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The review compliance proceedings under Article 21.5 of the DSU

Introduction

The World Trade Organisation (WTO) Agreements gave birth to a far-reaching system of solving dispute by introducing the Agreement of "Understanding on rules and procedures governing the settlement of disputes" (hereinafter DSU). Its successes were seen both in absolute terms, in that it seems to resolved trade disputes effectively, and in comparative terms vis-à-vis other forms of less successful examples of state to state dispute settlement (such as the International Court of Justice)[1]. The most important aspects of it, are the obligatory character and the duty to conform, that appear to show what has not been done so far in international law: the enforcement[2].

However, the period of its existence has demonstrated that dispute settlement system still need some improvements and clarifications, in order to meet the objectives necessary for purposes that it was created. Part of the reform proposals already submitted by Members of WTO is Article 21.5 of the DSU in combination with Article 22 of the DSU.

Article 21.5 is a very important article of the DSU, which provides for the review of whether measures taken to comply do in fact achieve compliance with WTO rules. Article 21.5 is used in more than 12 cases since the creation of the WTO, and it is an achievement in respect to the GATT system of solving the dispute[3]. I think going through the Article 21.5 cases will help to have a better understanding of the advantages and the problems relating to the article and the necessity of having the review compliance proceedings. The paper will be structured as follows:

In the first part I am going to give a general overview of the implementation of the panel and Appellate Body's recommendations and rulings under Article 21 of the DSU and the possibility of using panel and Appellate Body suggestions in order to prevent further conflicts during the implementation period (Article 19 of the DSU). In the second part I am going to

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[1] William J. Davey "*The WTO Dispute Settlement System*", JIEL, 5(1), 2000 at 15
[2] Chi Carmody *" Remedies and conformity under the WTO Agreement*. JIEL 5(2), 2002, 307
[3] Carolyn B. Gleason and Pamela D Walther "*The WTO Dispute Settlement Implementation Procedures: A System in need to reform".* Law & Pol'y Int'l Bus, 31 2000, at 721

deal with the scope of the Article 21.5 and how it works referring to that part of the jurisprudence created by the panel and Appellate Body, clarifying Article 21.5, during the dispute for the inconsistency of the measure taken to comply, (substantial matters relating with specific agreements are not going to be part of this work). Part three will consider the timetable conflict between Articles 21.5 and 22, the so-called 'sequencing' problem and the reform proposals regarding Article 21.5 of the DSU.

I. Articles 21 and 19 of the DSU

1.1 Implementation of the recommendations and rulings under Article 21 of the DSU

The DSU system is a system that tries to promote security and predictability in the multilateral trade. It is a system that serves to preserve rights and obligations to Members under the covered agreements. The above-mentioned statements are based in Article 3.2 of DSU[4] and they are reflected in the panel and Appellate Body proceedings and they give the meaning to the whole dispute settlement system.

Where the panel or the Appellate Body concludes that the measure brought by Member States in the dispute is inconsistent with the covered agreement, the panel or Appellate Body recommend the party through DSB to bring the measure into conformity[5]. But it does not end like this. A complete system for implementation, like establishment of reasonable period of time, surveillance of implementation and review of compliance are provided for the parties in order to have a satisfactory solution of the matter. Under Article 21.6 of the DSU, the implementation period is under the surveillance of DSB, in order to secure prompt compliance from the party with DSB recommendations. A part from the obligation to bring the measure into conformity, during the reasonable period of time, the party is asked to submit a 'status report' at regular intervals beginning 6 months into reasonable time[6]. Article 21.3 puts the limit of 15 months for the reasonable period of time, during which, the party is asked to implement the recommendations and the rulings.

Article 21.5 is called where there is a disagreement between parties as to the existence or inconsistency with the covered agreement of the measure taken to comply during the

[4] Article 3.2 of the DSU
[5] Article 19.1 of the DSU
[6] Article 21.6 of the DSU

implementation period [7]. It contains the right of the party to solve the implementation problems through dispute settlement mechanism. This possibility of going back to dispute settlement procedures through Article 21.5 enhances security and predictability because it reaffirms the rule of law instead of unilateral actions taken by Members.

Article 21.5 reflects three basic principles for the Dispute Settlement Body's surveillance of implementation: (1) 'prompt compliance' with recommendations and rulings of the DSB, (2) the 'objective assessment' of any measure taken to comply; and (3) the 'security and predictability' of the multilateral trading system. The principles are elaborated below when I am going to discuss procedural aspects under Article 21.5. The cases solved under this article have been not only very contentious, but they have been also a possibility to understand how the dispute settlement works and which are the problems faced during the process[8].

