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Procedural Agreements in WTO Disputes

An Analysis of the Agreements Concluded to Address the Sequencing Problem in the WTO Dispute Settlement System

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Abstract
The World Trade Organization has its own binding dispute settlement system. To ensure compliance with the outcome of the dispute settlement procedures, the claimant Member is authorized to retaliate in case the respondent Member fails to comply within a certain period of time. However, the rules and procedures regarding retaliation and determination of compliance are ambiguous and have caused an interpretational problem called the sequencing problem. To address the problem, the parties to any dispute generally conclude bilateral ad hoc procedural agreements.

However, by examining the procedural agreements concluded to date and by analyzing the potential problems of these agreements, this thesis concludes that due to the dependence on the will of the parties and the uncertain legal status of the agreements, the procedural agreements do not constitute a satisfactory method for addressing the sequencing problem. Alternatives such as amendments to the dispute settlement rules, an authoritative interpretation of them or — if consensus cannot be reached soon — clarification by means of a precedent from the Appellate Body, should be considered and attempted.
Acknowledgements

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<th>Full Form</th>
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<tr>
<td>AB</td>
<td>Appellate Body</td>
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<td>DSB</td>
<td>Dispute Settlement Body</td>
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<tr>
<td>DSU</td>
<td>Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding)</td>
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<td>EC</td>
<td>European Communities (prior to 2009)</td>
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<td>EU</td>
<td>European Union (after 2009), all reference to both the EC and the EU will be made with “EU”, with the exception of titles and quotes</td>
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<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<tr>
<td>Member</td>
<td>Member of the World Trade Organization</td>
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<tr>
<td>SCM Agreement</td>
<td>Agreement on Subsidies and Countervailing Measures</td>
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<td>US</td>
<td>United States of America</td>
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<td>WTO</td>
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1 Introduction

1.1 Introductory background

Ensuring compliance is generally seen as international law’s weakest link. International law lacks enforcement agencies and a police force, and depends instead on good faith and voluntary compliance. The World Trade Organization (WTO) has its own comprehensive set of rules for settling trade-related disputes. Although its dispute settlement system is often regarded as a success that influences many other areas of international law, ensuring compliance is still its weakest link.

The WTO’s dispute settlement rules are enshrined in the Dispute Settlement Understanding (DSU). One of the fundamental principles underpinning the DSU is to provide security and predictability to the multilateral trading system. Another fundamental principle is to ensure prompt compliance with WTO law. The balancing of these sometimes opposing principles is noticeable throughout the DSU.

To encourage compliance with WTO law, the DSU allows for a quasi-judicial procedure to resolve trade-related disputes between Members of the WTO (hereafter “Members”). The DSU arms the claimant Member with a rather primitive tool to ensure that the parties to the dispute comply with the outcome of the procedure: if the respondent Member fails to comply within a certain period of time, the claimant is authorized to retaliate by also breaching WTO law towards the respondent to an equivalent extent.

Retaliation may ensure prompt compliance, but in order for the system to be secure and predictable, the determination of the right to retaliate must be fair and just. Unfortunately, due to a flaw by the drafters, the DSU fails to provide a clear procedure for that determination. Rather, the DSU provides for two procedures through wording which makes the order of the two procedures unclear and open to different interpretations. The problem of interpreting the proper order has been called the “sequencing” problem due to the unclear sequence of the two procedures.

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1 Seth, Torsten, p. 410.
2 Article 3.2 of the DSU.
3 Articles 3.3 and 21.1 of the DSU.
4 Articles 3.2 of the DSU.
5 Articles 3.3 and 21.1 of the DSU.
6 It should be noted that many have questioned the effectiveness of retaliation. See e.g. McGivern, Brendan P., pp. 152-153, and Seth, Torsten, pp. 478-484.
7 Mavroidis, Petros C., ‘Proposals for Reform of Article 22 of the DSU’, p. 66.
8 The word “sequence” refers to a particular order in which related events follow each other. The description of the problem provided here is somewhat simplified and will be elaborated in chapter 3.
The sequencing problem has given rise to much controversy over the years.\textsuperscript{7} Innumerable attempts at reform have been made, but thus far all to no avail. Over time, a consensus has developed among the Members concerning the proper sequencing, but for various reasons no reform has yet been agreed. Instead, for the last 15 years the practical way of addressing the problem has been for the parties to any dispute to conclude a bilateral \textit{ad hoc} procedural agreement determining the sequencing that they prefer. However, these procedural agreements potentially contain inherent problems as a method for addressing the sequencing problem. The procedural agreements and associated potential problems will be the focus of this thesis.

1.2 Purpose

While the sequencing problem has been discussed and analyzed abundantly by scholars and representatives of Members, research on the procedural agreements has been scarce. The sequencing problem was heavily discussed in the years following the first dispute in which it was recognized. Many reform proposals were drafted and published, but discussion of the problem has faded out somewhat due to considerable difficulties encountered in achieving any reform. Likewise, the growing use of procedural agreements — which at least in practice seems to address the problem satisfactorily — constitutes another reason for the diminishing attention paid to the problem.

Some scholars have examined the first few procedural agreements and pointed at some potential problems with using them to address the sequencing problem. The potential problems pointed out by these scholars are rather general and straightforward and fail to identify the core legal questions posed by the use of procedural agreements. In addition, the real implications of the potential problems that have been identified depend on how the agreements are actually used today.

To date, 57 procedural agreements have been concluded during the 15 years in which they have been used to address the sequencing problem. No one has thoroughly examined these agreements or analyzed the agreements’ potential problems. While engaging halfheartedly in negotiations on reform, the Members have focused on practical solutions that work in the majority of cases, which they have found in the use of procedural agreements. At the same time, scholars seem to have lost interest in the sequencing problem all together. As a result, the Members seem to continue to use the

\textsuperscript{7} The controversy started with the \textit{EC – Bananas} dispute, which is discussed in subsection 3.3.2.
agreements without being truly aware of the potential consequences. A theoretical approach to the agreements, and the occurrence of a handful of disputes in which reliance on procedural agreements has proved to be unsatisfactory, demonstrate a need for a deeper analysis of the use of these procedural agreements.

In such analysis, the agreements may prove to be unreliable as a solution to the sequencing problem. That being the case, there is a need for an alternative. As stated above, reform attempts have been made but none has succeeded so far. The attempts have focused mainly on one method of addressing the problem, namely a complete reform of the DSU. This calls for an examination of other methods to address the sequencing problem.

Therefore, the aim of the thesis is firstly to analyze the procedural agreements and thereafter the potential alternatives to the agreements in resolving the sequencing problem. The salient questions are as follows:

1. Do the procedural agreements constitute a satisfactory method for addressing the sequencing problem?
2. If not, what is the most appropriate and realistic alternative?

1.3 Method and materials
A traditional legal method has been used when writing this thesis. The basis of the research and analysis underlying the thesis has been to identify the current state of law on the questions posed, albeit that to some extent the thesis aims, critically and pragmatically, at presenting constructive proposals for the future. To that end, the materials available to, and applied by, the relevant adjudicating bodies have been examined.

Official WTO documents with an emphasis on the procedural agreements and reform proposals have been examined. Most of those documents are available on the WTO website\(^8\); however, one document, which has mainly been used to understand the current status of negotiations, is classified. Case law, mostly from WTO panels, the AB and WTO arbitrators, has been used to provide an understanding of the sequencing problem, to exemplify the potential problems posed by procedural agreements, and to evaluate one of the alternatives proposed, namely clarification in the form of a precedent. Academic debate in literature has been used primarily to describe the sequencing problem, to support the analysis of the potential problems with the proce-

\(^8\) www.wto.org.
dural agreements, and to discuss the different alternatives to the use of procedural agreements as a means for addressing the sequencing problem.

The analysis of the procedural agreements has been based on a close examination of all the agreements. The most important information in these agreements has been compiled in a table appended to the thesis.\(^9\) Some information in the agreements has been omitted because it is of less importance for the thesis and would require more space in the thesis than is justified.

Since WTO law forms part of public international law,\(^10\) some of the analysis in the thesis has been based on rules of general international law as well as analogies with other areas of international law, such as relevant aspects of arbitration law. Since the WTO Agreement and the procedural agreements are intra-state agreements, the Vienna Convention on the Law of Treaties is applicable, at least to those Members that are parties to the Vienna Convention.\(^11\) As regards other Members, the provisions of the Vienna Convention will be used as customary international law or by way of analogy.

### 1.4 Delimitation

As outlined above, the thesis focuses on the procedural agreements concluded to address the sequencing problem. To that end, it is necessary also to examine the sequencing problem itself. However, since most Members agree on what constitutes proper sequencing, the different interpretations of the DSU concerning sequencing and the case law on the sequencing problem will be discussed only to the extent necessary to understand the reason for concluding procedural agreements and the provisions of the agreements, as well as the feasibility of the alternative methods available for addressing the sequencing problem. Likewise, the proposals for reform will only be covered in substance to the extent necessary to examine the appropriateness of the different alternative methods.

Since there has been very little research on the procedural agreements by other scholars, the analysis of those agreements will at times be based on other kinds of bilateral agreements concluded within the WTO and, in that respect, the conclusions of the thesis could be of value for bilateral agreements within the WTO in general.

\(^9\) See appendix in section 8.1.

\(^10\) See Pauwelyn, Joost, p. 1406.

\(^11\) The mentioned agreements are all “treaties” within the meaning of Article 2 of the Vienna Convention.
focus of the thesis will, however, remain the procedural agreements used to address the sequencing problem.

1.5 Presentation of outline

The thesis will begin with a brief presentation of the history and purpose of the WTO and its dispute settlement system in order to provide a background and understanding for this thesis (chapter 2). Chapter 3 will be devoted to describing the sequencing problem in order to give an understanding of the problem that the procedural agreements are trying to resolve. In chapter 4, the procedural agreements that have been concluded to date will be examined, after which the different problems associated with the use of procedural agreements for addressing the sequencing problem will be analyzed. Conclusions will be presented concerning the appropriateness of relying on the procedural agreements to address the sequencing problem and, based on such conclusions, the alternative methods for addressing the problem will be examined in chapter 5. Finally, some concluding remarks will be presented.

To facilitate reading of the thesis, the eight main parts are referred to as chapters. Chapters are divided into sections, which, in turn, are divided into subsections.

2 The WTO and its dispute settlement system

The WTO was established in 1995, but the history of regulation of international trade dates back much further. After the Second World War, many governments wanted to avoid the protectionist and non-cooperative views that in part had led up to the war. Governments started negotiating the establishment of a set of organizations to deal with international economic relations under the auspices of the United Nations: the International Monetary Fund, the International Bank for Reconstruction and Development (later the World Bank), and the International Organization for Trade. The first two were established, but the last was rejected by the United States Congress and consequently was never established. However, although the International Organization for Trade was never created, the substantial treaty comprising material trade rules, the General Agreement on Tariffs and Trade (GATT), which the organization was supposed to

\[12\] For the part on the history of the GATT and the WTO, see Egelund Olsen, Birgitte, pp. 5-11.
manage, did enter into force.\textsuperscript{13} Over time, the need for administration of the GATT led to the development of a \textit{de facto} organization under the same name, GATT.

The GATT treaty was a binding international treaty and the need to govern Members’ compliance with the GATT led to the development of a dispute settlement system based on a couple of rather vague provisions in the GATT.\textsuperscript{14} In case of an alleged breach of the GATT, these provisions allowed Members initially to enter into consultations and, in case of failed consultations, to refer a dispute to the CONTRACTING PARTIES, which was the decision-making body provided for by the GATT.\textsuperscript{15} In practice, \textit{ad hoc} panels were established to examine each dispute and panel reports were referred to the CONTRACTING PARTIES for adoption. Any decision to adopt a report needed consensus, which meant that the losing party could block such adoption.

Rules governing panel procedure developed as the need arose through panel practice and subsequent formal codification by the Members in the form of decisions and understandings.\textsuperscript{16} This extensive \textit{de facto} development of an organization and a dispute settlement system, together with a growing number of additional treaties to which all Members were not parties, led to an unmanageable, irregular trading system. As a result, systemic reform was required.

The negotiations on \textit{inter alia} the creation of a formal organization and a comprehensive dispute settlement system took place during the 1980’s and the beginning of 1990’s. The WTO Agreement\textsuperscript{17} entered into force in 1995. It established an organization named the World Trade Organization and, by making all trade agreements (subsequently referred to as covered agreements), annexes to it, the WTO Agreement made all Members bound by all agreements. One of the covered agreements was the Dispute Settlement Understanding (DSU), which codified and developed the dispute settlement practice of the GATT era.

The WTO Agreement created new decision-making institutions and rules. The Ministerial Conference became the highest institution; however, since it rarely convenes the General Council executes most functions of the WTO. Both of these institutions are composed of representatives from all Members. The General Council, sitting as the

\begin{itemize}
  \item\textsuperscript{13} The GATT was applied through the Protocol of Provisional Application, Egelund Olsen, Birgitte, p. 6.
  \item\textsuperscript{14} For the part on the history of the dispute settlement, see Daniel, Bugge Thorbjørn, p. 38.
  \item\textsuperscript{15} The relevant provisions are Articles XXII and XXIII of the GATT.
  \item\textsuperscript{16} Daniel, Bugge Thorbjørn, p. 38.
  \item\textsuperscript{17} Agreement Establishing the World Trade Organization.
\end{itemize}
Dispute Settlement Body (DSB), is the decision-making body on all matters related to the dispute settlement system.

The establishment of the WTO entailed a major shift from politics and diplomacy towards an institutionalized rule-based international trading system, with the shift being due in large part to the DSU. The DSU brought with it many important changes to the dispute settlement system, among other things it introduced a permanent Appellate Body (AB) to which panel reports can be appealed. The DSU also changed the decision-making rules for certain decisions such as the adoption of panel reports so that the Members, now in the form of the DSB, decide by negative consensus, i.e. “the report shall be adopted […] unless the DSB decides by consensus not to adopt the report”. 18

The DSU also provides that the WTO dispute settlement system is obligatory in the case of a dispute related to the covered agreements. 19 This means that the Members must use the DSU procedures in order to settle their disputes and cannot refer the dispute to e.g. the International Court of Justice (ICJ). 20 The obligatory nature of the DSU also entails mandatory compliance with the outcome of the procedures. 21

3 The sequencing problem

3.1 Introduction

This chapter will describe the problem that the procedural agreements are trying to resolve. To begin, the general procedure for enforcing compliance with reports will be presented. After that, the sequencing problem will be described by first highlighting the unclear wording of the DSU that has led to different interpretations on the correct sequencing, and thereafter discussing the dispute in which the sequencing problem was first encountered and outlined. At the end of the chapter, brief conclusions will be presented.

18 Article 16.4 of the DSU.
19 Article 23.1 of the DSU.
20 It should be noted that only Members to the WTO can be parties and, therefore, individuals, corporations or other private entities cannot be parties to a procedure under the DSU.
21 See Article 21 of the DSU.
3.2 General procedure for enforcing compliance with reports

The panel procedure results in a panel report or, if appealed, an Appellate Body report. The DSB then decides whether to adopt the report and make binding rulings and recommendations.22 In those rulings and recommendations the DSB cannot oblige a Member to pay damages or fees; rather, the outcome of the WTO dispute settlement system is that the Member must desist from violating WTO law. Compliance is thus considered to be the “withdrawal or modification of a measure, or part of a measure, the establishment or application of which by a [M]ember of the WTO constituted the violation of a provision of a covered agreement”.23

The adoption of reports is, in practice, automatic because the DSB decides by negative consensus. Thus, a report will be rejected only if all Members — including the prevailing party — object to it. Once the report is adopted, the respondent is obliged to comply. If immediate compliance is impracticable, the respondent will be granted a reasonable period of time to comply. The reasonable period of time will either be determined by the parties or through arbitration.24 If, after expiry of the reasonable period of time, the parties disagree as to whether the respondent has complied, either of them may request a panel (“compliance panel”), to determine the issue.25 Article 21.5 of the DSU provides as follows:

“Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings, such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible the original panel. The panel shall circulate its report within 90 days after the date of referral of the matter to it […]”

In the original report, the panel or the AB may suggest ways in which the respondent might comply with the report.26 Such suggestions are not binding and, in practice, very few reports have contained any suggestions.27 Thus, it is up to the respondent to decide

22 See Articles 16, 17.14 and 19 of the DSU.
23 Argentina – Hides and Leather (Recourse to Article 21.3(c) (WT/DS155/10), para. 41.
24 Article 21.3 of the DSU.
25 The AB has concluded that since the language of Article 21.5 is neutral on which party may initiate proceedings, it is open to either party to request an Article 21.5 panel. See US – Continued Suspension (WT/DS320/AB/R), para. 347. It can be noted that the procedures during the GATT era required a complainant to initiate a completely new panel procedure showing that implementing measures failed to achieve compliance, Hudec, Robert E., pp. 345–76.
26 Article 19.1 of the DSU.
27 Daniel, Bugge Thorbjørn, pp. 54-55.
how to comply in the individual case. For that reason, the existence and consistency of measures taken to comply are often uncertain until after the compliance panel procedure.

If the compliance panel concludes that no measures to comply have been taken or that such measures are inconsistent with WTO law, the complainant may request authorization from the DSB to suspend concessions, i.e. to retaliate through breaking WTO law vis-à-vis the respondent, to a level equivalent to the damage that the original non-consistent measure causes. Article 22.2 provides:

“If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time [...], such Member shall, if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation. If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements.”

