgiev and Kim Borghteds., 2006).
[57] *Id.* at 382.
[58] *Id.*

relates to arbitral proceedings. If a sequencing agreement allows the arbitrator to decide upon compliance, third parties might challenge the procedural agreement as it modifies their rights without their consent.

Introducing new amendments to the DSU should be considered during the upcoming rounds of reforms for the DSB. However, this is a lengthy process, as evidenced by the fact that the initial proposals addressing the issue were made in the early 2000s and the matters remains unresolved. Moreover, while sequencing agreements, as discussed, provide interim solutions, they have inherent shortcomings. In the meantime, scholars have proposed alternate solutions to the sequencing issue the operate within the ambit of the existing text.

VII. UNDERSTANDING SCHOLARLY PROPOSALS FOR SEQUENCING

Scholars have proposed two primary approaches to address the issue of sequencing: **[A]** An Alternative Interpretation to the Meaning of the Words, and **[B]** Understanding the Principle of Sequencing as Part of Customary International Law.

A. AN ALTERNATIVE INTERPRETATION TO THE MEANING OF THE WORDS

Since the DSU falls under the definition of covered agreements,[59]reliance can be placed on Article 3.2 of the DSU to clarify existing provisions causing the sequencing issue with the help of customary

[59] Understanding on Rules and Procedures Governing the Settlement of Disputes, App. 1, Apr. 15, 1994, WTO Agreement, WTO Doc. LT/UR/A-2/DS/U/1.

rules of interpretation of public international law.[60] As per Article 31(1) of the Vienna Convention on the Law of Treaties, treaty provisions should be interpreted in good faith, according to their ordinary meaning, and in light of the treaty's object and purpose.[61]

Therefore, primarily Article 22.6 which states:

> *"…fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings…"*[62]

should be interpreted as dealing with a situation where a party does absolutely nothing to bring measures into compliance. In such scenarios, the request for retaliation should be made within the RPT.

On the other hand, Article 21.5 which reads as: *"where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings…",*[63] should be interpreted as dealing with cases where the losing party takes some steps toward compliance but there is disagreement as to its adequacy. This creates a new scenario not covered by Article 22, where the time period for retaliation should begin from the day the compliance panel or appellate body determines non-compliance by the respondent.

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[60] Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 3.2, Apr. 15, 1994, WTO Agreement, WTO Doc. LT/UR/A-2/DS/U/1.
[61] Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331.
[62] Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 22.6, Apr. 15, 1994, WTO Agreement, WTO Doc. LT/UR/A-2/DS/U/1.
[63] Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 21.5, Apr. 15, 1994, WTO Agreement, WTO Doc. LT/UR/A-2/DS/U/1.

Additionally, the purpose and objective of dispute settlement which include achieving a *"positive solution to a dispute",*[64] and ensuring a *"satisfactory adjustment of the matter in good faith",*[65] will be better fulfilled by measures aimed at resolving the dispute promptly, rather than prolonging it through unnecessary litigation.[66]

B. VIABILITY OF THE INTERPRETATION

While retaliatory measures remain available regardless of the lapse of reasonable period of time, provided the panel is satisfied with the respondent's reforms, this approach opens the door for the respondent to implement an endless series of inadequate reforms.[67] Therefore, the core issue lies in the potential ability to evade full compliance by making only partial or superficial changes.

Each time the panel deems the reforms inadequate, the respondent can introduce new, still inadequate, measures. This cycle can result in prolonged or even indefinite non-compliance, undermining the effectiveness of the dispute resolution process. Such a loophole allows the respondent to delay genuine compliance indefinitely, thereby frustrating the very purpose of the dispute settlement system, which is to ensure timely and effective resolution of disputes.

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[64] Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 3.7, Apr. 15, 1994, WTO Agreement, WTO Doc. LT/UR/A-2/DS/U/1.
[65] Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 3.10, Apr. 15, 1994, WTO Agreement, WTO Doc. LT/UR/A-2/DS/U/1.
[66] Petros Mavroidis, *Remedies in the WTO Legal System: Between a Rock and a Hard Place,* 11(4) EUR. J. INT'L L.,795 (2000).
[67] *Supra* note 21.