The system of reviewing compliance is new. It did not exist before the establishment of WTO agreement. This is also has been used as an argument which shows that the system of enforcement is stronger under the WTO than in GATT[9]. During the GATT existence there were some attempt for creating a post-panel surveillance but that mechanism did not provide for an independent review[10].

1.2 Panel and Appellate Body's suggestions as a possibility of preventing future conflicts

Together with obligation to recommend Member States to bring the measure into conformity, the panel and Appellate Body may give suggestions for the ways of implementation[11]. It does not exist any compulsory obligation on this matter under the DSU Agreement. This is a discretionary right of the Member State. Article 19.1 uses the word '*may',* which means that the s*uggestion* is not obligatory, and more often it happens the panel or Appellate Body limit itself to the way of the implementation, but the modalities of implementation of the panel and Appellate Body's reports are for the Member concerned to

[7] Article 21.5 DSU
[8] Gleason & Walther supra note 3, at 711
[9] ibid, at 711
[10] Jason E. Kearns & Steve Charnovitz "A*djudicating Compliance in the WTO; A Review of the DSU Article 21.5",* JIEL 5(2), 2002, at 36.
[11] Article 19.1 of DSU reads inter alia that: [I]n addition to its recommendations, the panel and Appellate Body may suggest ways in which the Member concerned could implement the recommendations

be determined[12]. In *Guatemala Cement* case the panel distinct two steps of the procedures according Article 19 of DSU:

First, it is the obligatory recommendation given by panel or Appellate Body, which is limited to give the order to bring the measure into conformity; and the second step, is in a 'discretion' (emphasise added) of the defended to implement it, and the panel can make only non-obligatory "suggestions". If the means chosen by the defended do not achieve a legal valid solution, than the problem would have to be adjudicated under the DSU Article 21.5[13].

There are number of elements that should guide the panel and Appellate Body to determine whether to employ this discretion. Above all, is the principle on intentional law that the sovereign has the right to choose between the ways to implement international obligations. At this stage the panel should make a specific recommendation as to any of range of permissible options[14]. What panel usually does is that it limits itself to a general stipulation that the measure is brought into conformity with the specified elements of the covered agreement[15].

Another problem not yet solved in practice, is that Article 19.1 does not say anything how the panel can make the suggestion and how far these suggestions may reach[16]. The system gives freedoms to the parties for the ways of implementation in order to bring the measure into conformity, and this is necessary for specific matters in the dispute and the specific circumstances in that particular country. But, the so called "freedom of choice"[17] created by the system on one hand, and the need for conformity asked by the agreement on the other hand, can lead to further conflicts, and if the panel can give suggestion it can adjudicate the measure in the first place without the necessity of having another dispute[18]. The idea behind is to prevent as much as possible another dispute, which cost for the parties time and status quo situations, thereby, using the panel or Appellate Body suggestions can be a useful mean, that will prevent future conflicts.

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[12] Geert A. Zonnekeyn The Bed –Linen case and its Aftermath*; Some comments on the European Community's "World Trade Organisation Enabling Regulation",* J.WT 36(5) 2002, at 999

[13] Robert E, Hudec "*Broading the scope of the remedies in the WTO Dispute Settlement",* at 379 in Friedl Weiss "*Improving WTO Dispute Settlement Procedures : Issues & Lessons of the International Courts & Tribunals"*, Cameron May 2000, reciting Guatemala- Antidumping Investigation Regarding Portland Cement from Mexico, WT/DS60/R 19 June 1998

[14] Jeffrey Waincymer, "*Settlement of the dispute within the World Trade Organisation; A guide to the jurisprudence"* World Economy, at 1271

[15] ibid, at 1271

[16] Zonnekey, supra note 12, at 1001

[17] See also E. Hudec supra note 13 at 378

II Article 21.5 panel proceeding

2.1 Clarification of 'Recourse to these dispute settlement procedures'

Article 21.5 provides procedures in order to solve the problem of compliance during the implementation of DSB recommendations. It reads as following:

> Where there is disagreement as to the existence or consistency with the covered agreement of measures taken to comply with the recommendations and rulings such a dispute shall be decided through recourses to these dispute settlement procedures, including wherever possible resort to the original panel. The panel shall circulate it report within 90 days after the date of referral of the matter to it. When the panel consider that it can not 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.

It is obvious from the language used in this article that some parts of it need further interpretations. It is not very well understood that what does constitute '*recourse to these dispute settlement procures'*, meaning that, can these procedures follows the same steps as in original panel proceeding? Can the argument use for the competencies, term of references and limits of the original panel be used also in the Article 21.5 panel proceeding? Does the party have the right to appeal the decision of Article 21.5 panel, and how far can the procedures go?

