The Scope of Compliance Proceedings Under the WTO Dispute Settlement Understanding: What Are “Measures Taken to Comply”?

Kendall Turner, Stanford University
The Scope of Compliance Proceedings Under the WTO Dispute Settlement Understanding: What Are “Measures Taken to Comply”? 

The strength of a legal system is tied to its ability to enforce its commands.1 Indeed, one of the features of the World Trade Organization (WTO) that makes it so unique and successful in the realm of international law is its enforcement capabilities: the Dispute Settlement Understanding (DSU) created highly structured—and frequently used—procedures for the resolution of Members’ disputes. In particular, Article 21.5 of the DSU created a process for post-dispute monitoring of compliance with Dispute Settlement Body (DSB) rulings.

Although the existence and use of Article 21.5 procedures is indubitably an improvement on the lack of these procedures under the General Agreement on Tariffs and Trade (GATT), little scholarship has been published on whether Article 21.5 procedures work, or the primary challenges to their proper functioning. This Note attempts to address those questions. After examining all Article 21.5 proceedings through the end of 2011, it suggests that Article 21.5 proceedings have been working: Members see them as worthwhile and effective means to settle their disputes, and Members are not abusing these procedures by initiating frivolous Article 21.5 proceedings.

The review of past Article 21.5 proceedings also suggests that the major challenge to Article 21.5 panels is properly defining their scope: If these panels include too many measures within their purview, then they not only fail to provide the expedited proceedings necessary for a prompt resolution of disputes, but also put responding Members at a procedural disadvantage. On the other hand, if they include too few measures within their purview, then responding Members can effectively—at least for a time—evade compliance.

This Note suggests that Article 21.5 panels have developed two tools to address these risks of under- and over-inclusion: the “close nexus” test to address the former, and due process concerns to address the latter. This Note then suggests two ways in which these tools could be improved in order to better avoid the risks of under- and over-inclusion, and thus better serve the primary purposes of Article 21.5 panels: ensuring prompt compliance with DSB rulings, and preserving Members’ rights and obligations. Article 21.5 panels cannot function effectively as a mechanism for resolving Member disputes without a proper understanding of their scope, and the lack of an effective dispute resolution mechanism could threaten the continued viability of the WTO overall.

INTRODUCTION .........................................................................................................................................................2

I. THE WTO DISPUTE SETTLEMENT PROCESS ........................................................................................................3
   A. The Purposes of the WTO Dispute Settlement Understanding and Article 21.5 Panels…..3
      1. Prompt compliance.................................................................................................................................4
      2. Preserving the rights and obligations of Members.................................................................................5
      3. Tension between the goals of Article 21.5 panels..................................................................................5
   B. Article 21.5.......................................................................................................................................................6

II. IS ARTICLE 21.5 WORKING?............................................................................................................................9

III. HOW DO ARTICLE 21.5 PANELS LIMIT THE RISKS OF OVER-INCLUSION AND UNDER-INCLUSION?..........................................................12

---

INTRODUCTION

All judicial proceedings strive to avoid the twin risks of over- and under-inclusion: admitting too much or too little evidence, or hearing too many or too few claims. These risks are particularly prominent when a court is limited as to the types of claims it may hear. The risk of over-inclusion is especially great in these contexts because the court’s scope is so narrow; conversely, the risk of under-inclusion is also great because if the court excludes precisely the sorts of claims it is supposed to hear, it cannot serve the special purpose for which it is designed. Compliance panels in the WTO have just such a limited scope, and thus one of their primary challenges is avoiding over- and under-inclusion. As the WTO’s Appellate Body has explained, Article 21.5 panels may not consider just any measure, but only measures that have been, or should have been, implemented by a Member to bring about compliance with the recommendations and rulings adopted in a prior proceeding. But what are measures “taken to comply”? If a panel answers this question too narrowly, they will allow offending Members to repeat their offenses in creative ways without being subject to review by a compliance panel. Conversely, if a panel defines these measures too broadly, it will allow complaining Members to circumvent “regular” adjudicatory procedures and litigate their concerns through accelerated compliance proceedings.

This Note seeks to address three related questions: (1) Is the compliance panel mechanism outlined in Article 21.5 of the DSU working? (2) How do Article 21.5 panels avoid defining their scope to narrowly or too broadly—in other words, how do they avoid the risks of under- and over-inclusion? and (3) How should they modify the tools they use to address the risks of under- and over-inclusion to better serve the ends of Article 21.5? Part I of this note will lay out a brief history of the WTO’s dispute settlement process, and explain how the purposes of Article 21.5 panels fit in with the overarching goals of WTO dispute settlement. Part II will present a table of Article 21.5 cases through the end of 2011, and will briefly examine their results to draw some conclusions about how well Article 21.5 proceedings are working. Part III will explain how WTO panels use the “close nexus” test and due process concerns to limit the under- and over-inclusion of measures in Article 21.5 proceedings. Finally, Part IV will suggest improvements for of each of these tools—in particular, how the “effects” prong of the close nexus test could more meaningfully limit the scope of measures that fall within the purview of Article 21.5 panels, and how a slightly different understanding of due process could more adequately protect Members from unforeseeable claims in Article 21.5 proceedings.

