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# Compliance Proceedings under Article 21.5 of DSU and Doha Proposed Reform

TSAI-YU LIN\*

## I. Introduction

While the Dispute Settlement Body (DSB) within the World Trade Organization (WTO) dispute settlement system lacks coercive powers to enforce recommendations or rulings, it is generally accepted that the credibility of a DSB judgment itself, rather than any direct remedy, promotes compliance.<sup>1</sup> Such observance has, to a large extent, reflected the prevailing view of WTO Members that the Dispute Settlement Understanding (DSU) has generally functioned well to date. Existing practices demonstrate that most of the recommendations and rulings of the DSB have been implemented by the Member concerned, without the occurrence of compliance disputes.<sup>2</sup> Nevertheless, there have been ever-increasing numbers of disagreements with respect to implementation of recommendations and rulings since the first article 21.5 panel convened in 1998.<sup>3</sup> Some troublesome disputes involving bananas and Foreign Sales Corporations (FSC), for instance, which are relevant for the relationship between the United States and the European Community (EC), have in particular received enormous publicity and caused unnecessary delay. Implementation problems are likely to become some of the important challenges to the efficacy of today's entire dispute settlement process.

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1. John H. Jackson, *Designing and Implementing Effective Dispute Settlement Procedures: WTO Dispute Settlement, Appraisal and Prospects*, in *THE WTO AS AN INTERNATIONAL ORGANIZATION* 170 (Anne O. Kruege ed. 1998).

2. According to statistical information on recourse to WTO dispute settlement procedures provided by the Secretariat, between January 1, 1995 and September 30, 2004, there were eighty-two panel reports and 125 Appellate Body reports adopted by DSB individually. JOB (03)/225/Rev.122 (Oct. 2004).

3. Panel Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas, Recourse by Ecuador, Guatemala, Honduras, Mexico, United States to Article 21.5 by the European Communities*, WT/DS27/RW/EEC (Apr. 12, 1999) [hereinafter *European Communities Bananas Panel Report*].

The compliance proceeding under article 21.5 of the DSU was introduced after the creation of the WTO.<sup>4</sup> Its mandate is to assess whether compliance measures taken by the implementing Member bring about conformity with WTO law. Because the procedures set forth in article 21.5 are lacking in several respects, proposed amendments to article 21.5 have been advanced by certain Members in their attempts to reach successful conclusion of ongoing DSU negotiations under the Doha Mandate.<sup>5</sup> Of particular importance, the EC has proposed the inclusion of an article 21*bis* on Determination of Compliance to establish more comprehensive disciplines.

This paper will address the legal issues of DSU article 21.5 compliance proceedings in terms of current case law, as well as the proposed reform in the context of the Doha Round. Section II will discuss issues of implementation of the DSB recommendations and rulings. Section III provides an overall review of article 21.5 proceedings. Since article 21.5 does not adequately set forth the procedures to be conducted, section IV focuses on certain procedural issues arising from the jurisprudence created by the WTO. Section V will analyze the foremost problem of sequencing between the relationship of article 21.5 and article 22. The concluding remarks of this paper will be provided in section VI.

## II. Implementation of the DSB Recommendations and Rulings

### A. IMPLEMENTATION OBLIGATIONS AND THE DSB RECOMMENDATIONS AND RULINGS

The primary obligation for respondent Members to comply with recommendations and rulings of the DSB has been established under the DSU. There are certain pertinent provisions in this regard. DSU article 3.7 states that

[i]n the absence of a mutually agreed solution, the first objective of the dispute resolution mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements. The provision of compensation should be resorted only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement.<sup>6</sup>

4. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994), available at [http://www.wto.org/english/docs\\_e/legal\\_e/28-dsu.pdf](http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf) [hereinafter DSU].

5. Paragraph 30 of November 2001 Doha Ministerial Declaration provides that

[w]e agree to negotiations on improvements and clarifications of the Dispute Settlement Understanding. The negotiations should be based on the work done thus far as well as any additional proposals by Members, and aim to agree on improvements and clarifications not later than May 2003, at which time we will take steps to ensure that the results enter into force as soon as possible thereafter.

World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002). The DSU review started in 1997. Following the deadline that had been set for the end of May 2003 under the Doha Mandate lapsed, Members subsequently agreed to extend the deadline for the review until the end of May 2004. However, the failure of the Fifth Ministerial Conference held in Cancun, in mid-September 2003, caused a further setback to overall negotiations, including DSU review negotiations, causing the May 2004 deadline to be missed again. As part of the subsequent decision adopted by the General Council on August 1, 2004 on the Doha Work Programme—the so-called July Package—the mandate to continue the negotiations has been renewed, but without a new target date being set.

6. DSU art. 3.7.

Article 21.1 provides that prompt compliance with the recommendations or rulings of the DSB is essential in order to ensure the effective resolution of disputes.<sup>7</sup> In addition, article 22.1 indicates that compensation or suspension is not to be preferred to full implementation of the recommendation. By inference, article 26.1(b), which states that there is no obligation to withdraw the WTO-consistent measure in the event of a non-violation complaint, may suggest that there is an obligation to withdraw the inconsistency in the case of a violation complaint.<sup>8</sup> For these reasons, one may say that the DSU has clearly indicated its intention behind those provisions—that recommendations and rulings of the DSB, if concluding that there is a WTO-violation, are binding upon the parties to the dispute and shall be fully implemented.

As to the means of implementation of recommendations and rulings, the respondent Member would have the discretion to choose its preferred means among possible options. Although article 19 of the DSU provides that the panel or the Appellate Body may suggest ways in which the Members concerned could implement the recommendations, the panel or the Appellate Body has usually been reluctant to suggest ways and methods of implementation.<sup>9</sup> As a result, the real connotation of the DSB recommendations and rulings will often be less clear and may cause a different version of interpretations for Members. In general, the more room the WTO gives to Members in determining the scope of obligation for implementation, the easier for the respondent Member to implement the rulings, and the less likely for the complaining Member to accept the result of the implementation. It is especially true when the proposed implementation measure involves a burdensome legislation process domestically, affecting activities of various sectors and invested interests. These factors may give the respondent Member more difficulties in fulfilling the DSB recommendations or rulings within a reasonable period of time. In controversial disputes related to food, safety, or public health, the attitude of the general public towards the rulings of the DSB might also become the crucial key in determining implementation measures. At the extreme, the respondent Members may prefer to face retaliatory trade measures adopted by the complaining Member or leave the issues unsolved and endlessly protracted.

#### B. SURVEILLANCE BY THE DSB

Article 21.3 of the DSU states that the Member concerned “shall inform the DSB of its intentions in respect of implementation of recommendations and rulings of the DSB” within thirty days of adoption of the final report.<sup>10</sup> To enhance the efficiency of the dispute settlement mechanism, the DSB shall continue to keep under surveillance the implementation of adopted recommendations or rulings. According to article 21.6 of the DSU, the issue of implementing the recommendations or rulings may be raised by any Member at

7. *Id.* art. 21.1.

8. WTO, A HANDBOOK ON THE WTO DISPUTE SETTLEMENT SYSTEM 89 (2004).

9. DSU art. 19. In the *United States-DRAMS* case, for example, the panel refused to suggest how the United States should comply with the antidumping agreement, stating that “in light of the range of possible ways in which we believe the United States could appropriately implement our recommendation, we decline to make any suggestion in the present case.” Panel Report, *United States Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea*, ¶ 7.4, WT/DS99/R (Jan. 29, 1999); see also TERENCE P. STEWART & AMY S. DWYER, HANDBOOK ON WTO TRADE REMEDY DISPUTES: THE FIRST SIX YEARS (1995-2000) 394-95 (2001).

