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THE RELATIONSHIP BETWEEN THE DSU ARTICLES 21(5) AND 22 AND THE ISSUE OF THE LITIGATION DEADLOCKS IN THE DISPUTE SETTLEMENT SYSTEM OF THE WORLD TRADE ORGANIZATION

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Abstract

In December 2019, the World Trade Organization (WTO) litigation system was deadlocked. One of the important concerns which arose then was how the blockage of the litigation system could affect Dispute Settlement Understanding (DSU) procedural provisions governing the suspension of concession and other obligations. In the light of this these circumstances, we need to discuss the "sequencing" issues regarding the claimant's procedural right to seek authorization for suspension in accordance with Article 22 of the DSU and implementation procedure envisaged in Article 21(5). Thus far, the WTO judicial bodies have been inclined to the position that there is no "sequencing condition" for exercising procedural rights provided in Article 22. Contrary to the position of the WTO jurisprudence, academics mostly advocate that the relationship between Articles 21(5) and 22 of the DSU exists through sequencing prerequisite. However, this problem needs to be redefined in the light of the irregular circumstances that may be created by the blockage of the litigation system. Therefore, exclusively in situation where litigation is in blockage, the claimant should be entitled to commence the Article 22 procedure, without prior employment of the implementation procedure in accordance with Article 21(5) of the DSU. In normal circumstances, the claimant must respect a sequencing prerequisite.

Key words: World Trade Organization, Dispute Settlement System, sequencing, implementation procedure, countermeasures

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ОДНОС ИЗМЕЂУ ЧЛАНОВА 21(5) И 22 DSU СПОРАЗУМА И ПИТАЊЕ БЛОКАДЕ СИСТЕМА РЕШАВАЊА СПОРОВА У СВЕТСКОЈ ТРГОВИНСКОЈ ОРГАНИЗАЦИЈИ

Апстракт

Од децембра 2019. године, систем решавања спорова у оквиру Светске трговинске организације је блокиран. Тада се јавила значајна забринутост око тога како ће блокада решавања спорова у њиховој парничној фази утицати на процедуралне одредбе Договора о правилима и процедурама за решавање спорова (*Dispute Settlement Understanding – DSU*) којима се уређује суспензија концесија и других обавеза. У светлу ове околности, потребно је да се преиспита „питање редоследа“ између процедуралног права тужиоца да тражи одобрење суспензије у складу са чланом 22 *DSU* споразума и његовог права да покрене имплементациону процедуру, предвиђену чланом 21(5) истог Споразума. До сада су судећа тела СТО била наклоњена ставу да не постоји услов „редоследа“ за покретање процедуре која је предвиђена чланом 22. Истовремено, академска јавност заузима супротан став, истичући да се однос између чланова 21(5) и 22 мора посматрати кроз призму условљености одговарајућим редоследом коришћења права која су предвиђена овим одредбама – пре захтева за суспензију се мора покренути имплементациона процедура. Свеједно, поглед на ово питање се мора редефинисати у светлу нерегуларних околности које могу бити успостављене блокадом парничног механизма у систему решавања спорова пред СТО. С тим у вези, једино у случају када је парнични систем у блокади, тужилац може покренути процедуру суспензије на основу члана 22, без услова да претходно покрене имплементациону процедуру на основу члана 21(5). У редовним околностима, тужилац мора да поштује редослед ових правних овлашћења.

Кључне речи: Светска трговинска организација, Систем решавања спорова, Имплементациона процедура, услов редоследа, контрамере

INTRODUCTION

In December 2019, the WTO dispute settlement system (DSS) confronted the most serious crisis in its 25-year history. The appeal system was blocked given that the terms of office (mandates) had expired for two of the three remaining Appellate Body (AB) members. This was the result of the US veto on the appointment of new AB members since 2017. Thus, the AB has lost the quorum necessary for its work and the entire appeal system became inoperative. Moreover, the mandate of Hong Zhao, the last remaining AB member, expired on 30 November 2020. Therefore, from 1 December 2020, the AB became an entirely "empty" body. It was the first time in the WTO dispute settlement history that litigation system was deadlocked.

This circumstance has raised many political and legal issues and dilemmas. In terms of legal dilemmas, the main practical concern was how the DSS should overcome the crisis and continue to operate in both pending and new cases. The academic community offered several solu-

tions for the interim functioning of the DSS until the crisis is overcome, either through the change of the US veto policy or through some new multilateral trade deals (Pauwelyn, 2019, p. 297).

The main concern introduced and addressed in this article is how the litigation system blockage could affect the procedural DSU provisions governing the suspension of concession and other obligations (countermeasures) in post-litigation stage of disputes. This concern has to be clarified in the context of the described AB crisis, but it is even more important in light of similar DSS litigation deadlocks that may occur again in the future.

Many academics have raised the "sequencing" issue regarding the procedural right of the claimant to seek authorization for suspension in accordance with Article 22 of the DSU and the implementation procedure envisaged in Article 21(5) of the DSU. The WTO members may concurrently commence Article 21(5) and Article 22 procedures.Accordingly, the question is whether the Article 22 procedure may be finished prior to the Article 21(5) procedure. Consequently, the question is also what the Dispute Settlement Body (DSB) should do in a situation when the request for suspension (along with the arbitral award) is on the table.[1] In the WTO, this scenario can occur in normal circumstances, even without any kind of blockage or veto that would interrupt the overall operation of the DSS. On the other hand, the respondent member may always claim that it brought its measures in conformity with recommendations from the original panel or the AB report, and thus provoke endless series of implementation procedures. In such a case, the question is whether the complaining member should constantly be precluded from seeking suspension before the DSB. The WTO judicial bodies, as well as the academic community, have offered certain solutions to some of these questions. Yet, those solutions correspond to the regular conditions in the WTO DSS and can be applied in normal circumstances. Hence, the author of this article considers that this problem needs to be re-examined in light of the irregular circumstances that may be created by the litigation system blockage. In particular, this article discusses the situation briefly described in the text that follows. The complainant WTO member makes a request for suspension of concession and other obligations, claiming that the respondent member did not implement the recommendations contained in the original report adopted by the DSB. On the other hand, the respondent member claims