One of the reasons that the WTO is so unique as an institution in international law is that it has meaningful dispute resolution and enforcement powers. But without a proper definition of

---

the scope of Article 21.5 panels, the WTO will lose part of its enforcement capabilities and will jeopardize its continued efficacy overall.

I. THE WTO DISPUTE SETTLEMENT PROCESS

When a WTO Member believes that another Member has acted inconsistently with its WTO obligations, it may request consultations with the allegedly offending Member. If these consultations do not settle the dispute, the complainant may then request that a panel be established to adjudicate the matter. If a panel is established and concludes that a measure is inconsistent with a covered WTO agreement, the panel (or Appellate Body, if the case has been appealed) must make recommendations as to how the responding Member can bring the measure into conformity with its WTO obligations. Until compliance is achieved, the Dispute Settlement Body (DSB) continues to monitor the offending Member’s efforts to comply.

If the offending Member fails to bring itself into compliance with its WTO obligations within the reasonable period of time, the prevailing Member may request compensation—such as a tariff reduction—from the offending Member, or it may temporarily suspend its WTO obligations with respect to the offending Member. Alternately, if the offending Member claims that it has taken measures to comply with the panel’s recommendations and rulings and there is a dispute over the existence or consistency of these measures, either Member may request the establishment of an Article 21.5 panel. The panel will review the measures allegedly taken to comply and determine whether these measures do, in fact, bring the offending Member into compliance.

A. The Purposes of the WTO Dispute Settlement Understanding and Article 21.5 Panels

Compliance proceedings did not exist under the WTO’s predecessor, the GATT. Although the Contracting Parties to the GATT introduced the concept of post-panel surveillance at the end of the Tokyo Round in 1979, this surveillance procedure essentially asked the parties to the original dispute to monitor their own compliance. In other words, it did not provide for an independent review of a Member’s compliance efforts. Additionally, while Article XXIII of the GATT 1994 provided that panels might occasionally review the existence or consistency of measures taken to comply with previous recommendations and rulings, these panels were not

---

4 Id. art. 6.1.
5 Id. art. 19.1
6 Id. art. 21.6.
7 Id. art. 22.2.
8 Id.
9 For a discussion of whether Members can resort to Article 22 before convening a compliance panel under Article 21.5, see, for example, Cherise M. Valles & Brendan McGivern, The Right to Retaliate Under the WTO Agreement: The “Sequencing Problem”, 34 J. WORLD TRADE 63 (2000).
11 See Understanding on Notification, Consultation, Dispute Settlement and Surveillance, Nov. 28, 1979, BISD 26S/210, ¶ 22 (“The contracting Parties shall keep under surveillance any matter on which they have made recommendations or given rulings. If the Contracting Parties’ recommendations are not implemented within a reasonable period of time, the contracting party bringing the case may ask the Contracting Parties to make suitable efforts with a view to finding an appropriate solution.”).
effective enforcement mechanisms because they were not regularly established and did not follow any set procedures.12

The desire for reform of the GATT led to the Uruguay Round of 1986 to 1994, which produced the Marrakesh Agreement, the WTO, and, among other things, the DSU. The purposes of the WTO’s new dispute settlement system under the DSU were to provide security and predictability to the multilateral trading system,13 to preserve the rights and obligations of WTO Members,14 to clarify these rights and obligations through interpretation of the covered WTO agreements,15 to settle disputes promptly16 with a “positive solution,”17 and to avoid unilateral retaliation.18

Article 21.5 proceedings serve all of these ends, but they are, as their procedures reflect, especially intended to promote prompt compliance with the recommendations and rulings of the DSB, and to preserve the rights and obligations of members.

1. Prompt compliance

Article 21.5 proceedings are designed to be faster than Article 6 proceedings. While the original panel has six months to issue its final report, an Article 21.5 panel has only ninety days.19 Additionally, the members of the original dispute panel comprise the members of the Article 21.5 panel.20 Consequently, the panelists do not have to spend much time familiarizing themselves with the facts and legal issues in the dispute.21

More broadly, the very existence of Article 21.5 proceedings promotes the prompt resolution of disputes by saving a complaining Member from having to initiate new dispute settlement proceedings when a responding Member has failed to comply with earlier rulings and recommendations.22 The complaining Member can instead initiate expedited proceedings under Article 21.5. In the domestic context, we allow a court that has mandated equitable relief to monitor compliance with the equitable decree for the same reasons: doing so saves a new judge from having to familiarize herself with the issues, and it protects the injured party from the additional burden of initiating a separate dispute.