10. DSU art. 21.3.

the DSB (including the winning Member) at any time following their adoption.<sup>11</sup> Unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time pursuant to article 21.3.<sup>12</sup> It is to remain on the DSB's agenda until the issue is resolved. Additionally, at least ten days prior to each DSB meeting, the Member concerned is required to provide the DSB with a written status report of its progress in the implementation.<sup>13</sup>

These status reports are expected to ensure transparency and give an incentive for the respondent to advance implementation.<sup>14</sup> Other members, particularly the complainants, theoretically may take the opportunity to observe the progress of implementation or to decide whether the implementing Member has fully complied with the recommendations or rulings. Nevertheless, the functioning of status reports is more limited than it otherwise should be in practice. In the *Bananas* case, for instance, the EC refused from the beginning to be specific about its implementation plans when called upon to state its implementation intentions. Despite the fact that the United States, the prevailing Member, kept insisting that the new measures proposed by the EC could not be regarded as implementation, the EC still maintained its implementation. The status reports of the EC to the DSB simply noted that significant progress was being made towards implementation.<sup>15</sup> Likewise, in the *Beef Hormones* case, the EC argued that it could hold a law, which was seen to be inconsistent with a requirement, for an adequate risk assessment by retrospectively engaging in the necessary risk assessment and refused to remove its ban.<sup>16</sup> The EC's first status report to the DSB noted only that the Community had decided to launch a number of scientific studies "with a view to assessing the implications thereof for the Community's import prohibition."<sup>17</sup>

Although requiring the respondent Member to provide the status report seems to be the only way that the DSB can actually carry out its job, which is to survey the implementation of adopted recommendations or rulings, it apparently has little efficiency. Under current DSB rules, the respondent Member is not required to identify the measures it will seek to

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11. *Id.* art. 21.6.

12. *Id.* art. 21.3. If it is impractical to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so. A reasonable period of time can be decided three ways: (1) Members concerned propose a period that is approved by the DSB; (2) If the DSB does not approve the period proposed by the Members concerned, both Members should negotiate a certain period of time within forty-five days after the DSB passes the recommendations and rulings of the panel or the Appellate Body; and (3) If both Members fail to agree on a period, within ninety days after the DSB has adopted the recommendations and rulings of the panel or the Appellate Body, the case will be rendered to arbitration and the arbitrator with binding power will decide a reasonable period of time. The arbitrator normally has ninety days from the date of the ruling to issue its ruling. WTO rules state that a guideline for the arbitrator should be that the reasonable period should not exceed fifteen months from the date of the ruling, although this can vary depending on the particular circumstances. *Id.*

13. DSU art. 21.6.

14. HANDBOOK ON WTO DISPUTE SETTLEMENT, *supra* note 8, at 79.

15. See Carolyn B. Gleason & Pamela D. Walther, *The WTO Dispute Settlement Implementation Procedures: A System in Need of Reform*, 31 LAW & POL'Y INT'L BUS. 721 (2000) (citing *EC—Bananas—Status Report by the European Communities*, WT/DS27/17 (July 13, 1998)).

16. Panel Report, *EC Measures Concerning Meat and Meat Products (Hormones): Complaint by the United States*, WT/DS26/R/USA (Aug. 18, 1997).

17. *European Communities—Measures Concerning Meat and Meat Products (Hormones)—Status Report by the European Communities*, WT/DS26/17, WT/DS48/15 (Jan. 14, 1999).

remove or implement, nor is it required to specify any sort of implementation schedule. Imposing more stringent requirements for the respondent Member in the fulfillment of implementation of DSB rulings may contribute an improvement in the surveillance function.

### III. An Overview of DSU 21.5 Proceeding

#### A. FUNCTIONING AND FEATURES OF ARTICLE 21.5 PROCEEDINGS

As discussed in previous sections, disagreements as to compliance can easily arise depending upon the complexity of individual cases. When the respondent Member believes that it has fully or partially followed the recommendations and rulings of the DSB, but the original complaining party disagrees, an expedited procedure should be available. This procedure is provided for in article 21.5.

Article 21.5 of the DSU states that

[w]here 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. The panel shall circulate its report within 90 days after the date of referral to 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 panel within which it will submit its report.<sup>18</sup>

Based on the provision of article 21.5, the compliance panel must decide (1) whether there is disagreement with a covered agreement of measures taken to comply with the recommendations and rulings; (2) the existence of the implementation of measures; and (3) whether the measures is consistent with the WTO rules.<sup>19</sup> Wherever possible, the DSB will bring the matter back to the original panel to review the quality of compliance. The panel should decide the matter in an expedited fashion, normally within ninety days. If the panel finds 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.

In summary, besides having different tasks, an article 21.5 panel procedure has other two basic differences from the normal proceedings.<sup>20</sup> First, the original panel has a six-month period to issue its final report under article 12.8, whereas an article 21.5 panel has to circulate its report within ninety days.<sup>21</sup> Second, under the normal procedure, the respondent Member may resort to article 21.3 to gain a reasonable period of time to implement original recommendations and rulings. In contrast, article 21.5 does not provide such grace periods.<sup>22</sup> The concerned Member does not seem to be entitled to any further period of time for implementation following the DSB's adoption of the compliance panel report. In the aftermath of the conclusion that a WTO-inconsistent measure exists, the complainants may directly request for the authorization to suspend concessions toward the respondent under article 22.

18. DSU art. 21.5.

19. Jason E. Kearns & Steve Charnovitz, *Adjudicating Compliance in the WTO: A Review of DSU Article 21.5*, 5 J. INT'L ECON. L. 331, 332-34 (2002).

20. *Id.*

21. *Id.* at 333.

22. *Id.*

The features described above reveal that time is of the essence for the entire 21.5 procedure. This is in line with the fundamental requirement of prompt compliance with DSB recommendations and rulings expressed in both article 3.3 and article 21.1 of the DSU.<sup>23</sup> It may also help the DSB fulfill its article 21.6 duties and re-establish the peaceful and predictable relationship between Members sooner.<sup>24</sup> By utilizing article 21.5 procedures, a complainant, after having prevailed in an original dispute, should not have to go through the entire DSU process once again to address the new measures for implementation. On the other hand, if recourse to lodge new claims is through normal proceedings, the original complainant may again be involved in the new process for the same matter and the same parties to the dispute under a longer time frame. The respondent Member may just use the process strategically to continue practices that the original panel found to be violations, such as gaining another compliance period for new recommendations and rulings. In such an instance, unnecessary postponement of the settlement of disputes may undermine the effective functioning of the WTO.

#### B. SOME FACTS REGARDING ARTICLE 21.5 DISPUTES

As of July 2005, there have been twenty-five disputes rendered to article 21.5 proceedings since the first case was requested in 1998. Disputed issues usually involve areas such as anti-dumping, subsidies and countervailing measures (SCM), agriculture, and sanitary and phytosanitary measures (SPS). The average time between matter referral to the original panel and circulation of the final report is estimated around 181.36 days,<sup>25</sup> which is far longer than the ninety days required in article 21.5. The United States, Canada,<sup>26</sup> and the EC are regular users of article 21.5 as complainants.<sup>27</sup>

As noted in the introduction of this paper, the implementation disputes between the United States and the EC have particularly drawn the most attention in the media, including *United States—Countervailing Measures Concerning Certain Products from the European Communities* (DS212); *United States—Tax Treatment for “Foreign Sales Corporations”* (DS108); and *European Communities—Regime for the Importation, Sale and Distribution of Bananas* (DS16, DS27, DS158).<sup>28</sup> In the *FSC* and *Bananas* cases, in particular, a second article 21.5

23. DSU arts. 3.3, 21.1. Article 3.3 states that

[t]he prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.

24. Kearns & Charnovitz, *supra* note 19, at 333-37.

25. World Trade Law Home Page, <http://www.worldtradelaw.net> (last visited Oct. 30, 2005) (subscription required).

26. The disputes for which Canada sought recourse, for instance, include *United States—Final Dumping Determination on Softwood Lumber from Canada* (DS264); *United States—Investigation of the International Trade Commission in Softwood Lumber from Canada* (DS277); *United States—Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada* (DS257); *Brazil—Export Financing Programme for Aircraft* (DS46); and *Australia—Measures Affecting Importation of Salmon* (DS18). See WTO, Dispute Settlement: Disputes by Country, [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_by\\_country\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm) (last visited Oct. 30, 2005) [hereinafter WTO Dispute Settlement].