[1] "In its role of authorizing sanctions, the WTO becomes the gatekeeper. The DSU requires that sanctions be approved (even if *pro forma*) by the DSB and provides an opportunity for the defendant government to seek arbitration of the amount of sanctions." (Charnovitz, 2001, p. 813).

that they have implemented the recommendations and thus triggers the implementation procedure. The implementation procedure cannot be finished due to the blockage of the litigation system. Procedural provisions in Article 22 are not subject to any appeal provisions in the DSU. The respondent member can only object to the proposed level of suspension and pursue an arbitration procedure that is not subject to appeal (a request for authorization of suspension commonly triggers an arbitration procedure under Article 22.6). Unlike litigation proceedings (such as implementation procedure), the procedure for authorization of suspension under Article 22 cannot be vetoed by the WTO members. Then, should the complainant WTO member be enabled to fully exercise its procedural rights in accordance with Article 22? In other words, should the respondent member be allowed to take advantage of the litigation blockage and keep acting contrary to the WTO norms?[2]

This article is divided into three parts. The first part discusses the relationship between the two DSU provisions: Article 21(5) and Article 22. Article 21(5) of the DSU governs the procedure which becomes necessary when there is disagreement between parties in dispute, as to the existence or consistency with a covered agreement of measures taken by the respondent to comply with the DSB recommendations and rulings. Article 22 of the DSU provides rules and procedure for the final resort which the claimant in the original dispute may pursue – suspension of concessions and other obligation against the respondent. This may occur in cases where the respondent fails to implement the DSB recommendation and rulings, i.e. fails to bring its internal measures in conformity with the WTO law. The main concern is how to interpret the relationship between these two provisions: is the claimant entitled to use the rights from these provisions independently, or is it obliged to respect the sequence of procedures? In this article, the author discusses this issue by referring to the relevant WTO judicial practice and the pertinent argumentation in literature. The second part focuses on bilateral sequencing agreements between parties in disputes dealing with the application of these two provisions. In this part, the author offers clarification of such kinds of procedural agreements and their effect on obligations in the overall WTO membership. The third part provides the author's remarks on the relationship between the implementation and the suspension procedure in case the litigation procedure is blocked.

[2] Professor Colares describes a typical situation when the respondent member obstructs the suspension of concession: "…offending members may at times abuse the system to gain a temporary trade advantage—first, violating a rule; second, litigating a potentially meritless case; third, resisting compliance by exploiting procedural tactics at the compliance stage..." (Colares, 2011, p. 422).

RELATIONSHIP BETWEEN ARTICLES 21(5) AND 22 OF THE DSU

The first sentence of Article 21(5) DSU reads 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 resort to the original panel."

According to this provision, parties in the original dispute may take recourse to the so-called "implementation procedure," when there is disagreement as to the existence or consistency with a covered agreement on measures to be taken to comply with the DSB recommendations and rulings. The implementation procedure is subject to all DSU procedural provisions which generally apply to original procedures. The implementation procedure should take place before the original panel wherever possible. In the implementation procedure, the panel examines whether the respondent member has taken measures to comply with the recommendations and rulings from the original panel report. Like panel reports in original disputes, panel reports in implementation procedures are also subject to appeal before the AB. Finally, such reports are adopted by the DSB through the negative consensus rule. The main purpose of the implementation procedure is to reach a multilateral determination on whether the measures found to be inconsistent with a covered agreement have been taken into compliance with the WTO law. Article 21(5) does not refer to Article 22 provisions or to any kind of situation described in Article 22.

Article 22 of the DSU entitles the complaining member to request authorization from the DSB to suspend the application to respondent member of the concessions or other obligations under the covered agreements if the respondent member fails to bring the measure found to be inconsistent with a covered agreement into compliance within a reasonable period of time. If the respondent member objects to the requested level of suspension, or claims that the principles and procedures envisaged in Article 22 have not been followed, the matter will be referred to arbitration. The issues concerning the merits (such as, whether the respondent member has brought its measures into compliance) cannot be examined by means of arbitration procedure set out in Article 22. Unlike the reports in the original or implementation procedure, arbitration decisions are final. The DSB shall grant authorization to suspend concessions or other obligations where the request is consistent with the arbitrator's decision, unless the DSB decides by consensus to reject the request. Article 22 does not refer to Article 21(5) provisions or to any kind of situation described in Article 21(5).

Therefore, neither the DSU nor other WTO agreements clarify or deal with the issue of relationship between these two DSU provisions alt-

hough the logical connection is quite visible. Thus, we need to find the answers in the WTO judicial practice and relevant academic literature.

The issue of connection between Articles 21(5) and 22 of the DSU is not new. This topic been discussed in a large number of published articles. The most important question in literature is whether these two provisions should be interpreted as provisions in "symbiosis" or as two independent norms – the so-called "sequencing dilemma". The manner of addressing this question is crucial for elaboration on the topic of this article. If we consider that Articles 21(5) and 22 of the DSU are "symbiotic" provisions that need to be interpreted and applied together, then it is logical that the procedures under Article 22 could not be carried out until the litigation procedure under Article 21(5) is finished. In that case, the arbitration procedure envisaged in Article 22 should be suspended until the implementation procedure is completed. On the other hand, if we interpret these provisions as separate and independent provisions entailing different aims and purposes, then the claimant can engage provisions contained in Article 22 irrespective of prior use of the implementation procedure envisaged in Article 21(5). In that situation, Article 22 arbitration procedure may ensue and result in a final decision pertaining to the level of suspension. That decision would further create grounds for the DSB to authorize suspension. Nevertheless, the arbitration does not have competence to examine the issues on merits (such as whether the respondent member implemented the recommendations from the original dispute). The DSU provisions strictly specify that arbitration procedure is to determine the level of suspension. In other words, the arbitration cannot simultaneously act as the compliance panel envisaged in Article 21(5), regardless of the fact that, in principle, the same persons are engaged in both procedures. Issues on the merits can be discussed only in appropriate litigation procedure. In our scenario, the litigation system blockage prevents the resolution of those issues on the merits .

The WTO judicial practice and academic community have offered certain solutions to these issues. In this part of the article, the author examines those assertions in an attempt to clarify the grounds for his own position on these issues in the context of the litigation system blockage in the WTO DSS.