First of all Article 21.5 does not make any reference to the possibilities of pursuing consultation before going through the panel proceeding. In *EC-Bananas*[19] case, the EC initial position was that Article 21.5 implied a revisiting of all stages of the dispute settlement procedures, starting with the standard request for consultations. But the complainant parties on the other hand argued that Article 21.5 provides for an expedited procedure and not a 'new' dispute[20]. However in different cases consultations were used from the parties when the disagreement for implementation measure was faced. In the recent case, *EC-Bed Linen*[21],

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[18] In Guatemala Cement case the panel went to give suggestion believing that it was the only appropriate means of implementing its recommendation. Guatemala was asked to revoke the existence antidumping order. See for more discussions in this case E Hudec ibid at 380

[19] European Communities- Regime for importation, Sale and Distribution of Bananas- Recourse to Article 21.5 of the DSB by European Community, WT/DS27/RW adopted 6 May 1999 (EC-Bananas)(21.5)

[20] Mauricio Salas &John H Jackson "*Procedural overview of the WTO EC-Banana Dispute* , JIEL 2000,4 (1)at 154

[21] European Communities-Anti Dumping Duties on Imports of Cotton-Type Bed Linen from India (EC-Bed Linen) (21.5) WT/DS141/RW para. 2.11

India started the procedures under Article 21.5 by asking first for consultations, which were not successful and lead to an Article 21.5 panel proceeding.

Article 12.8 gives the original panel six months period to issue its final report, in contrary to that, Article 21.5 gives the panel the period of 90 days[22]. Article 21.5 doesn't say anything about Appellate Body procedures, although some cases have been resolved also through Appellate Body proceeding[23]. The first case was *Brazil- Aircraft*[24], when the Appellate Body agreed to hear the case, and it occurred afterwards in the six next cases, when panel judgements were issued[25].

A surprising decision was reached in *US- Shrimp*[26] case when the panel noted that the United States new measure constituted compliance, as long as the conditions in the findings of the Report, in particular the ongoing serious good faith efforts to reach the multilateral agreement, remains satisfied. If those conditions cease to meet in the future, than the complainant party in the original case may be entitled to have further recourse to Article 21.5 procedure. This lead to open ended review which can be acceptable because of the dynamic nature of the treaty obligations for the members, but it can creates tensions relating with security and predictability of the system[27].

In the original panel proceeding the party is entitled to have a reasonable period of time in order to implement the Appellate Body or panel's recommendations and rulings[28]. Such a "grace period" is not established under the Article 21.5-panel proceeding[29].

The aspects mentioned above are settled in cases under Article 21.5 and each of them can lead to further analyses, but for the sake of brevity I am going to deal with some other aspects like; standing, date of the establishment of the panel, and measure taken to comply

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[22] Articles, 12.8 and 21.5 of DSU

[23] Mexico- Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United State, Recourse to Article 21.5 of the DSU by United States, WT/DS132/AB/RW, 21 November 2001. Canada-Measure Affecting the Importation of the Milk and the Exportation of the Diary Product –Recourse to Article 21.5 of the DSU by New Zealand WT/DS103/AB/RW, 8 December 2001,

[24] Brazil-Export Financing Programme for Aircraft, WT/DS46/RW, 9 May 2000

[25] Kearns & Charnovitz, supra note 10, at 337

[26] United States- Import Prohibition on Certain Shrimp and Shrimp Turtle Products, Recourse to Article 21.5 of the DSU by Malaysia (US-Shrimp (21.5)) WT/DS58/RW 15 June 2001, para 5.13

[27] Kearns & Charnovitz supra note 10, at 337

[28] Article 21.3(b) of the DSU establishes the possibilities of agreement for the reasonable time. In case that such agreement is not reached between parties , (c) arbitrators can determine it, the period should not expire the 15 months from the date of the adoption of a panel or Appellate Body report

2.1.1 The question of standing under Article 21.5

DSU leaves open the question or whether an original panel defendant may initiate an Article 21.5 proceeding. The problems is obvious, meaning that, will only the original complainant party starts an Article 21.5 proceeding, and moreover what is the position of parties that were never involved in the original panel proceeding?