27. Argentina, India, New Zealand, Malaysia, Korea, Brazil, Ecuador, Guatemala, Honduras, and Mexico were also complainants in other cases. *Id.*

28. *Id.*

panel was appointed.<sup>29</sup> In the *FSC* case, for instance, the EC argued that the American Jobs Creation Act of 2004 enacted by the United States for implementation—which repealed the tax exclusion of the FSC Repeal and Extraterritorial Income Exclusion Act—continued to grant and maintain export subsidies and allow companies to benefit from the FSC scheme beyond the compliance deadline.<sup>30</sup> The EC thus views the Act as a failure of the United States to fully implement the DSB recommendations and rulings and has sought further recourse in a second article 21.5 procedure.<sup>31</sup> In addition, in the dispute between Brazil and Canada over export subsidies for the regional aircraft industry, the parties also requested a second article 21.5 procedure.<sup>32</sup> Likewise, in the *Canada-Dairy* cases, New Zealand and the United States requested an article 21.5 panel for the second time, as they thought that the Appellate Body had failed to settle definitively the dispute between them.<sup>33</sup>

Another noteworthy point is that, due to the anomaly in DSU rules, not all disputes involving implementation have to undergo a compliance review of article 21.5. Instead, many cases, such as *Beef Hormones* (DS26),<sup>34</sup> *Anti-dumping Act of 1916* (DS162),<sup>35</sup> and *Section 110(5) of the US Copyright Act*,<sup>36</sup> in which the United States and the EC are involved, have requested authorization to suspend concessions without first seeking recourse to article 21.5.

#### IV. Issues Relating to DSU Article 21.5 Proceedings

Since article 21.5 is relatively brief, there are a number of uncertainties that inevitably flow from it. For instance, what does the phrase “through recourse to these dispute settlement procedures” in article 21.5 refer to?<sup>37</sup> To what extent do other procedural aspects of the DSU apply to this process? Who may seek the compliance procedure? What are the time-limits for a request for implementation review? What range of claims can be considered in compliance procedure? Before trade retaliation has been attempted to be authorized, should the compliance procedure be taken in advance? In examining certain procedural issues arising from the jurisprudence created by the WTO, the following sections will analyze standing, scope of review, consultation, appeal, and the relationship between article 21.5 and article 22.

29. See Panel Report, *United States—Tax Treatment for “Foreign Sales Corporations”—Second Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/RW2 (Sept. 30, 2005) [hereinafter *United States Tax Treatment Panel Report*]; *European Communities Bananas Panel Report*, *supra* note 3.

30. *United States Tax Treatment Panel Report*, *supra* note 29, at 1-3.

31. *Id.* at 2-3.

32. Panel Report, *Brazil—Export Financing Programme for Aircraft—Second Recourse by Canada to Article 21.5 of the DSU*, WT/DS46/RW2 (July 26, 2001).

33. Panel Report, *Canada—Measures Affecting the Importation of Milk and the Exportation of Dairy Products—Second Recourse to Article 21.5 of the DSU by New Zealand and United States*, WT/DS103/AB/RW2, WT/DS113/AB/RW2 (Dec. 20, 2002).

34. See WTO Dispute Settlement, *supra* note 26, Dispute DS26—*European Communities—Measures Concerning Meat and Meat Products (Hormones)*.

35. See WTO Dispute Settlement, *supra* note 26, Dispute DS162—*United States—Anti-Dumping Act of 1916*.

36. See WTO Dispute Settlement, *supra* note 26, Dispute DS160—*US—Section 110(5) of the US Copyright Act*.

37. DSU art. 21.5.



## A. STANDING

Article 21.5 does not indicate who may request review. Most cases thus far have been commenced by the original prevailing complainant, except one. In the *Bananas* case, the EC, being the respondent member, sought review through its own initiative.<sup>38</sup> In considering the issue of parties to an article 21.5 proceeding, the panel noted that whether the original respondent in a panel proceeding is, or should be, permitted under the DSU to initiate an article 21.5 proceeding is not clear; however, even assuming such an action is permitted, the panel did not believe that a finding of WTO consistency could be made based on the submission made by the EC.<sup>39</sup> In this sense, the panel indicated its position that the language of article 21.5 itself does not preclude respondents from using the compliance procedure to ensure their implementing measure of WTO consistency. Since article 21.5 merely states that where there is any disagreement, "such dispute shall be decided through recourse to the dispute settlement procedures . . .," and does not refer to any requirement to have a nominator, the respondent should be allowed to initiate an article 21.5 process.<sup>40</sup> In contrast, the compliance report of the *Bananas* case initiated by the EC was never adopted by the DSB.<sup>41</sup> Thus, the issue of whether the defaulting Member can commence an article 21.5 proceeding remains questionable.

In its proposal for reform of the DSU, the EC suggested limiting the complaining party as the qualified party to request an article 21.5 panel, excluding the possibility of the respondent Member's bringing the case against itself.<sup>42</sup> Japan holds the same position.<sup>43</sup> In this author's view, unless it does nothing at all, the implementing Member should have a right to request an article 21.5 proceeding to rule whether it now complies with the WTO. This would not only facilitate the resolution of disputes, but also contribute to the establishment of judicial predictability and security sooner, which is the essence of prompt settlement of disputes under the DSU. This is especially true if the sequencing of article 21.5 and article 22.2 proceedings can be expressly provided for in the revised DSU by requiring

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38. See European Communities Panel Report, *supra* note 3.

39. The panel stated that

it is not clear from the provisions of Article 21.5 whether the original respondent in a panel proceeding is, or should be, permitted under the DSU to initiate an Article 21.5 proceeding for the purpose of establishing the WTO consistency of measures taken to implement DSB rulings and recommendations. Assuming such an action is permitted, we note that in this proceeding, the European Communities presents in its written submission only one summary paragraph (paragraph 2.15) listing aspects of its prior banana import regime that it has changed in order to comply with the DSB's recommendations and rulings. We do not believe that a finding of WTO consistency could be made on the basis of the submission made by the European Communities in this case, as there is an insufficient discussion of how the previously found WTO inconsistencies have been eliminated in a WTO-consistent manner. *Id.*, ¶ 4.14.

40. DSU art. 21.5.

41. WTO Dispute Settlement, *supra* note 26, Dispute DS27—*European Communities—Regime for the Importation, Sale and Distribution of Bananas*.

42. DSB Special Session—Communication from the EC, *Contribution of the European Communities and its Member States to the Improvement and Clarification of the WTO Dispute Settlement Understanding*, TN/DS/W/1 (Mar. 13, 2002) [hereinafter EC Proposal TN/DS/W/1]; TN/DS/W/38 (Jan. 23, 2003) [hereinafter EC Proposal TN/DS/W/38].

43. DSB Special Session—Proposal of Japan, *Amendment of the Understanding on Rules and Procedures Concerning the Settlement of Disputes*, TN/DS/W/32 (Jan. 22, 2003) [hereinafter Japan Proposal TN/DS/W/32].

article 21.5 procedures to be completed before article 22 procedures are initiated. In the event that the original complainants are reluctant to request an article 21.5 procedure, the implementing Member may have more incentives to seek recourse in an article 21.5 proceeding to reconfirm the WTO-legality of its modified implementing measure, with a view to gaining legal certainty faster. On the other hand, as was the case in *Bananas*, where the original complainants refused to be involved and the implementing Member had been deemed non-compliant, there might not be any Member that would be willing to seek to place an item on the DSB's agenda for adoption of the report, rendering the report unadopted.<sup>44</sup> Such technical difficulties remain to be further resolved.