Position of the WTO Jurisprudence

The practice of the WTO judicial bodies on the sequencing dilemma pertaining to Articles 21(5) and 22 of the DSU is not very substantial. There are several cases in which the AB, panels and arbitrations discussed this problem.

In relevant literature, the most cited case on this issue is the famous *Bananas* case.[3] The parties in this dispute submitted confronting arguments on the issue of sequencing. The United States (acting as the claimant) asserted in its argumentation that the claimant has the right to request authorization for suspension of concessions when it considers that the respondent member failed to implement the recommendations from the original report in a reasonable period of time. According to the submitted US' argumentation, there is no "sequence" between Article 21(5) and Article 22; therefore, the claimant can commence Article 22 procedures irrespective of the implementation procedure. The United States argued that the integrity of the DSS system would deteriorate if the complainant member cannot enforce countermeasures at the end of the reasonable time period for compliance, which would ultimately be in favor of the WTO members that disregard the DSB rulings.[4] Furthermore, in the view of the US, if the claimant could not make a request for authorization to suspend concessions within the Article 22(6) time-period (30 days)[5], it would preclude its right to do so afterwards.[6]

On the other hand, the European Community (acting as the respondent) claimed that sequence exists between the two DSU provisions. The EC argued that the implementation procedure must be conducted prior to the Article 22 procedures. According to the EC, multilateral determination on compliance is a precondition for using the Article 22 procedural rights. The EC claimed that complainants could not have the right to unilaterally determine whether implementation measures comply with the covered agreements and the DSB rulings. Therefore, the EC considered that Arbitration should suspend its work until it is determined in the implementation procedure that the EC did not comply with the recommendations from the original report.

The Arbitration did not agree with the EC's argumentation and supported the US's position. According to the Arbitration, there are no provisions envisaged in the DSU that govern sequencing between Articles 21(5) and 22 of the DSU. The arbitrators concluded that their terms of

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[3] Full case title: Decision by the Arbitrator, *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, 9 April 1999, DSR 1999:II.

[4] *See* more detailed discussion on this Case and argumentation of the parties: (McCall Smith, 2006).

[5] The first sentence of the Article 22(6) of the DSU states: '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.'

[6] According to many authors, the time-limits mismatch for procedural actions provided in Articles 21(5) and 22 of the DSU is a root of the "sequencing" issue.

reference are limited to those envisaged in Article 22 (paragraphs 6 and 7) of the DSU. Consequently, they do not have competence to resolve the relationship between those articles.[7] According to the Arbitration, its competence is limited to the following issues governed by Article 22 provisions: a) whether the proposed level of suspension is equivalent to the level of nullification or impairment; b) whether the proposed suspension is allowed under the covered agreement; and c) whether the principles and procedures set forth Article 22 (paragraph 3) have been followed.

Therefore, if we strictly follow the arbitrators' terms of reference, we can determine that arbitration can fully conduct the Article 22 procedures; the complainant member can subsequently obtain authorization for suspension regardless of Article 21(5) procedures.[8] Moreover, the Arbitration found that 30-day deadline predicted in the Article 22(6) "runs independently from any other DSU provision" (Mavroidis, 2000, p. 796). According to the Arbitration, if the claimant cannot make a request for authorization to suspend concessions within the Article 22(6) time-period, it loses its right to do so, at least under circumstances where the negative consensus rule of Article 22(6) applies.[9]

Another example where the WTO judicial bodies examined the sequencing issue is the case *US — Certain EC Products.*[10] The subject matter of this case were countermeasures that the US put in place against the EC, claiming that the EC did not implement recommendations from the report in the *Bananas* dispute. The US actually imposed a so-called "3 March Measure" against the imports of certain EC products, in the absence of a prior DSB authorization. The EC filed a claim against the US, arguing that the US violated its obligations under Article 23(2)(a) and Article 21(5) of the DSU.

The AB confirmed the previous position of the Panel that the obligation under Article 21(5) was comparable and similar to the prohibition of "unilateral determinations" under Article 23(2)(a)[11] of the DSU, although the obligation in Article 21(5) was "another" DSU obligation. The AB also recognized the fact that, when the US put in place its counter-

[7] *See* footnote 11 of the Decision.
[8] *See* para. 2.9 and paras 4.11 – 4.13. of the Decision.
[9] *See* para. 4.11 of the Decision.
[10] Appellate Body Report, *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R, adopted 10 January 2001, DSR 2001:I, p. 373.
[11] Article 23(2)(a) of the DSU: '…Members shall: (a) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding;'

measures, the WTO-consistency of the EC's implementing measures had not been determined through recourse to the WTO dispute settlement procedures as required by Article 21(5) of the DSU.[12] There are opinions in literature that the AB actually held that the Article 21(5) panel determination is a "prerequisite to undertaking a suspension of concessions" (Charnovitz, 2002, p. 409, fn. 4). However, the AB did not explicitly express that the claimant cannot exercise its rights from Article 22 of the DSU and obtain authorization for suspension without a prior Article 21(5) procedure. Moreover, the AB confirmed the existence of an ambiguous relationship between Articles 21(5) and 22 of the DSU and concluded that it had no competence to provide an authentic interpretation of that relationship. According to the AB, only WTO Members have the authority to amend the DSU or to adopt interpretations within the meaning of Article IX:2 of the WTO Agreement.[13]

Further examples where the AB ruled on the sequencing issue may be found in the cases *United States — Continued Suspension*[14] and *Canada — Continued Suspension.*[15] In those cases, the AB ruled that the WTO member could continue to apply authorized countermeasures during ongoing procedure on the respondent's new (modified) measures. These cases actually covered the extent and limits of panel's standard of review in a post-suspension situation, where parties did not initiate the Article 21(5) proceedings, but where the panel performs "functions similar to those of an Article 21(5) panel".[16] According to Professor Brewster, this approach could generally provide the resolution to the sequencing issue between Article 21(5) and Article 22(6); the WTO members can use the Article 22(6) procedure concurrently with the Article 21(5) compliance procedure (Brewster, 2011, p. 157).