13 DSU art. 3.2.
14 Id.
15 Id.
16 Id. art. 3.3 (“The 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.”).
17 Id. art. 3.7.
18 See id. art. 23.
19 Id. arts. 12.8, 21.5. Of course, both Article 6 and Article 21.5 panels generally take longer to circulate their reports. But Article 21.5 panel reports are still issued in an expedited fashion relative to Article 6 panel reports.
20 Id. art. 21.5.
22 See DSU art. 21.1; Appellate Body Report, US – Softwood Lumber IV (Article 21.5 – Canada), ¶ 72 (“On the one hand, [Article 21.5] seeks to promote the prompt resolution of disputes, to avoid a complaining Member having to initiate dispute settlement proceedings afresh when an original measure found to be inconsistent has not been brought into conformity with the recommendations and rulings of the DSB, and to make efficient use of the original panel and its relevant experience.”).
2. **Preserving the rights and obligations of Members**

Article 21.5 proceedings are also designed to preserve the rights and obligations of Members. The GATT’s lack of objective surveillance of Members’ efforts to comply with the original panel’s rulings and recommendations effectively allowed Members to avoid compliance if they wished.\(^{23}\) Article 21.5 proceedings were created to insure that Members obey DSB rulings to respect other Members’ WTO rights. To this end, the DSB has the power to—and does—monitor Members’ efforts to comply until compliance is achieved.\(^{24}\) The dispute in *EC – Bananas III*, for example, was on the DSB agenda for years and opened every regular DSB meeting during that period.\(^{25}\)

Article 21.5 panels also protect Members’ substantive rights and obligations by protecting their procedural rights and obligations. After all, Members can only obtain an adequate adjudication under Article 21.5 if they stand on procedurally equal footing.\(^{26}\) The procedures in Article 21.5 are designed to protect Members’ procedural equality in a number of ways. First, the members of all initial panels—and thus Article 21.5 panels—are selected to ensure their independence.\(^{27}\) The impartiality of judges allows Members to obtain a reasoned rather than biased judgment of their claims, such that Members’ rights and obligations are preserved rather than manipulated by an adjudicator’s prejudice. Second, the appealability of Article 21.5 findings also provides Members with a procedural protection for their substantive rights: where they feel that the Article 21.5 panel erred in its findings, they may ask the Appellate Body to reconsider whether the challenged measures are WTO-consistent.

3. **Tension between the goals of Article 21.5 panels**

The DSU adopts a liberal approach to standing and the admission of claims in Article 21.5 proceedings, and this approach protects Members’ right to be heard. Either party to the original dispute may request compliance proceedings—even if compliance measures were successfully implemented.\(^{28}\) A responding Member might, for example, initiate these proceedings to obtain what is effectively a declaratory judgment that the measures that Member has taken to

---

\(^{23}\) Under the GATT, the lack of any independent review of Members’ compliance efforts was more problematic because of the possibility of increasing non-compliance, rather than numerous instances of actual non-compliance. The level of voluntary compliance was quite high. See George W. Downs, David M. Rocke & Peter N. Barsoom, *Is the Good News About Compliance Good News About Cooperation?*, 50 INT’L ORG. 379, 379 (1996).

\(^{24}\) DSU art. 19.1.


\(^{26}\) Procedural equality can be understood as (1) the right to be heard by a panel, (2) the right to due deliberation by a duly constituted panel, and (3) the right to a reasoned judgment. See Appellate Body Report, *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/AB/R (Feb. 10, 1997) 15 (finding that the requirement of consultation has its basis in due process rights); BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 292-96, 307-10 (1987); V.S. MANI, INTERNATIONAL ADJUDICATION: PROCEDURAL ASPECTS 15 (1980).


comply are consistent with its WTO obligations.29 This liberal approach to standing and the admission of claims could also produce swifter compliance—and thus greater protection of Members’ rights and obligations—by encouraging Members to bring more claims during expedited Article 21.5 proceedings rather than the usual, slower Article 6 proceedings.

This liberal approach, however, may also allow Members to use Article 21.5 proceedings to harass other Members or to gain more time before they must fully comply. First, Members may seek to have measures that should not fall within the purview of an Article 21.5 panel reviewed by an Article 21.5 panel to put the responding Member at a procedural disadvantage. Because of the expedited nature of Article 21.5 proceedings, the responding Member will have only a short period of time to respond to claims made in that context. Additionally, the inclusion of more claims in Article 21.5 proceedings will, of course, prolong them, thus tempering the Article 21.5 panel’s ability to secure prompt compliance with the DSBC’s rulings and recommendations.

The WTO’s liberal approach to claims and standing in Article 21.5 proceedings thus both serves and conflicts with the goals of prompt compliance and preserving Members’ rights and obligations. But an overly narrow approach to the scope of Article 21.5 would also undermine efforts to preserve Members’ rights and obligations and promptly resolve disputes: if an Article 21.5 panel restricts its purview too much, it effectively allows an offending Member to keep offending if it’s sufficiently creative, and burdens the complaining Member with initiating an entirely new dispute if it wishes to enforce its rights and the other Member’s obligations.