The issue of whether the respondent Member's right to initiate an article 21.5 procedure could apply to the situation of article 22.8 is also being considered under the Doha Mandate. Article 22.8 states that "[t]he suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed."<sup>45</sup> The proposal indicated in paragraph 9 of article 22 in the revised DSU text put forward by the EC suggests that

[a]fter the DSB has authorized the suspension of concessions or other obligations pursuant to paragraph 6 or 7 of this article, the Member concerned may request a termination of such authorization on the grounds that it has eliminated the inconsistency or the nullification or impairment of benefits under the covered agreements identified in the recommendations or rulings of the DSB.<sup>46</sup>

In the event that the complaining party objects to withdrawal of such authorization, the procedures provided for in article 21.5 (proposed article 21*bis*) shall apply. By reference to Member concerned, the EC proposes that the respondent Member can request the termination of retaliatory measures when it views that it has complied with the DSB rulings. This proposal is quite commendable. The availability of such expedited procedures would provide an incentive for implementing Members to terminate trade retaliation earlier, especially when the original complainants insist that the implementing measures are insufficient and are not willing to initiate compliance procedures.<sup>47</sup>

Nevertheless, before the proposed provision—which would apply the 21.5 procedure to determine the lifting of retaliation—has been formally inserted into future DSU, whether it can be equally applicable under the context of the DSU remains unclear. In the ongoing *Hormone* dispute relating to the termination of retaliation, despite its judgment that the EC's new Directive was inconsistent with the SPS Agreement, Canada refused to initiate an article 21.5 procedure to obtain a review of the new Directive's consistency with the recommendations and rulings of the DSB.<sup>48</sup> Canada maintained the suspension of its obligations in relation to imports from the EC and continued to impose import duties in excess of bound rates on imports from the EC.<sup>49</sup> Failing to reach agreement following

44. JEFF WALINCYMER, *WTO LITIGATION: PROCEDURAL ASPECTS OF FORMAL DISPUTE SETTLEMENT* (2002). Although, article 16.4 provides that the report shall be adopted unless the DSB decides by consensus not to do so, as a practical matter, some must seek to place an item on the DSB's agenda.

45. DSU art. 22.8.

46. EC Proposal TN/DS/W/1, *supra* note 42, at 18.

47. Kearns & Charnovitz, *supra* note 19, at 341-42.

48. Request for Consultation by the EC, *Canada—Continued Suspension of Obligations in EC-Hormones Dispute*, p. 2, WT/DS321/1, G/L/714 (Nov. 10, 2004).

49. *Id.*

consultation, the EC thus requested the establishment of a panel pursuant to articles 4.7 and 6 of the DSU and article XXIII of the General Agreement on Tariffs and Trade.<sup>50</sup> Rather than seeking recourse directly to article 21.5 procedures to terminate the retaliation, the EC, being an implementing member, chose to re-initiate the normal dispute settlement procedure in relation to the continued suspension of obligations toward its exports. A completely new dispute settlement procedure might trigger another potentially endless series of proceedings and unexpected delay, continuously adding more perplexity to this tremendous dispute that has been pending since the adoption of the original recommendations and rulings of the DSB in 1998.

The issue of whether other WTO Members, other than parties to the dispute that are directly or indirectly affected by implementing measures, can launch an article 21.5 procedure also requires clarification. The current language of article 21.5 only mentions "disagreement as to the existence or consistency with a covered agreement."<sup>51</sup> Literally, it seems not to limit this disagreement specifically to disagreement between parties to the dispute. Moreover, article 21.6 also states that any Member may raise the issue of implementation of the recommendations or rulings at the DSB "at any time following their adoption."<sup>52</sup> Because they are intrinsically multilateral in nature, the recommendations and rulings of the DSB are also the matters that may concern other Members.<sup>53</sup> Thus, one might say that article 21.5, under the current text, does not prevent other WTO Members from initiating a compliance procedure to challenge the WTO-conformity of implementing measures taken by respondent members, including third parties that have never participated in the previous dispute settlement process. Nevertheless, as indicated in the EC proposal, only the complaining party may initiate 21.5 proceedings, excluding the possibility of another Member commencing the proceeding. In the author's view, article 21.5, by its nature, is mainly related to disagreement on measures taken by the respondent Member to comply with rulings. Only the original parties to disputes can truly be aware of the details of such disputes. If any Member, other than parties to the dispute, can launch the implementation review under the article 21.5, it might make it difficult to go forward with the proceedings. As a new party to the dispute in the specific dispute of implementation, it seems questionable how the third party that has never participated in the previous dispute settlement procedure can proceed to the whole proceeding. Does the compliance report have a direct legal effect, if any at all, on the original complainant if the original complainant in the previous dispute settlements refuses to get involved in the new proceeding? The author considers the EC proposal raises valid points.

In considering the related issue about whether other Members can participate in an article 21.5 proceeding as a third party, including those that have never attended prior dispute settlement procedures, the WTO jurisprudence seems to have established its rulings in past practice. In the case of *Australia-Leather*, the EC and Mexico became the newly joined third

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50. *Id.* at 1.

51. DSU art. 21.5.

52. *Id.* art. 21.6.

53. Joost Pauwelyn, *Proposals for Reforms of article 21 of the DSU*, in *PREPARING THE DOHA DEVELOPMENT ROUND: IMPROVEMENTS AND CLARIFICATIONS OF THE WTO DISPUTE SETTLEMENT UNDERSTANDING* 75 (Ernst-Ulrich Petersmann ed., 2003); also in *THE WTO DISPUTE SETTLEMENT SYSTEM 1995-2003* 51-59 (Federico Ortino & Ernst-Ulrich Petersmann eds., 2004).

parties.<sup>54</sup> Similarly, Australia became the third party in the *Brazil-Aircraft* case.<sup>55</sup> Likewise, Australia, Canada, India, Jamaica, and Japan became third parties in the *FSC* case.<sup>56</sup>

The EC proposes that a third party may request to join the consultations and be given “an adequate opportunity to express its views” as to the dispute.<sup>57</sup> However, the proposal does not specify whether those Members that have never attended any prior dispute settlement procedure can be joined. It is noteworthy that, in the remaining parts of the EC proposal to article 21.5, there is no provision on third parties. The EC seems to limit the right of third parties to consultation, not extending third party rights to the panel or appellate review process. This may be unduly restrictive, especially given that third parties have an opportunity to attend various stages of normal dispute settlement procedure, including consultation, panel, and appellate review processes. Correspondingly, the author believes that the reasoning behind the exclusion of third parties in the latter two stages of 21.5 proceedings, which are of equal importance for Members, needs greater justifications.

#### B. DISAGREEMENT OR MEASURES TO BE EXAMINED

Article 21.5 exclusively refers to disagreements on measures taken to comply with the DSB recommendations and rulings; any other measures fall outside the scope of a compliance panel. Thus, it is quite crucial for the panel to determine the meaning of the phrase “measures taken to comply with the recommendations and rulings” in article 21.5.<sup>58</sup> According to the view expressed by the Appellate Body in the *Canada-Aircraft* case, the phrase “measures taken to comply” refers to “measures which have been, or which should be, adopted by a Member to bring about compliance with the recommendations and rulings of the DSB.”<sup>59</sup> In principle, a measure taken to comply with the recommendations and rulings will not be the same as the measure that was the subject of the original dispute. There would be two separate and distinct measures.<sup>60</sup> To put it differently, “measures taken to comply with DSB recommendations and rulings” should refer to those measures which are adopted or should be adopted by the respondent Member in order to implement the recommendations and rulings of the DSB; these are different from the prior measures that gave rise to the DSB recommendations and rulings in the first place.<sup>61</sup>

54. Panel Report, *Australia—Subsidies Provided to Producers and Exporters of Automotive Leather—Recourse to Article 21.5 of the DSU by the United States*, ¶ 1.7, WT/DS126/RW (Jan. 21, 2000) [hereinafter *Australia Subsidies Panel Report*].

55. Panel Report, *Brazil—Export Financing Programme for Aircraft—Recourse by Canada to Article 21.5 of the DSU*, ¶ 1.8, WT/DS46/RW (May 9, 2000).

56. Panel Report, *United States—Tax Treatments for “Foreign Sales Corporations—Recourse to Article 21.5 of the DSU by the European Communities*, ¶ 1.11, WT/DS108/RW (Aug. 20, 2001).

57. EC Proposal TN/DS/W/38, *supra* note 42, at 8-9. Japan, in its proposal, mentions that when consultations are entered into during the reasonable period of time, before 21.5 procedures are activated, each party to the dispute shall afford to any third party that so requests an adequate opportunity to express its views. Japan Proposal TN/DS/W/32, *supra* note 43. This suggestion was also inserted into proposals put forward by Costa Rica and Ecuador. DSB Special Session—Communication from Costa Rica, *Proposal by Costa Rica—Third Party Rights*, TN/DS/W/12/Rev.1; DSB Special Session—Proposal by Ecuador, *Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding*, TN/DS/W/33 (Jan. 23, 2003).