In the case *US – Tuna II (Mexico) (Article 22.6 - US)*[17], the Arbitration did not support the US' claims that each time a respondent modifies a measure and asserts that it has brought the measure into compliance, and Article 22(6) arbitration is subsequently conducted, a new im-

[12] *See* paragraphs 124-126 of the AB Report.
[13] *See* paras 91-92 of the AB report.
[14] Appellate Body Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320/AB/R, adopted 14 November 2008, DSR 2008:X, p. 3507
[15] Appellate Body Report, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS321/AB/R, adopted 14 November 2008, DSR 2008:XIV, p. 5373.
[16] Appellate Body Reports, *US/Canada – Continued Suspension*, paras 359 and 580.
[17] Decision by the Arbitrator, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 22.6 of the DSU by the United States*, WT/DS381/ARB, 25 April 2017, DSR 2017:VIII, p. 4129.

plementation procedure is necessary before the DSB can authorize any suspension of concessions. According to the Arbitration:

> "...in such a situation, new compliance panel proceedings under Article 21(5) needed to be undertaken every time a measure already found to be inconsistent at the expiry of the reasonable period of time were modified and compliance was claimed, this could very substantially delay, and in theory effectively thwart, a complaining party's efforts towards obtaining DSB authorization to suspend concessions."[18]

Moreover, the Arbitration expressed that such an outcome would not be consistent with the DSU objectives: to preserve the rights of the WTO members and to promote the prompt settlement of disputes.[19]

There are also examples where arbitrators concluded that they do not have a mandate to resolve whether sequencing between Articles 21(5) and 22 is required under the DSU. In the case *Brazil – Aircraft (Article 22.6 – Brazil)* [20], the arbitrators explicitly expressed this view. In a few other arbitration cases, arbitrators implicitly expressed this view by referring to the limits of their mandate. For example, in *EC – Hormones (US) (Article 22.6 – EC)*[21], arbitrators referred to the minimum requirements that should be attached to a request for suspension. According to the Arbitration, the minimum specificity requirements are: a) a specific level of suspension, i.e. a level equivalent to the nullification and impairment caused by the WTO inconsistent measure, pursuant to Article 22(4); and b) specification of the agreement and sector(s) under which concessions or other obligations would be suspended, pursuant to Article 22(3) of the DSU.[22] In *EC – Bananas III (Ecuador) (Article 22.6 – EC)*[23], the Arbitration connected these specificity requirements on request for suspension with the limits of its jurisdiction:

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[18] Para. 3.53. of the Decision.
[19] *Ibid.*
[20] Decision by the Arbitrator, *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, 28 August 2000, DSR 2002:I, p. 19, footnote 7.
[21] Decision by the Arbitrator, *European Communities – Measures Concerning Meat and Meat Products (Hormones), Original Complaint by Canada – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, WT/DS48/ARB, 12 July 1999, DSR 1999:III, p. 1135.
[22] Para. 16 of the Decision.
[23] Decision by the Arbitrator, *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/ECU, 24 March 2000, DSR 2000:V, p. 2237.

> "The jurisdiction of the Arbitrators includes the power to determine (i) whether the level of suspension of concessions or other obligations requested is equivalent to the level of nullification or impairment; and (ii) whether the principles or procedures concerning the suspension of concessions or other obligations across sectors and/or agreements pursuant to Article 22.3 of the DSU have been followed."[24]

Through these statements, both arbitrations actually clarified the issues that covered by their jurisdiction. Other issues, such as the sequence of the implementation procedure and the arbitration procedure, do not fall into the scope of arbitration competence.

From the above analysis of the WTO jurisprudence, we can conclude that the WTO judicial bodies (particularly the AB and arbitration) in several cases expressed their views on the relationship between Articles 21(5) and 22 of the DSU. According to their points of view, the DSU does not provide any kind of specification or clarification on that relationship. Moreover, the AB has stated that it has no competence to interpret the relationship between those two DSU provisions. However, both AB and arbitrations have been inclined (thus far) to the position that there is no "sequencing condition" for exercising procedural rights provided in Article 22, meaning that the claimant in the original dispute can commence Article 22 procedure irrespective of a prior procedure under Article 21(5).

Positions in Academic Literature

Contrary to the position of the WTO jurisprudence, academics mostly advocate that the relationship between Articles 21(5) and 22 of the DSU exists through sequencing prerequisite. According to Kearns and Charnovitz, the objective findings of the Article 21(5) panel are a ground for the DSB to determine whether respondent has implemented recommendations and, consequently, to authorize suspension if the respondent has failed to do that (Kearns & Charnovitz, 2002, p. 335). That would mean that the procedure conducted under Article 21(5) is a precondition for the procedure under Article 22.

Two decades ago, Professor Mavroidis published a notable and commonly cited article, titled "*Remedies in the WTO Legal System: Between a Rock and a Hard Place",* (Mavroidis, 2000, p. 796), discussing the sequencing issue. In that article, Mavrodidis generally claims that sequencing between Articles 21(5) and 22 stems from the DSU context. However, Mavrodis also raises the question of whether the respondent may always obstruct the procedure for authorization of countermeasures through continual claims that it did *something* to implement the recom-

[24] Para. 22 of the Decision.

mendations. If the claimant considers that this *something* is not adequate, it raises the condition for the implementation procedure that can proceed in "endless circle" (Mavroidis, 2000, p. 794). This stands if we accept the position of some authors that countermeasures may be approved exclusively after multilateral determination at the DSB meeting that this *something* is not adequate. In order to prevent such illogical interpretation of the DSU provisions, Mavroidis offered a reasonable clarification. The claimant can make a request for authorization of suspension in the absence of a prior implementation procedure only in case the respondent did not do anything to implement the recommendations. On the other hand, if the respondent did *something*, then the implementation procedure becomes necessary before using the Article 22 procedures (Mavroidis, 2000, p. 797). Moreover, the respondent member may claim that it is in compliance after taking little or no action to implement the DSB recommendations from the original dispute (Brewster, 2011, p. 115). Mavroidis, nevertheless, makes an important correction of this attitude: when the first implementation procedure is completed with findings of non-implementation, then the claimant can request suspension. In that situation, the respondent cannot obstruct the Article 22 procedure by triggering new implementation procedures under the allegation that it modified the implementation action again. New implementation procedures may take action, but they cannot affect the Article 22 procedure (Mavroidis, 2000, p. 799). Mavroidis also refers to the principle of effective treaty interpretation concerning time limits provided in the Article 22. According to Mavroidis, a thirty-day period could be counted at the end of the reasonable period of time when the respondent member did not take any implementation action. On the other hand, if the respondent member took some implementation actions and the compliance panel finds that those activities were inadequate, the thirty-day period should be counted as of the date when the compliance panel issues its report (Mavroidis, 2004, p. 61).