The decision to authorize suspension of concessions is taken by negative consensus, which in practice means that the DSB will do so automatically. To protect the interest of the respondent and prevent the claimant from deciding the level unilaterally, the respondent may request arbitration to determine the level of suspension. Article 22.6 states that:

“When the situation described in paragraph 2 occurs, the DSB, upon request, shall grant authorization to suspend concessions or other obligations within 30 days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request. However, if the Member concerned objects to the level of suspension proposed, or claims that the principles and procedures set forth in paragraph 3 have not been followed [...], the matter shall be referred to arbitration.”

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28 The respondent in an original dispute is hereafter consistently referred to as the respondent even in subsequent compliance panel procedures or arbitration, irrespective of which party requested the compliance panel or arbitration. Likewise, the original claimant will be consistently referred to as the claimant.

29 Concessions are the promised undertakings that the Members have made towards each other. Suspending them means departing from that undertaking, e.g. to raise the tariffs on certain products only towards the respondent.

30 Article 22.6 of the DSU states that the DSB “shall grant authorization to suspend concessions [...] unless the DSB decides by consensus to reject the request”.

15
Article 22.7 provides the scope of the arbitration:

“The arbitrator […] shall not examine the nature of the concessions or other obligations to be suspended but shall determine whether the level of such suspension is equivalent to the level of nullification or impairment. The arbitrator may also determine if the proposed suspension of concessions or other obligations is allowed under the covered agreement. However, if the matter referred to arbitration includes a claim that the principles and procedures set forth in paragraph 3 have not been followed, the arbitrator shall examine that claim. […] The parties shall accept the arbitrator's decision as final and the parties concerned shall not seek a second arbitration.”

After the DSB has authorized suspension of concessions, the suspension may remain in place until the respondent proves that it has complied.31

3.3 The basis of the sequencing problem

3.3.1 The cause for different interpretations

The above outline of the general procedure of the DSU for enforcing compliance with reports depicts a rather logical procedure. However, at the core of the procedure lies an inadvertent mistake by the drafters of the DSU that has given rise to many practical problems and much debate.32 The mistake lies in the fact that Article 22.2 read together with Article 22.6 requires the claimant to request authorization to suspend concessions within 30 days after the expiry of the reasonable period of time; Article 22.2 allows a prevailing party to request authorization from the DSB 20 days after the expiry of the reasonable period of time, while Article 22.6 requires the DSB to grant authorization within 30 days of the expiry of that period, unless there is consensus to reject the request, or the respondent requests arbitration. Concurrently, Article 21.5 provides that a compliance panel shall circulate its report within 90 days after the date of referral of the matter to it.

Since, the respondent’s obligation to comply arises when the reasonable period of time has expired, a compliance panel will usually not be requested before that. Accordingly, the compliance panel procedure will not be finished before the 30-day time frame in Article 22 has expired. In other words, the time frames in the two Articles appear to

31 US – Continued Suspension (WT/DS320/AB/R), para. 308.
32 See Mavroidis, Petros C., ‘Proposals for Reform of Article 22 of the DSU’, p. 66.
be irreconcilable. This problematic wording has been interpreted in different ways and led to the questioning of the correct “sequencing” of Article 21.5 and Article 22.

3.3.2 EC – Bananas: outlining the sequencing problem

The sequencing problem was recognized for the first time in a dispute between the US and the European Communities (hereafter referred to as the EU, short for European Union) over compliance with a report in which EU import of bananas was held to be inconsistent with WTO law. The US requested authorization to suspend concessions because it considered that the EU had failed to comply with the report. The EU, however, considered that it had complied and argued that the US had failed to follow the sequencing required by the DSU. According to the EU, prior to a request for authorization to suspend concessions, the non-existence or non-consistency of a measure taken to comply had to be determined multilaterally by a compliance panel according to Article 21.5. If the US could determine unilaterally that the EU had failed to comply and get “automatic” authorization to suspend concessions due to the negative consensus rule, this would be contrary to principles of due process and Article 23 of the DSU, which provides that:

“when Members seek the redress of a violation […] they shall […] not make a determination to the effect that a violation has occurred […] except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding”.

The US on the other hand, saw a compliance panel procedure as a way for the EU to voluntarily obstruct and delay compliance and feared that it would forfeit its right to “automatic” suspension if the 30-day time frame in Article 22 were not observed. The disagreement between the EU and the US grew so large as to pose a serious threat to the institutional integrity of the WTO.

The dispute highlighted the underlying issue in the sequencing problem: who determines whether a respondent has failed to comply. The two relevant Articles were considered to be unclear on this. Article 21.5 makes no reference to the right to retaliate

33 EC – Bananas (WT/DS27/AB/R).
34 Valles, Cherise M., and McGivern, Brendan P., p. 75. The EU blocked the adoption of the agenda for the DSB meeting at which the authorization of suspension of concessions by the United States was to be decided. This was possible due to the general consensus rule in Article 2.4 of the DSU, which provides that “[w]here the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus”.
under Article 22, and Article 22 makes no reference to Article 21.5. It was, therefore, debatable whether the Article 21.5 panel process must precede a request under Article 22 for authorization to retaliate.

Moreover, the case shed light on the vague wording “recourse to these dispute settlement procedures” in Article 21.5. It is presumably a reference to the DSU’s normal panel procedures, but the short time frame for a compliance panel, 90 days, compared to the normal 6–9 months for panel proceedings, and another 2–3 months for an appeal, shows that the same procedures would be impracticable and may not be intended. In such case, the question is which of the normal rules apply to a compliance panel procedure. In the dispute, the US feared that the procedures applicable to a compliance panel would be interpreted in a very time-consuming fashion and, supposedly, provide the EU with a possibility to request yet another compliance panel after merely a slight change of the measure, in order to perpetually delay compliance.

The disagreement between the EU and the US on the correct sequencing resulted in two parallel procedures: Article 22.6 arbitration and Article 21.5 compliance panel proceedings. As a consequence of the time frames of the two Articles, the arbitrators would have decided the level of suspension of concessions before the compliance panel had determined whether the EU had failed to comply. In reality, however, the two procedures were carried out by the same individuals (the original panelists) as provided by both Articles 21.5 and 22.35 These individuals solved the problem mainly by acting as Article 22.6 arbitrators; they interpreted the articles to mean that the short time frame for authorization to suspend concessions confirmed that such authorization could not be conditioned by a prior determination of compliance by a panel.36 This interpretation was possible since the arbitrators considered that they could determine the level of suspension to zero if they found that the respondent had been in compliance. Applying this interpretation to the dispute, the arbitrators found that the EU had not complied and, therefore, continued to determine the level of suspension.37 The US was consequently authorized to suspend concessions.

However, in the course of the dispute the US had not awaited the report by the arbitrators and had taken a retaliatory measure prior to authorization by the DSB. Accordingly, the EU requested a new panel to determine the inconsistency of that

35 Both articles provide that the matter shall be referred to the original panel wherever possible.
36 EC – Bananas (Recourse to Article 22.6) (WT/DS27/ARB), paras. 4.1-4.15.
37 EC – Bananas (Recourse to Article 22.6) (WT/DS27/ARB), paras. 5.96-5.98. See also Valles, Cherise M., and McGivern, Brendan P., p. 77.
measure. The panel agreed with the EU but, in addition, it stated that, similarly to the previous arbitrators, it considered that arbitrators under Article 22.6 were competent to determine compliance instead of a compliance panel. The EU appealed *inter alia* this statement. The AB concluded that the statement was outside the terms of reference of the panel and hence “without legal effect”. Even if the statement has no legal effect, it shows the difference in interpretation that existed at the time.

3.4 Conclusions

This chapter has described the sequencing problem that the procedural agreements are trying to resolve. In short, the sequencing problem is due to the unclear wording of the DSU as regards the compliance stage of disputes. The drafters of the DSU mistakenly gave Articles 21.5 and 22 irreconcilable time frames: Article 22 requires the claimant to request authorization to suspend concessions within 30 days after the expiry of the reasonable period of time, while Article 21.5 provides that a compliance panel shall circulate its report within 90 days after the date of referral of the matter to it.

In *EC – Bananas*, which was the first time the problem was encountered, this led to different interpretations as to how to sequence the two procedures, i.e. whether an Article 21.5 panel procedure must precede a request under Article 22 for authorization to retaliate. On the one hand, determination of compliance should be made multilaterally, while on the other the right to request “automatic” authorization to suspend concessions should not be forfeited.

4 Analysis of the procedural agreements

4.1 Introduction

This chapter is devoted to the procedural agreements. By way of introduction to the use of procedural agreements, the first dispute in which the parties concluded a procedural agreement will be presented. Thereafter, the 57 procedural agreements concluded to date will be examined based on the appended table, in order to provide a basis for subsequent analysis. First, the general features of the agreements will be presented, after

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38 See *US – Certain EC Products* (WT/DS165/R), paras. 6.116-6.130.
39 *US – Certain EC Products* (WT/DS165/AB/R), para. 92.
which two main types of agreements will be outlined and, finally, certain additional provisions concerning other issues than the direct issue of sequencing will be examined.

The discussion will then proceed to an analysis of the potential problems associated with the use of procedural agreements. First, two potential problems pointed out by other scholars will be studied, namely (i) unpredictability due to differences in the provisions of the agreements and (ii) dependence on the will of the parties. After that, the more complicated potential problems connected to the legal status of the procedural agreements, first raised in this thesis, will be analyzed. The method employed for identifying these problems has been to study case law in which the problems have arisen, as well as other kinds of bilateral agreements, to discover how they have been treated. The identified potential problems connected to the legal status of the agreements relate to (1) the jurisdiction of compliance panels and arbitrators over the procedural agreements; (2) the jurisdiction of a new panel over the procedural agreements; and (3) the ability of third parties to challenge the procedural agreements. These three potentially problematic areas connected to the legal status of the procedural agreements will each be analysed individually.

At the end of the chapter, a brief summary will be provided as well as certain conclusions drawn from the analysis as to whether the procedural agreements constitute a satisfactory method for addressing the sequencing problem.

4.2 The first procedural agreement

In a dispute between Canada and Australia, an Australian import ban on certain salmon products was found to be inconsistent with WTO law.\(^{40}\) After the reasonable period of time had expired the parties disagreed as to whether Australia had complied. In order to avoid the strain on the institution as caused by the parties in EC – Bananas, Canada and Australia agreed on an arrangement according to which Canada requested authorization to suspend concessions within the time frame envisioned in Article 22 and Australia requested arbitration according to Article 22.6 to determine the level of suspension.\(^{41}\) But the parties agreed to suspend the work of the arbitrators until a compliance panel under Article 21.5 — requested by Canada as part of the arrangement — had determined and circulated its report on whether Australia had complied.

\(^{40}\) Australia – Salmon (WT/DS18/AB/R).
\(^{41}\) Australia – Salmon (Recourse to Article 21.5) (WT/DS18/RW), para. 1.3.
This was done to avoid forfeiting the opportunity to request authorization to suspend concessions due to the time frame in Article 22, while still allowing a compliance panel to determine compliance. In addition, the parties agreed to allow the arbitrators to resume their work directly following a determination of non-compliance, regardless of whether either party tried to appeal the report. The arrangement, which was announced at a DSB meeting, managed to avoid distress and the dispute was settled without any problems connected to sequencing.

4.3 An overview of the procedural agreements

4.3.1 General features of the procedural agreements

As stated above, the first procedural agreement was concluded in Australia – Salmon, in the wake of the crisis caused by EC – Bananas. Since then, it has become the common way to circumvent the problematic wording of Articles 21.5 and 22. To date, 57 procedural agreements have been concluded. An overview of the general features of these procedural agreements has been outlined in an appended table, in order to identify the differences. The most important general features will be described below.

The agreements are drafted only with an individual dispute in mind and are thereby always ad hoc in nature. The parties to the procedural agreement are the two parties to the original dispute. If there is more than one complainant, separate procedural agreements are concluded between each complainant and the respondent. No agreement has been concluded between more than two parties. Members that have been third parties to the original dispute have never concluded a procedural agreement with the respondent.

The agreements are usually concluded after the expiry of the reasonable period of time but before expiry of the 30-day time frame in Article 22. In some cases, the agreement has been concluded before the expiry of the reasonable period of time and, in very few cases, after the 30-day time frame in Article 22.

The wording of the first agreements varied and so did their provisions. Some agreements were rather verbose, while others were more succinct. However, over time the agreements have become more standardized in wording. Many provisions are copied

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42 2 February 2015.
43 See the appendix in section 8.1.
44 E.g. Canada – Dairy (DS 103, 113) where the two complainants to the originally consolidated procedures, the US and New Zealand, concluded separate procedural agreements. According to Article 9.1 of the DSU a single panel may be established where more than one Member requests the establishment of a panel related to the same matter.
from one agreement to the next. Yet, there has been a difference in technique in addressing the sequencing problem. Even if all agreements provide that a compliance panel must determine the existence and consistency of compliance measures, it is possible to see two main types of agreed provisions on this issue.

4.3.2 Two main types of procedural agreements
From the appended table it is possible to conclude how the Members wish to determine compliance. All agreements sequence Articles 21.5 and 22 in the same way; in the case of disagreement over compliance, a compliance panel must always determine the existence and consistency of compliance measures before suspension of concessions can be authorized. The Members have, in other words, never endorsed the sequence proposed by the panels in EC – Bananas and US – Certain EC Products, i.e. that an arbitrator according to Article 22.6 might just as well determine compliance. However, the ways that the parties have interpreted the articles, and therefore drafted their procedural agreements, vary. The table shows that there are two main types of agreements.

The first main type of agreement for resolving the sequencing problem has been used in 38 agreements. It is based on an interpretation of the DSU whereby a compliance panel is obligatory in case of disagreement over compliance. With this interpretation, the parties do not need to agree that a compliance panel according to Article 21.5 is obligatory. Rather, the parties simply agree not to invoke the 30-day time frame in Article 22. The following excerpt from the agreement between the US and China in China – Electronic Payment Services exemplifies how the first main type of agreement addresses the sequencing problem:

“In the event that the DSB following a proceeding under Article 21.5 of the DSU rules that a measure taken to comply does not exist or is inconsistent with a covered agreement, the United States may request authorization to suspend concessions or other obligations pursuant to Article 22.2 of the DSU. China shall not assert that the United States is precluded from obtaining such DSB authorization on the grounds that the request was made outside the 30-day time-period specified in Article 22.6 of the DSU. This is without prejudice to China's right to have the matter referred to arbitration in accordance with Article 22.6 of the DSU.”

45 The excerpt is the main paragraph dealing with the sequencing problem in China – Electronic Payment Services (WT/DS/413/10), para. 6. For the full agreement, see the appendix in subsection 8.2.1.
The second main type of agreement has been used in 13 agreements, including the first procedural agreement, in *Australia – Salmon*. It is based on an interpretation whereby the parties must request authorization to suspend concessions within the 30-day time frame in order not to forfeit that right. It does not suffice that the parties agree not to invoke the expired time frame. A consequence of this interpretation is that a compliance panel is not obligatory in case of disagreement over compliance, unless the parties so agree. The parties must, therefore, conclude a more complicated agreement.

According to the second main type of agreement, the claimant must request authorization to suspend concessions within the 30-day time frame and the respondent must request arbitration according to Article 22.6 as to the level of suspension. At the same time, though, the parties must also request a compliance panel and agree to immediately and jointly request that the arbitrators suspend their work until a compliance panel report has been adopted. The following excerpt from the agreement between the US and the EU in *EC – Approval and Marketing of Biotech Products* illustrates how the second main type of agreement addresses the sequencing problem:

“1. Should the United States request authorization to suspend concessions or other obligations pursuant to DSU Article 22.2, the European Communities shall object to the level of concessions or other obligations and/or claim that the principles and procedures set forth in DSU Article 22.3 have not been followed no later than before the DSB meeting at which the US request is proposed for the agenda. The matter will be referred to arbitration pursuant to DSU Article 22.6.”

2. After the referral of the matter to Article 22.6 arbitration, the parties will request the Article 22.6 arbitrator, at the earliest possible moment, to suspend its work. The arbitration will resume if and when the condition in paragraph 6 is fulfilled.

[...]

6. In the event that the DSB finds that a measure taken to comply with the recommendations and rulings of the DSB in this dispute does not exist or is inconsistent with a covered agreement, the Article 22.6 arbitrator will resume its work at the request of the United States.”

The second main type of agreement often prescribes the conditions under which the arbitrator will resume its work. These conditions vary somewhat, as some provide for automatic resumption in case of non-compliance while others entitle one or both parties to request resumption in case of non-compliance. In case of compliance, most agreements oblige the party requesting arbitration to withdraw its request, thereby terminating the arbitration procedure.

46 The excerpt reproduces the main paragraphs dealing with the sequencing problem in *EC – Approval and Marketing of Biotech Products* (WT/DS291/38). For the full agreement, see the appendix in subsection 8.2.2.
It is possible to recognize the positions of the EU and the US in *EC – Bananas* in these two main types of agreements. The EU’s original interpretation of Articles 21.5 and 22 is close to the first main type of agreement. The second main type of agreement evinces the worry of forfeiting the right to automatic authorization to suspend concessions due to the 30-day time frame that the US had in *EC – Bananas*. This might lead to the assumption that these two Members (i.e. the EU and the US) use the type of agreement that is closest to their original position. A review of the agreements, however, reveals no such trend. The US has used the second type more often than the EU, but in fact both of them use the first type in the vast majority of their agreements.47

Three agreements48 have combined the two main types of agreements by providing that if a request for authorization to suspend concessions is made before the adoption of a compliance panel or AB report, the parties will request arbitration and immediately request suspension of the arbitration until the adoption of the compliance panel or AB report. If, however, a request for authorization to suspend concessions is made after the adoption of a compliance panel or AB report, the respondent may not to invoke the 30-day time frame in Article 22.