The first Article 21.5's panel that was faced with this problem did not reach any conclusion. In *EC –Bananas case*[30] the panel held that even EC, which was original defending, could initiate an Article 21.5 proceeding, but no finding of WTO consistency could be made based on the European Community submission. As Kearns and Charnovitz state, "it may happen that the original defending party can initiate a Article 21.5 proceeding, although it is unlikely to occur in the absence of retaliatory threat"[31]. The willing of the defendant party to initiate such a process may come after Article 22 retaliation. Such a situation never had happened, but the language of the DSU does not put any requirement or any limit for that. The language of the article asks only for the existence of the disagreement regarding the consistency of the measure and does not make any reference to the possible party initiating the process.[32]

The position of non-parties in the original proceeding in Article 21.5 proceeding has never been addressed when panel compliance has occurred. Neither Article 21.5, nor the DSU agreement put any restriction about it. The only argument that one can determine is that Article 21.5 is related with measures taken to comply, which means that the parties must have a clear connection with the matter involved in the dispute. If such measures affect the third country that has not been involved in the dispute, under the DSU, the member has the right to initiate a new proceeding and does not have many chances to go through Article 21.5 procedure. However it is hard to base this argument in any of the DSU articles, due to the lack of limitations of this respect. One may read this DSU article as not being restrictive for the standing of the new party complainant, where the measures taken to comply violate its rights.

The situation is much clearer, when it comes to third parties rights in the process. In contrary to the non –original party rights, panel has always granted the rights to third parties

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[29] Kearns & Charnovitz supra note10 at 332
[30] EC-Bananas (21.5), supra note 19, para 4.14
[31] Kearns & Charnovitz supra note 10 at 341-342
[32] ibid, at 342

to participate in the Article 21.5 proceeding, even when they were not having such a status in the original panel proceeding[33].

2.1.2 Reasonable period of time and Article 21.5 panel's establishment

The DSU is based on three different procedures when it comes to implementation period. The first are the procedures and guidelines for the establishing a compliance deadline, or reasonable period of time. The second are compliance review, procedures to be used when is a disagreement between parties over whether the loosing party has complied with DSB ruling. The third are procedures for the suspension of concessions if the loosing party failed to implement the WTO ruling, or otherwise satisfy the wining party by its implementation deadline[34]. Article 21.5 tries to give guidance for the second kind of procedures.

Under the terms of DSU Article 21 between, the time that the loosing member must inform the DSB of its intentions in respect of implementation of the recommendations and ruling under the DSB, and the time the member's reasonable period expires many months later, few interim requirements are imposed upon that member[35]. The member is not required to identify the measures it will seek to remove or neither implement, nor it is required to specify any resort of implementing schedule[36].

Under article 21.3 the party is asked to bring the measure into conformity within the reasonable period of time[37]. It is important to mention here that Article 21.5 does not make any reference to the reasonable period of time. It is not determined in the article when the parties are supposed to call the compliance panel.[38].

The problem is still open and it first arose in *EC-Bananas* case, and after it has been solved in different ways. In *EC-Banana* case the European Community for several months rejected to use Article 21.5 procedure arguing that an Article 21.5 compliance review can not

[33] ibid at 342
[34] Gleason & Walther, supra note 3 , at 722
[35] Article 21.6 of DSU states *inter alia* that [t] he issue of implementation of the recommendations and rulings shall be placed on the agenda of DSU after six months following the date of establishment of the reasonable time and shall remain under DSB agenda. At least 10 days prior to each such DSB meeting, the Member concerned shall provide the DSB with the status report in writing for its progress in implementation of the recommendations and rulings
[36] Gleason & Walther, supra note 3 at 719
[37] Article 21.3 of the DSU
[38] Article 21.5 of the DSU

be taken until the reasonable period of time expired[39]. In *Canada-Aircraft* case and *Brazil-Aircraft* case the parties voluntarily agreed to ask for Article 21.5 proceeding after the expiration of the reasonable period of time[40]. *In EC- Bed linen* case India asks for recalling the original panel on 8 March 2002 and the expiration of the reasonable period of time for EC was 14 August 2001[41].

The language of Article 21.5 is too broad to allow the panel to take place during the reasonable time. If such thing may happen is a good achievement not only to give meaning the time limit provided in Article 22.2 but also to secure short process that is always necessary in trade matters. One of the reasons that such a solution is hardly to be achieved is that not very often parties implement the DSB recommendation within reasonable time[42].

In contrary to that, Article 22.2 gives the party 20 days after the expiration of the reasonable time to ask DSB for authorisation of retaliation where non-compliance occurs. Once the dispute goes through Article 21.5 panel's proceeding it is understandable that the period of 20 days can be expired and normally can lead to the situation that the timetable of Article 22.2 becomes meaningless. Giving possibilities to Members to adjudicate compliance (Article 21.5) on one hand, and making the article 22 time limit useless on the other hand, has created the so called 'sequencing' problem, that became visible at the Bananas III case.