The trick, then, for compliance panels is to avoid including too many or too few measures in their purview. But how can an Article 21.5 panel meaningfully limit its scope while retaining the ability to review all the measures that it must be able to review to promptly resolve Members’ disagreements?

B. Article 21.5

As explained above, an Article 21.5 panel may be convened if there is a dispute about the existence and/or consistency of measures taken to comply with the original panel’s or the Appellate Body’s rulings and recommendations. Article 21.5 provides:

Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. . . . 30

As this language indicates, an Article 21.5 panel must determine, first, whether any measures taken to comply with the DSB’s recommendations and rulings exist, and, second, assuming that such measures do exist, whether they are consistent with the covered WTO agreements. This Note will not deal with the second step—determining the WTO compliance of a given measure—as that effort varies from case to case and depends on the substance of the WTO

29 In EC – Hormones (Article 21.5 – EC), for example, the European Union requested Article 21.5 consultations because it wished to obtain a holding that the measures it had taken to comply with the DSB’s recommendations and rulings were consistent with its WTO obligations. See Request for Consultations by the European Communities, European Communities – Measures Concerning Meat and Meat Products (Hormones), WT/DS26/23 (Jan. 8, 2009); see also Jeff Waincymer, WTO Litigation: Procedural Aspects of Formal Dispute Settlement 672 (2002) (explaining that, while it is normally the successful claimant who seeks an Article 21.5 panel’s review of the adequacy of implementation, a respondent may make such a request, too).
30 DSU art. 21.5 (the word “panel” in this provision refers to the original DSU Article 6 panel rather than the DSU Article 21.5 panel).
obligations at issue. This Note will, rather, focus on the first step: identifying the measures that should properly fall within the compliance panel’s scope.

The Appellate Body has explained that such measures are not “just any measure of a Member of the WTO,” but are limited to “measures taken in the direction of, or for the purpose of achieving, compliance.” But, in fact, the language of Article 21.5 indicates that the scope of compliance panels is broader than measures “taken to comply” in several ways, all of which allow Article 21.5 panels to limit the risks of over- and under-inclusion.

First, since “disagreements” about measures taken to comply fall within the scope of Article 21.5 panels, these panels may consider certain measures that the implementing Member does not identify as measures it has taken to comply with the DSB’s recommendations and rulings. Holding otherwise would allow the offending Member to evade review of any new measure by simply declining to identify it as a measure “taken to comply”—in other words, holding otherwise would risk under-inclusion of measures that should be considered by Article 21.5 panels. Conversely, the complaining Member does not have the authority to decide what constitutes a measure taken to comply either, as this practice would lend itself to manipulation in the direction of over-inclusion of measures in compliance proceedings. The Appellate Body has accordingly found that, while a Member’s designation of a measure as one “taken to comply” is always relevant to the determination of an Article 21.5 panel’s scope, it is ultimately up to

31 See supra text accompanying note 2.
32 Appellate Body Report, US – Softwood Lumber IV (Article 21.5 – Canada), ¶ 66. The Appellate Body’s interpretative approach in this case derives from that outlined in Articles 31 and 32 of the Vienna Convention, though the Appellate Body does not explicitly reference these provisions in its decision. Although the English version of the text does not necessarily suggest that “measures taken to comply” must be measures taken with the intention of complying—they might be measures that just happen to bring the Member into compliance—the French and, especially, the Spanish versions of the phrase (“mesures prises pour se conformer” and “medidas destinadas a cumplir,” respectively) suggest that the relevant measures are those taken with such an intention. Id.
33 Appellate Body Report, United States – Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”) – Recourse to Article 21.5 of the DSU by the European Communities, WT/DS294/AB/RW (May 14, 2009) [hereinafter US – Zeroing (Article 21.5 – EC)], ¶ 202 (“[T]he Appellate Body also expressed the view that a panel’s mandate under Article 21.5 of the DSU is not necessarily limited to the measures that the implementing Member maintains are taken ‘in the direction of’ or ‘for the purposes of achieving’ compliance with the recommendations and rulings of the DSB.”); Appellate Body Report, US – Softwood Lumber IV (Article 21.5 – Canada), ¶ 67 (noting that the words “existence” and “consistency” in Article 21.5 “weigh against an interpretation of Article 21.5 that would confine the scope of a panel’s jurisdiction to measures that move in the direction of, or have the objective of achieving, compliance”).
35 That said, a complaint generally does define the outer limits of an Article 21.5 panel’s scope. As a panel explained: “the Panel’s terms of reference are defined by the ‘request for establishment’ . . . In general, it is the complaining Member in WTO dispute settlement which establishes the scope of the measures before a panel.” Panel Report, Australia – Subsidies Provided to Producers and Exporters of Automotive Leather – Recourse to Article 21.5 of the DSU by the United States, WT/DS126/RW (Jan. 21, 2000) [hereinafter Australia – Automotive Leather II (Article 21.5 – US)], ¶¶ 6.3-6.4; see also Appellate Body Report, US – Shrimp (Article 21.5 – Malaysia), ¶ 87 (“The task of a panel under Article 21.5 to examine the ‘consistency with a covered agreement of measures taken to comply with the recommendations and rulings’ of the DSB. That task is circumscribed by the specific claims made by the complainant when the matter is referred to the DSB for an Article 21.5 proceeding. It is not part of the task of a panel under Article 21.5 to address a claim that has not been made.”)
36 Appellate Body Report, US – Zeroing (Article 21.5 – EC), ¶ 203 (“[A] Member’s designation of a measure as one ‘taken to comply’ will always be relevant . . .”); Appellate Body Report, US – Softwood Lumber IV (Article 21.5 – Canada), ¶ 73 (“A member’s designation of a measure as one taken ‘to comply,’ or not, is relevant to this inquiry, but it cannot be conclusive.”). Notably, in no case where the implementing Member has identified a measure as a
the panel itself to determine which measures fall within its purview.\footnote{Appellate Body Report, European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India, WT/DS141/AB/RW (Apr. 24, 2003) [hereinafter EC – Bed Linen (Article 21.5 – India)], ¶ 78 (“[I]t is, ultimately, for an Article 21.5 panel—and not for the complainant or respondent—to determine which of the measures listed in the request for its establishment are ‘measures taken to comply.’”); Appellate Body Report, US – Softwood Lumber IV (Article 21.5 – Canada), ¶ 73; see also Panel Report, Australia – Automotive Leather II (Article 21.5 – US), ¶ 6.4; Panel Report, Australia – Measures Affecting the Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada, WT/DS18/RW (Mar. 20, 2000) [hereinafter Australia – Salmon (Article 21.5 – Canada)], ¶ 7.10 § 22.}