In addition to these main types of agreements, another technique was used in three of the first disputes involving the Agreement on Subsidies and Countervailing Measures (SCM Agreement), which, for cases falling under its scope, provides some additional rules to the DSU.49 The procedural agreements in these disputes made use of a footnote50 in the SCM Agreement providing that the deadlines in the DSU can be modified if the parties so agree. These procedural agreements have, therefore, stated that the deadline for DSB action under the first sentence of Article 22.6 shall be 15 days after the circulation or adoption of the report under Article 21.5, instead of after expiry of the reasonable period of time.51 In a later case involving the SCM Agreement, the second main type of agreement has been used instead of prolonging the deadline in reliance on the footnote.52

47 The US has used the second type in 34 % of all its agreements and the EU has used it in 13 % of all its agreements.
49 *Brazil – Aircraft* (WT/DS46/13), *Canada – Aircraft* (WT/DS70/9) and *Australia – Automotive Leather II* (WT/DS126/8).
50 Footnote 6 to Article 4 of the SCM Agreement.
51 See e.g. *Canada – Aircraft* (WT/DS70/9) para. 5.
52 *US – Subsidies on Upland Cotton* (WT/DS267/22).
4.3.3 Additional provisions

Even if most procedural agreements follow one of the two main types of agreements, there are some additional provisions that differ. These are not directly linked to the sequencing problem but relate to it. One of these additional provisions relates to the right to appeal the report of the compliance panel. In some of the first procedural agreements, the parties agreed not to appeal the report, in order to limit the time necessary to determine compliance. An appeal could otherwise be interpreted into Article 21.5, which refers to “these dispute settlement procedures”. However, after those first few cases, in Brazil – Aircraft the AB ruled in an appeal of a compliance panel report for the first time. Thereafter, the Members seem to have accepted that compliance panel reports are appealable and most procedural agreements refer to a possible appeal.

Most agreements also provide that the parties agree not to raise any procedural objections in connection to the Articles 21.5 and 22 procedures. Such provisions stem from the situation in EC – Bananas where, due to the general consensus rule, the EU made use of the possibility to block consideration of a matter related to the compliance dispute by objecting to the adoption of the agenda for a DSB meeting at which the matter was supposed to be addressed.

As Article 21.5 is unclear on whether consultations are required prior to a request for a compliance panel, the parties to the procedural agreements have agreed on this matter in their own provisions. The phrase “recourse to these dispute settlement procedures” in Article 21.5 could imply that mandatory consultations according to Article 4 in normal panel procedures apply to compliance procedures as well. However, as with many other aspects of the normal procedures, consultations are time-consuming. The procedural agreements deal with this differently. More than one-half of all procedural agreements prescribe mandatory consultations prior to a request for a compliance panel.

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53 Australia – Salmon (WT/DS18/RW), para. 1.3, and Australia – Automotive Leather II (WT/DS126/8).
54 Brazil – Aircraft (WT/DS46/AB/RW).
55 Kearns, Jason, and Charnovitz, Steve, pp. 336-337.
56 90 % of all agreements had this provision.
57 Valles, Cherise M., and McGivern, Brendan P., p. 75. The EU blocked the adoption of the agenda for the DSB meeting at which the authorization of suspension of concessions by the United States was to be decided. This was possible due to the general consensus rule in Article 2.4 of the DSU. See also Rhodes, Sylvia A., pp. 557-558.
58 In normal dispute settlement procedures according to the DSU, the parties must first engage in consultations, see Article 4 of the DSU. If the consultations fail to settle a dispute within 60 days, or the respondent does not enter into consultations within 30 days, the complainant may request the establishment of a panel.
Approximately one-tenth of the agreements explicitly prescribe that consultations are not necessary, whereas the rest are silent on the matter.

Another additional provision used in the majority of procedural agreements relates to the use of the original panelists as panelists in the compliance panel and as Article 22.6 arbitrators. Both Articles 21.5 and 22.6 provide that the matter shall be referred to the original panel wherever possible.\(^59\) However, for most part the procedural agreements only reiterate Article 22.6 in that they state that the parties shall facilitate the use of the original panel and that, if the panelists are not available, the Director-General shall appoint a replacement and, in so doing, seek a person who will be available to act in both proceedings.

Most agreements also provide for certain time frames for the different stages in the procedures under Articles 21.5 and 22. The exact time frames vary, but the trend is that the parties try to encourage promptness. In conjunction with the time frames, the parties often agree to cooperate to adhere to such time frames. Since all agreements provide that the claimant can request authorization to suspend concessions directly after a determination of non-compliance, no agreement has been needed to exclude another reasonable period of time for compliance after the compliance panel report.\(^60\)

The final clause in most procedural agreements provides in very general language that the agreement does not prejudice the interests and rights of the parties under the DSU.

\subsection{4.4 Problems connected to the procedural agreements}

\subsubsection{4.4.1 Unpredictability due to different provisions in agreements}

It has been argued that the variety of procedures provided for in the different procedural agreements diminishes the predictability of the WTO dispute settlement system and the

\(^{59}\) The use of the original panel saves time since the panelists are already familiar with the facts of the dispute. One could, however, question the suitability of referring the matter to the same individuals that have already ruled once in the case. They have already formed an opinion of the dispute, which would influence their examination of compliance measures and the level of suspension. This might impair the respondent’s right to an objective examination. If a respondent considers this a problem in a certain dispute, it can probably insist on another composition of the compliance panel and arbitrators when negotiating the procedural agreement.

\(^{60}\) An initial fear relating to the wording “recourse to these dispute settlement procedures” was that a respondent, whose non-compliance has been determined by a compliance panel, could obtain another reasonable period of time during which it could change its measure only slightly in order to be entitled to another compliance procedure with another reasonable period of time, and that this could create an endless loop of litigation.
multilateral trading system as a whole.\textsuperscript{61} This is true if a wide variety of agreements leads to different outcomes in practice. It is, therefore, necessary to analyze the agreements and their practical differences.

As shown in the previous section, there are two main types of procedural agreements. An analysis of the desired and obtained results of these two main types of agreements shows that the practical difference between them is small, if any. In both types of agreements the parties agree to determine compliance according to Article 21.5 prior to any suspension of concessions. The only real difference is how to cope with the time frame set forth in Article 22. It seems very unlikely that a panel, the AB or an arbitrator would rule differently on the two ways of handling the time frame, rejecting one way but not the other. The intention of the parties is too obvious and, to date, no such difference has been noted.

The other types of agreements have very rarely been used and do not seem to entail much difference in practice. The type related to the SCM Agreement is not applicable to disputes beyond the scope of that agreement and has not been used during the last decade; the two main types seem to suffice, also in disputes within the scope of the SCM Agreement. The combined type of agreement is a compromise that tries to provide the parties with flexibility. However, in this case flexibility is precisely what the parties try to avoid by concluding procedural agreements. The parties wish to sequence the steps of the procedures under Articles 21.5 and 22, and such combined agreement fails to do so, albeit that it provides solutions to the time frames. Accordingly, this type of agreement seems poorly suited for the purpose; that is probably why it has only been used in three disputes.

In addition, it is clear from the appended table that one of the two main types of agreements has been used in many more disputes than the other. The first one, which provides that the right to request authorization to suspend concessions is not precluded by the 30-day time frame if that time frame has expired due to compliance panel procedures, has been used in two-thirds of all procedural agreements. The table also shows that the last 22 agreements have been of that type. This suffices to draw the conclusion that, at present, one main type of agreement is used, thereby significantly reducing the already low risk of different outcomes in practice.

The additional provisions in the procedural agreements vary only slightly and are

\textsuperscript{61} See e.g. Valles, Cherise M., and McGivern, Brendan P., p. 84.
not directly related to the sequencing of Articles 21.5 and 22. Some of those provisions, e.g. the possibility to appeal and the use of original panelists, merely reiterate either what is already panel practice or what the DSU already states. Other additional provisions, e.g. the obligation to cooperate and not to raise any procedural objections, probably lack legal effect (see subsection 4.4.3.2). The additional provisions that may cause some practical differences to the procedure are those related to whether consultations prior to a request for a compliance panel are mandatory, and those related to the use of certain time frames; however, they would not affect the overall sequencing.

The conclusion is, therefore that the practical differences between the procedural agreements concluded at present are very small and that these differences in themselves do not give rise to any marked unpredictability in the dispute settlement system.

4.4.2 Dependence on the will of the parties

As any agreement, the procedural agreements require the consent of both parties. Since each agreement is only valid in one dispute, i.e. ad hoc, they are dependent on the will of both parties in every dispute. This can be compared with a multilateral agreement, such as the DSU, which also requires the consent of all parties, but only one-time consent which is binding in relation to all future disputes. It is fair to say that it is more difficult for all 160 Members of the WTO to agree on a certain procedure than it is for only two parties. However, the two parties to the procedural agreements try to agree when they are already embroiled in a dispute.

Turning to the time for conclusion of most procedural agreements, this occurs after the expiry of the reasonable period of time but before the expiry of the 30-day time frame in Article 22. In the majority of cases procedural agreements were concluded during the last 15 days of the 30-day time frame. In some cases the agreement has even been concluded after the 30 days. This shows that the parties negotiate and conclude these agreements at a time when the dispute is potentially as contentious as ever; the respondent has not complied during the reasonable period of time and the complainant is considering retaliation. It also shows that the parties have a fairly short time at their disposal to agree on a procedural arrangement. All in all, this indicates a risk of the

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62 The potential problem of the dependence on the will of the parties has been raised by many authors, e.g. Yen, Ching-Chang, p. 438, Suzuki, Yoichi, p. 382, and Valles, Cherise M., and McGivern, Brendan P., p. 84.
parties failing to reach a procedural agreement which, in turn, could endanger the usefulness of the agreements as a practical solution to the sequencing problem.

Some scholars have raised the problem of differences in the negotiating strength of the parties. Small, weaker Members may be forced to agree to terms dictated by more powerful, procedurally more experienced Members such as the US and the EU. It is difficult to know whether this has been the case, but as a general rule smaller and weaker Members benefit from a more rule-based system rather than bilateral *ad hoc* arrangements. It is also possible to imagine a difference in negotiating strength between the complainant and the respondent. The complainant can use its possibility to request retaliation as a threat, enabling it to push through its preferred provisions, whereas it is in the interest only of the respondent to have recourse to a compliance panel and thereby avoid the complainant’s unilateral determination of non-compliance.

The cogency of both of these arguments, namely the risk of the parties failing to reach an agreement and that powerful or complainant parties ride roughshod over weaker or respondent parties when negotiating the provisions of the procedural agreements, should have diminished now that the last 22 agreements have been almost identical, copying the first main type of agreement. In these last agreements, only one additional term has differed somewhat, and that is whether consultations are mandatory prior to the request for a compliance panel. Even if this term might cause some disagreement — with an advantage to the more powerful or complainant party — the fact that most procedural agreements are similar reduces the risk of imbalance between the parties and of not reaching an agreement at all.

The risk is, however, not completely eliminated. This is shown by the fact that in a recent case the parties failed to reach a procedural agreement. In *US – Clove Cigarettes*, Indonesia challenged a ban on clove cigarettes in the US. The AB ruled in favor of Indonesia. It was held that the reasonable period of time for the US to comply expired on 24 July 2013. Indonesia initially proposed a procedural agreement and the parties held discussions aiming at one to which the US had agreed in principle. However, notwithstanding those discussions, 19 days after expiry of the reasonable period of time Indonesia decided to request authorization to retaliate under Article 22.2. Con-

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63 E.g. Suzuki, Yoichi, p. 382.
64 Suzuki, Yoichi, p. 391.
65 See Minutes of Meetings from DSB meeting on 23 August 2013 (WT/DSB/M/335).
sequently, the US objected to the level of suspension and referred the matter to arbitration. The parties never concluded a procedural agreement.

The reasons for the failure to reach a procedural agreement are difficult to determine but Indonesia’s arguments deserve closer examination. Indonesia claimed that there was no need to refer the case to a compliance panel because there was no measure for such a panel to consider and that, if there was, sequencing was not required under the DSU because issues of compliance can be resolved as part of arbitration according to Article 22.6. Indonesia added that it was a developing country, that the production and sale of clove cigarettes was important to its economy, and that the people of Indonesia were following this dispute closely and wanted to know “if the rules-based trading system promised by the WTO is real or a mere illusion”.

In other words, Indonesia appeared to view the sequencing problem differently than the US, but the failure seems mainly attributable to internal politics and national media in Indonesia.

In the subsequent arbitration between Indonesia and the US, most of the procedure concerned the determination of compliance rather than the level of suspension. On 3 October 2014, Indonesia and the US notified the DSB that they had reached a mutually agreed solution, i.e. a settlement agreement, whereby Indonesia withdrew its request for authorization to suspend concessions and the arbitration lapsed.

While the parties in most cases are able to reach an agreement on the applicable procedures, it is not difficult to imagine cases where the circumstances of the dispute or the differing views of the parties on how to proceed impede the conclusion of an agreement. It would be better, especially for a respondent or a weaker party, to be able to rely on clear rules to enforce its rights, rather than to seek ad hoc arrangements with the other party.

### 4.4.3 Uncertain legal status of procedural agreements

#### 4.4.3.1 The jurisdiction of compliance panels and arbitrators

The bilateral and ad hoc nature of the procedural agreements may give rise to uncertainty concerning the legal status of the agreements; this may, in turn, threaten to undermine the certainty that the agreements are supposed to create.

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66 Indonesia’s request for authorization to suspend concessions (WT/DS406/12).
67 The EU’s request for consultations in Indonesia – Recourse to Article 22.2 (WT/DS481/1).
68 The dispute will be further discussed in subsection 5.2.3.1.
One of the situations where the legal status of the procedural agreements may come into question is if one of the parties challenges the validity of the procedural agreement per se or the jurisdiction it confers on a compliance panel or arbitrators at a certain stage of the dispute. A party to a procedural agreement may claim that the agreement is invalid due to circumstances pertaining to the conclusion of the agreement or for any subsequent reason, such as termination. If the agreement is invalid or terminated, the sequencing of Articles 21.5 and 22 prescribed in the agreement would be ineffective. Likewise, a party may claim that a procedural agreement should be interpreted in a way that disallows the jurisdiction of a compliance panel or arbitrators at a specific stage of the dispute. Such an interpretation could also vitiate the sequencing in the procedural agreement. These claims might be based on legitimate reasons, but they might also be a way of obstructing the functioning of the procedural agreement to the benefit of the party itself.

If these types of claims were to hinder the procedure of a compliance panel, the AB or arbitrators, the role of procedural agreements as a means of addressing the sequencing problem would be seriously imperiled. The problem could, however, be avoided for most part if the panel, the AB and the arbitrators have jurisdiction to try the claims and dismiss them. Whether they have such jurisdiction will be examined below by way of analogy with arbitration law and by studying certain case law. It should be noted, however, that even if such jurisdiction existed, if the claims are considered legitimate they might still give rise to uncertainty since the procedural agreement might no longer provide a practical solution to the sequencing problem. Such jurisdiction would only avoid the problem of illegitimate claims aimed at obstructing the procedure and, even then, the litigation of the claims could be time-consuming.

According to principles of arbitration law, covering also state-to-state arbitration, the arbitrator is competent to determine its own jurisdiction, i.e. the existence, validity and scope of the arbitration agreement. This is sometimes referred to as competence-competence or “compétence de la compétence”. The purpose of the principle is to avoid obstruction of the arbitration procedure by one of the parties. Since the WTO’s dispute settlement procedures can be considered a specialized form of state-to-state arbitration, the principle could be applied to the DSU. However the procedural agreements cannot

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70 Born, Gary B., International Arbitration: Law and Practice, p. 441.
be seen as arbitration agreements; nevertheless, they do impose conditions that have to be met prior to compliance panel proceedings and arbitration.\(^{71}\) Accordingly, the compliance panel and the arbitrators have jurisdiction to determine the validity of such conditions and thus the procedural agreements. Likewise, the compliance panel and the arbitrators are competent to interpret such conditions in the procedural agreements.

In arbitration law, the arbitrator’s determination of its own jurisdiction can subsequently be challenged in court.\(^{72}\) Decisions of compliance panels can be appealed to the AB, but the ruling of an arbitrator cannot be challenged; “the parties shall accept the arbitrator's decision as final and the parties concerned shall not seek a second arbitration”\(^{73}\). This lack of review is, however, often the case in state-to-state arbitration and has been considered a general characteristic of public international law.\(^{74}\)

The only time the validity of a procedural agreement has been at issue was in \textit{Brazil – Aircraft}. Canada and Brazil had reached two identical procedural agreements on sequencing in two proceedings brought by the two Members against each other in relation to their respective aircraft export subsidies. The parties had relied on the footnote in the SCM Agreement to prolong the time frame for a request to suspend concessions\(^{75}\) until “after the circulation of the 21.5 report”.\(^{76}\) The procedural agreements were silent on whether the compliance report was appealable.

When Brazil appealed the compliance report, Canada responded by requesting authorization to suspend concessions, in response to which Brazil, in turn, requested arbitration. The matter was discussed at a DSB meeting where Canada expressed the view that Brazil was appealing as a way to delay compliance. However, in the subsequent arbitration Brazil claimed that Canada’s request to suspend concessions constituted a material breach of the procedural agreement and, consequently, declared that it terminated the agreement pursuant to Article 60 of the Vienna Convention. The effect of this was that Canada’s request to suspend concessions should be considered to have been made too late in relation to the time frame provided in Article 22. Canada, on the other hand, considered that the arbitrators lacked jurisdiction to interpret the procedural agreement.