C. UNDERSTANDING THE PRINCIPLE OF SEQUENCING AS PART OF CUSTOMARY INTERNATIONAL LAW

The principle of sequencing can be considered a part of customary international law,[68] as it fulfills the twin-test of state practice and *Opinio juris*. To satisfy the first requisite, consider the following definition of State Practice: *"state practice is to be general meaning sufficiently widespread and representative."*[69] Furthermore, for a general customary rule, even a majority or substantial minority of interested states can establish new customs.[70] Such as, in the *Continental Shelf* dispute, the position of significant maritime States was recognized as customary international law, even though several eligible coastal states lacked similar state practices.[71] The consistent adoption of the sequencing approach by member states, evidenced by binding agreements they have entered into, demonstrates articulation of claims and responses which in turn represents state practice.[72] This is because the widespread and consistent practice by nations, particularly those controlling a majority of global trade, not only shows general acceptance but also constitutes a widespread and representative practice within the given industry. To fulfill the requirement of *Opinio juris*, States must believe that a course of action is legally binding and perform it with

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[68] Garima Shahani, *The Sequencing Dilemma: Will the European Union Succeed against Indonesia,* 49(3) J. WORLD TRADE 517 (2015).

[69] Draft Conclusions on Identification of Customary International Law, with commentaries, in the Year book of the International Law Commission on the work of its seventieth session, U.N. Doc. A/73/10, Vol. 2(2) (2018).

[70] MALCOLM SHAW, INTERNATIONAL LAW, 87-88 (Cambridge University Press ed., 5th ed., 2003).

[71] Continental Shelf (Lib. v. Mal.), Merits, 1985 I.C.J. 13 (June 3).

[72] Michael Scharf, *Accelerated Formation of Customary International Law,* 20 J. INT'L & COMP. L. 305, 314 (2014).

that understanding. Even a single instance can infer that they have tacitly consented to the rule involved.[73] This must, however, be distinguished from mere usage or habit,[74] where a practice may exist as a matter of convenience or political expediency.[75] Legal obligations can be evidenced through diplomatic correspondence, drafting processes, and diplomatic actions.[76]

Thus, the explicit intent to follow sequencing in agreements and the correspondence submitted to the WTO advocating for sequencing reforms reflect *Opinio juris*. This demonstrates the practice is not merely a social or moral convention but is considered legally binding. Furthermore, sequencing agreements themselves provide positive evidence of the adoption of the rule by the state.

D. VIABILITY OF THE PROPOSALS

While the practice is dispute-specific, certain states exhibit inconsistent behavior, sometimes signing the agreement while sometimes refraining,[77] depending upon factors such as if it is the complaining party or not. But this can be solved by giving weightage to the representative practice as a few uncertainties or contradictions need not undermine the general acceptance of the rule.[78]

An additional concern might also arise of accelerated formulation of customary international law because the time passed for the practice has

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[73] Shaw, *supra* note 70, at 71.
[74] Identification of Customary International law, *supra* note 69, at 138.
[75] Asylum (Col. v. Peru), Judgement, 1950 I.C.J. 266 (Nov 20).
[76] Identification of Customary International Law, *supra* note 69, at 141.
[77] Shahani, *supra* note 68, at 535.
[78] Fisheries (U.K. v. Nor), Merits, 1951 I.C.J. Rep 116 (Dec 18).

not been much and there exists no Grotian moment as such for such practice to come into play. But the duration of time that is taken into consideration can surely be minimized based on over manifestation of the practice as a legal obligation through consistent and widespread adoption.[79]

VIII. WAY FORWARD

Addressing the sequencing issue between Articles 21 and 22 of the DSU reflects a very critical procedural gap that undermines the predictability and efficiency of the WTO dispute settlement system. Ambiguity on the order of compliance and retaliation proceedings has remained in place even after several reform proposals and general use of sequencing agreements as a stopgap measure. Although pragmatic, these are neither universally adopted nor robust enough to resolve the underlying issue.