In one of his articles, Professor Fukunaga refers to the compliance panel report in the case *EC – Bananas III (Article 21.5 – EC),* which states that the implementation measures taken in good faith by the WTO member are presumed to be in conformity with the DSB recommendations and the WTO Agreements.[25] According to Fukunaga, this presumption implies that, when the respondent member alleges to have implemented the DSB recommendations, the complaining member shall first have recourse to Article 21(5) (Fukunaga, 2006, p.407). This position is

[25] Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS27/RW/EEC, 12 April 1999, and Corr.1, unadopted, DSR 1999: II, p. 783, para. 4.13.

taken by other authors as well.[26] Fukunaga argues that, if the complaining member requests authorization for the suspension even though the respondent member claims that it took implementation measures, the DSB should dismiss this request because the claimant is not entitled to make such a request. (Fukunaga, 2006, p.407). Fukunaga (and some other authors) also refers to the beginning of the first sentence of Article 22(2) of the DSU:

> "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…"

In the context of the whole text of Article 22(2), this part of the first sentence needs to be interpreted as a precondition for any following actions described in that provision (such as a request for suspension as a final resort). This precondition is reflected in establishing that the "Member concerned" failed to bring the measure into conformity with a covered agreement. According to Article 23 of the DSU, the establishment of that fact must be taken multilaterally, through the recourse to the DSU procedures and consequent decision of the DSB. Therefore, any request for suspension on the basis of unilateral determination regarding non-conformity of the respondent's implementation action would be against the first sentence of Article 22(2) (Fukunaga, 2006, p.407).[27]

Generally, this point of view does make sense. It is obvious that the provisions contained in Article 22 refer to a situation of non-compliance. Therefore, those provisions cannot be invoked without a prior multilateral establishment of non-compliance (Shahani, 2015, p. 526). Many writers interpret Article 22 provisions in that manner. Professor Davey argues that it is logical that a decision on consistency of implementation actions must be made before the authorization of suspension (Davey, 2000, p. 17). Furthermore, complaining member can only retaliate after the adjudication and compliance phases (Lester, S., Mercurio, B., Davies, A. & Leitner, K., 2008, p. 172-174). Although it is not explicitly

[26] For example, Pelzman and Shoham argue that "under this set of acceptable presumptions, any allegations of non-compliance and non-implementation of the DSB recommendations requires that the complaining party shall first have recourse to the Article 21.5 review. In effect, this puts a stop to a complaining party attempt to seek authorization for suspension until the procedures under Article 21.5 are complete." (Pelzman & Shoham, 2007, p. 6-7).

[27] "If the complaining party requests authorization for the suspension, although the Member concerned has allegedly taken the implementation measures, the DSB should pronounce that the request is inadmissible or invalid since the condition prescribed in the first sentence of Article 22.2 of the DSU is not met." (Fukunaga, 2006, p.407, fn. 96).

stated in Article 22, Professor Brewster claims that the complaining member can request that the DSB authorize the suspension of trade benefits to the respondent member only if the AB finds that the respondent member is still in violation of the WTO agreements after the compliance stage (Brewster, 2011, p. 116).

THE QUESTION OF SEQUENCING AGREEMENTS

The WTO litigants have often resolved the tension between Articles 21(5) and 22 of the DSU by negotiating and concluding a bilateral *ad hoc* sequencing agreements. These agreements usually provide that Article 21(5) and Article 22 procedures can be requested at the same time, but the parties may also agree to postpone the Article 22 procedure while the implementation procedure is underway. These bilateral sequencing agreements enable the complainant to retain its right to retaliate in the future, if the implementation procedure ends with findings of non-compliance.[28]

There are many standpoints in the literature on the common "bilateral agreement" practice pertaining to the sequencing of the implementation procedure and suspension provisions. Kearns and Charnovitz argue that complaining WTO members, in reality, take recourse to Article 22 only in situations when respondent members have not taken any implementation activity (Kearns & Charnovitz, 2002, p. 338). They (and many other authors as well) refer to the common practice of negotiating bilateral procedural agreements in post-litigation stage, where parties in disputes envisage sequencing of procedures contained in Articles 21(5) and 22 of the DSU (Kearns & Charnovitz, 2002, p. 339; Valles & McGivern, 2000, p. 83-84). Fukunaga indicates the prevailing behaviour of complaining WTO members where they refrain from recoursing to Article 22 provisions until the ongoing implementation procedure is completed (Fukunaga, 2006, p. 407). The issue of binding sequencing agreements is important because some authors are prone to conclude that the WTO members, by adopting the practice of these agreements, constituted customary international law that the WTO judicial bodies should respect (Shahani, 2015, p. 537).

According to Article 3(1) of the DSU and subsequent WTO jurisprudence, the jurisdiction of the WTO judicial bodies is limited to the clarification of the covered agreements. From the perspective of the WTO

[28] There are several variations of these bilateral agreements. Parties may agree to suspend the Article 22 procedure until the implementation procedure is completely over (including the appeal procedure). On the other hand, the claimant may agree to wait only for the circulation of compliance panel report to reactivate the Article 22 procedure. *See*, for example, the analysis of such agreement in the case *Australia – Salmon* (Tsai-yu, 2005, p. 934).

law, customary international law falls into the scope of extrinsic sources of law that the WTO judicial bodies may apply in certain limited situations. Pertaining to the customary international law, the only recognized function of that particular legal source can be reflected in the interpretation of the covered agreements, in line with Article 3(2) of the DSU. Namely, that DSU provision refers to the customary rules of interpretation of public international law for clarification of provisions of the covered agreements.[29] In that regard, the practice of the WTO judicial bodies and legal theory agree that interpretation provisions contained in the Vienna Convention on the Law of Treaties from 1969 (VCLT) need to be considered as "customary rules of interpretation of public international law" from the language of Article 3(2) of the DSU.[30] In the context of the VCLT terms, the sequencing agreements may constitute a "subsequent practice" of the parties which may be relevant for interpretation of the WTO law, in accordance to Article 31(3)(b) of the VCLT.[31] However, the AB demonstrated a restrictive approach in recognizing facts and practice to fall within the phrase "subsequent practice" in the context of Article 31(3)(b) of the VCLT. In one of its first reports, in the case *Japan – Alcoholic Beverages II,* the AB reversed the finding of the Panel that previously adopted GATT reports and the DSB reports are "subsequent practice" which needs to be relevant in interpreting covered agreements.[32] The AB stated that an isolated act (particularly an adopted DSB report) is generally insufficient to establish subsequent practice:

> "Generally, in international law, the essence of subsequent practice in interpreting a treaty has been recognized as a "concordant, common and consistent" sequence of acts or pronouncements which is sufficient to establish a discernable pattern implying the agreement of the parties regarding its interpretation. An isolated act is generally not sufficient to establish subsequent practice; it is

[29] Article 3(2) of the DSU: '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 …'

[30] *See*, for example, the AB report in *US-Gasoline* case (page 17) and in *Japan-Alcoholic Beverages* case (page 9).

[31] Article 31(3)(b) of the VCLT provides: 'There shall be taken into account, together with the context: (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.'

[32] *Japan – Taxes on Alcoholic Beverages*, WT/DS8/R, WT/DS10/R, WT/DS11/R, adopted 1 Nov. 1996, as modified by Appellate Body Report WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, DSR 1996:I, 125, pp. 12-15.

> a sequence of acts establishing the agreement of the parties that is relevant."[33]

The AB concluded that the "subsequent practice" in the context of the VCLT may be developed only through the activities of the Ministerial Conference and the General Council, as exclusive authorities for interpretation of the covered agreements in accordance to Article IX(2) of the WTO Agreement.[34]

Although the previously mentioned position of the AB refers to the status of adopted GATT and DSB reports, this opinion is also relevant for bilateral sequencing agreements. These agreements are also "isolated acts" that are negotiated and concluded only between parties in disputes. Other WTO members do not participate in that process. Hence, other WTO members cannot be subject to practice that has been developed through activities of several members. For the establishment a "subsequent practice" as a customary international law, the whole WTO membership must be included, through the activities and decisions of the Ministerial Conference and the General Council, as exclusive authorities for interpretation of the covered agreements. In other words, the Ministerial Conference (or the General Council) has to recognize the status of "subsequent practice" to bilateral sequencing agreements by adopting an interpretation on the relationship between Articles 21(5) and 22 of the DSU.

NEW REALITY – NEW APPROACH

From the succinct analysis above, we have established all pertinent points regarding the interpretation of the relationship between Articles 21(5) and 22 of the DSU. The DSU neither clarifies nor refers in any manner to that relationship. The WTO jurisprudence has been (at least) implicitly inclined to interpret those provisions as independent provisions. On the other hand, academics mostly argue that a sequencing of those norms exists. Those academics submit their standpoints with strong ar-

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[33] *See* pages 12 and 13 of the AB report.

[34] The AB stated: "We do not believe that the CONTRACTING PARTIES, in deciding to adopt a panel report, intended that their decision would constitute a definitive interpretation of the relevant provisions of GATT 1947. Nor do we believe that this is contemplated under GATT 1994." There is specific cause for this conclusion in the WTO Agreement. Article IX:2 of the WTO Agreement provides: "The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements". Article IX:2 provides further that such decisions "shall be taken by a three-fourths majority of the Members". The fact that such an "exclusive authority" in interpreting the treaty has been established so specifically in the WTO Agreement is reason enough to conclude that such authority does not exist by implication or by inadvertence elsewhere.' *See* page 13 of the AB Report.

guments. The solution offered by Professor Mavroidis two decades ago seems to be acceptable for filling the gap in the DSU text. At that time, this was a "fresh" legal and academic issue, and Mavoridis reacted with a reasonable proposal for interpretation of the two conflicting provisions: the claimant can make a request for authorization of suspension in the absence of prior implementation procedure exclusively in case the respondent did not do anything to implement the recommendations. If the respondent did *something*, then the implementation procedure becomes necessary before the engagement of Article 22 procedures. After the first implementation procedure is completed with findings of non-implementation, the claimant can request suspension. New implementation procedures may take action, but they cannot affect the Article 22 procedure. This solution is logical and corresponds to the nature and purpose of the DSU.

Nevertheless, we can accept these arguments exclusively in "normal" circumstances, where litigation and appeal can function properly. Otherwise, this approach would upgrade obstacles to justice in the WTO dispute settlement system. The implementation procedure may commence, but it cannot be finished as long as the blockage of the AB is in force. Therefore, if we accepted the concept proposed by Mavroidis and other scholars (that the implementation procedure must take place prior to Article 22 procedure), we would recognize that the claimant should be disabled from implementing legal suspension in the unforeseeable period of time. This would create a comfortable situation for the respondent to invoke procedural rights and obstruct the authorization of the suspension by the DSB. That concept would be also against the DSU principles, particularly against the aim of the dispute settlement mechanism to secure a positive solution to a dispute. As a matter of fact, the primary goal of the countermeasures is to induce compliance with the WTO law. The countermeasures are contemplated as a final resort for the claimant in a situation when the respondent is persistent to maintain measures that are multilaterally established to be inconsistent with the covered agreements. Without that possibility, we can hardly expect from the respondent to bring its measures in conformity with the WTO law. On the other hand, in the absence of any kind of legal solution, the claimant would be continuously exposed to illegal measures that cause nullification or impairment of benefits.

We may propose a possible *middle* solution: the claimant can seek authorization for suspension if the prior implementation procedure is not completed in a reasonable period of time. On the one hand, we must recognize that the claimant should act in accordance with the logical relationship between Articles 21(5) and 22 of the DSU. Therefore, the claimant should first commence the implementation procedure if the respondent *did something* and claims that it brought their measures in conformity with the WTO law (Mavroidis's opinion). On the other hand, if the im-

plementation procedure is not finished in the period of time envisaged in the DSU provisions, then the claimant can commence Article 22 procedure. The period of time for the implementation procedure may be determined through the text of the DSU norms. In particular, Article 21(5) regulates:

"The panel shall circulate its report within 90 days after the date of referral of the matter to it. When the panel considers that it cannot provide its report within this time frame, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report."