\(^{71}\) The DSU would be the arbitration agreement in the case of the WTO.  
\(^{73}\) Article 22.7 of the DSU.  
\(^{75}\) See Article 4.10 of the SCM Agreement for suspension of concessions (countermeasures) when it comes to subsidies.  
\(^{76}\) \textit{Brazil – Aircraft} (WT/DS46/13), para. 5, and \textit{Canada – Aircraft} (WT/DS70/9), para. 5.
The arbitrators found a way of circumventing the need to discuss the question of whether they could interpret the bilateral agreement, or whether it had ceased to apply upon Brazil’s purported application of Article 60 of the Vienna Convention.\textsuperscript{77} Instead, they considered that the parties, at the DSB meeting, had agreed not to request suspension of concessions "pending the Appellate Body report and until after the arbitration report in the present case" and, in doing so, the parties had amended the procedural agreement so that appeal was added to the time frame “after the circulation of the 21.5 report”\textsuperscript{78} That being the case, Canada had accepted to await the AB report prior to requesting authorization to suspend concessions, by which Brazil forfeited its possible right to termination.

The arbitrators’ decision not to discuss their own jurisdiction concerning the procedural agreements may indicate a reluctance to address this issue. According to the above-mentioned principle, the arbitrators could have stated that the procedural agreement stipulated conditions precedent to any arbitration, e.g. an adopted compliance panel or AB report. Had the validity of those conditions been questioned, it would have been the task of the arbitrator to determine validity. Any other approach would emasculate the arbitration since otherwise it could be too easily obstructed by one of the parties. The arbitrators would, therefore, have had jurisdiction to determine the validity of the agreement by applying the Vienna Convention. Consequently, the arbitrators also would have been competent to interpret the agreement in accordance with the Vienna Convention.

In fact, it is possible to say that, in concluding that the procedural agreement had been amended in a certain way, the arbitrators actually engaged in interpretation of the procedural agreement, whereas the parties themselves did not even raise the question of any possible amendment. Perhaps it might have been better if the arbitrators had explicitly stated that they possessed such jurisdiction, rather than stating that they “did not need to discuss the question of whether [they] could interpret the [b]ilateral agreement” due to the amendment.\textsuperscript{79}

The issue of the jurisdiction of a compliance panel to interpret other kinds of bilateral agreements than procedural agreements, in order to determine its own jurisdiction, arose in the aftermath of EC – Bananas. The EU had reached an agreement

\textsuperscript{77} Brazil – Aircraft (Recourse to Article 22.6) (WT/DS46/ARB), paras. 3.6-3.10.
\textsuperscript{78} Cf. Minutes of Meeting from DSB Meeting on 22 May 2000 (WT/DSB/M/81), paras. 31-32.
\textsuperscript{79} Brazil – Aircraft (Recourse to Article 22.6) (WT/DS46/ARB), para. 3.8.
with the complainants that it would change its banana import regime. The EU appeared to comply, but then reverted to non-compliance by reinstating the inconsistent measures. The complainants then requested that a second compliance panel reconfirm the inconsistency. The EU claimed that the agreement between the EU and the complainants extinguished the compliance panel’s jurisdiction over the dispute. Interpreting the agreement to determine its own jurisdiction, the AB held that the agreement did not constitute any final resolution of the dispute because it was aspirational in nature and that mere agreement to a “solution” does not necessarily imply that the parties waive their right to have recourse to the dispute settlement system. This ruling shows that a compliance panel has, and needs to have, jurisdiction to determine its own jurisdiction.

The conclusion to be reached is that compliance panels and arbitrators are competent to determine their own jurisdiction and, to that extent, rule upon the procedural agreements, even if they have not (yet) explicitly so stated. Accordingly, a party’s questioning of the validity of the procedural agreement per se or the jurisdiction it confers on a compliance panel or arbitrators at a certain stage of the dispute may cause some uncertainty and be time-consuming, but since the compliance panel and arbitrators are able to rule on the matter, the uncertainty is significantly reduced.

4.4.3.2 The jurisdiction of a new panel over procedural agreements

Another situation where the legal status of the procedural agreements may come into question is if one of the parties challenges certain additional provisions of a procedural agreement. If the challenged provisions of the agreement constitute conditions precedent to any compliance panel procedure or arbitration, they may be tried as part of the compliance panel procedure or arbitration as outlined in subsection 4.4.3.1 above. If, however, a party breaches an undertaking to cooperate, to facilitate the engagement of original panelists or to desist from raising any procedural objections, such breach will hardly be seen as a matter on which a compliance panel or arbitrator can rule as falling under its competence to determine its own jurisdiction. Rather, such provisions are


81 In another dispute, the AB noted in a footnote that “it is a widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative, and to satisfy itself that it has jurisdiction in any case that comes before it.”, US – Anti-Dumping Act of 1916 (WT/DS136/AB/R), para. 54, footnote 30.
pertinent to parts of the compliance stage other than the specific procedures of a compliance panel or arbitrators, e.g. to the decision-making in the DSB.  

The question then arises whether it is possible to start a new panel procedure alleging breach of a procedural agreement. To answer that question, it is essential to examine the ambit of the DSU as provided for in Article 1.1 of the DSU:

“The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the […] covered agreements. The rules and procedures of this Understanding shall also apply to consultations and the settlement of disputes between Members concerning their rights and obligations under the provisions of the Agreement Establishing the World Trade Organization […] and of this Understanding taken in isolation or in combination with any other covered agreement.”

This makes clear that the DSU only applies to disputes concerning the covered agreements, including the DSU itself, and the WTO Agreement. In addition, Article 3.2 of the DSU states that the DSU serves to preserve the rights and obligations of Members under the covered agreements. Disputes concerning bilateral agreements such as the procedural agreements are thus not covered by the DSU and it is, therefore, doubtful if a party may use the DSU dispute settlement procedures to force another party to comply with such agreement.

One could argue that the parties might adjust the terms of reference in order to define the jurisdiction of the panel in the particular dispute in accordance with Article 7.1 of the DSU. However, Article 7.2 of the DSU makes clear that the terms of reference must address the relevant provisions in any covered agreement. As with Articles 1.1 and 3.2, Article 7.2 excludes agreements other than the covered agreements.

The issue arose in a case that did not involve a procedural agreement but another kind of bilateral agreement. In EC and certain Member States – Large Civil Aircraft, the EU argued that, in its examination of the matter, the panel should directly apply the

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82 These provisions might e.g. imply an obligation not to block the adoption of the agenda for a DSB meeting at which matters relating to the compliance stage are supposed to be decided, as the EU did in EC – Bananas. See subsection 4.3.3.

83 This situation is distinguished from the situation described in subsection 4.4.3.1 because in that situation the party challenging the provisions of the procedural agreement was not requesting the panel or arbitrator to rule on a breach of the procedural agreement, but rather to rule on non-compliance with the original report and thus a covered agreement. The situation described here is based on the request for a panel to rule on a breach of a bilateral agreement only. In other words, the first situation involves a dispute over a covered agreement, while the second involves a dispute over a bilateral agreement. The competence-competence in the first situation gives panels and the AB implied jurisdiction beyond the limited jurisdiction provided by the DSU, which applies in the second situation. See Pauwelyn, Joost, p. 1410, and Marceau, Gabrielle, and Tomazos, Anastasios, p. 72.
provisions of a bilateral agreement between the EU and the US instead of the covered agreement, in this case the SCM Agreement. The Panel, however, stated that since the agreement was not a “covered agreement” it did “not have jurisdiction to determine the rights and obligations of the parties under [that] agreement". This lack of jurisdiction is presumably the case with procedural agreements too, rendering certain additional provisions devoid of legal effect.

However, the EU’s alternative pleas in *EC and certain Member States – Large Civil Aircraft* may suggest that there are other ways in which a bilateral agreement can have legal effect. Neither the panel nor the AB ruled on any of these alternative pleas; rather, they dismissed them on other grounds not applicable to an analogy with the procedural agreements at issue in this thesis. Nevertheless, the arguments of the EU deserve a closer look.

In the alternative, the EU argued that the bilateral agreement could be considered a waiver of the applicable covered agreement, making the bilateral agreement supersede the covered agreement. However, this argument falls short because Article IX.3 of the WTO Agreement explicitly states that waivers to the covered agreements must be approved by at least three-fourths of the Members. Another argument was that the bilateral agreement supposedly affected the interpretation of the covered agreement as a “relevant rule of international law applicable to the relations of the parties” according to Article 31.3(c) of the Vienna Convention. However, “the parties” has been considered to refer to the parties of the agreement under interpretation, implying that only an agreement by all parties to the covered agreement, i.e. all 160 Members, would suffice as interpretational aid, and not a bilateral agreement between just two of them.

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84 *EC and certain member States – Large Civil Aircraft* (WT/DS316/R), para. 7.89. This finding of the panel was not appealed. However, the AB ruled similarly in *EC – Poultry* (WT/DS69/AB/R), para. 79.

85 According to Article 3.2 of the DSU, panels and the AB shall clarify the provisions of the covered agreements in accordance with customary rules of interpretation of public international law. According to the AB, those customary rules are expressed in Articles 31-32 of the Vienna Convention. See *US – Gasoline* (WT/DS2/AB/R) pp. 16-17.

86 *EC – Approval and Marketing of Biotech Products* (WT/DS291/R; WT/DS292/R; WT/DS293/R), para. 7.68. It should be noted that panels and the AB have made use of general public international law, such as rules on burden of proof, due process and state responsibility, even if those rules have not been mentioned directly in a covered agreement. However, unlike bilateral agreements these rules have been considered to apply to all Members and have thus been considered to aid the interpretation of the covered agreements as “relevant rules of international law applicable to the relations between the parties”. Cf. Pauwelyn, Joost, p. 1424, who suggests that WTO panels and the AB should apply non-WTO agreements directly and not just use them as interpretational aid; however, Marceau, Gabrielle, and Tomazos, Anastasios, conclude that Pauwelyn’s suggestion does not reflect the current state of law, see e.g. pp. 78-80.
Another alternative plea by the EU was that the commitments in the bilateral agreement gave rise to an estoppel preventing the US from using the WTO dispute settlement system in the way that it had. According to the EU, the principle of estoppel would mean that where (i) there is a clear and unambiguous statement of fact; (ii) that statement was made voluntarily, unconditionally and is authorized by one party; (iii) and is relied on in good faith by another party, the party making the statement is bound by it. The EU asserted that the existence of such a principle in WTO law derives from the good faith obligation contained in Article 3.10 of the DSU. In the case of the procedural agreements, an estoppel would mean that the parties are bound by the statements made in the procedural agreements and that a panel or the AB could rule on whether those binding statements have been breached.

However, neither a panel nor the AB has ever recognized the principle of estoppel in WTO law. Nor has this version of the principle been accepted outside common law legal systems and no general recognition of it exists in international law or in arbitration law. In addition, recognition of the principle in WTO law as presented by the EU would be highly controversial; if statements satisfying the above-mentioned criteria were to give rise to an estoppel hindering the application of the covered agreement, e.g. the DSU, this would counteract the implementation of the provisions of such an agreement. In the case of the DSU it would also contradict the binding obligation in Article 23.1 to have all disputes relating to the covered agreements settled according to the procedures of the DSU. The consequences of recognizing the principle in the version presented by the EU, together with the lack of such recognition in general international law make recognition in WTO law highly unlikely.

This shows the weak legal status of bilateral agreements in WTO law. They cannot be applied and enforced in a panel procedure and the alternative ways of giving them

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87 EC – Approval and Marketing of Biotech Products (WT/DS291/R; WT/DS292/R; WT/DS293/R), para. 7.102, footnote 1914. See also Panizzon, Marion, pp. 106-107.

88 The principle of estoppel has been recognized in other versions in commercial arbitration law by some arbitrators, mainly in common law legal systems. However, in those cases the estoppel has not only been caused by a statement of a party but by a statement of an adjudicating body in previous litigation between the same parties (compare to the principle of res judicata), see Born, Gary B., International Arbitration: Law and Practice, p. 350, and Born, Gary B., International Commercial Arbitration, pp. 3732-3738.
Applying this conclusion to the procedural agreements, it becomes clear that some of their provisions (those that do not entail conditions precedent to a procedure, which can be tried according to the panel’s or arbitrators’ competence to determine jurisdiction) are devoid of legal effect. As a consequence, the bilateral nature of the procedural agreements renders them rather uncertain as a method for addressing the sequencing problem.

4.4.3.3 The ability of third parties to challenge the procedural agreements

A final situation in which the legal status of the procedural agreements may come into question is if a third party could challenge the procedural agreement. Third parties have never concluded a procedural agreement, but such an agreement may affect them. The extent to which the procedural agreements can be challenged by third parties is, therefore, an issue that needs to be analyzed. In order to do so, the role and rights of third parties will be examined.

According to the present interpretation of Article 21.5, third parties are not able to request, i.e. initiate, a compliance panel. If a third party to the original dispute considers that a compliance measure nullifies or impairs benefits accruing to it under a covered agreement, it must initiate a completely new panel procedure. Article 10 of the DSU provides and defines the rights of third parties in general:

89 Cf. de Mestral, Armand C. M., who, while considering that it is unsatisfactory, comes to the same conclusions concerning the legal status of regional trade agreements and rulings from dispute settlement bodies under regional trade agreements in the WTO dispute settlement system. Panels and the AB have refused to apply such agreements and such rulings, considering that it is outside their jurisdiction, see e.g. Argentina – Poultry (WT/DS241/R), paras. 7.40–7.41, and Mexico – Soft Drinks (WT/DS308/AB/R), paras. 53, 54 and 56. In disputes concerning mutually agreed solutions, i.e. settlement agreements, between parties in a previous dispute, the jurisdiction of panels is also controversial. Some scholars have claimed that since these mutually agreed solutions are expressly referred to in the DSU, it should be possible to refer a dispute over them to a panel. However, panels and the AB have been reluctant to do so, see e.g. India – Autos (WT/DS146/R; WT/DS175/R), para. 7.116, footnote 364. Some commentators have proposed the use of arbitration under Article 25 for solving issues relating to regional trade agreements and mutually agreed solutions, suggesting that the parties can determine the scope of the arbitration. However, arbitration under Article 25 is subordinate to the coverage of the DSU, just as much as a panel procedure. In any case, this would not be a viable solution since arbitration requires the consent of both parties and one party could easily obstruct the procedure by objecting to it. See de Mestral, Armand C. M., p. 804, footnote 189, and Marceau, Gabrielle, and Tomazos, Anastasios, p. 61, footnote 7.

80 Marceau, Gabrielle, and Tomazos, Anastasios, p. 72, explains the position thus: “In a nutshell, the mandate of panels and the Appellate Body is defined and limited: to interpret WTO law and decide whether a provision of the covered agreements has been violated. […] In accordance with their respective mandates, the WTO panels and the Appellate Body only have the jurisdiction to interpret and apply WTO law. As such, they cannot interpret, let alone reach any legal conclusions of violation or compliance with other treaties or customs in complete isolation from the covered agreements. If and when they do so, it is only to the extent necessary to interpret provisions of the covered agreements.”

81 See Fukunga, Yuka, p. 409, footnote 105.
“1. The interests of the parties to a dispute and those of other Members under a covered agreement at issue in the dispute shall be fully taken into account during the panel process.

2. Any Member having a substantial interest in a matter before a panel and having notified its interest to the DSB (referred to in this Understanding as a “third party”) shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report.

3. Third parties shall receive the submissions of the parties to the dispute to the first meeting of the panel.

4. If a third party considers that a measure already the subject of a panel proceeding nullifies or impairs benefits accruing to it under any covered agreement, that Member may have recourse to normal dispute settlement procedures under this Understanding. Such a dispute shall be referred to the original panel wherever possible.”

From Article 10 it is clear that third parties have rights “during panel process” and, therefore, during compliance panel procedures since they follow “these dispute settlement procedures”. That is not the case with arbitration under Article 22.6, which is not a “panel process”.\textsuperscript{92}

With that in mind, an example of a procedural agreement infringing third party rights can be given: depending on the interpretation one makes of the sequencing problem, a procedural agreement providing that the determination of compliance shall be made by an Article 22.6 arbitrator may infringe the rights of third parties to obtain information and make submissions in a compliance panel procedure. In such case, is the third party bound by the procedural agreement or can it challenge the agreement?

Neither the DSU nor the WTO Agreement regulates how and when a third party may be bound by an agreement to which it is not party. Guidance may, though, be found in Article 35 of the Vienna Convention, which provides that “a treaty does not create either obligations or rights for a third State without its consent”. In addition, general principles of contract law would suggest that an agreement cannot have any binding nature vis-à-vis third parties unless the third party has acted through representation or, in rarer cases, if the agreement is made on behalf of the third party.\textsuperscript{93} The procedural agreements fall under none of these exceptions.

Furthermore, the DSU, read together with the dispute settlement provisions in the GATT, provides in general that a Member may request a panel if it considers that any benefit accruing to it under the covered agreements is being nullified or impaired as the result of the failure of another contracting party to perform its obligations under the

\textsuperscript{92} The general provision on arbitration in Article 25 of the DSU provides no rights for third parties unless both parties to the dispute so agree, see Article 25.3. See also Seth, Torsten, p. 381.

\textsuperscript{93} Cf. e.g. the Draft Common Frame of Reference II.9:301-303 discussed by von Bar, Christian, p. 39.
covered agreements.\textsuperscript{94} Therefore, the procedural agreements could be challenged by third parties, not in the actual arbitration but in a new panel procedure alleging a violation of the DSU.\textsuperscript{95}

This example shows that third parties may challenge the procedural agreements; that, in turn, makes the agreements risky as a means of addressing the sequencing problem and may jeopardize the certainty that the agreements are supposed to provide.