2.1.3 Measures taken to comply

The mandate of an Article 21.5 panel extends to dispute over the consistency of the *measure taken to comply*. Article 21.5 gives the panel three important objectives regarding that measure. First it must determine whether is a disagreement between the parties, second whether measures taken to comply have 'existence' and whether such measures manifest 'consistency' with the rules in WTO agreements[43]. The Article 21.5 panel is not allowed to examine the so-called replacement measure or the new measure with the same restrictive effect as old measure. This rises to competing objective. On one hand a responding party may argue legitimately that the new measure should not be adjudicated on the basis of 90 days

[39] EC-Bananas (21.5) supra note 19
[40] Canada-Measure Affecting the Export of Civil Aircraft, Recourse to Article 21.5 of the DSU by Brazil, WT/DS70/RW 9 May 2000 para 1.6 Brazil-Aircraft,(21.5) supra note 24 para 1.5
[41] EC-Bed Linen (21.5), supra note 21, para 2.11
[42] Cherise M. Walles and Brendan P. McGivern, "*The right to retaliate under the WTO Agreement : The Sequencing Problem"*, J.W.T 2000 5(2) at 66
[43] Kearns &Charnovitz supra note 10, at 335

proceeding[44]. On the other hand the responding party should not be entitled to avoid implementation by enacting a new measure with the same trading inhibiting effect as the previously impugned measure, thereby seeking to deny the complainant party of its right to proceed retaliation. Article 21.5 did little to solve this matter[45].

Definition of the measure under the "term of panel jurisdiction" and the limit of this jurisdiction has been always a matter of ruling in panel and Appellate Body recommendations. Part of it has been solved through the reach jurisprudence of the WTO. A measure in the meaning of trade dispute can be any law regulation, which is contrary to the obligations of the agreement and creates distortion in the trade. However not every measure falls under the jurisdiction of the Panel. With respect of identifying the measure, panel and Appellate Body have developed different standards for satisfying Article 6.2 of the DSU requirements. The standards include that the measure is expressly identified in the request for establishment of the panel for example; 1) the name the date of publication, 2) is subsidiary or flows from an identified measure that has focused and specific delegation on implementing power, 3) is closely related to such narrowly-focused, identified measure[46].

The problem is a bit different when we talk about Article 21.5-panel proceeding. The Panel in *Australia- Salmon* case stated that it is not going to give a definition of what is the *measure taken to comply* in order to be applied in all cases[47]. The panel tried to solve the problem by referring to the context of the dispute. In this case panel ruled out that 'not only the measures explicitly express in the request of the panel can be examine by it, but also the measures that they are closely related or subsidiary to the measures specifically mentioned in the request for the panel[48]. The panel defined the "compliance as an ongoing process and once it has been identified as such, any measure taken to be comply can be fall under the panel mandate unless a genius lack of notice can be pointed to"(emphasise added)[49]. Under the jurisprudence of the panel decisions, can be classified as the measures taken to comply, measures that have 'a clear connection' with measures challenge in the original panel. This test was first use by the panel in *Australia –Salmon* case, when the panel found the Tasmanian

[44] Article 21.5 gives the Panel a period of 90 days to deliver its decision.
[45] Walles & Mc Givern, supra note 42, at 64
[46] James Cameron &Stephen J. Orava "*GATT/WTO Panels Between Recording and finding facts: Issues of Due Process, Evidence, Burden of Proof, and Standard of review in GATT/WTO Dispute Settlement*, at 212 in, Friedl Weiss "*Improving WTO Dispute Settlement Procedures: Issues n& Lessons of the International Courts & Tribunals"*, Cameron May 2000.
[47] Australia- Measure Affecting the Importation of Salmon- Recourse to Article 21.5 of the DSU by Canada Australia-Salmon(21.5)),WT/DS/18/RW, adopted 16 June 1999,para 23
[48] ibid Australia –Salmon (21.5) para 26
[49] ibid at para 28

measure was a measure taken to comply. In the original dispute the panel concluded that Australian measures were inconstant with Sanitary and Phytosanitary Agreement by prohibiting the importation of chilling and freezing salmon from Canada[50].

No party has the right to determine what constitutes a measure taken to comply, although they can be mentioned in the request for establishment of the panel. In *EC-Bed Linen* case the panel stated that India was right on arguing that EC could not decide what constitute that measure, but only the panel can make the final determination[51]. In this case the panel went a bit further from the ruling that it made in *Australia- Leather* case. In the latter case's decision, the panel stated that in WTO panels proceeding, the complainant determines which measures are in dispute. Under this approach, Article 21.5 permits the compliant to delineate the scope of Article 21.5 review[52]. Measure included in compliance request for establishing of the panel can help the panel in determining the measure taken to comply, but they could not be definitive measure fallen in the jurisdiction of the Article 21.5 panel[53].

It is obvious that the panel should examine only the measure relating to the DSB recommendations. In the case of *measure taken to comply* the following standards can be taken into consideration from the panel once it has to determined it: (1) they are linked in official government statement; (2) are enacted or adopted within the reasonable period of time; (3) affect the specially target the same products or same producers; (4) are enacted or adopted by the same legislative body; (5) are in the same general nature[54].