The most apparent course of action for resolving the sequencing issue is an amendment to the existing DSU under the procedure laid down in the Marrakesh Agreement. The twelfth Ministerial Conference also called for final reforms to the DSU by 2024. However, more pressing issues, such as the state of the Appellate Body, and the requirement for adoption by consensus during the ongoing crisis have delayed modifications to the DSU. These delays resulted in no fruitful conclusion on the negotiations of the reforms during the Thirteenth Ministerial Conference.

With such an obscure position on future reforms on the thematic issues of the DSU, relying on the natural course, as in the EC-Banana

[79] DIONISIO ANZILOTTI, CORSO DI DIRITTOINTERNATIONALE 73-76 (3rd ed., 1928).

dispute where the arbitration and compliance panel were composed of the same people, who then synchronized timelines by merging the deadlines for Article 21.5 and Article 22.6 proceedings, is also not a guarantee for a fix to the sequencing issue. This is because, in the first place, as laid down in US-Wool Shirts and Blouses, "*the panels or appellate bodies are not empowered to make law by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute*."

Second, this approach depends heavily on the availability of the arbitrators, as an Article 22.6 arbitrator might proceed to decide compliance in their absence, potentially prolonging the issue if coordination between arbitrators and panelists fails.

This leaves us the alternative of signing sequencing agreements separately for each dispute. While varied interpretations and considering sequencing as customary international law provide possible fixes, the lack of viability and universal acceptance of these proposals means they cannot be enforced consistently.

An authoritative interpretation by the Ministerial Conference or General Council under the Marrakesh Agreement offers a less cumbersome solution compared to an amendment. This approach requires comparatively fewer votes, only a two-thirds majority for adoption. But it is essential to note that Article IX:2 is limited to interpretation and cannot modify the contents of the DSU.

Therefore, clarification can be given to the extent that Article 21 and Article 22 deals with two distinct scenarios. One scenario would be

where the losing party undertakes measures to comply, but there is disagreement as to its adequacy, and in the other, the party in violation would do nothing to bring measures into compliance.

But in order to resolve every aspect of the issue, following interpretations should be incorporated:

i. **Restriction on Premature Suspension Requests:** Remedies under Article 22 should be allowed only in situations where the party in violation fails bring measures into compliance. Without modifications to the 30-day time period in Article 22.6, suspension requests should only be permitted after the expiry of reasonable period of time. This would ensure that suspension requests are not made before a compliance panel is requested. Furthermore, it would preempt arguments from defending parties claiming while no measures have been taken, implementation is in progress.

ii. **Addressing Gaps in Article 22:** Article 22 does not address situations where there is disagreement about the adequacy of the compliance measures. To fill this gap, if a panel report clarifying the disagreement is circulated after the expiration of the RPT, the purpose and objective of the DSU to ensure positive solutions to disputes should regulate such new scenarios. Relying on Article 3.2 of the DSU, retaliation should be allowed under such circumstances.

iii. **Preventing Endless Cycles of Inadequate Reforms:** Disagreements under Article 21.5 should be considered resolved once a panel report is circulated. Any new measures introduced

after the expiry of the RPT should not be deemed to create a fresh disagreement regarding their adequacy. This would help prevent an endless cycle of inadequate reforms and ensure a more streamlined dispute resolution process.

By implementing these clarifications through an authoritative interpretation, the sequencing issue can be addressed more effectively, without waiting for the lengthy amendment process.

In this regard, procedural imbalance must be bridged in order to ensure the legitimacy and functionality of the WTO dispute settlement mechanism, especially within the context of broader reforms instigated by the Appellate Body crisis. Bridging the gap will require either an authoritative interpretation under Article IX.2 of the Marrakesh Agreement or a more comprehensive amendment to the DSU. Such measures should make it clear that compliance and retaliation proceedings have different purposes and that timelines are clearly established to avoid indefinite delays and strategic misuse.

Ultimately, solving the sequencing problem is not just a matter of legal accuracy but also one of fairness, accessibility, and effectiveness in the resolution of international trade disputes. In embracing a systematic and balanced approach, the WTO can further consolidate its position as a cornerstone of global trade governance.