Hence, for the panel procedure that time should be 90 days plus some additional period of time proposed by the panel. Considering the appellate procedure, the Article 17(5) of the DSU provides:

> "As a general rule, the proceedings shall not exceed 60 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report… When the Appellate Body considers that it cannot provide its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 90 days."

Hence, the maximum period of time for the appellate procedure is 90 days from the date the disputing party formally notifies its decision to appeal. Therefore, if the AB does not submit its report in 60 or 90 days from the date of formal notification of decision to appeal, the claimant should have the right to seek retaliation in accordance with Article 22. Even in the WTO judicial practice, there was a case (*Australia-Salmon*) where the parties agreed a modified sequencing approach: the claimant and the respondent agreed that Article 22 procedure would be suspended until the Article 21(5) procedure was completed.[35] If the compliance panel finds WTO-inconsistency with the implementation measures, then the claimant can un-suspend the Article 22 procedure regardless of whether the panel report is subject to appeal. According to Professor Tsai-yu, who commented on this bilateral sequencing agreement:

> "this kind of approach may ensure that the examination of WTO conformity is conducted through a multilateral track, instead of unilateral judgment by the complaining party, before the article 22.6 retaliation review into processing" (Tsai-yu, 2005, p. 934).

Yet, there is another open question: what if the compliance panel finds that the respondent implemented the recommendations? In that situation, the report could not be applied due to the AB blockage and the

[35] *See* Panel Report, *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada*, WT/DS18/RW, adopted 20 March 2000, DSR 2000:IV, 2031.

findings of the compliance panel could actually be perceived as final. This would be a very severe situation for the claimant, especially if the compliance panel made some errors in its findings. Thus, if the claimant decides to commence the implementation procedure, it takes risks to make such an unfavorable circumstance for its future position. In addition, the amount of legitimacy for seeking suspension would drastically decrease.

Therefore, from the claimant's interests, the *middl*e solution is hazardous. To avoid the implementation procedure, a better solution for the claimant is direct use of the Article 22 procedure. We cannot reasonably expect from the claimant to postpone Article 22 procedures and to get itself involved into a defective implementation procedure which cannot provide the final resolution of the matter. Certainly, the respondent may commence the implementation procedure. In that case, the claimant would be obliged to participate in that procedure. However, the claimant may not be obliged to wait for the final resolution of that procedure as a prerequisite for commencing the Article 22 procedure.

Nevertheless, we need to look at some possible consequences of this *kind of radical, but necessary*approach, which can give rise to several important issues. First, let us suppose that the arbitration has proposed suspension subsequently approved by the DSB. In the meantime, the appellate system starts to function properly, and the implementation procedure (commenced either by the respondent or by the claimant) is finally finished with findings on the WTO conformity with the implementation measures. During all that time, the claimant may apply the DSB-approved countermeasures which eventually appear to have been lacking justification. Who would be responsible in such a case? The DSB approves countermeasures on the basis of the claimant's request and arbitration decision. If we consider that the DSB adopts its decisions on the basis of the negative consensus rule, it brings us to the conclusion that all decisions submitted by the arbitration are automatically adopted by the DSB. According to the DSU provisions, the possibility for non-adoption of an arbitration decision exists only in theory. Therefore, we cannot conclude that the DSB would be responsible for imposing unjustified measures. On the other hand, the arbitration does not have the authority to examine the implementation issues and to establish facts, i.e. whether the respondent did or did not bring its measures in conformity with the WTO law. The competence of the arbitration is strictly limited to establishing the level of suspension and this body cannot decide on the issues concerning the merits and implementation. Therefore, the arbitration cannot be held responsible either. Moreover, arbitration decisions are final and cannot be subject to appeal; they are always "on the road" to receiving the final approval by the DSB.

Hence, we could not argue that either the DSB or the arbitration could be responsible for possible long-term imposition of unjustified countermeasures. So, who can be responsible? Could it be the claimant?

This is also an ambiguous point. First, it is hard to assign all responsibility to the WTO complainant member, and to rely on its *awareness, conscience* and good faith. As a matter of fact, the complainant member has every right to consider (in good faith) that the respondent member did not implement the recommendations from the adopted panel report. The complainant member cannot be expected to act as a guardian of the WTO law. This is a task for the WTO collective institutions and judicial bodies. Each WTO member has the right to protect its own interests in accordance with the WTO law. Therefore, if the complainant member fully acts in accordance with the DSB provisions and requests suspension, no one can argue that it acts in bad faith.

There is also another problem related to this issue. Long ago, the AB established a rule that DSB-authorized countermeasures 'may continue until the removal of the measure found by the DSB to be inconsistent results in substantive compliance'.[36] According to the AB, respondent member cannot require termination of the suspension of concessions simply because a Member declares that it has removed the inconsistent measure, without a multilateral determination that substantive compliance has been achieved. The AB concluded that it would undermine the important function of the suspension of concessions in inducing compliance.[37] Furthermore, the AB holds that parties in dispute must invoke the implementation procedure in accordance with Article 21(5) (in case of a disagreement) to determine whether a new measure achieves compliance (Charnovitz, 2009, p. 564-65).[38] It means that the respondent must use the implementation procedure to reach a multilateral determination of the WTO-consistency of its implementation measures. Until that determination, the claimant is fully entitled to implement the DSB-approved suspension. In other words, the claimant may obstruct multilateral determination of compliance by *shifting* the matter to the AB, which cannot finish its work due to the blockage. In that situation, the respondent cannot use any kind of legal and procedural instrument to terminate suspension, even though it has done everything in good faith to ensure substantial compliance. In those circumstances, everything rests on the claimant's good faith and *conscience*. A possible solution may also be found through bilateral negotiations and agreement between the disputing parties. However, this remains an open issue for discussion.

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[36] *See* AB report in US-Continued Suspension, para. 306. Full title of the Report: Appellate Body Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320/AB/R, adopted 14 November 2008.
[37] *Ibid*, para. 308.
[38] *See* also: *ibid*, paras. 345, 348, 358, 368.