58. DSU art. 21.5.

59. Appellate Body Report, *Canada—Measures Affecting the Export of Civilian Aircraft—Recourse by Brazil to Article 21.5 of the DSU*, ¶ 36, WT/DS70/AB/RW (July 21, 2000).

60. *Id.*

61. *See id.*

In the *Australia-Leather* case, the original panel found that payments under a grant contract between the Government of Australia, Howe and Company Proprietary Ltd. (Howe), and Howe's parent company Australia Leather Holdings, Ltd. (ALH) were subsidies inconsistent with the SCM Agreement.<sup>62</sup> The panel recommended that Australia withdraw those subsidies without delay.<sup>63</sup> To implement the rulings of the DSB, Australia had asked Howe to repay the Australian Government \$A8.065 million and had terminated all subsisting obligations under the grant contract. However, at the same time, Australia also provided a new \$A13.65 million loan to Howe's parent company, ALH.<sup>64</sup> The United States indicated its view that the measures taken by Australia to comply with the recommendations and rulings of the DSB were not consistent with the SCM Agreement and the DSU.<sup>65</sup> Australia argued that the 1999 new loan was not part of the implementation of the DSB's ruling and recommendation and thus, not within the scope of the panel's terms of reference.<sup>66</sup> In the view of this article 21.5 panel, the United States' request for establishment clearly had identified both the repayment by Howe and the 1999 loan as the measures at issue.<sup>67</sup> The 1999 loan was "inextricably linked to the steps taken by Australia in response to the DSB's ruling in this dispute" and was therefore within the panel's terms of reference.<sup>68</sup> Accordingly, in this case, the compliance panel was based entirely on the coverage of the United States' panel request for establishment as far as implementing measures are concerned, which comports with the general rule that "it is the complaining Member in WTO dispute settlement which establishes the scope of the measures before a panel."<sup>69</sup>

In the *Australia-Salmon* case, after Australia announced that it had already implemented the dispute rulings, Canada asserted that Tasmania Island, an island belonging to Australia, had imposed an import ban toward salmonids.<sup>70</sup> To determine whether the Tasmanian import ban on salmonids would be "measures taken to comply," the compliance panel noted that it "cannot leave it to the full discretion of the implementing Member to decide whether or not a measure is one 'taken to comply.'"<sup>71</sup> If so, as the panel explained,

an implementing Member could simply avoid any scrutiny of certain measures by a compliance panel, even where such measures would be so clearly connected to the panel and Appellate Body reports concerned, both in time and in respect of the subject-matter, that any impartial observer would consider them to be measures 'taken to comply.'<sup>72</sup>

Another issue associated with the Tasmanian import ban concerns the changes or new measures that were enacted only during the article 21.5 procedures and not mentioned in the complaining member's panel request. Referencing decisions by previous

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62. Australia Subsidies Panel Report, *supra* note 54, ¶¶ 6.1-6.7.

63. *Id.*

64. *Id.* ¶ 6.3.

65. *Id.*

66. *Id.* ¶ 6.1.

67. *Id.* ¶ 6.4.

68. *Id.* ¶ 6.5.

69. *Id.* ¶ 6.4.

70. Panel Report, *Australia—Measures Affecting Importation of Salmon—Recourse by Canada to Article 22.2 of the DSU*, ¶ 4.26 *et seq.*, WT/DS18/RW, (Feb. 18, 2000) [hereinafter *Australia Salmon Panel Report*].

71. *Id.* ¶ 7.10(22).

72. *Id.*

panels<sup>73</sup> the *Australia-Salmon* compliance panel was of the view that the Tasmanian ban also fell within its mandate given that it was “implementing, subsidiary or so closely related to measures that were specifically mentioned” and that Australia should have reasonably expected that any further measures it would take to comply could be scrutinized by the panel.<sup>74</sup> The panel did not consider that “measures taken subsequently to the establishment of an article 21.5 compliance panel should *per force* be excluded from its mandate.”<sup>75</sup> Rather, it stated that, “compliance is often an ongoing or continuous process and once it has been identified as such in the panel request, as it was in this case, any ‘measures taken to comply’ could be presumed to fall within the panel’s mandate.”<sup>76</sup>

Unlike rulings by previous panels, the *Australia-Salmon* compliance panel ruling clarifies the measures “taken to comply” in an innovative way.<sup>77</sup> According to the view of the panel, on the one hand, timing and the same subject-matter should be decisive in determining the measure “taken to comply” and such measures should be clearly connected to panel and Appellate Body reports.<sup>78</sup> Hence, not all measures specifically indicated in the panel request would definitely fall within the terms of references of compliance panel and should be examined. On the other hand, measures “taken to comply” under broad interpretation should include future measures to be taken outside of the scope of the panel request, including measures that occur during the article 21.5 procedures.<sup>79</sup> An argument in favor of having panels consider such changes or modifications is that their rulings otherwise would run behind the facts and could not provide positive solutions to the dispute.<sup>80</sup> In the author’s view, this argument has its merits in terms of the objective of prompt compliance set out in articles 3.3 and 21.1 of the DSU. In particular, by its nature, compliance is often an ongoing or continuous process. If the measure currently in place could not be addressed by the panel, then its rulings might become incomprehensive and less meaningful. Conversely, allowing such measures to be examined also requires consideration of the likely risks for the dispute settlement procedure. If the panels can go beyond the mandate at the time the panel was established based on panel requests, the respondent Member might simply make subtle changes in their violations to avert the obligations arising from the adverse ruling on it. In addition, when faced with certain measures that have not been identified as such in the panel request, it would be questionable whether the respondents would be provided sufficient information in a timely manner about the scope of claims.

Turning to proposals for reform, Korea suggests expanding the mandate of 21.5 panels to provide that, “in the case of non-compliance, the Panel shall proceed to determine the

73. See, e.g., Panel Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas—Complaint by the United States (Bananas III)* ¶¶ 7.27-7.29, WT/DS27/R/USA (May 22, 1997); Appellate Body Report, *European Communities—Bananas III*, ¶ 140, WT/DS27/AB/R (Sept. 9, 1999); Panel Report, *Japan—Measures Affecting Consumer Photographic Film and Paper*, ¶ 10.8, WT/DS/44/R (Apr. 22, 1998); Appellate Body Report, *Australia—Measures Affecting Importation of Salmon*, ¶ 90-105, WT/DS18/AB/R (Oct. 20, 1998); Panel Report, *Argentina—Safeguard Measures on Imports of Footwear*, ¶¶ 8.23-8.46, WT/DS121/R (June 25, 1999).

74. *Australia Salmon* Panel Report, *supra* note 70, ¶ 7.10(26).

75. *Id.* ¶ 7.10(28).

76. *Id.*

77. See *id.* ¶ 7.10.

78. *Id.*

79. *Id.*

80. Pauwelyn, *supra* note 53, at 77.

level of the nullification or impairment and circulate its report within 120 days after the date of referral of the matter to it, including the level of the nullification or impairment."<sup>81</sup> One problem of such a suggestion might lie in the overlap that could arise between the jurisdictions of article 21.5 and article 22.6 procedures. The author believes that the tasks mandated under article 21.5 and article 22.6 should be distinguished and separate under the context of DSU.

In addition, the EC proposal limits the mandate of 21.5 procedures to disagreement mainly between the complaining party and the defendants by adding the wording "disagreement between the complaining party and the Member concerned."<sup>82</sup> Given the nature of bilateral focus, if applicable, whether such wording would affect the determination of "measures taken to comply" in future practice remains to be observed.<sup>83</sup>

### C. CONSULTATION

The procedural issue of whether the complainant in an article 21.5 proceeding must satisfy the requirements of consultations under article 4.7 of the DSU also needs more clarification. Some argue that, pursuant to the provisions of articles 4.3, 4.7, and 6.2 of the DSU, consultation should be a mandatory prerequisite for establishing the panel.<sup>84</sup> Under this view, because rules governing consultations and the establishment of panels do not distinguish between different types of panels, generally applicable rules must also be observed in proceedings under article 21.5. However, others prefer the contrary view that including a consultation requirement into article 21.5 would undermine prompt compliance with the DSB recommendations and rulings and extend the period during which the complaining Member suffers harm. In addition, those Members concerned must have been aware of factual aspects of disputes during the consultations held before the establishment of the original panel, in which instance, the failure of consultation would not prejudice the respondent party's rights.