Second, the word “existence” in Article 21.5 indicates “that measures falling within the scope of Article 21.5 encompass not only positive acts, but also omissions.”\footnote{Appellate Body Report, US – Zeroing (Article 21.5 – EC), WT/DS294/RW (Dec. 17, 2008), ¶ 8.86; see also Appellate Body Report, Canada – Aircraft (Article 21.5 – Brazil), ¶ 36 (defining a measure “taken to comply” as one that has “been, or which should be, adopted by a Member to bring about compliance with the recommendations and rulings” of the panel in the original proceeding (emphasis added)); see also Appellate Body Report, United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan, WT/DS244/AB/R (Jan. 9, 2004), ¶ 81 (“[A]ny act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement.”).} Consequently, an Article 21.5 panel may consider not only those measures that the allegedly offending Member has taken to comply, but also those measures that the Member “should have taken to bring itself into compliance.”\footnote{Appellate Body Report, US – Softwood Lumber IV (Article 21.5 – Canada), ¶ 67.} The inclusion of “omissions” in the purview of Article 21.5 panels serves to avoid the risk of under-inclusion; if a compliance panel could not consider a responding Member’s failure to take any action to implement the original panel’s recommendations and rulings, it would be severely constrained in its ability to secure prompt compliance with those recommendations and rulings.

Third, the word “consistency” implies that Article 21.5 panels must objectively determine whether the measures in question are consistent with the covered WTO agreements, not just whether they are consistent with the panel’s recommendations and rulings.\footnote{Appellate Body Report, US – Shrimp (Article 21.5 – Malaysia), ¶ 87.} The determination of WTO consistency (or lack thereof) requires that the compliance panel consider the challenged measure “in its totality”—focusing on “both the measure itself and the measure’s application”—not just specific aspects of it.\footnote{Appellate Body Report, US – Zeroing (Article 21.5 – EC), ¶ 205.} In other words, the Article 21.5 panel is not confined to examining whether the challenged measure complies with (or was taken in order to comply with) the panel’s recommendations and rulings, but may also determine whether or not it satisfies all of the other WTO obligations of the implementing Member. This conclusion makes sense as a means to avoid under-inclusion in Article 21.5 proceedings: Measures taken to comply may well be inconsistent with WTO obligations in different ways than the original challenged measures. If Article 21.5 panels could only consider measures taken to comply for their consistency with the original panel’s rulings and recommendations, it would not achieve the prompt resolution of disputes. Rather, a complaining Member would be forced to initiate distinct proceedings against the same responding Member to address any additional inconsistencies in the new measures.

Finally, the express link between “measures taken to comply” and the recommendations and rulings of the DSB indicates that any Article 21.5 proceeding must include an examination of the recommendations and rulings adopted by the original DSB, and of the original measures to measure “taken to comply” has the panel or Appellate Body found that it was not, in fact, such a measure. (Of course, this does not mean that the identified measure actually brought the implementing Member into full compliance.)
which they refer.\textsuperscript{42} Otherwise, the Article 21.5 panel would not be able to determine whether the measure allegedly taken to comply was, in fact, taken to remedy the inconsistencies found in the original proceedings.

In short, the scope of Article 21.5 panels is in many ways broader than suggested by the language “measures taken to comply,” and the ways in which it is broader than this language reflects the DSU’s concern with avoiding the under- and over-inclusion of measures in Article 21.5 proceedings.