2.1.4 Relevant date for assessing the inconsistency of the measures taken to comply

The key jurisdictional question is whether the panel is bound to limit itself to the measures as existing at the time of the request, or whether it may instead consider the modified provisions. In *US- Shrimp turtle* case the panel noted the DSU in silent as to the date on which the existence or consistency of the measure must be assessed. On one hand it can be the date of the finishing of the reasonable period time, determined under the term of Article 21.3 and on the other hand, based on article 3.3 of DSU essential to the effective function of the WTO and the maintenance of the proper balance of the rights and obligations between the Members, it might be appropriate for the Panel to take the subsequent to the end

[50] ibid para 4.27
[51] EC – Bed Linen(21.5) supra note 21, at para 6.15
[52] Australia-Subsidies Provided to Procedures and Exporters of Automotive Leather, Recourse to Article 21.5 of the DSU by United States, WT/DS126/8 4 October 1999,para 6.4
[53]Kearns & Charnovitz , supra note 10, at 347
[54] ibid at 347

of the reasonable time[55]. The Panel than decided to take in consideration all the relevant facts acquiring under the date that the matter was referring to it, with the argument that can secure prompt compliance within the requirements of the DSU[56].

The practice of the panel has been generally not to examine the new measure. No ruling for the reapeal measure or measure once settled was made. However, the mere fact that a measure might be introduced is not in itself sufficient ground for the panel to review it. Member State is presumed to perform in good faith their treaty obligations[57]. In *EC-Bed linen* case the panel argues first that if 'there is not any dispute for the time when the measure is taken, the panel does not see it necessary as a matter of judicial economy to examine if the measure is been taken within this period or not'[58]. However the panel emphasis the ruling of the panel in the *US-Shrimp Turtle* case, that the appropriate date for assessing the compliance of a Member with the recommendation of the DSB is the date of establishment of the panel[59].

III. Sequencing problem

3.1 Sequencing problem in the EC-Bananas case

One of the issues that has been discussed but not yet solved is the conflict between Articles 21.5 and 22 of the DSU. It was the *EC-Bananas* case when the conflict became visible and caused 'the conflict' to become a priority for resolution in DSU review[60]. The problem raised between to articles is both procedural and substantial[61]. The procedural problem is relating to the part of the text of Article 21.5, which leaves open the time when the member can invoke an Article 21.5 proceeding. The substantial part of it referrers to the fact that, who is going to determine whether a defending party has failed to comply[62].

The Bananas III panel's report was circulated on 22 May 1997 and it was the third time that the result was against EC. The Appellate body, with some modification upheld the

[55] US-Shrimp (21.5)) supra note 26, para 5.13
[56] ibid para 5.13
[57] Waincymer, supra note 14 at 1225
[58] EC-Bed linen (21.5), supra note 21, at para 6.28
[59] US-Shrimp (21.5), supra note 26
[60] Gleason &Walther, supra note 3, at 726
[61] Sylvia. Rhodes "*The Article 21.5/22 Problem: Clarification through bilateral agreements*"? JIEL 2000 at 555
[62] Walles & Mc Givern, supra note 42, at 63

conclusion of the panel and the report was circulated on 9 November 1997[63]. Following the procedures under the DSU, EC was asked to bring the measure into conformity by the 1 of January, the reasonable time determined by the arbitrator according the words of Article 21.3 of the DSU. The amendment that took place afterward did not satisfy any of the parties in the dispute and they all believed that the "new regime" of the bananas was inconsistent with WTO rules[64].

This was followed by lots of attempts between parties to solve the dispute through consultation and several attempts to reach an agreement to convene a panel under Article 21.5 to determine the WTO consistency of the new EC regime within the reasonable time.[65] On December 1998 the DSB circulated the request of the EC for the establishment of the Article 21.5 panel. Ecuador submitted a separate request for an Article 21.5-panel proceeding. In meantime the United States was publishing a series of notices in the federal register indicating its intent to seek one hundred ad valorem duties on certain product imported form the EC[66].

According to the EC point of view, as long as the Article 21.5 procedures are not complete, the complainant party must refrain from requesting retaliation even after the expiration of the implementation period. Moreover the EC argued that retaliation could not be authorised on the basis of a unilateral determination from the parties, unless the DSB adopts a panel or Appellate Body reports finding the implementing measures to be WTO inconsistent[67].