In most article 21.5 cases, prior consultations were not held. In the *Mexico-HFCS* case, the Appellate Body did not confirm that this requirement applies to article 21.5 procedures, leaving this issue open.<sup>85</sup> However, it did confirm that it is possible, either explicitly or implicitly, to waive consultation between parties to disputes.<sup>86</sup> In the *US-FSC* case, the EC requested that the United States enter into consultations on November 17, 2000.<sup>87</sup> Consultations were then held on December 4, 2000, in Geneva.<sup>88</sup> Thus, the period during which the consultation was held following the request was about twenty-seven days.<sup>89</sup>

81. DSB Special Session—Communication from the Republic of Korea, *Contribution of the Republic of Korea to the Improvement of the Dispute Settlement Understanding of the WTO*, ¶ E(13), TN/DS/W35 (Jan. 22, 2003).

82. EC Proposal TN/DS/W/1, *supra* note 42, ¶ 23 (Article 21bis).

83. *See id.*

84. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, DISPUTE SETTLEMENT—WTO: IMPLEMENTATION AND ENFORCEMENT 21 (2003), available at <http://www.unctad.org>.

85. Appellate Body Report, *Mexico Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) From the United States—Recourse to Article 21.5 of the DSU by the United States*, Part IV, ¶¶ 35-75, WT/DS132/AB/RW (Oct. 22, 2001).

86. *See id.*

87. WTO Dispute Settlement, *supra* note 26, DS108—*United States-Tax Treatment for "Foreign Sales Corporations"*: Summary of the Dispute.

88. *See id.*

89. *See id.*

As discussed earlier, the EC, Japan, Costa Rica, and Ecuador, respectively, propose that consultation opportunities, during a reasonable period of time before 21.5 procedures are commenced, should be given.<sup>90</sup> Currently, each party to the dispute is only required to accord sympathetic consideration<sup>91</sup> to any request from another party to the dispute. Such consultation is thus not mandatory. From the perspective of facilitating prompt solution of disputes, in the author's view, if the implementing party is willing to participate in open consultation and sympathetically consider divergent views from another party as to the implementation of DSB rulings during the reasonable period of time, mutual understanding between parties to the dispute might be achieved at an earlier stage.

As to the nature of the consultation requirement before a formal article 21.5 panel procedure is initiated, based on the wording indicated in the proposal of the EC, the complaining party may request consultations.<sup>92</sup> Under the EC's proposal, "[t]he Member to which the request is made shall, unless otherwise agreed, reply to the request within 5 days after the date of its receipt and shall enter into consultations in good faith within 12 days from the date of circulation of the request."<sup>93</sup> In addition, Japan further clarifies in its proposal that consultations between the Member concerned and the complaining party are desirable, yet are not required prior to a request for a compliance panel.<sup>94</sup> In the forum of proposals for reform, the consultation requirement is thus not suggested as being a mandatory prerequisite to the panel procedure, but rather a voluntary action by Members. As most cases show, parties to disputes are given the discretion to waive the consultation request under the 21.5 proceedings; so far these proposals merely reflect the reality of current practice.

The author believes that consultation is valuable to the resolution of implementation issues. The implementing measures that are the subject of consultation under the article 21.5 proceedings should be separate and different from the measures examined under the original panel procedure. If parties to the dispute are given the opportunity to exchange information and further narrow the scope of difference through consultations in good faith, it would benefit the pursuit of a mutually satisfactory solution. Moreover, the respondent party, to which the request is addressed, should not be entitled to refuse to consult or impose any terms and conditions as a precondition to engaging in consultations when consultation is requested. Otherwise, the non-mandatory consultation requirement might mean little, especially in the event that the respondent party refused consultation based on any reason. In considering the goal of faster compliance with article 21.5 proceedings, the timeframe of consultation, as suggested by the EC, should be shorter than it is in the original procedure. Additionally, such timeframe should be given more flexibility based on mutual agreements.

90. See *supra* text accompanying note 57.

91. The phrase "sympathetic consideration" is also seen in various other agreements; for instance, articles 9.2, 22, and 23 of GATT; article 4.2 of the DSU; and article 17.2 of the Anti-Dumping Agreement. General Agreement on Tariffs and Trade arts. 9.5, 22, 23, Oct. 30, 1947, 61 Stat. A-11, A-30, A-64, 55 U.N.T.S. 194; DSU art. 4.2; Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994), art. 17.2.

92. See EC Proposal TN/DS/W/1, *supra* note 42.

93. *Id.* ¶ 23 (Article 21*bis*).

94. See Japan Proposal TN/DS/W/32, *supra* note 43.



Another question relates to the time period for a request for consultation. In light of the EC proposal, consultations can be requested at any time after the Member concerned either (1) states that it does not need a reasonable period of time for compliance; (2) submits a notification that it has complied with; or (3) thirty days before the expiration of the reasonable period of time.<sup>95</sup> Although the EC appropriately pointed out the minimum time period for consultation that needs to be considered, the maximum time period is not included.<sup>96</sup> If a new implementing measure has been adopted for a certain period of time, five years for example, and during that period no disagreement arises, can the complaining party start a consultation request after five years following the completion of implementation? The absence of a provision on the maximum time period for consultation would, in practice, create legal uncertainty, and should therefore be elaborated upon.

#### D. APPEALING

Article 21.5 does not explicitly provide for the possibility to appeal. Whether the compliance panel report can be appealed was not clarified until the first appeal was accepted by the *Brazil-Aircraft* Appellate Body in May 2000.<sup>97</sup> So far, the practice has shown that appeals against the compliance panel report are allowed and are used quite frequently.<sup>98</sup> As to the timeframe of appellate review, article 21.5 only provides that the completion of proceedings is to be ninety days after the referral of the matter to the Panel—whether both the panel and Appellate Body are required to share the ninety days remains to be clarified.<sup>99</sup>

The EC supports the current case law on the issue of appeal, describing in its proposal that “in case the report of the compliance panel is appealed, the Appellate Body proceedings, as well as the adoption of the Appellate Body report, shall be conducted in accordance with article 17” of the DSU.<sup>100</sup> The Japanese take the same position in their proposal.<sup>101</sup> Under such proposals, all provisions of article 17 would apply to article 21.5 appellate proceedings, including article 17.5 that gives the Appellate Body sixty days to complete its review.<sup>102</sup> In the author’s view, while the possibility of an appeal adds to the overall time taken to resolve a dispute, transferring the sixty-day requirement of article 17.5 directly into article 21.5 situations is not in keeping with the essential time factor stressed in article 21.5 proceedings. An abbreviated appeal process should thus be taken into account. This is particularly true because regulatory flexibility has been suggested in the proposals for consultation and panel

95. See EC Proposal TN/DS/W/1, *supra* note 42.

96. Pauwelyn, *supra* note 53, at 73.

97. Appellate Body Report, *Brazil—Export Financing Programme for Aircraft—Recourse by Canada to Article 21.5 of the DSU*, Part I, ¶¶ 1-7, WT/DS46/AB/RW (July 21, 2000).

98. Take the *MEXICO—HFCS* case for example. In the cover page of the panel report, the Secretariat noted that “[i]f the Panel Report is appealed to the Appellate Body, it shall not be considered for adoption by the DSB until after the completion of the appeal.” Panel Report, *Mexico Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) From the United States*, WT/DS132/R (Jan. 28, 2000).

99. DSU art. 21.5.

100. EC Proposal TN/DS/W/1, *supra* note 42, ¶ 23(8) (Article 21*bis*). Article 17.1 of the DSU provides that the “[t]he Appellate Body shall hear appeals from panel cases,” and Article 17.6 provides that “[a]n appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.” DSU arts. 17.1, 17.6.

101. See Japan Proposal TN/DS/W/32, *supra* note 43.

102. DSU art. 17.5.

proceedings, which both differ from the original provisions of normal dispute settlement procedures.