\textbf{4.5 Conclusions}

This chapter has initially presented the first procedural agreement concluded to address the sequencing problem. It has examined the general features of the procedural agreements concluded to date and identified two main types of agreements as well as certain additional provisions. Subsequently, the chapter has considered potential problems associated with the use of procedural agreements to address the sequencing problem. Some of those problems have been considered less significant than other scholars have assumed, while other potential problems have been considered still relevant. In addition, potential problems not previously noted have been identified.

Subsection 4.4.1 analyzed the potential problem of different practical results if the procedural agreements contain different provisions. Even if differences in the agreements may, in theory, cause unpredictability, the different types of agreements that have been used so far achieve the same practical result and, more importantly, the agreements concluded at present are almost identical, thereby lowering the risk of unpredictability even more.

Subsection 4.4.2 analyzed the potential problem associated with the procedural agreements’ dependence on the will of the parties, and the risk of the parties failing to reach an agreement. The fact that the agreements at present are almost identical should lower the risk of not reaching an agreement. However, the time for conclusion of the agreements as well as differences in negotiating strength between the parties may heighten this risk — as happened in a recent dispute, causing much distress.

Subsection 4.4.3 analyzed the potential uncertainty that the \textit{ad hoc} and bilateral nature of the procedural agreements may cause to the legal status of the agreements.

\textsuperscript{94} See Articles 4.3, 4.7 and 6.1 of the DSU and Articles XXII and XXIII of the GATT, which still applies according to Article 3.1 of the DSU.

\textsuperscript{95} The issue of third party rights outside the scope of a procedural agreement arose in connection to the recent case, \textit{US – Clove Cigarettes}, which will be further discussed in subsection 5.2.3.
Firstly, the legal status of a procedural agreement may be rendered uncertain if a party were able to hinder the procedure of the compliance panel or arbitrator by invoking invalidity or a particular interpretation of the agreement. However, since the compliance panels and arbitrators are competent to rule on the conditions for their own jurisdiction, such claims could be tried in the ongoing compliance procedure or arbitration, thereby not hindering the procedure unless the panel or the arbitrators find them to be legitimate. Even if the risk of such claims still exists, the uncertainty that the claims may cause is much reduced by virtue of this jurisdiction. In the main, such claims would result in a somewhat lengthier procedure.

Secondly, the legal status of the procedural agreements may be uncertain if some of their provisions are devoid of legal effect. Due to the limited coverage of the DSU and the failure to find other convincing ways to endow them with some legal effect, a breach of the provisions of a procedural agreement that do not condition the procedures of a compliance panel or an arbitrator cannot be challenged in a new panel procedure.

Thirdly, the legal status of the procedural agreements may be uncertain if third parties could challenge them and thereby invalidate them. Since procedural agreements could infringe third party rights and there is nothing to indicate that third parties are bound by the procedural agreements, third parties could challenge the agreements in a new panel procedure as violating the DSU.

Taken together, the following risks demonstrate that the procedural agreements do not constitute a satisfactory method of addressing the sequencing problem: (i) the risk of failing to reach an agreement; (ii) the risk of legitimate claims of invalidity or lack of jurisdiction, or time-consuming illegitimate attempts to obstruct the panel procedure or arbitration; (iii) the risk that specific provisions of a procedural agreement are devoid of legal effect; and (iii) the risk of third parties challenging the agreements. This conclusion raises the second question posed in this thesis: what is the most appropriate and realistic alternative for addressing the sequencing problem?
5 Alternatives for addressing the sequencing problem

5.1 Introduction

In connection with the establishment of the WTO and the entry into force of the DSU, the Ministerial Conference called for a full review of the DSU within four years in order to decide “whether to continue, modify or terminate such dispute settlement rules and procedures”. The EC – Bananas dispute and the tense disagreement on sequencing between the EU and the US made the relationship between Articles 21.5 and 22 a priority issue for the DSU review. However, the DSU review has so far not yielded any results.

Since the first procedural agreement, concluded in 2000, the procedural agreements have been used as a practical way of addressing the sequencing problem. However, the shortcomings associated with the use of procedural agreements outlined in the previous chapter have shown that these agreements do not constitute a satisfactory method for addressing the sequencing problem. This chapter will attempt to objectively examine different alternative methods, analyzing their advantages and disadvantages, in an endeavor to find the most appropriate and realistic alternative for addressing the sequencing problem.

The most commonly proposed alternative thus far — amending the DSU — will be discussed first, including a brief presentation of past and current negotiations. Secondly, another alternative that has been proposed by some Members and scholars — an authoritative interpretation by the Members — will be examined. Finally, an alternative that has not yet been discussed in academic circles — clarification by the AB — will be analyzed. The discussion on clarification by the AB will also include an analysis of the panels’ and the AB’s authority to interpret the DSU, as well as the status of precedents within WTO law. Finally, some conclusions will be presented as to the most appropriate and realistic alternative to the procedural agreements.

96 Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes, adopted by Ministers at the Meeting of the Trade Negotiations Committee in Marrakesh on 14 April 1994.
97 Statement by the DSB Chairman on EC – Bananas in Minutes of Meeting from DSB meeting on 25, 28 and 29 January 1999 (WT/DSB/M/54), p. 31. See Valles, Cherise M., and McGivern, Brendan P., p. 82.
5.2 The different alternatives

5.2.1 Amendment to the DSU

Almost all past and current alternative attempts to address the sequencing problem have proposed doing so by amending the DSU. According to Article X.8 of the WTO Agreement, such amendments require consensus\(^98\) in the Ministerial Conference. Amendments provide a possibility of completely changing the provisions of the DSU and creating new rights and obligations for the Members. This makes it the ideal format for a complete DSU review, which has been the attempt so far. The negotiations on amending Articles 21.5 and 22 to address the sequencing problem have thus been part of a more general review of the DSU stemming from the declaration by the Ministerial Conference mentioned in the previous section. Such a complete review naturally entails amendments and changes to many other parts of the DSU, not just the sequencing problem.

Since 1998, several proposals for amendments have emerged from the DSU review.\(^99\) None of them have garnered the required consensus. However, as regards the sequencing problem, all of the proposals have prescribed that, in case of disagreement over compliance a determination of compliance by a compliance panel shall be obligatory prior to authorization to suspend concessions.

The latest outcome of the negotiations is a stabilized draft legal text on, \textit{inter alia}, the sequencing problem, that was achieved in 2012.\(^100\) This, too, prescribed obligatory determination of compliance by a compliance panel. “Stabilized” or not, the draft still

\(^{98}\) According to Article 2.4 footnote 1 of the DSU, consensus means that no Member present at a meeting formally objects a proposal. This is to be contrasted with unanimity, which requires the consent of all Members.

\(^{99}\) The first negotiations on DSU review started in 1998. At the Seattle Ministerial Conference, a proposal for amendments was presented (WT/MIN(99)/8/rev). However, the US, at the time a com-plaintant in \textit{EC – Bananas} and a net complainant overall, preferred direct retaliation instead, see Zimmermann, Thomas A., p. 445. For that reason and due to disagreement over other issues, the proposal was never adopted. Negotiations started again with the Doha Ministerial Conference in 2001. The US, which had then been a respondent in more cases than before, shifted its view on the sequencing problem and was now in favor of a prior determination of compliance by a compliance panel; see Zimmermann, Thomas A., p. 446. In 2003, the negotiations resulted in a new proposal for amendments made by the Chairman of the DSB in Special Session, Ambassador Péter Baláš (the DSB in Special Session is the form of DSB meeting where reform negotiations take place). For the part of the proposal concerning the sequencing problem, see TN/DS/9 pp. 9-13. However, the proposed amendments were complicated and included almost all of DSU, which was partly the reason why consensus was never reached within the deadline, see Yen, Ching-Chang, p. 438. Since 2004, the negotiations on DSU review have been conducted without a deadline, see Stewart, Terence P. et al., p. 363. In 2008, the current Chairman of the DSB in Special Session, Ambassador Ronald Saborio Soto, presented a new proposal for amendments, see JOB(08)/81, p. 36. However, the proposal only led to continued negotiations.

\(^{100}\) JOB/DS/14. See the reference made in e.g. TN/DS/26 p. 7. The details of the draft will not be discussed in this thesis because the document is confidential.
contains divergences and it deals with only some parts of the DSU, leaving many issues for continued negotiations. The latest report on the negotiations is from January 2015, when the Chairman expressed optimism regarding the negotiations, but added that not all issues are at the same level of progress and that the amount of work remaining to achieve consensus still varies significantly from issue to issue.\textsuperscript{101}

The past and current proposals to amend the DSU show that while the all-in-one approach enables greater focus to be placed on general principles of law, legal consistency and systemic implications over a longer-term perspective, the approach has made the negotiations very comprehensive, covering almost every article of the DSU.\textsuperscript{102} To reach consensus on all aspects at one go has proven to be extremely difficult and the approach may, therefore, impede reform on issues where there is consensus. While the Chairman is fairly optimistic about the negotiations, there are still many issues on which consensus is still lacking. Given that negotiations on amendments have been ongoing for almost 17 years and that all past attempts have failed, the outcome of the current negotiations is uncertain.

The past and current proposals, together with the procedural agreements, also show that the Members have reached consensus as to what constitutes the correct sequencing of Articles 21.5 and 22. Theoretically, this should mean that a separate amendment on the sequencing problem would achieve consensus. A separate amendment outside the framework of the DSU review could be a good way to overcome difficulty in reaching consensus in the current negotiations. However, in reality it is far from certain that all Members would accept a separate amendment on the sequencing problem, since some Members have been reluctant to open up the DSU to any changes whatsoever, probably out of fear of further judicialization of the WTO.\textsuperscript{103} Based on the overall success of DSU, these Members embrace the “if it ain’t broken, don’t fix it” approach.\textsuperscript{104} To them, the use of procedural agreements has reduced the need for amendments to address the

\textsuperscript{101} TN/DS/26 pp. 1-2. Another reason for the difficulty in reaching consensus is that the DSU review has been decided not to formally be part of the Doha round. These rather technical legal reforms were supposed be dealt with more expeditiously than the rest of the negotiations and not be subject to trade-offs with other negotiated areas. However, the formal separation can be criticized as hindering fruitful negotiation where pragmatic bargaining is necessary. There is \textit{a de facto} link between the DSU review and the Doha round and Member officials insist that they cannot conclude the DSU review without a broader accord in the troubled global trade negotiations. See Bridges, Summary – Dispute Settlement Body (DSB) Report, Volume 15, No. 15, 27 April 2011.

\textsuperscript{102} Cf. Petersmann, Ernst Ulrich, WTO Negotiators Meet Academics; The Negotiations on Improvements of the WTO Dispute Settlement System, p. 238.

\textsuperscript{103} According to Kessie, Edwini, p. 118, Members have traditionally been unwilling to amend the texts of the agreements.

\textsuperscript{104} Bálas, Peter, p. 23.
sequencing problem. At the same time, other Members are deeply committed to a comprehensive DSU review and, for them, addressing the sequencing problem separately would most likely result in a loss of momentum in the negotiations on the rest of the DSU review, which would be contrary to those Members’ ambitions.

In conclusion, amendments theoretically represent a good alternative for addressing the sequencing problem since they could clarify the articles once and for all, but in reality the all-in-one approach of the negotiations conducted so far, and the slight chance for any separate amendment of Articles 21.5 and 22, makes it difficult to rely on amendments to address the sequencing problem any time soon.

5.2.2 Authoritative interpretation

Another alternative to the procedural agreements could be an authoritative interpretation according to Article IX.2 of the WTO Agreement. An authoritative interpretation is legally binding on all parties and can modify the law. However, it cannot create self-standing rules since that would undermine the amendment provision in Article X. According to Article IX.2, the Ministerial Conference or the General Council can adopt such an interpretation by a three-fourths majority. However, due to the consensus practice in WTO decision-making, one must assume that, in reality, consensus will be needed also for authoritative interpretations.

To date, no authoritative interpretation has ever been adopted. An attempt was made by the EU to tackle the sequencing problem after EC – Bananas, but the interpretation was never adopted since the issue was highly contentious at the time. Nevertheless, an authoritative interpretation on the sequencing problem could be a satisfactory alternative to the procedural agreements, since it could clarify the articles

105 See Zimmermann, Thomas A., p. 469. Motta, Eduardo Pérez, and Diego-Fernández, Mateo, even consider that sequencing is no longer a problem, p. 305.
106 This has been proposed by e.g. Petersmann, Ernst-Ulrich, Additional Negotiation Proposals on Improvements and Clarifications on the DSU, p. 92.
107 See Ehlermann, Claus-Dieter, and Ehring, Lothar, The Authoritative Interpretation under Article IX:2 of the WTO Agreement: Current Law, Practice and Possible Improvements, p. 155. According to Article IX.1 of the WTO Agreement, “the WTO shall continue the practice of decision-making by consensus followed under GATT 1947”. The consensus practice is thus a relic from the GATT era, which means that even if the WTO Agreement prescribes a certain voting rule, in practice the decision will not be taken unless there is consensus.
universally without the need to open up the DSU.\textsuperscript{109} However, an authoritative interpretation might be considered less permanent than an amendment since it would not change the wording of the DSU. In addition, an authoritative interpretation still requires consensus and this might be difficult to achieve even if there is consensus on the correct sequencing and even if such interpretation does not require the DSU to be opened up. Some Members fervently desire a comprehensive DSU review — the same problem as encountered as regards a separate amendment. Addressing the sequencing problem separately would most likely hamper the already difficult negotiations on the rest of the DSU review and thus be contrary to these Members’ ambitions.

In conclusion, an authoritative interpretation would be a good alternative, but since consensus is required in practice, such an interpretation would probably be rather difficult to accomplish. In addition, the fact that no authoritative interpretation has ever been adopted demonstrates that the practical use of the provision is questionable.

5.2.3 Clarification by the AB

5.2.3.1 The current dispute Indonesia – Recourse to Article 22.2

While the two alternatives presented so far require consensus, which has proved to be difficult to accomplish even if there is consensus on what constitutes the correct sequencing, the third alternative does not require any consent from the Members. The alternative is a clarification by the AB on the correct sequencing of Articles 21.5 and 22 in a particular dispute. The opportunity to do so has arisen in the compliance stage of US – Clove Cigarettes, which was discussed in subsection 4.4.2.

The EU, as a third party to the original dispute in US – Clove Cigarettes, complained that most of the arbitration procedure under Article 22.6 had focused on the issue of compliance and not on the level of suspension, as it should have. According to the EU, the determination of compliance should have been made by a compliance panel, which would have accorded the EU third party rights. The EU went so far as to start a new procedure by requesting consultations with Indonesia, Indonesia – Recourse to Article 22.2, alleging that Indonesia had violated the DSU by having recourse to Article 22 before the adoption of a compliance panel or AB report.\textsuperscript{110}

\textsuperscript{109} Kessie, Edwini, p. 118, asserts that while Members have a long-standing preference for not amending the texts of the agreements, they have always preferred to clarify ambivalent provisions through “Decisions and Understandings”.
\textsuperscript{110} WT/DS481/1.
By using this dispute, a panel and later the AB could rule on whether the DSU prescribes an obligation to commence with Article 21.5 of the DSU. The current status of the dispute is “in consultations”, and has been so for a couple of months.\(^{111}\) It is unclear what the EU intends to do now that Indonesia and the US have reached a mutually acceptable solution prior to issuance of the arbitration decision. To determine what the EU can do, one must first examine whether a request for a panel would be accepted.

A Member may request a panel if it considers that any benefit accruing to it directly or indirectly under a covered agreement is being nullified or impaired due to the failure of another Member to perform its obligations under the covered agreement.\(^{112}\) In its request for consultations, the EU described how its benefits as third party are impaired or nullified in this case.\(^{113}\) In addition, there is a presumption that an infringement of the obligations assumed under a covered agreement such as the DSU constitutes a case of nullification or impairment, i.e. that a breach of the rules has an adverse impact on other Members.\(^{114}\) In practice, the presumption even appears to be irrebuttable.\(^{115}\) A panel request by the EU would, therefore, be accepted in this aspect.

However, in the present case the US and Indonesia settled and the arbitrator resigned after the EU had requested consultations. This calls into question whether a panel request will be accepted when there is nothing that Indonesia can now change in order to comply with WTO law. In disputes where a panel request has been made prior to withdrawal of disputed measures, the panel procedure and the subsequent adoption of the panel report have been accepted.\(^{116}\) The complainant’s interest in obtaining a ruling on infringement has thus been considered to prevail. In Indonesia – Recourse to Article 22, the EU had only requested consultations, and not a panel, before the arbitration that infringed the EU’s third party rights lapsed. This makes a panel’s acceptance to rule in

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\(^{111}\) The WTO website (https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds481_e.htm) accessed on 17 March 2015.

\(^{112}\) See Article XXIII of the GATT: “if a contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired […] as the result of the failure of another contracting party to carry out its obligations under this Agreement […] the matter may be referred to the CONTRACTING PARTIES […] to make appropriate recommendations […].

\(^{113}\) According to the EU, its benefits as third party are impaired or nullified because it has been a third party in the original panel and AB proceedings, it is engaged in the production, trade and regulation of the product concerned, it has a systemic interest in the correct and consistent interpretation and application of the covered agreements and because any suspension of concession could affect the EU in trade deflection and diversion effects.

\(^{114}\) Article 3.8 of the DSU.