\textbf{II. IS ARTICLE 21.5 WORKING?}

This section does not examine the substantive conclusions of Article 21.5 panel and Appellate Body reports to determine their “correctness;” rather, it focuses on two simpler inquiries: (1) Are Members using Article 21.5 procedures? and (2) Are Members abusing these procedures? Regular Member usage of Article 21.5 proceedings could suggest that these proceedings are seen as effective in resolving their disputes and thus do, in the most important sense, “work.”

Alternately, regular Member recourse to Article 21.5 proceedings could reflect that these proceedings are being used abusively: a Member might bring Article 21.5 claims to harass another Member that has not, in fact, acted inconsistently with its WTO obligations. This Note with thus use findings of inconsistency in Article 21.5 proceedings as an indication that Article 21.5 proceedings are not being used frivolously. Findings of inconsistencies are, admittedly, not perfect indicators of non-frivolous usage, but they are suggestive of the fact that Article 21.5 proceedings are not being initiated without reason.

The below table presents an overview of all requests for Article 21.5 proceedings through the end of 2011.

\begin{tabular}{|c|p{7cm}|p{3cm}|p{3cm}|p{3cm}|p{7cm}|}
\hline
WT/DS No. & Case Name (Short Form) & Requesting Member & Date of Request & Appeal & Outcome \\
\hline
18 & Australia – Salmon & Canada & 7/28/1999 & No appeal & Inconsistent \\
26 & EC – Hormones & EU & 12/22/2008 & N/A & MoU reached \\
27 & EC – Bananas III & EU & 12/15/1998 & No appeal & No finding of presumption of consistency \\
 & & Ecuador & 12/18/1998 & No appeal & Inconsistent \\
 & & Honduras, Nicaragua & Panama & 11/20/2005 & N/A & Joined Ecuador’s second recourse to Article 21.5 \\
 & & Ecuador & 11/16/2006 & Mostly upheld & Inconsistent \\
\hline
\end{tabular}

\textsuperscript{42} Id. ¶ 68.
<table>
<thead>
<tr>
<th>Case No.</th>
<th>Parties</th>
<th>Country</th>
<th>Date of Panel Ruling</th>
<th>Findings</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>46</td>
<td>Brazil – Aircraft</td>
<td>Canada</td>
<td>11/23/1999</td>
<td>Upheld panel findings</td>
<td>Inconsistent</td>
</tr>
<tr>
<td>48</td>
<td>EC – Hormones</td>
<td>EU</td>
<td>11/22/2008</td>
<td>N/A</td>
<td>MoU reached</td>
</tr>
<tr>
<td>58</td>
<td>US – Shrimp</td>
<td>Malaysia</td>
<td>10/12/2000</td>
<td>Upheld panel findings</td>
<td>Not inconsistent</td>
</tr>
<tr>
<td>70</td>
<td>Canada – Aircraft</td>
<td>Brazil</td>
<td>11/23/1999</td>
<td>Upheld panel finding</td>
<td>Some consistent; some inconsistent</td>
</tr>
<tr>
<td>103, 113</td>
<td>Canada – Dairy</td>
<td>New Zealand &amp; US</td>
<td>2/16/2001</td>
<td>Reversed panel finding; unable to complete analysis for lack of data</td>
<td>Panel found measures inconsistent; second recourse to Article 21.5 initiated to address inadequacies in record on appeal</td>
</tr>
<tr>
<td>108</td>
<td>US – FSC</td>
<td>EU</td>
<td>12/6/2001</td>
<td>Upheld panel findings‡</td>
<td>Inconsistent</td>
</tr>
<tr>
<td>126</td>
<td>Australia – Automotive Leather II</td>
<td>US</td>
<td>10/4/1999</td>
<td>No appeal</td>
<td>Not consistent</td>
</tr>
<tr>
<td>132</td>
<td>Mexico – Corn Syrup</td>
<td>US</td>
<td>10/12/2000</td>
<td>Upheld panel findings</td>
<td>Inconsistent</td>
</tr>
<tr>
<td>141</td>
<td>EC – Bed Linen</td>
<td>India</td>
<td>4/4/2002</td>
<td>Reversed panel finding of no inconsistency</td>
<td>Inconsistent</td>
</tr>
<tr>
<td>207</td>
<td>Chile – Price Band System</td>
<td>Argentina</td>
<td>12/29/2005</td>
<td>Upheld panel findings</td>
<td>Inconsistent</td>
</tr>
<tr>
<td>212</td>
<td>US – Countervailing Measures on Certain EC Products</td>
<td>EU</td>
<td>9/16/2004</td>
<td>No appeal</td>
<td>Mostly consistent; some inconsistent</td>
</tr>
<tr>
<td>245</td>
<td>Japan – Apples</td>
<td>US</td>
<td>7/19/2004</td>
<td>No appeal</td>
<td>Inconsistent</td>
</tr>
<tr>
<td>257</td>
<td>US – Softwood Lumber IV</td>
<td>Canada</td>
<td>12/30/2004</td>
<td>Upheld panel findings</td>
<td>Inconsistent</td>
</tr>
<tr>
<td>264</td>
<td>US – Softwood Lumber V</td>
<td>Canada</td>
<td>5/19/2005</td>
<td>Reversed panel finding of no inconsistency</td>
<td>Inconsistent</td>
</tr>
<tr>
<td>267</td>
<td>US – Upland Cotton</td>
<td>Brazil</td>
<td>8/18/2006</td>
<td>Mostly upheld panel findings</td>
<td>Some inconsistent; some consistent</td>
</tr>
<tr>
<td>268</td>
<td>US – OCTGs Sunset Reviews</td>
<td>Argentina</td>
<td>3/6/2006</td>
<td>Reversed some panel findings; upheld others</td>
<td>Mostly not inconsistent; some inconsistent</td>
</tr>
<tr>
<td>277</td>
<td>US – Softwood Lumber VI</td>
<td>Canada</td>
<td>2/14/2005</td>
<td>Reversed panel finding of no inconsistency</td>
<td>Appellate Body unable to complete analysis because of inadequacies in record</td>
</tr>
</tbody>
</table>
The overview of Article 21.5 proceedings presented in the table above gives rise to a number of observations about the functioning of Article 21.5 panels. First, Article 21.5 proceedings generally do not seem to be used in a harassing manner; in the vast majority of cases, WTO-inconsistent actions have been found. This suggests that complainants are continuing to request Article 21.5 panels only when they have good reason to do so.