## V. Sequencing Issues of Article 21.5 and Article 22

The DSU does not clearly specify the relationship between the article 21.5 review of implementation and article 22.6 review of retaliation rights, creating what is known as the sequencing problem. As noted above, article 21.5 merely requires a compliance panel to complete its review within ninety days of the referral. Nothing in the provision indicates the time limits for when the respondent Member should initiate such a proceeding. As a result, it is possible that the proceedings might be commenced before or after the expiration of a reasonable period of time for implementation of rulings. However, article 22.6 provides that, "the DSB . . . shall grant authorization to suspend concessions and other obligations within 30 days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request," or an objection to such request is raised and referred to arbitration.<sup>103</sup> Article 22.6 thus states an express time limit for DSB authorization to be requested and granted. Yet there is no provision to ensure that an article 21.5 proceeding is completed within thirty days following a reasonable period of time for compliance. At the same time, article 22.6 is limited to cases where "the situation described in paragraph 2 occurs," which refers to the case where the Member concerned "fails to bring the measure found to be inconsistent with [the] covered agreement into compliance."<sup>104</sup> Accordingly, the sequencing question arises as to whether an article 21.5 proceeding takes precedence over an article 22 proceeding. More specifically, before invoking trade sanctions for non-compliance authorized by the DSB, must the complaining Member first go through a compliance panel process under article 21.5 to ensure the WTO consistency or inconsistency of its implementing measure?<sup>105</sup>

In the *Banana* case, the United States asserted that it had the right to request authorization from the DSB to suspend concessions and other obligations towards the EC, despite the EC's new banana regime adopted in response to the recommendations and rulings of the DSB.<sup>106</sup> According to the United States, a Member does not need to proceed first to article 21.5 before utilizing article 22.<sup>107</sup> Article 22.2, on the one hand, states that, "[i]f no

103. DSU art. 22.6.

104. *Id.* arts. 22.6, 22.2.

105. See Sylvia A. Rhodes, *The Article 21.5/22 Problem: Clarification Through Bilateral Agreements?*, 3 J. INT'L ECON. L. 553-58 (2000); Cherise M. Valles & Brendan P. McGivern, *The Right to Retaliate under the WTO Agreement: The "Sequencing" Problem*, 34(2) J. WORLD TRADE 63 (2000); Petros C. Mavroidis, *Proposals for Reform of Article 22 of the DSU: Reconsidering the "Sequencing" Issue and Suspension of Concessions*, in PREPARING THE DOHA DEVELOPMENT ROUND: IMPROVEMENTS AND CLARIFICATIONS OF THE WTO DISPUTE SETTLEMENT UNDERSTANDING 78 (Ernst-Ulrich Petersmann ed., 2003).

106. See Arbitrators Decision, *European Communities—Bananas III—Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, Part IV, ¶¶ 4.1-4.15, WT/DS27/ARB (Apr. 9, 1999) [hereinafter *Bananas Arbitrators Decision*]. For a detailed analysis of the implementation problem of this dispute, see Mauricio Salas & John Jackson, *Procedural Overview of the WTO EC-Banana Dispute*, 3(1) J. INT'L ECON. L. 145-66 (2000); John Jackson & Patricio Grane, *The Saga Continues: An Update on The Banana Dispute and its Procedural Offspring*, 4(3) J. INT'L ECON. L. 581-95 (2001); Michelle M. Mulvena, Note, *Has the WTO Gone Bananas? How the Banana Dispute has Tested the WTO Dispute Settlement Mechanism*, 7 NEW ENG. INT'L & COMP. L. ANN. 177 (2001).

107. See *Bananas Arbitrators Decision*, *supra* note 106, ¶¶ 4.1-4.15.

satisfactory compensation has been agreed within 20 days after [the end] of the reasonable period of time, any party . . . may request authorization from the DSB to suspend the . . . concessions or other obligations."<sup>108</sup> Article 22.6, on the other hand, provides that the DSB "shall grant authorization to suspend the concessions or other obligations within thirty days [after] the reasonable period."<sup>109</sup> Thus, if the complaining Member does not invoke proceedings for authorization of retaliatory measures within ten days following the reasonable period, it may miss the negative consensus deadline under article 22. Actually, if article 21.5 proceedings were required before invoking the retaliatory right, the latter provision may mean little, on the ground that the compliance panel would be unlikely to make its rulings within ten days if such case was brought at the end of the reasonable period of implementation. In sum, the United States contended that there is no sequencing application between article 21.5 and article 22.<sup>110</sup>

The EC, however, strongly opposed the United States' interpretation believing that article 22 can only be utilized after the completion of article 21.5 procedures.<sup>111</sup> For the EC, if complainants were allowed to unilaterally judge the WTO-consistency of the EC's new banana regime, and sanctions thereof were based on that judgment alone (the approach taken by the United States), then the WTO multilateral review would be undermined.<sup>112</sup>

The DSB established two compliance procedure panels under article 21.5 to review the legality of the EU revised regime on January 12, 1999. One was requested by Ecuador<sup>113</sup> and the second by the EC itself.<sup>114</sup> Instead of seeking any recourse under article 21.5, the United States moved alone to directly invoke the article 22.2 process, requesting the DSB to authorize the suspension of concessions towards the EC on January 14, 1999, which involved a \$US5.2 billion dollar deal.<sup>115</sup> The EC then objected to the level of suspension proposed and referred the matter to arbitration based on article 22.6 on January 29, 1999.<sup>116</sup> The *Bananas* case, rather bizarrely, established three separate panels—all with the same members as the original panel and all working at the same time. The same panelists thus made determinations under both article 22.6 and article 21.5 concurrently and strategically delayed their article 22.6 rulings so that all three reports could be issued at the same time in April 1999.

On April 6, 1999, the arbitrator made its decision that there had been \$US191.4 million worth of nullification or impairment of the United States each year.<sup>117</sup> The United States, thus, was authorized by the DSB to suspend concessions against the EC on April 19. On April 12, the panel also ruled that the EC's modified regime remained illegal.<sup>118</sup>

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108. DSU art. 22.2.

109. DSU art. 22.6.

110. See *Bananas Arbitrators Decision*, *supra* note 106, ¶¶ 4.1-4.15.

111. *Id.* ¶ 4.11.

112. See *id.*

113. See Panel Report, *European Communities—Bananas III—Recourse to Article 21.5 by Ecuador*, WT/DS27/RW/ECU (Apr. 12, 1999).

114. See *European Communities Bananas Panel Report*, *supra* note 3.

115. Recourse by the United States to Article 22.2 of the DSU, *European Communities—Bananas III*, WT/DS27/43 (Jan. 14, 1999).

116. Request by the European Communities for Arbitration Under Article 22.6 of the DSU, *European Communities—Bananas III*, WT/DS27/46 (Feb. 3, 1999).

117. *Bananas Arbitrators Decision*, *supra* note 106, ¶ 7.8.

118. *European Communities Panel Report*, *supra* note 3, Part V.

Because the Chairman of the DSB indicated that the solution to the *Bananas* matter would be totally without prejudice to future cases relating to the relationship between 21.5 and 22,<sup>119</sup> the debate does not cease after the bananas compromise solution. In authorizing U.S. retaliation, the article 22 arbitrators did not follow the EC interpretation of article 22, rather they based their work only on the provisions of article 22.6, namely, to evaluate the level of suspension following the arbitrators' determination of the WTO legality of the measure in dispute. In other words, the article 22 arbitrators not only carried out work relating to the tasks mandated by article 22.6, but also to those mandated by article 21.5. In the meantime, there were also two other article 21.5 proceedings being processed for the same subject of dispute.