\(^{116}\) Seth, Torsten, pp. 224-225. In e.g. US – Certain EC Products (WT/DS165/AB/R), paras. 81, 82 and 129, the Appellate Body concluded that although the measure at issue no longer existed, it was nonetheless inconsistent with WTO law; however, no recommendation could be made to the DSB.
the dispute less certain. Nevertheless, the EU’s interest in having a ruling on the fact that Indonesia infringed its rights may prevail over the fact that Indonesia’s ability to comply is now outdated, especially since the measure at issue — recourse to arbitration — is always limited in time.

The potential acceptance of the EU’s request, as well as the eventuality of other disputes providing a possibility to rule on the sequencing problem, gives rise to two further questions: have the panel and the AB authority to interpret the DSU so as to oblige a party to have recourse to Article 21.5 prior to Article 22 in case of disagreement over compliance; and would that interpretation make future panels rule similarly, thereby addressing the sequencing problem in the form of a precedent?

5.2.3.2 The authority to interpret the DSU

According to Article IX.2 of the WTO Agreement, the Ministerial Conference and the General Council have exclusive authority to adopt interpretations of the covered agreements, including the DSU. However Article 3.2 of the DSU states that:

“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.”

On one hand, panels and the AB are supposed to clarify the agreements by interpreting them, but on the other hand they cannot add or diminish the rights and obligations in the agreements. The distinction is not always clear. Some Members, especially those that have lost in a certain dispute due to pragmatic interpretation, have at times raised a fear of judicial activism in the WTO. At the same time, those Members that would have benefitted from a more pragmatic interpretation in a certain dispute have often argued

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118 Reiterated in Article 19.2 of the DSU.
119 Stewart, Terence P., et al., p. 331.
the contrary. Panels and the AB themselves have at times also exhibited reluctance to engage in pragmatic interpretation.\(^{120}\)

To decide whether a panel and the AB have the authority to interpret the DSU in a way that requires recourse to Article 21.5 prior to Article 22, the above-cited Article 3.2 of the DSU prescribes that the articles must be analyzed according to customary rules of interpretation of public international law. According to the AB, these customary rules are expressed in Articles 31 and 32 of the Vienna Convention.\(^{121}\) Thus, the terms, context, object and purpose of the DSU are decisive.\(^{122}\)

In Indonesia – Recourse to Article 22, the EU argues that Articles 21.5, 22 and 23 of the DSU require recourse to Article 21.5 prior to Article 22.\(^{123}\) As for Article 23, it has been argued that unilateral determination of compliance is clearly contrary to the obligation to have recourse to the DSU in all disputes concerning the covered agreements and not to make determinations of violation thereof, etc. except through recourse to the procedures of the DSU.\(^{124}\) Nevertheless, the general language of Article 23.2 provides no definitive solution to the sequencing problem. If one considers the possibility of allowing an arbitrator to determine compliance according to Article 22.6, such sequencing is not contrary to Article 23.

Article 21.5 is cast in obligatory language: “shall be determined through recourse to these procedures”. This wording was the subject of interpretation in US – Continued Suspension and Canada – Continued Suspension.\(^{125}\) The dispute concerned Article 22.8 of the DSU: the US had continued its previously authorized suspension of concessions.

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\(^{120}\) In US – Certain EC Product (WT/DS165/AB/R), para. 92, the AB stated that “It is certainly not the task of either panels or the Appellate Body to amend the DSU or to adopt interpretations within the meaning of Article IX:2 of the WTO Agreement. Only WTO Members have the authority to amend the DSU or to adopt such interpretations. […] Determining what the rules and procedures of the DSU ought to be is not our responsibility nor the responsibility of panels; it is clearly the responsibility solely of the Members of the WTO.”

\(^{121}\) US – Gasoline (WT/DS2/AB/R), pp. 16-17.

\(^{122}\) Article 31.1 of the Vienna Convention states: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

\(^{123}\) WT/DS481/1.

\(^{124}\) Suzuki, Yoichi, p. 368.

\(^{125}\) In US – Continued Suspension and Canada – Continued Suspension the EU claimed that it had removed a measure, which had been found to be inconsistent with WTO law in EC – Hormones. It therefore argued that since the United States and Canada had not terminated the suspension of concessions, which had been authorized due to the EU’s initial failure to comply, the United States and Canada breached Article 23.1, read together with Article 22.8, which provides that suspension of concessions shall be temporary and only applied until the inconsistent measure has been removed. The United States and Canada disagreed because it had not been demonstrated that the EU had in fact removed its WTO-inconsistent measure. See US – Continued Suspension (WT/DS320/R), paras. 7.252-7.269, and Canada – Continued Suspension (WT/DS321/R), paras. 7.245-7.285.
even after the EU, as the respondent, had claimed that it had complied. To ensure a multilateral assessment of the EU’s supposed compliance, the AB interpreted the obligatory language of Article 21.5 to mean that “the proper course of action” within the procedural structure of the DSU was to have recourse to Article 21.5.\footnote{US – Continued Suspension (WT/DS320/AB/R), paras. 345 and 362, and Canada – Continued Suspension (WT/DS321/AB/R), paras. 345 and 362.} The dispute is not directly related to the sequencing problem, but nevertheless shows that Article 21.5 has already been interpreted as “the procedures to be followed” in determining compliance.

The language of Article 22.2 is conditioned upon failure to comply: “if the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance […]”. That implies that compliance must be determined before a request for authorization to suspend concessions is made. Since Article 22.6 is, in turn, conditioned upon the occurrence of a situation described in Article 22.2 and since Article 22.7 defines the scope of review by Article 22.6 arbitrators in detail without referring to determination of compliance, the most logical interpretation would be that a compliance panel according to Article 21.5 should make that determination. Besides, any other interpretation would render Article 21.5 redundant.\footnote{Mavriodis as asserts that this would be contrary to the principle of effective treaty interpretation, see Mavroidis, Petros C., ‘Proposals for Reform of Article 22 of the DSU’, pp. 64-65. Cf. US – Certain EC Products (WT/DS165/R), paras. 6.116-6.130, where the panel interpreted the wording “recourse to these dispute settlement procedures, including wherever possible resort to the original panel” in Article 21.5 in a way that a panel procedure would not be the only possible procedure to determine compliance and thus that an arbitrator according to Article 22.6 could do that just as well. However, “including wherever possible resort to the original panel” has generally been interpreted as meaning that the compliance panel can consist either of the original panelists or new panelists. After appeal, the AB rejected the panel’s interpretation and declared it to be without legal effect.}

As for the ambiguous time frame in Article 22, there is no indication whatsoever that the deadlines of the DSU (the purpose of which is acceleration, not exclusion) have the suggested cut-off effect of preventing a party from exercising a right under the DSU, e.g. the right in Article 22.2 to request authorization to suspend concessions and have such authorization decided by negative consensus.\footnote{Ehlermann, Claus-Dieter, and Ehring, Lothar, The Authoritative Interpretation under Article IX:2 of the WTO Agreement: Current Law, Practice and Possible Improvements, p. 165.} The most logical interpretation of the time frame would be that, in cases where there is no disagreement as to the existence or consistency of compliance measures, the time frame to request authorization to suspend concessions is the one articulated in Article 22, i.e. 30 days after the expiry of
the reasonable period of time; however, in the case of disagreement over compliance, the time frame will be 30 days after the adoption of a compliance panel or AB report.\(^{129}\)

This shows that an interpretation of the DSU based on recourse to Article 21.5 prior to Article 22 is in line with the terms, context, object and purpose of the DSU. It should, therefore, be possible for a panel and the AB, maybe even in the current Indonesia – Recourse to Article 22, to clarify the relationship between Articles 21.5 and 22.

5.2.3.3 Precedents in WTO law

When it is determined that a panel and the AB can make this clarification, the question arises whether other panels are obliged to follow. At the core of this question is whether WTO law recognizes a principle of *stare decisis* whereby a previous ruling is either binding on, or persuasive for, an adjudicating body when deciding subsequent cases with similar issues or facts.\(^{130}\) The degree to which an adjudicating body is bound or influenced varies with each legal system. In the WTO, the existence of the principle has been highly controversial.\(^{131}\)

It is be possible to argue for the existence of some degree of *stare decisis* in WTO law whereby panels are more or less obliged to follow a previous ruling, especially one by the AB. Panels regularly make reference to previous reports and the establishment of the permanent AB with highly qualified legal experts and the automatic adoption of reports are definitely steps towards a system of legal precedents.

In *US – Shrimp*, the AB stated that:

> “Adopted panel reports are an important part of the GATT acquis […]. They create legitimate expectations among WTO Members and, therefore, should be taken into account where they are relevant to any dispute”.

Thus, in reality, a cogent reason is required to deviate from a previous AB report.\(^{133}\)

However, since the AB can only rule on legal issues, since panels regularly employ judicial economy, and since the AB lacks power to remand cases, the AB cannot

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\(^{129}\) See Mavroidis, Petros C., ‘Proposals for Reform of Article 22 of the DSU’, p. 65.

\(^{130}\) Kaufmann-Kohler, Gabrielle, p. 358.

\(^{131}\) Cf. e.g. Waincymer, Jeff, p. 410.


\(^{133}\) See e.g. Waincymer, Jeff, p. 410.
function as a typical court of appeal when it comes to establishing precedents. In addition, the only way for the Members to change a precedent is to reach consensus and amend the covered agreement at issue or make an authoritative interpretation. Consequently, acknowledgement of the principle of *stare decisis* in WTO law is problematic.

All in all, it would be inaccurate to say that WTO law recognizes a principle of *stare decisis* that binds subsequent panels. Nevertheless, few would argue that a ruling of the AB lacks persuasive power on subsequent panels. A panel will rule in the same way as a previous panel or the AB if the first ruling is well-founded. As the ICJ has put it:

> “It is not a question of holding […] to decisions reached by the court in previous cases. The real question is whether in this case, there is cause not to follow the reasoning and conclusions of earlier cases.”

In the case of the sequencing problem and Articles 21.5 and 22, it would suffice to say that the previous ruling is reasonable enough for other panels to follow, without having to actually discuss the existence of *stare decisis*.

5.2.3.4 *The advantages and disadvantages of clarification by the AB*

From the previous subsections it is clear that it would be theoretically possible for the AB to address the sequencing problem by clarifying the DSU. However, as with the other alternatives to the procedural agreements, there are practical advantages and disadvantages with this alternative.

An advantage is that clarification by the AB does not require consensus by the Members, which has proven to be difficult even if the Members agree on what constitutes the correct sequencing. Since it is clear from the procedural agreements and the negotiations in the DSU review which sequencing the Members prefer, clarifying the DSU in accordance therewith would be an easy way to codify what is already member

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134 On the problematic relationship of factual and legal question, see e.g. the AB’s inability to rule on compliance in the first compliance proceedings in *Canada – Dairy (Recourse to Article 21.5)* due to lack of factual findings by the compliance panel (WT/DS103/AB/RW; WT/DS113/AB/RW), paras. 102-104.


136 The basis for the ambiguous role of the AB seems to be the disagreement between the supporters of a more rule-based dispute settlement system and those of a more power-based one, see e.g. Stewart, Terence P. et al, p. 364.

practice. In other words, sequencing has become an issue of a technical legal nature and not a political one, which makes it suitable for a precedent. In addition, clarification by panel interpretation has already occurred in other issues relating to Articles 21.5 and 22, e.g. in *US – Continued Suspension*. The panel, and later the AB, could build on this practice and thus merely further clarify the proper use of the two articles.

There are, however, inherent disadvantages in relying on the AB to address the sequencing problem by clarifying the DSU. First of all, the AB has no right to initiate a procedure. At the moment, the AB might have the opportunity to rule in *Indonesia – Recourse to Article 22.2*, but this is not certain since the EU might not request a panel or such request might not be accepted. If *Indonesia – Recourse to Article 22.2* is not brought before the AB, it is unsure when another dispute providing an opportunity to clarify the sequencing problem will be under review of the AB. In order for that to happen, such a dispute has to arise, be referred to a panel, and be appealed to the AB.

In addition, it is not certain that the facts in the dispute will have played out well enough for the AB to make a general clarification. Since, as stated above, the AB can only rule on legal issues, since panels regularly employ judicial economy, and since the AB lacks power to remand cases, it could well be that the dispute proves to be inappropriate for a precedent. In *Indonesia – Recourse to Article 22*, the facts are rather straightforward and the main issue for a panel would be to clarify the sequencing problem. This would enhance the chances of the dispute being suitable for a precedent. Nevertheless, it is by definition impossible to be sure that a precedent solves all future disputes on the sequencing problem, since the ruling will always be more or less bound to the facts of the original dispute. In theory, a clarification by the AB cannot, therefore, be a permanent and universal alternative for addressing the problem.

Moreover, it is conceivable that panels and the AB might be pressured politically not to clarify the sequencing problem, especially since the issue is under consideration in the DSU review. However, if the sequencing problem comes under review in a dispute, it is not a viable solution for panels or the AB to act as some national courts may do and refuse to rule on the matter, implying that the legislator should deal with it.\(^\text{138}\) Whereas a national legislator could resolve the lack of clarity of the legal act fairly quickly and easy, this has proven to be almost impossible in the WTO context due, *inter alia*, to the consensus requirement. The aim of the DSU is to operationalize and ensure

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\(^{138}\) See Ehlermann, Claus-Dieter, *Six Years on the Bench of the "World Trade Court", Some Personal Experiences as Member of the Appellate Body of the World Trade Organization*, pp. 524-525.
that the substantial obligations in the other covered agreements are respected.\textsuperscript{139} Where the DSU is deficient in providing rules for the procedure, it is up to the panel and the AB to develop these rules. That is how the procedural rules developed under the GATT and it was those rules that were later enshrined in the DSU. Refusing to rule on the matter might even involve denial of justice.\textsuperscript{140}

All in all, there are difficulties in relying on clarification by the AB to address the sequencing problem. It is uncertain if and when a dispute suitable for a precedent is under review by the AB and, in a strict sense, the clarification will not be a permanent and universal alternative to the procedural agreements. However, if a dispute concerning the sequencing problem, like Indonesia – Recourse to Article 22, were brought before it, the AB would most likely have to rule on the matter and thereby, at least to the extent possible in the particular dispute, clarify the DSU.\textsuperscript{141}

\subsection*{5.3 Conclusions}

In this chapter, three alternatives to the procedural agreements as methods for addressing the sequencing problem have been presented and analyzed. The first alternative, amendments to the DSU, has been the alternative attempted by the Members so far. Amendments as such are appropriate for addressing the sequencing problem, even more appropriate than the second alternative (an authoritative interpretation), since they change the terms of the DSU. Both amendments and an authoritative interpretation would, however, theoretically be better than the third alternative, a clarification by the AB, since they are both able to establish the correct sequencing in a permanent and universal way.

However, the all-at-once approach of the negotiations on the DSU review has significantly reduced the possibilities of satisfying the consensus requirement for amendments and authoritative interpretations. It is unlikely that all Members would accept an authoritative interpretation or separate amendments on the sequencing

\textsuperscript{139} See Mavroidis, Petros C., Development of WTO Dispute Settlement Procedures Through Case-Law (We Will Fix It), pp. 153-155.
\textsuperscript{140} See e.g. Waincymer, Jeff, pp. 407 and 409, and Ehlermann, Claus-Dieter, Six Years on the Bench of the “World Trade Court”, Some Personal Experiences as Member of the Appellate Body of the World Trade Organization, p. 525.
\textsuperscript{141} The interpretation should simply provide that, in case of disagreement as to compliance, compliance has to be determined by a compliance panel according to Article 21.5 before a request for authorization to suspend concessions can be made. The time frame for such request would logically be 30 days after the adoption of a compliance panel or AB report.
problem while negotiations on the DSU review are pending. At the same time, the negotiations on the DSU review have been ongoing for almost 17 years without success and it is doubtful whether they will realistically provide an alternative for addressing the sequencing problem any time soon.

This demonstrates the difficulty of determining the most appropriate and realistic alternative for addressing the sequencing problem. It very much depends on the outcome of negotiations and that, in turn, is difficult to predict. Nonetheless, a separate amendment or an authoritative interpretation should be attempted through negotiations, perhaps based on the stabilized draft legal text from 2012. If such negotiations fail, so be it; the negotiations on the DSU review would continue. In the meantime, if a suitable dispute were to be brought before the AB, perhaps even *Indonesia – Recourse to Article 22.2*, clarification by the AB would be the most appropriate and realistic alternative in anticipation of consensus in the negotiations. Such a clarification might even be the only realistic alternative in the near future and it would definitely be a more satisfactory method for addressing the sequencing problem than the procedural agreements.

6 Concluding remarks

Unless a Member admits that it has failed to bring its measures into compliance, which is very rare, the sequencing problem arises in every dispute that reaches the compliance stage. In broad terms, this problem is due to the ambiguous wording of the DSU, which has given rise to uncertainty as to whether a complainant can skip compliance panel procedures according to Article 21.5 and, instead, directly request retaliation under Article 22. In light of this uncertainty, Members have generally concluded bilateral *ad hoc* procedural agreements determining the sequence of the two procedures.

The aim of this thesis has been to examine these procedural agreements and evaluate whether they constitute a satisfactory method for doing so. The thesis has examined the procedural agreements concluded to date and analyzed the different potential problems associated with the use of procedural agreements for addressing the sequencing problem. It concluded that due to: (i) the risk of failing to reach an agreement; (ii) the risk of legitimate claims of invalidity or lack of jurisdiction, or time-consuming illegitimate attempts to obstruct the panel procedure or arbitration; (iii) the risk that specific provisions of a procedural agreement are devoid of legal effect; and
(iii) the risk of third parties challenging the agreements, the procedural agreements do not constitute a satisfactory method for addressing the sequencing problem.