Second, the Article 21.5 process is being used regularly, suggesting that Members do find it an effective way to address their concerns about noncompliance. This is especially relevant where Members have the option to suspend concessions under Article 22. Suspension of concessions would intuitively seem to compel compliance more quickly than panel proceedings because the economic detriment of suspension is felt more immediately than any economic detriment flowing from an Article 21.5 panel. The fact that Members who can suspend concessions instead opt for recourse to Article 21.5 proceedings suggests that Members see Article 21.5 panels as an effective way to resolve their disputes and achieve prompt compliance.

However, recourse to Article 21.5 has decreased in frequency over the past three years: there were no requests in 2009, and only one in 2010 and 2011 each. And in at least one case, US – Continued Suspension, the complainant opted to initiate a new proceeding rather than an Article 21.5 proceeding, even though an Article 21.5 proceeding would have been appropriate. It would be premature to suggest that such a recent trend reflects a growing dissatisfaction with Article 21.5 proceedings, but it will be interesting to see how frequently they occur during the coming years.

One of the main challenges for Article 21.5 panels, if they wish to remain a relevant and useful forum, is to ensure that the proceedings are timely and efficient. The Appellate Body, for example, reversed one of the panel’s findings of law, but upheld their findings of inconsistencies. This highlights the need for clear and consistent guidance on how to handle such situations. Future developments in the application of Article 21.5 will be closely watched by Members and observers alike.

---

43 The European Union requested only Article 21.5 consultations, not the composition of an Article 21.5 panel.
44 Again, or a discussion of whether Members can resort to Article 22 before convening a compliance panel under Article 21.5, see, for example, Valles & McGivern, supra note 9.
effective way to adjudicate disputes, is how to determine their proper scope. As suggested earlier, too broad a scope will effectively allow complaining Members to “cheat” the system by bringing claims that should be brought in Article 6 proceedings in expedited Article 21.5 proceedings instead. On the other hand, too narrow a scope will allow the responding Member to “cheat” the system by evading review by an Article 21.5 panel.

III. HOW DO ARTICLE 21.5 PANELS LIMIT THE RISKS OF OVER-INCLUSION AND UNDER-INCLUSION?

When both parties agree that a certain measure is a measure taken to comply, there is no problem determining that the measure falls within the purview of the Article 21.5 panel. But when the implementing Member denies that the measure in question is a measure taken to comply, the panel must employ the analysis outlined in US – Softwood Lumber IV (Article 21.5 – Canada) to determine if the measure nevertheless falls within the scope of Article 21.5 “by reason of the close relationship between the measure at issue and the declared measure taken to comply.”46 This approach—called the “close nexus” test—is designed to prevent Members from avoiding the scrutiny of a compliance panel by simply failing to identify a connected measure as a measure taken to comply.47 In other words, panels rely on the close nexus test to limit the risk of under-inclusion. At the same time, Article 21.5 panels seek to avoid the risk of over-inclusion by limiting their ambit to measures that the allegedly offending Member had adequate notice could be scrutinized by a compliance panel.48 In other words, panels rely on due process concerns to protect responding Members from having to answer to a compliance panel about a measure that it could not reasonably foresee, given the complainant’s claims, would fall within that panel’s purview.