On the other hand United State based its legal argument following Article 22.2 and 22.6 of DSU emphasising the right of the prevailing party to seek retaliation within 20 days of the expiration of the reasonable time, and if this period was missed, than the negative consensus rule would lapse[68]. Two weeks after the expiration of the reasonable time, the United States filed a communication before the DSB requesting authorisation to suspend tariff concession and related obligations to the EC, covering trade amount of US $ 520 million[69].

It is true that the language of Article 21.5 makes no reference to Article 22 of DSU. On one hand it gives the Panel 90 days to deliver its report, and on the other hand Article 22.2

[63] EC-Bananas WT/DS27/AB/R
[64] For more details about the dispute see Salas & H Jackson ,supra note 20, 145-166
[65] Walles & McGivern supra note 42, at 72
[66] Michelle M Mulvena "*Has the WTO gone Bananas? How the bananas dispute has tested the WTO dispute settlement mechanism"* New England International and Comparative Law, Vol.7 2001 at186
[67] Norio Komuro, "*The EC Bananas regime and Judicial control"*, J.WT 2000 at 31-32, citing Request for authorization interpretation pursuant to article IX.2 of the Marrakech Agreement establishing the World Trade Organization, Communication from European Communities, WT/GC/W/133, 25 January 1999.
[68] Walles &Mc Givern, supra note 42, at 72
[69] Salas &H Jackson , supra note 20 at 157-158

provides the right of the party to ask DSB for the authorisation of retaliation after 20 days of expires of reasonable time[70]. How the DSU drafters intended the timetable to be reconciled within the timetable of potentially protracted compliance review pursuant to Article 21.5, is nowhere clarified in the text. The Article 21.5 panel refused to settle this problem because it said that is a DSU revision matter and not a panel proceeding matter[71].

The dispute was solved in Article 21.5 panel procedures. The same panel was serving as arbitrators in order to determine the level of retaliation. The panel and arbitrators concluded their work in the same date[72], respectively panel found that the measure was WTO inconsistent and the arbitrators confirmed the US right to retaliate[73], and evaluated the level of retaliation[74].

The solution under which the dispute was solved seemes to be not a 'solution' where the non-compliance cases occurred afterwards. Although the panel refused to rule on the matter by passing the problem to the DSU review meetings, it still working like this for a quite a period of time. The proposals for clarifyng the problem submitted already by the countries in the ministerial conferences were never adopted[75]

3.2 Sequencing problem after the Bananas Case

As I mentioned above Article 21.5 was invoked in more than 12 cases and the conflict between this article and Article 22 of the DSU arose in other cases like Australia –Lather[76], Brazil-Aircraft and Canada- Aircraft. In all these cases the parties to the dispute reached an 'agreement' on the application of Articles 21.5 and 22, expressed in the document seeking recourse[77]. The DSB endorsed these agreements pursuant to these requests under Article 21.5 proceeding[78] Similarly to that in *US- Shrimp* case, the United State and Malaysia reached

[70] Article 22.6 of DSU
[71] EC-Bananas Case (21.5 by Ecuador), supra note 19
[72] On the 6 April 1999 the panel announced to the parties its final work concerning: article 21.5 requested file by EC, Article 21.5 requested file by Ecuador and arbitration award requested by EC , pursuant to article 22.6 of DSU
[73] The Arbitrators determined that they were allowed to study the inconsistency of the banana regime (which was basically an article 21.5 matter) under an article 22.6 procedure, and so they found no reason to wait until an article 21.5 panel determination was reached. See Salas & H Jackson, supra note 20 at 160.
[74] WT/DS27/46 Request by EC for the Arbitration under DSU article 22.6
[75] Japan submitted its proposal in November 1999 in the Ministerial Conference held in Seattle, but the proposal was not discussed due to the collapse of the Seattle conference. See Komuro , supra note 67, at 37
[76] Australia-Leather(21.5), supra note 52
[77] Rhodes supra note 61 at 556
[78] ibid, Rhodes 556

such an agreement, although neither party has sought recource to Articles 215 or 22[79]. In *Australia- Salmon* case, the parties agreed to initiate current procedures under Articles 21.5 and 22.6. Since that the panellist and the arbitrators ruled that their review will not produce a ruling seven months after the expiration of the reasonable time[80]. In three other instances[81] the parties have voluntarily agreed to undertake an Article 21.5 review prior to initiate procedures to suspend concessions, thereby entirely waiving the Article 22 timetable for negative consensus approval[82].

EC –Beef hormone case was the only non-compliance case that involved an admission on the part of the losing party that it had failed to come into compliance. That admission enables the United States to proceed directly under Article 22 following the expiration of the reasonable period of time[83].

However these are examples that show the attempts of the parties in the disputes to give solution for the sequencing problem. As a conclusion we can say that almost in all cases parties agree on having an Article 21.5 proceeding before asking for the authorization of retaliation. Nevertheless such bilateral agreements do not fulfil DSU requirements, which are based on multilateral agreement recognised and accepted by all Member States.