This conclusion engendered the second aim of the thesis: to examine the alternatives to the procedural agreements and draw conclusions as to the most appropriate and realistic alternative for addressing the sequencing problem. The three alternatives that have been examined all have their advantages and disadvantages. In theory, amendments would be the most appropriate alternative, followed by an authoritative interpretation. In practice, however, these two alternatives are difficult to realize because they require consensus.

The difficulty does not mean that consensus should not be aspired to. Hence, the optimal scenario would be for agreement to be reached soon concerning the DSU review negotiations. However, since the realistic chances for that are low, the Members should try to agree on separate amendments or an authoritative interpretation, apart from the DSU review negotiations. In the meantime, if a suitable dispute were to be brought before the AB, perhaps even Indonesia – Recourse to Article 22.2, a clarification by the AB would be the most appropriate and realistic alternative in anticipation of consensus in the negotiations.

In conclusion, the sequencing problem requires a solution. The procedural agreements have not provided a satisfactory one. Therefore, the Members of the WTO should make every effort to seek an alternative. This is vital to ensure prompt compliance with WTO law as well as a secure and predictable dispute settlement system in world trade.
7 List of references

7.1 Legal acts and documents

7.1.1 International treaties
General Agreement on Tariffs and Trade, Geneva, 30 October 1947

Protocol of Provisional Application, Geneva, 30 October 1947

Vienna Convention on the Law of Treaties, Vienna, 22 May 1969

Agreement Establishing the World Trade Organization, Marrakesh, 15 April 1994

Agreement on Subsidies and Countervailing Measures, Annex 1A of the WTO Agreement

Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 of the WTO Agreement

7.1.2 Procedural agreements
WT/DS46/13 Procedural agreement in Brazil – Aircraft, 23 November 1999

WT/DS70/9 Procedural agreement in Canada – Aircraft, 23 November 1999

WT/DS126/8 Procedural agreement in Australia – Automotive Leather II, 4 October 1999

WT/DS267/22 Procedural agreement in US – Subsidies on Upland Cotton, 5 July 2005

WT/DS282/12 Procedural agreement in US – Anti-Dumping Measures on Oil Tubular Goods Country, 11 July 2006


WT/DS295/15 Procedural agreement in Mexico – Anti-Dumping Measures on Beef and Rice, 16 January 2007

WT/DS334/13 Procedural agreement in Turkey – Rice, 7 May 2008

WT/DS413/10 Procedural agreement in China – Electronic Payment Services, 19 August 2013
7.1.3 Documents from the DSU review
WT/MIN(99)/8/rev Proposal of 2 December 1999

TN/DS/9 Proposal of 28 May 2003 by DSB SS Chairman Ambassador Péter Balás

JOB(08)/81 Proposal of 18 July 2008 by DSB SS Chairman Ambassador Ronald Saborío Sóto

TN/DS/25 Report of 21 April 2011 by the DSB SS Chairman Ambassador Ronald Saborío Sóto

JOB/DS/14 Compilation of Recent Draft Legal Text, 28 May 2013

TN/DS/26 Report of 30 January 2015 by the DSB SS Chairman Ambassador Ronald Saborío Sóto

7.1.4 Other legal documents
Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh, 14 April 1994

WT/DSB/M/54 Minutes of Meeting from DSB meeting on 25, 28 and 29 January 1999

WT/DSB/M/81 Minutes of Meeting from DSB Meeting on 22 May 2000

WT/DS406/12 Indonesia’s request for authorization to suspend concessions in US – Clove Cigarettes, 12 August 2013

WT/DSB/M/335 Minutes of Meeting from DSB meeting on 23 August 2013

7.2 Case law

7.2.1 Non-WTO case law

7.2.2 WTO case law


EC – Bananas (Recourse to Article 22.6) (European Communities – Regime for the Importation, Sale and Distribution of Bananas, Recourse to Arbitration by the European Communities under Article 22.6 of the DSU, WT/DS27/ARB) Decision by the Arbitrators on 9 April 1999

EC – Bananas (Second Recourse to Article 21.5) (European Communities – Regime for the Importation, Sale and Distribution of Bananas, Second Recourse to Article 21.5 of the DSU by Ecuador and First Recourse to Article 21.5 of the DSU the United States, WT/DS27/AB/RW2/ECU; WT/DS27/AB/RW/USA) Reports of the Appellate Body adopted 11 and 22 December 2008

Brazil – Aircraft (Recourse to Article 22.6) (Brazil – Export Financing Programme for Aircraft, Recourse to Arbitration by Brazil under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement, WT/DS46/ARB) Decision of the Arbitrators on 28 August 2000


Canada – Dairy (Recourse to Article 21.5) (Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products, Recourse to Article
21.5 of the DSU by New Zealand and the United States, WT/DS103/AB/RW; WT/DS113/AB/RW) Reports of the Appellate Body adopted 18 December 2001


India – Autos (India – Measures Affecting the Automotive Sector, WT/DS146/R; WT/DS175/R) Reports of the Panel circulated 21 December 2001

Argentina – Hides and Leather (Recourse to Article 21.3(c)) (Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather, Arbitration under Article 21.3(c), WT/DS155/10) Award of the Arbitrators on 31 August 2001


7.3 Literature


Ehlermann, Claus-Dieter, Six Years on the Bench of the ”World Trade Court”, Some Personal Experiences as Member of the Appellate Body of the World Trade Organization, in Georgiev, Dencho, and Van der Borgh, Kim (eds), Reform and Development of the WTO Dispute Settlement System, Cameron May, 2006, pp. 499-529.


Motta, Eduardo Pérez, and Diego-Fernández, Mateo, If the DSU is ”Working Reasonably Well”, Why Does Everybody Want to Change It, in Georgiev, Dencho, and Van der Borght, Kim (eds), Reform and Development of the WTO Dispute Settlement System, Cameron May, 2006, pp. 293-308.


Seth, Torsten, Tvistlösning i WTO, Om rättens betydelse i den internationella handelspolitiken, MercurIUS, 2000.

Stewart, Terence P., et al., Proposals for DSU Reform that Adress, Directly or Indirectly, the Limitations on Panels and the Appellate Body Not to Create Rights and Obligations, in Georgiev, Dencho, and Van der Borght, Kim (eds), Reform and Development of the WTO Dispute Settlement System, Cameron May, 2006, pp. 331-366.


Waincymer, Jeff, Evaluating Options for Dispute Settlement Reform, in Georgiev, Dencho, and Van der Borght, Kim (eds), Reform and Development of the WTO Dispute Settlement System, Cameron May, 2006, pp. 405-422.
Yen, Ching-Chang, Flexibility and Simplicity as Guiding Principles for Improving the WTO Dispute Settlement Mechanism, in Georgiev, Dencho, and Van der Borght, Kim (eds), Reform and Development of the WTO Dispute Settlement System, Cameron May, 2006, pp. 423-442.

8. Appendices

8.1 Table of procedural agreements

8.2 Examples of the two main types of procedural agreements

8.2.1 First type: *China – Electronic Payment Services* (WT/DS413/10)

8.2.2 Second type: *EC – Approval and Marketing of Biotech Products* (WT/DS291/38)
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<th>Dispute</th>
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<th>Sequencing solution</th>
<th>Additional provisions</th>
<th>Time of agreement</th>
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<tbody>
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<td>DS18</td>
<td>Australia – Salmon (complainant: US)</td>
<td>WT/DS18/RW, para. 1.3</td>
<td>Suspend 22.6 arbitration until circulation of 21.5 report</td>
<td>Not appealable</td>
<td>21 days after RPT</td>
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<tr>
<td>DS46</td>
<td>Brazil – Aircraft (complainant: Canada)</td>
<td>WT/DS46/13</td>
<td>Prolong time frame in 22 until circulation of 21.5 report (SCM)</td>
<td>Not pose any procedural objections</td>
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</tr>
<tr>
<td>DS58</td>
<td>US – Shrimp (complainant: Malaysia)</td>
<td>WT/DS58/16</td>
<td>21.5 panel obligatory if disagreement, not precluded from using art. 22 due to time frame</td>
<td>Appealable, mandatory consultations prior to 21.5</td>
<td>16 days after RPT</td>
</tr>
<tr>
<td>DS70</td>
<td>Canada – Aircraft (complainant: Brazil)</td>
<td>WT/DS70/9</td>
<td>Prolong time frame in 22 until circulation of 21.5 report (SCM)</td>
<td>Not pose any procedural objections</td>
<td>5 days after expiry of DSB recommendation (SCM)</td>
</tr>
<tr>
<td>DS103</td>
<td>Canada – Dairy (complainant: US)</td>
<td>WT/DS103/14 and 24</td>
<td>Suspend 22.6 arbitration until adoption of 21.5 report</td>
<td>Appealable, not pose any procedural objections</td>
<td>40 days prior to expiry of RPT</td>
</tr>
<tr>
<td>DS113</td>
<td>Canada – Dairy (complainant: New Zealand)</td>
<td>WT/DS113/14 and 24</td>
<td>Suspend 22.6 arbitration until adoption of 21.5 report</td>
<td>Appealable, not pose any procedural objections</td>
<td>40 days prior to expiry of RPT</td>
</tr>
<tr>
<td>DS103</td>
<td>Canada – Dairy (Article 21.5 – New Zealand and US II, complainant: US)</td>
<td>WT/DS103/14 and 24</td>
<td>Suspend 22.6 arbitration until adoption of 21.5 report</td>
<td>Appealable, not pose any procedural objections</td>
<td>After AB was unable to determine compliance</td>
</tr>
<tr>
<td>DS113</td>
<td>Canada – Dairy (Article 21.5 – New Zealand and US II, complainant: New Zealand)</td>
<td>WT/DS113/14 and 24</td>
<td>Suspend 22.6 arbitration until adoption of 21.5 report</td>
<td>Appealable, not pose any procedural objections</td>
<td>After AB was unable to determine compliance</td>
</tr>
<tr>
<td>DS108</td>
<td>US – FSC (complainant: EC)</td>
<td>WT/DS108/12</td>
<td>Suspend 22.6 arbitration until adoption of 21.5 report (SCM)</td>
<td>Appealable, not pose any procedural objections</td>
<td>30 prior to expiry of RPT</td>
</tr>
<tr>
<td>DS122</td>
<td>Thailand – H-Beams (complainant: Poland)</td>
<td>WT/DS122/10</td>
<td>21.5 panel obligatory if disagreement, not precluded from using art. 22 due to time frame</td>
<td>Appealable, mandatory consultations prior to 21.5</td>
<td>59 days after RPT</td>
</tr>
<tr>
<td>DS126</td>
<td>Australia – Automotive Leather II (complainant: US)</td>
<td>WT/DS126/8</td>
<td>Prolong time frame in 22 until circulation of 21.5 report (SCM)</td>
<td>not appealable, not pose any procedural objections</td>
<td>20 days after expiry of DSB recommendation (SCM)</td>
</tr>
<tr>
<td>DS141</td>
<td>EC – Bed Linen (complainant: India)</td>
<td>WT/DS141/11</td>
<td>21.5 panel obligatory if disagreement, not precluded from using art. 22 due to time frame</td>
<td>-</td>
<td>30 days after RPT</td>
</tr>
<tr>
<td>DS155</td>
<td>Argentina – Hides and Finished Leather (complainant: EC)</td>
<td>WT/DS155/12</td>
<td>21.5 panel obligatory if disagreement, not precluded from using art. 22 due to time frame</td>
<td>-</td>
<td>3 days prior to the expiry of RPT</td>
</tr>
<tr>
<td>DS184</td>
<td>US – Hot-Rolled Steel (complainant: Japan)</td>
<td>WT/DS184/19</td>
<td>Not precluded from using art. 22 due to time frame</td>
<td>-</td>
<td>24 days prior to the expiry of RPT</td>
</tr>
<tr>
<td>DS206</td>
<td>US – Steel Plate (complainant: India)</td>
<td>WT/DS206/9</td>
<td>21.5 panel obligatory if disagreement, not precluded from using art. 22 due to time frame</td>
<td>Appealable, not pose any procedural objections, mandatory consultations prior to 21.5</td>
<td>14 days after RPT</td>
</tr>
</tbody>
</table>