CONCLUSION

In December 2019, the system of appeal in the WTO dispute settlement system became inoperative as the terms of office of the AB members expired and the AB lost the necessary quorum. It was the first time in the WTO dispute settlement history that litigation system was deadlocked. After more than two decades of proper functioning, the WTO litigation system proved to be absolutely liable to blockage. One of the important emerging concerns was how the blockage of the litigation system could affect DSU procedural provisions governing the suspension of concession and other obligations (countermeasures) in post-litigation stage of disputes. More specifically, we need to address the *sequencing* issue regarding the procedural right of the claimant to seek authorization for suspension in accordance with Article 22 of the DSU and the implementation procedure envisaged in Article 21(5) of the DSU. Should these two provisions be interpreted as provisions in "symbiosis" or as two independent norms? Neither the DSU nor other WTO agreements clarify or deal with the relationship between these two DSU provisions.

In several cases, the WTO judicial bodies (particularly the AB and arbitrations) expressed their views on the relationship between Articles 21(5) and 22 of the DSU. From their point of view, the DSU does not provide any kind of specification or clarification of that relationship. Moreover, the AB has stated that it has no competence to interpret the relationship between those two DSU provisions. However, both the AB and arbitrations have been inclined to the position that there is no "sequencing condition" for exercising procedural rights provided in Article 22 of the DSU; it means that the claimant in the original dispute can commence Article 22 procedure irrespective of a prior procedure under Article 21(5). Contrary to the position of the WTO jurisprudence, academics mostly advocate that the relationship between Articles 21(5) and 22 of the DSU exists through sequencing prerequisite.

However, this problem needs to be re-examined in light of the irregular circumstances that may be created by the blockage of the litigation system. The implementation procedure may be commenced, but it cannot be finished as long as the blockage of the AB is in force. Therefore, if we accepted the concept proposed by the majority of scholars (that the implementation procedure must take place prior to the Article 22 procedure), we would recognize that the claimant should be prohibited from implementing the legal suspension in the unforeseeable period of time. This would create a favorable situation for the respondent to invoke procedural rights and obstruct the authorization of suspension by the DSB. That concept would also be against the DSU principles, particularly against the aim of the dispute settlement mechanism to secure a positive solution to a dispute. Therefore, *exclusively in situation where litigation is in blockage*, the claimant should be entitled to commence the Article 22

procedure, without prior use of the implementation procedure in accordance with Article 21(5) of the DSU. In normal circumstances, the claimant must respect a sequencing prerequisite. We should accept that position, although such a scenario may have some peculiar implications. However, those implications are subject to further discussion, aimed at finding the best possible solution in the future.

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ОДНОС ИЗМЕЂУ ЧЛАНОВА 21(5) И 22 DSU СПОРАЗУМА И ПИТАЊЕ БЛОКАДЕ СИСТЕМА РЕШАВАЊА СПОРОВА У СВЕТСКОЈ ТРГОВИНСКОЈ ОРГАНИЗАЦИЈИ

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Резиме

Децембра 2019. године систем решавања спорова у Светској трговинској организацији (СТО) је постао нефункционалан, с обзиром да су мандати једног броја чланова Апелационог тела истекли, чиме је ово најзначајније судеће тело остало без неопходног кворума за одлучивање. Ово је уједно и први случај блокаде у историји решавања спорова у СТО, након више од две деценије нормалног функционисања. Међу бројним питањима и дилемама које су искрсле услед ове околности, појавила се и недоумица у погледу начина утицаја блокаде Апелационог тела на процедуралне одредбе Договора о правилима и процедурама за решавање спорова (*Dispute Settlement Understanding – DSU*) које уређују суспензију концесија и других обавеза (тзв. контрамере) у постпарничној фази спора између чланица СТО. Појавила се потреба да се одговори на „питање редоследа“ у коришћењу процедуралног овлашћења тужиоца да тражи одобрење за примену контрамера у складу да чланом 22 *DSU,* с једне, и његовог права да покрене тзв. имплементациону процедуру на основу одредбе 21(5) *DSU,* с друге стране. Прецизније, проблем се састоји у питању да ли се ове две одредбе могу тумачити као одредбе у „симбиози“ или као две независне норме? Споразум *DSU,* нити било који други СТО споразум, не дају одговор на постављено питање.

Судећа тела СТО (пре свега Апелационо тело и арбитраже) су у неколико случајева исказали свој поглед на питање односа између чланова 21(5) и 22 *DSU.* Ова тела су у више наврата протумачила да *DSU* не садржи било какво разјашњење овог односа. Чак, Апелационо тело је заузело становиште да оно нема надлежност да тумачи однос између ових процедуралних норми. Ипак, Апелационо тело је демонстрирало наклоњеност позицији да не постоји „услов редоследа“ када је у питању употреба процесног овлашћења које је предвиђено чланом 22 *DSU;* то значи да чланица СТО – тужилац може покренути процедуру одобрења контрамера без обзира да ли је претходно спроведена имплементациона процедура на основу члана 21(5). Исти став су исказале и арбитраже које су поступале у споровима поводом захтева за примену контрамера. Насупрот позицији коју је установила пракса судећих тела СТО, академска јавност углавном заговара став да се однос између чланова 21(5) и 22 *DSU* рефлектује кроз услов редоследа коришћења овлашћења из ових одредби: најпре се мора окончати имплементациона процедура, па тек након тога тужилац може покренути процедуру за примену контрамера.

Међутим, оно што се намеће је потреба да се описани проблем преиспита у светлу нередовних околности које могу бити, као што можемо посведочити, изазване блокадом парничног процеса у СТО систему решавања спорова. Докле год траје блокада Апелационог тела, имплементациона процедура може бити започета, али се не може окончати, уколико једна од страна у поступку упути жалбу Апелационом телу. Стога, ако прихватимо мишљење које предлаже већина академске јавности (да се имплементациона процедура мора спровести пре про-

цедуре из члана 22), признали бисмо то да тужилац треба бити онемогућен да примени контрамере током непредвидивог периода. Тиме би се онда успоставио повољан амбијент за тужену чланцу СТО која може, користећи процедуралне технике, у недоглед опструирати одобрење контрамера против себе. Овакво полазиште би такође било у супротности са принципима *DSU*, нарочито са принципом позитивног решења спора. С тим у вези, требало би прихватити становиште да искључиво у ситуацији блокаде парничне процедуре, тужилац може покренути процедуру на основу члана 22 *DSU* и захтевати контрамере без претходно спроведене имплементационе процедуре. У редовним околностима, тужилац мора поштовати логичан редослед ових процесних права.