In the author's view, without the clarification of the relationship between article 21.5 and article 22, the *Bananas* arbitrators/panelists seemed to lean more towards the United States, considering that the WTO compatibility determination mandated by the article 21.5 could be performed through the article 22.6 arbitration process.<sup>120</sup> The appropriateness of such deliberation needs more thought. First, it might blur the line of application between article 21.5 and article 22. In the context of the DSU, besides the normal panel, panels established under articles 21.3, 21.5, 22.6, and 25, as adjudicating bodies, perform different functions mandated by the respective provisions. If an article 22.6 arbitration panel can perform the tasks mandated by article 21.5, it seems to be more logical to infer that an article 21.3 arbitration panel—that is set-up to determine the reasonable period of time for implementation—can also perform the tasks under article 21.5 on the ground that the determination of what constitutes measures taken to comply with the rulings of DSB should be made first before the period of such measures taken to comply can be ensured.<sup>121</sup> From this point of view, can one say that an article 21.3 arbitration panel is more appropriate than an article 22.6 arbitration panel to perform the tasks of an article 21.5 procedure arbitrating panel? If so, the functioning of each procedure in the context of the DSU would be more difficult. The author does not consider that, based on the provisions of article 21.5 and article 22.6, the separate tasks should be performed by the same original panel, or that individual Members should regard one panel as a ground to mix the respective functions mandated under other provisions. In particular, this is likely to occur in the event that the original members are not available. In addition, the specific tasks of the arbitrator set out by article 22.7 do not expressly include the consideration of WTO compatibility that is mandated exclusively by article 21.5.

Secondly, to allow analysis of implementing measures under an article 22.6 arbitration panel might deprive rights conferred on respondent Members under Article 21.5. According to article 22.6 and article 22.7, arbitration shall be completed within sixty days after the expiration of the reasonable period of time and the parties shall accept the arbitrator's decision as final, without the option to appeal. However, there are ninety days before the completion of a panel process, and appeal by parties in dispute is generally accepted in the WTO, which may extend the ninety period in practice. In such an instance, to save time and facilitate implementation, complaining Members may be considered to have recourse

119. Dispute Settlement Body, Minutes on Meetings held on Jan. 25, 28, 29 & Feb. 1, 1999, WT/DSB/M/54 (Apr. 20, 1999), at 30.

120. Similar consideration also appeared in another case. See Panel Report, *United States—Import Measures on Certain Products From the European Communities*, WT/DS165/R (July 17, 2000).

121. Pauwelyn, *supra* note 53, at 80.

under article 22.6 procedures. This would undermine the functioning mandated by article 21.5.

In the *Australia-Salmon* case,<sup>122</sup> the members concerned took the *de facto* sequencing approach. While asking for a review of the article 22.2 retaliation right, Canada also requested the establishment of an article 21.5 compliance panel.<sup>123</sup> For Canada, the simultaneous approach may have been the effective way to prevent missing any rights conferred from potential conflicts between article 21.5 and article 22. Following the consultation held between Canada and Australia, both parties agreed that the article 22.6 arbitration process initiated by Australia would be suspended until the article 21.5 panel was completed.<sup>124</sup> If the implementing measures were ruled as a WTO-inconsistency by the article 21.5 panel, both parties could then request the re-processing of arbitration regardless of whether either party appealed. Arbitrators would make their decisions after the issuance of the compliance panel report.<sup>125</sup> Thus, under such initiative, an article 21.5 compliance panel may first perform its task of determining whether the implementing measure was consistent with WTO requirements, based on mutual agreements between parties.

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. However, there are certain points of the initiative to be discussed. First, once the article 21.5 panel determines that Australia does not fulfill the rulings of DSB, no matter whether the case is appealed or not, the arbitration procedure would then begin to progress. Accordingly, even while an appeal of the compliance panel report is pending, the arbitrators may be allowed to make decisions on the level of suspension before the completion of appellate review. As a consequence, the lack of a final decision relating to WTO conformity by article 21.5 proceedings remains an issue. It might render the arrangements as to the sequencing of article 21.5 and article 22 less of an issue. Secondly, article 22.6 states that arbitration shall be completed within the sixty days following the end of a reasonable period of time. Whether the sixty days of completion of arbitration can be counted from the date of the issuance of the article 21.5 panel report, which is inconsistent with the conditions provide for in article 22.6, may need more justification. Thirdly, the initiative proposed in this case was for the solution of a specific dispute and has practical implications. Nevertheless, the potential conflict arising from the legislative flaws as to the relationship between article 21.5 and article 22 still remains. Also, the rights of parties to dispute under the WTO cannot be ensured or certain in advance before any mutual agreements are made. In the event of disagreement, further perplexity may inevitably flow.

In the *Australia—Leather* case, without recourse to countermeasure granted by the DSB based on article 4.10 of the SCM, the United States instead utilized article 21.5 and agreed with Australia not to seek authorization to retaliate until after the article 21.5 proceedings were completed.<sup>126</sup> Such a model was also applied to the disputes between Canada and Brazil regarding aircraft subsidies.<sup>127</sup>

122. See *Australia Salmon Panel Report*, *supra* note 70.

123. See *id.* ¶ 1.3.

124. *Id.*

125. See *id.*

126. See *Australia Subsidies Panel Report*, *supra* note 54.

127. Panel Report, *Brazil—Export Financing Programme for Aircraft—Recourse by Canada to Article 21.5 of the DSU*, WT/DS46/RW (May 9, 2000); Panel Report, *Canada—Measures Affecting the Export of Civilian Aircraft—Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/RW (May 9, 2000).

Even though parties following the *Bananas* case have reached bilateral agreements on how they will proceed in a practical way, ambiguity remains and may arise again. Looking at the proposals advanced in this context, Members appear to widely support the sequencing between article 21.5 and 22. On September 29, 2000, Japan, supported by Canada, Colombia, Costa Rica, Ecuador, Korea, New Zealand, Norway, Peru, Switzerland, and Venezuela submitted a proposal to amend the provision of the DSU in order to clarify the sequencing issue.<sup>128</sup> The amended DSU would require a compliance panel to decide disagreements over measures taken to implement a panel or Appellate Body ruling before Members can request WTO authorization to impose retaliatory trade sanctions.<sup>129</sup> Australia has also provided clear and concise wording in its proposal, which provides that “the procedures in article 21.5 shall be completed before the procedures in article 22 are initiated.”<sup>130</sup> The EC’s position on this issue is that “after circulation of the compliance panel or the Appellate Body report, a complaining Member . . . may request authorization from the DSB to suspend the application to the Member concerned with concessions or other obligations pursuant to article 22.”<sup>131</sup> Under the EC’s proposal, “[t]he DSB shall grant authorization to such request only after the adoption of the compliance panel or the Appellate Body report.”<sup>132</sup>

## VI. Concluding Remarks

In the past ten years of dispute settlement practice under the DSU, an article 21.5 proceeding has become one of the pillars in the enforcement process and of vital interests for Members. For the most part, the procedure set forth in proposed article 21*bis* reflects the current practice under article 21.5. Perhaps the most significant change is the resolution of the sequencing issue of article 21.5/22 that would allow the complainant to request DSB authorization to retaliate only after an article 21.5 proceeding finds that the respondent has failed to bring the measures found to be WTO-inconsistent into compliance with the WTO Agreement. In addition, the proposal for the termination of retaliation measures through article 21.5 proceedings may have important practical implications. Dealing with the questions of consultation and appeal on the basis of expedited process will also help prevent undue delay in the implementation phase of dispute settlement.

Strengthening the function of article 21.5 through the elaboration and clarification in the DSU text is a necessity. If a large number of ongoing disputes about the implementation of the recommendations and rulings are allowed and the injuries that the prevailing complainant has suffered cannot be redressed in a timely way, the effectiveness and credibility

128. Submission by Bolivia, Canada, Chile, Colombia, Costa Rica, Ecuador, Japan, Korea, New Zealand, Norway, Peru, Switzerland, Uruguay and Venezuela for Examination and Further Consideration by the General Council, *Proposal to Amend Certain Provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) Pursuant to Article X of the Marrakesh Agreement Establishing the World Trade Organization*, WT/GC/W/410/Rev. 1 (Oct. 26, 2001).

129. *Id.*

130. DSB Special Session—Communication from Australia, *Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding*, art. 21, ¶ 5*bis*, TN/DS/W/49 (Feb. 17, 2003).

131. EC Proposal TN/DS/W/1, *supra* note 42, ¶ 23(9)(ii) (Article 21*bis*).

132. *Id.*

of the dispute settlement system may thus be greatly undermined. While negotiations for DSU reform are going on under the Doha Mandate, no substantial progress has yet been reached and no clear deadline for the conclusion of negotiations has yet been set. Despite this, amendment of the DSU text along the line of proposals being advanced is still desirable. In the meantime, practical issues of article 21.5 interpretation may be resolved through a further development of dispute settlement practice.