<sup>142</sup> The information compiled in this table derives from the procedural agreements that can be found in the database called “Documents online” on the WTO website, www.wto.org. However, the accuracy of the compilation in the table is the responsibility of the author.
<p>| DS207 | Chile – Price Band System (complainant: Argentina) | WT/DS207/16 | 21.5 panel obligatory if disagreement, not precluded from using art. 22 due to time frame | Appealable, not pose any procedural objections, mandatory consultations prior to 21.5 | 1 day after RPT |
| DS245 | Japan – Apples (complainant: US) | WT/DS245/10 | Suspend 22.6 arbitration until adoption of 21.5 report | Not pose any procedural objections, mandatory consultations prior to 21.5 | Same day as expiry of RPT |
| DS257 | US – Softwood Lumber TV (complainant: Canada) | WT/DS257/18 | Suspend 22.6 arbitration until adoption of 21.5 report | Appealable, not pose any procedural objections | 28 days after RPT |
| DS264 | US – Softwood Lumber V (complainant: Canada) | WT/DS264/18 | Suspend 22.6 arbitration until adoption of 21.5 report | Appealable, not pose any procedural objections | 25 days after RPT |
| DS265 | EC – Export Subsidies on Sugar (complainant: Australia) | WT/DS265/36 | 21.5 panel obligatory if disagreement, not precluded from using art. 22 due to time frame | Appealable, not pose any procedural objections | 17 days after RPT |
| DS266 | EC – Export Subsidies on Sugar (complainant: Brazil) | WT/DS266/36 | 21.5 panel obligatory if disagreement, not precluded from using art. 22 due to time frame | Appealable, not pose any procedural objections | 17 days after RPT |
| DS267 | EC – Export Subsidies on Upland Cotton (complainant: Brazil) | WT/DS267/22 | Suspend 22.6 arbitration until adoption of 21.5 report (SCM) | Appealable, not pose any procedural objections | 4 days after expiry of panel recommendation (SCM) |
| DS268 | US – Oil Country Tubular Goods Sunset Reviews (complainant: Argentina) | WT/DS268/14 | 21.5 panel obligatory if disagreement, not precluded from using art. 22 due to time frame | Appealable, not pose any procedural objections, mandatory consultations prior to 21.5 panel | 19 days after RPT |
| DS277 | US – Softwood Lumber VI (complainant: Canada) | WT/DS277/11 | Suspend 22.6 arbitration until adoption of 21.5 report | Appealable, not pose any procedural objections | 28 days after RPT |
| DS282 | US – Anti-Dumping Measures on Oil Tubular Goods Country (complainant: Mexico) | WT/DS282/12 | Suspend 22.6 arbitration until adoption of 21.5 report if art. 22 requested prior or, if later, not precluded from using art. 22 due to time frame | Appealable, not pose any procedural objections, mandatory consultations prior to 21.5 panel | 14 days after RPT |
| DS285 | US – Gambling (complainant: Antigua and Barbuda) | WT/DS285/16 | 21.5 panel obligatory if disagreement, not precluded from using art. 22 due to time frame | Appealable, not pose any procedural objections, mandatory consultations prior to 21.5 panel | 51 days after RPT |
| DS286 | EC – Chicken Cuts (complainant: Thailand) | WT/DS286/18 | 21.5 panel obligatory if disagreement, not precluded from using art. 22 due to time frame | Appealable, not pose any procedural objections, mandatory consultations prior to 21.5 panel | 17 days after RPT |
| DS269 | EC – Chicken Cuts (complainant: Brazil) | WT/DS269/16 | 21.5 panel obligatory if disagreement, not precluded from using art. 22 due to time frame | Appealable, not pose any procedural objections, mandatory consultations prior to 21.5 panel | 29 days after RPT |</p>
<table>
<thead>
<tr>
<th>DS291</th>
<th>EC – Approval and Marketing of Biotech Products (complainant: US)</th>
<th>WT/DS291/38</th>
<th>Suspend 22.6 arbitration until adoption of 21.5 report</th>
<th>Appealable, not pose any procedural objections, mandatory consultations prior to 21.5 panel</th>
<th>3 days after RPT</th>
</tr>
</thead>
<tbody>
<tr>
<td>DS294</td>
<td>US – Zeroing (complainant: EC)</td>
<td>WT/DS294/21</td>
<td>21.5 panel obligatory if disagreement, not precluded from using art. 22 due to time frame</td>
<td>Appealable, not pose any procedural objections, mandatory consultations prior to 21.5 panel</td>
<td>25 days after RPT</td>
</tr>
<tr>
<td>DS295</td>
<td>Mexico – Anti-Dumping Measures on Beef and Rice (complainant: US)</td>
<td>WT/DS295/15</td>
<td>Suspend 22.6 arbitration until adoption of 21.5 report if art. 22 requested prior or, if later, not precluded from using art. 22 due to time frame</td>
<td>Appealable, not pose any procedural objections, mandatory consultations prior to 21.5 panel</td>
<td>27 days after RPT</td>
</tr>
<tr>
<td>DS312</td>
<td>Korea – Certain Paper (complainant: Indonesia)</td>
<td>WT/DS312/7</td>
<td>21.5 panel obligatory if disagreement, not precluded from using art. 22 due to time frame</td>
<td>Appealable, not pose any procedural objections, mandatory consultations prior to 21.5 panel</td>
<td>20 days after RPT</td>
</tr>
<tr>
<td>DS322</td>
<td>US – Zeroing (complainant: Japan)</td>
<td>WT/DS322/26</td>
<td>Suspend 22.6 arbitration until adoption of 21.5 report</td>
<td>Appealable, not pose any procedural objections, consultations prior to 21.5 panel not mandatory</td>
<td>After request for suspension and 22.6 arbitration</td>
</tr>
<tr>
<td>DS334</td>
<td>Turkey – Rice (complainant: US)</td>
<td>WT/DS334/13</td>
<td>Suspend 22.6 arbitration until adoption of 21.5 report if art. 22 requested prior or, if later, not precluded from using art. 22 due to time frame</td>
<td>Appealable, not pose any procedural objections, mandatory consultations prior to 21.5 panel</td>
<td>15 days after RPT</td>
</tr>
<tr>
<td>DS336</td>
<td>Japan – DRAMs (complainant: Korea)</td>
<td>WT/DS336/18</td>
<td>21.5 panel obligatory if disagreement, not precluded from using art. 22 due to time frame</td>
<td>Appealable, not pose any procedural objections, mandatory consultations prior to 21.5 panel</td>
<td>8 days after RPT</td>
</tr>
<tr>
<td>DS344</td>
<td>US – Stainless Steel (complainant: Mexico)</td>
<td>WT/DS344/17</td>
<td>21.5 panel obligatory if disagreement, not precluded from using art. 22 due to time frame</td>
<td>Appealable, not pose any procedural objections, mandatory consultations prior to 21.5 panel</td>
<td>18 days after RPT</td>
</tr>
<tr>
<td>DS350</td>
<td>US – Continued Zeroing (complainant: EU)</td>
<td>WT/DS350/19</td>
<td>21.5 panel obligatory if disagreement, not precluded from using art. 22 due to time frame</td>
<td>Appealable, not pose any procedural objections, mandatory consultations prior to 21.5 panel</td>
<td>16 days after RPT</td>
</tr>
<tr>
<td>DS362</td>
<td>China – Intellectual Property Rights (complainant: US)</td>
<td>WT/DS362/15</td>
<td>21.5 panel obligatory if disagreement, not precluded from using art. 22 due to time frame</td>
<td>Appealable, not pose any procedural objections, mandatory consultations prior to 21.5 panel</td>
<td>19 days after RPT</td>
</tr>
<tr>
<td>DS363</td>
<td>China – Publications and Audiovisual Products (complainant: US)</td>
<td>WT/DS363/18</td>
<td>21.5 panel obligatory if disagreement, not precluded from using art. 22 due to time frame</td>
<td>Appealable, not pose any procedural objections, mandatory consultations prior to 21.5 panel</td>
<td>25 days after RPT</td>
</tr>
<tr>
<td>DS366</td>
<td>Colombia – Ports of Entry (complainant: Panama)</td>
<td>WT/DS366/14</td>
<td>21.5 panel obligatory if disagreement, not precluded from using art. 22 due to time frame</td>
<td>Appealable, not pose any procedural objections, mandatory consultations prior to 21.5 panel</td>
<td>19 days after RPT</td>
</tr>
<tr>
<td>DS375</td>
<td>EC – IT Products (complainant: US)</td>
<td>WT/DS375/17</td>
<td>21.5 panel obligatory if disagreement, not precluded from using art. 22 due to time frame</td>
<td>Appealable, not pose any procedural objections, mandatory consultations prior to 21.5 panel</td>
<td>6 days after RPT</td>
</tr>
<tr>
<td>DS376</td>
<td>EC – IT Products (complainant: Japan)</td>
<td>WT/DS376/17</td>
<td>21.5 panel obligatory if disagreement, not precluded from using art. 22 due to time frame</td>
<td>Appealable, not pose any procedural objections, mandatory consultations prior to 21.5 panel</td>
<td>6 days after RPT</td>
</tr>
<tr>
<td>DS377</td>
<td>EC – IT Products (complainant: Chinese Taipei)</td>
<td>WT/DS377/15</td>
<td>21.5 panel obligatory if disagreement, not precluded from using art. 22 due to time frame</td>
<td>Appealable, not pose any procedural objections, mandatory consultations prior to 21.5 panel</td>
<td>6 days after RPT</td>
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<tr>
<td>DS379</td>
<td>US – Definitive Anti-Dumping and Countervailing Duties (complainant: China)</td>
<td>WT/DS379/14</td>
<td>21.5 panel obligatory if disagreement, not precluded from using art. 22 due to time frame</td>
<td>Appealable, not pose any procedural objections, consultations prior to 21.5 panel not mandatory</td>
<td>16 days after RPT</td>
</tr>
<tr>
<td>DS381</td>
<td>US – Tuna II (complainant: Mexico)</td>
<td>WT/DS381/19</td>
<td>21.5 panel obligatory if disagreement, not precluded from using art. 22 due to time frame</td>
<td>Appealable, not pose any procedural objections, consultations prior to 21.5 panel not mandatory</td>
<td>20 days after RPT</td>
</tr>
<tr>
<td>DS384</td>
<td>US – COOL (complainant: Canada)</td>
<td>WT/DS384/25</td>
<td>21.5 panel obligatory if disagreement, not precluded from using art. 22 due to time frame</td>
<td>Appealable, not pose any procedural objections, consultations prior to 21.5 panel not mandatory</td>
<td>18 days after RPT</td>
</tr>
<tr>
<td>DS386</td>
<td>US – COOL (complainant: Mexico)</td>
<td>WT/DS386/24</td>
<td>21.5 panel obligatory if disagreement, not precluded from using art. 22 due to time frame</td>
<td>Appealable, not pose any procedural objections, consultations prior to 21.5 panel not mandatory</td>
<td>18 days after RPT</td>
</tr>
<tr>
<td>DS394</td>
<td>China – Raw Materials (complainant: US)</td>
<td>WT/DS/394/20</td>
<td>21.5 panel obligatory if disagreement, not precluded from using art. 22 due to time frame</td>
<td>Appealable, not pose any procedural objections, mandatory consultations prior to 21.5 panel</td>
<td>17 days after RPT</td>
</tr>
<tr>
<td>DS395</td>
<td>China – Raw Materials (complainant: EC)</td>
<td>WT/DS/395/19</td>
<td>21.5 panel obligatory if disagreement, not precluded from using art. 22 due to time frame</td>
<td>Appealable, not pose any procedural objections, mandatory consultations prior to 21.5 panel</td>
<td>18 days after RPT</td>
</tr>
<tr>
<td>DS397</td>
<td>EC – Fasteners (complainant: China)</td>
<td>WT/DS/397/16</td>
<td>21.5 panel obligatory if disagreement, not precluded from using art. 22 due to time frame</td>
<td>Appealable, not pose any procedural objections, mandatory consultations prior to 21.5 panel</td>
<td>13 days after RPT</td>
</tr>
<tr>
<td>DS398</td>
<td>China – Raw Materials (complainant: Mexico)</td>
<td>WT/DS/398/18</td>
<td>21.5 panel obligatory if disagreement, not precluded from using art. 22 due to time frame</td>
<td>Appealable, not pose any procedural objections, mandatory consultations prior to 21.5 panel</td>
<td>17 days after RPT</td>
</tr>
<tr>
<td>DS405</td>
<td>EU – Footwear (complainant: China)</td>
<td>WT/DS/405/8</td>
<td>21.5 panel obligatory if disagreement, not precluded from using art. 22 due to time frame</td>
<td>Appealable, not pose any procedural objections, mandatory consultations prior to 21.5 panel</td>
<td>15 days after RPT</td>
</tr>
<tr>
<td>DS413</td>
<td>China – Electronic Payment Services (complainant: US)</td>
<td>WT/DS/413/10</td>
<td>21.5 panel obligatory if disagreement, not precluded from using art. 22 due to time frame</td>
<td>Appealable, not pose any procedural objections, mandatory consultations prior to 21.5 panel</td>
<td>19 days after RPT</td>
</tr>
<tr>
<td>DS414</td>
<td>China – GOES (complainant: US)</td>
<td>WT/DS/414/14</td>
<td>21.5 panel obligatory if disagreement, not precluded from using art. 22 due to time frame</td>
<td>Appealable, not pose any procedural objections, mandatory consultations prior to 21.5 panel</td>
<td>19 days after RPT</td>
</tr>
<tr>
<td>DS426</td>
<td>Canada – Feed-in Tariff Program (complainant: EU)</td>
<td>WT/DS/426/18</td>
<td>21.5 panel obligatory if disagreement, not precluded from using art. 22 due to time frame</td>
<td>Appealable, not pose any procedural objections, mandatory consultations prior to 21.5 panel</td>
<td>73 days prior to expiry of RPT</td>
</tr>
<tr>
<td>DS427</td>
<td>China – Broiler Products (complainant: US)</td>
<td>WT/DS/427/9</td>
<td>21.5 panel obligatory if disagreement, not precluded from using art. 22 due to time frame</td>
<td>Appealable, not pose any procedural objections, mandatory consultations prior to 21.5 panel</td>
<td>6 days after RPT</td>
</tr>
</tbody>
</table>
CHINA – CERTAIN MEASURES AFFECTING ELECTRONIC PAYMENT SERVICES

UNDERSTANDING BETWEEN CHINA AND THE UNITED STATES REGARDING PROCEDURES UNDER ARTICLES 21 AND 22 OF THE DSU

The following communication, dated 19 August 2013, from the delegation of China and the delegation of the United States to the Chairperson of the Dispute Settlement Body, is circulated at the request of these delegations.

________

China and the United States would like to inform the Dispute Settlement Body of the attached "Agreed Procedures under Articles 21 and 22 of the Dispute Settlement Understanding" between the United States and China with respect to the dispute China — Certain Measures Affecting Electronic Payment Services (WT/DS413).

We request that you please circulate the attached agreement to the Members of the Dispute Settlement Body.
Agreed Procedures under Articles 21 and 22 of the Dispute Settlement Understanding

China – Certain Measures Affecting Electronic Payment Services (WT/DS413)

The Dispute Settlement Body ("DSB") adopted its recommendations and rulings in the dispute China – Certain Measures Affecting Electronic Payment Services (WT/DS413) on 31 August 2012.

Pursuant to Article 21.3(b) of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), the United States of America ("United States") and the People’s Republic of China ("China") agreed that the reasonable period of time in which China would have to implement the recommendations and rulings of the DSB in this dispute would be eleven months, expiring on 31 July 2013 (WT/DS413/8).

The United States and China (collectively, "the Parties") have agreed on the following procedures for the exclusive purposes of this dispute. They are designed to facilitate the resolution of the dispute and reduce the scope for procedural disputes and are without prejudice to either Party’s views on the correct interpretation of the DSU:

1. Should the United States consider that the situation described in Article 21.5 of the DSU exists, the United States will request that China enter into consultations with the United States. The Parties agree to hold such consultations within 15 days from the date of receipt of the request. After this 15-day period has elapsed, the United States may at any time request the establishment of a panel pursuant to Article 21.5 of the DSU.

2. At the first DSB meeting at which the U.S. request for the establishment of an Article 21.5 panel appears on the agenda, China shall accept the establishment of that panel.

3. The Parties shall cooperate to enable the Article 21.5 panel to circulate its report within 90 days of the panel's establishment, excluding such time during which the panel’s work may be suspended pursuant to Article 12.12 of the DSU.

4. Either Party may request the DSB to adopt the report of the Article 21.5 panel at a DSB meeting held at least 20 days after the circulation of the report to the Members unless either Party appeals the report.

5. In the event of an appeal of the Article 21.5 panel report, the Parties shall cooperate to enable the Appellate Body to circulate its report to the Members within 90 days from the date of notification of the appeal to the DSB. Further, either Party may request the DSB to adopt the reports of the Appellate Body and of the Article 21.5 panel (as modified by the Appellate Body report) at a DSB meeting held within 30 days of the circulation of the Appellate Body report to the Members.

6. In the event that the DSB following a proceeding under Article 21.5 of the DSU rules that a measure taken to comply does not exist or is inconsistent with a covered agreement, the United States may request authorization to suspend concessions or other obligations pursuant to Article 22.2 of the DSU. China shall not assert that the United States is precluded from obtaining such DSB authorization on the grounds that the request was made outside the 30-day time-period specified in Article 22.6 of the DSU. This is without prejudice to China’s right to have the matter referred to arbitration in accordance with Article 22.6 of the DSU.
7. If the United States requests authorization to suspend concessions or other obligations pursuant to Article 22.2 of the DSU, China shall have the right to object under Article 22.6 of the DSU to the level of suspension of concessions or other obligations and/or claim that the principles and procedures set forth in Article 22.3 of the DSU have not been followed, and the matter will be referred to arbitration pursuant to Article 22.6 of the DSU.

8. The Parties will cooperate to enable the arbitrator under Article 22.6 of the DSU to circulate its decision within 60 days of the referral to arbitration.

9. If any of the original panelists is not available for either the Article 21.5 compliance panel or the Article 22.6 arbitration (or both), the Parties will promptly consult on a replacement, and either Party may request the Director-General of the WTO to appoint, within ten days of being so requested, a replacement for the proceeding or proceedings in which a replacement is required. If an original panelist is unavailable to serve in either of the proceedings, the Parties will further request that, in making this appointment, the Director-General seek a person who will be available to act in both proceedings.

10. The Parties will continue to cooperate in all matters related to these agreed procedures and agree not to raise any procedural objection to any of the steps set out herein. If, during the application of these procedures, the Parties consider that a procedural aspect has not been properly addressed in these procedures, they will endeavor to find a solution within the shortest time possible that will not affect the other aspects and steps agreed herein.

11. These agreed procedures in no way prejudice other rights of either Party to take any action or procedural step to protect its rights and interests, including recourse to the DSU.


For the People's Republic of China

For the United States of America

(signed)
Mr Fu Xingguo
Chargé d'affaires a.i.

(signed)
Mr Randy Miller
Chargé d'affaires a.i.
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

The following communication, dated 14 January 2008, from the delegation of the European Communities and the delegation of the United States to the Chairman of the Dispute Settlement Body, is circulated at the request of these delegations.

_______________

Please find attached the agreed procedures between the European Communities and the United States under Article 21 and 22 of the Dispute Settlement Understanding in the dispute European Communities - Measures Affecting the Approval and Marketing of Biotech Products (WT/DS291).

For the European Communities

Eckart Guth
Ambassador

For the United States

Peter F. Allgeier
Ambassador
Agreed Procedures between the European Communities and the United States under Articles 21 and 22 of the Dispute Settlement Understanding in the dispute European Communities - Measures Affecting the Approval and Marketing of Biotech Products (WT/DS291)

The Dispute Settlement Body (DSB) adopted its recommendations and rulings in the dispute European Communities - Measures Affecting the Approval and Marketing of Biotech Products (WT/DS291) between the United States and the European Communities on 21 November 2006.

Pursuant to Article 21.3(b) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), the European Communities and the United States agreed on a one-year reasonable period of time (RPT) for implementation of the DSU's recommendations and rulings (WT/DS291/35). The European Communities and the United States subsequently agreed to extend the RPT so as to expire on 11 January 2008 (WT/DS291/36).

During the RPT, the European Communities and the United States have engaged in discussions with the goal of resolving this dispute and related issues. With the intent of allowing those discussions to continue, the European Communities and the United States have agreed on the following procedures for the exclusive purposes of this dispute. These procedures are without prejudice to either party's views on the correct interpretation of the DSU.

1. Should the United States request authorization to suspend concessions or other obligations pursuant to DSU Article 22.2, the European Communities shall object to the level of concessions or other obligations and/or claim that the principles and procedures set forth in DSU Article 22.3 have not been followed no later than before the DSB meeting at which the US request is proposed for the agenda. The matter will be referred to arbitration pursuant to DSU Article 22.6.

2. After the referral of the matter to Article 22.6 arbitration, the parties will request the Article 22.6 arbitrator, at the earliest possible moment, to suspend its work. The arbitration will resume if and when the condition in paragraph 6 is fulfilled.

3. The United States may at any time request consultations with regard to whether the situation described in Article 21.5 of the DSU exists. The parties will hold such consultations within 30 days of the circulation of such a request.

4. The United States may request the establishment of a panel pursuant to Article 21.5 of the DSU at any time following 30 days after the circulation of the aforementioned consultation request. The European Communities shall not raise any objection to the panel request being made after this time period.

5. At the first DSB meeting at which the United States request for the establishment of an Article 21.5 panel appears on the agenda, the European Communities shall accept the establishment of that panel.

6. In the event that the DSB finds that a measure taken to comply with the recommendations and rulings of the DSU in this dispute does not exist or is inconsistent with a covered agreement, the Article 22.6 arbitrator will resume its work at the request of the United States.

7. The parties will cooperate to facilitate the participation of the original panelists in an Article 21.5 compliance proceeding and an Article 22.6 arbitration.

8. If an original panelist is not available for either an Article 21.5 compliance panel or an Article 22.6 arbitration, or both, the parties will promptly consult on a replacement, and either party may request the Director-General of the WTO to appoint, as soon as possible, a replacement for the proceeding or proceedings for which such a replacement is required. If an original panelist is unavailable to serve in either proceeding, the parties will further
request that in making this appointment, the Director-General seek a person who will also be available to act in both proceedings.

9. The parties will cooperate to enable the Article 21.5 compliance panel, the Appellate Body in the event of an appeal of the compliance panel report, and the Article 22.6 arbitrator to complete their work as expeditiously as possible.

10. The parties will continue to cooperate in all matters related to these agreed procedures and will not raise any procedural objection to any of the steps set out herein. If, during the application of these procedures, the parties consider that a procedural aspect has not been properly addressed, they will endeavor to find a solution within the shortest time possible that will not affect the other aspects and steps herein agreed.

For the European Communities

For the United States

Geneva, 14 January 2008