3.3 Review Proposals regarding Article 21.5

The sequencing problem rose in the Bananas III case and afterwards and the need for other reforms in DSU, has been always in the attention of the Members of WTO, but nothing has changed so far. In the Ministerial conference in Seattle nothing was reached because of the collapse of the Conference, although Member States have submitted their proposals for DSU reforms to the Ministerial Conference[84]. Recently, DSU reforms were discussed in the

[79] United States– Import Prohibition of Certain Shrimp and Shrimp Products , Understanding between Malaysia and United States Regarding the Possible Proceeding under Article 21.5 of the DSU , WT/DS58/16/, 12 January 2000
[80] Australia-Salmon (21.5) supra note 47
[81] Australia-Subsidies Provided to Procedures and Exporters of Automotive Leather, Recourse by United States to Article 21.5 of the DSU, WT/DS126/8 (Oct 4 1999), Brazil –Aircraft (21.5) supra note 24, Canada-Aircraft (21.5), supra note 40.
[82] Gleason & Walther supra note 3 , at 722
[83] ibid at 723
[84] Canada tabled a proposal in May 1999 to be discussed in Seattle Ministerial Conference, by introducing an Article 21bis for panel compliance. See Walles & Givern , supra note 42 at 82

Doha Round. Article 30 of Doha Ministerial Declaration[85] mandates negotiations on improvements and clarifications of the DSU, which are to be concluded by May 2003. In the previous meeting Members have stated the clarification of relationship of Article 21.5 and 22 as a key element for negotiation under the Doha mandate[86]. One of the problem that is going to be solved is the timetable under which Article 21.5 and Article 22 are going to be called. The draft proposals already submitted by many countries mandate that Article 21.5 should be called before the Article 22, (authorisation for retaliation and the suspension). Moreover the party has the right to call for article 21.5 panel procedures at 10-20 days before the expiration of the reasonable period of time, and 10 days after the panel should be established. A first attempt is done to delimit the Article 21.5 procedure, to entail less than "normal" dispute settlement proceeding[87].

However no one can deny the role of panel and Appellate Body in this respect. Although the timetable can be determined the problems already discussed in the previous cases are going to be called when an Article 21.5 proceeding is going to occur. The jurisprudence already created will help the future work of the panel during the examination of compliance measure and will serve in the improvement of the system.

Conclusion

A lesson that can be driven form non-compliance cases is that the existing DSU text contains obvious ambiguities and the drafting oversights need to be corrected[88]. Moreover if one refers to cases like Bananas that took more than three years, might be right on saying the system is not efficient and it takes too long. The need for compliance review seems to be more than necessary and the need to have precise system of reviewing seem to be important for having short proceedings of solving dispute. The problems are eminent when you see Members like European Community that hardly decided to give up form their adverse measures. In the last case *EC-Bed Linen*, the Commission argued that:

[85] Doha Declaration at WTO website
[86] DSU Members discuss 'sequencing " and selection panellist , Bridges Weekly main page volume 6 no 19 22 May 2002
[87]Gleason &Walther, supra note 10 reciting Decision regarding the Understanding Rule and Procedures Governing the Settlement of the Dispute , WT/MIN(99)Draft[2 December 1999], at 721
[88] Gleason & Walther, ibid at 7111

Although WTO rules do not obliged the Community to implement a report adopted, in certain circumstances the Community might find it appropriate to amend anti- dumping or anti-subsidy regulations to bring them in the line with such reports[89]".

The problem seems overcome when one analyses that, conformity with the agreement can be reached through implementation of measures under the DSB ruling. Moreover the domestic policy would influence Member like United States to pass "carousel bill" in their Senate. The role of lobbies and interested groups remains still strong and sometimes leads the Members to take unilateral actions in the multilateral level[90]

Believing that the next meeting for the DSB will solve some how the problems raising from the implementation of the two articles, I think that still the role of the panel and Appellate Body is important in developing a body of law, necessary for trade disputes.

Preventing the conflicts can also be a very sensitive issue under the agreement. However good faith implementation and sanction to encourage prompt compliance are as much important as the solving the conflict between articles. But there has been no attempt so far to change it. With the enlargement of the organisation (WTO) will come also the need for putting more sanctions to the Members in order to maintain a balanced system of multilateral trade, and moreover to create possibilities of having a short dispute settlement proceeding, which is important for trade matters.

[89] Zonnekeyn supra note 12 at 995 reciting *COM(2001)379 final of 5 July 2001 and OJ C 270 E/242 of 2*
[90] Mulvena supra note 66, at 190