A. The Close Nexus Test As a Means to Limit the Risk of Under-Inclusion

The close nexus test, first articulated in Australia – Salmon (Article 21.5 – Canada) and Australia – Automotive Leather II (Article 21.5 – US), and elaborated upon in US – Softwood Lumber IV (Article 21.5 – Canada), allows Article 21.5 panels to review measures that the implementing Member denies are measures taken to comply, but that have a very close relationship to any declared measures taken to comply, and to the recommendations and rulings of the DSB. In other words, the test allows Article 21.5 panels to avoid the under-inclusion of measures that do not, superficially, seem to be measures taken to comply, even though they, substantively, are.

1. The creation of the close nexus test

In Australia – Salmon (Article 21.5 – Canada), a panel found that a measure by the Government of Tasmania that effectively prohibited the importation of certain Canadian salmon products into most of Tasmania fell within the purview of the Article 21.5 panel, where the rulings and recommendations from the original proceedings had found an Australia-wide prohibition of imports of Canadian salmon inconsistent with WTO obligations. Australia claimed

46 Appellate Body Report, European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador, WT/DS274/RW2/ECU (Nov. 26, 2008), ¶ 244.
47 Id. ¶ 245 (“The Appellate Body has emphasized that the reasoning in US – Softwood Lumber IV (Article 21.5 – Canada) concerned the identification of closely connected measures so as to avoid circumvention.”).
that the Tasmanian ban could not be reviewed by the Article 21.5 panel, as it was not a measure
that Australia had taken with the intention of complying with the DSB’s recommendations and
rulings. But, as the panel explained, it “would be absurd to hold that the effects of a measure by
one level of government that thwarts a measure by another level of government cannot be
considered by an Article 21.5 panel because it is not itself a measure ‘taken to comply’. ”49 Such a
result would not promote the purposes of Article 21.5 proceedings: ensuring prompt compliance
with the recommendations and rulings of the DSB, and preserving the rights and obligations of
Members. 50 In other words, understanding the purview of an Article 21.5 panel to extend only to
measures intentionally taken to comply would result in the under-inclusion of measures that
Article 21.5 panels should be able to review to serve the ends for which they were created.

To avoid such under-inclusion, the panel explained that Article 21.5 panels would be able
to review measures that are “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 consider
them measures ‘taken to comply.’ ”51 That panel did not attempt to define “clearly connected” in a way that would suit all contexts. 52 Rather its determination that the
measure in question was closely connect to the previous measure seemed to rest on the
measures’ nature (that the second measure was a quarantine measure, like the measure examined
and found inconsistent in the initial dispute) and their timing (the second measure was
implemented seventeen days before the adoption of the recommendations and rulings in the
original dispute53). The effects of the subsequent measure—in this case, the subsequent measure
effectively prevented the importation of certain salmon products into various parts of Australia—
were potentially relevant, though the panel spent little time focusing on them. 54

In *Australia – Automotive Leather II (Article 21.5 – US)*, the panel similarly explained
that a loan would be considered a measure taken to comply because it was “inextricably linked”
to the measure that Australia identified as one taken to comply “in view of both its timing and its
nature.”55 In that case, Australia withdrew from a company a grant that had been found to be a
prohibited subsidy. At the same time, it granted a loan on non-commercial terms to a related
company; this loan was conditioned on repayment of the original subsidy. When the second loan
was challenged, Australia argued that it was “not part of the implementation of the DSB’s ruling
and recommendation” and thus did not fall within the purview of the Article 21.5 panel. The
panel disagreed, noting that exclusion of the second loan from its purview would “severely limit[ ] [the panel’s] ability to judge . . . whether Australia has taken measures to comply with the

---

49 Id. ¶ 4.28.
50 Id.
51 Id. ¶ 7.10 § 2 (emphasis added); see also id., ¶ 7.10 § 26 (“Previous panels have examined measures not explicitly
mentioned in the panel request on the ground that they were implementing, subsidiary or so closely related to
measures that were specifically mentioned, that the responding party could reasonably be found to have received
adequate notice of the scope of the claims asserted by the complainant.”).
52 Id. ¶ 7.10 § 22 (“Without attempting to give a precise definition of ‘measures taken to comply’ that should apply
in all cases, we are of the view that in the context of this dispute at least any quarantine measure introduced by
Australia subsequent to the adoption on 6 November 1998 of DSB recommendations and rulings in the original
dispute – and with a more or less limited period of time thereafter – that applies to imports of fresh chilled or frozen
salmon from Canada, is a ‘measure taken to comply.’ ”)
53 Id.
54 See, e.g., id. ¶ 4.28 (“It would be absurd to hold that the effects of a measure by one level of government that
thwarts a measure by another level of government cannot be considered by an Article 21.5 panel because it is not
itself a measure ‘taken to comply’. ”) (emphasis added).
DSB’s ruling.” In other words, the panel could not determine whether Australia had taken the measures necessary to bring its WTO-inconsistent loan into compliance without examining the subsequent loan, given their many links in terms of their timing and nature. Thus, the close nexus approach was again employed to avoid the under-inclusion of measures in Article 21.5 proceedings when review of those measures was essential to achieve the Article 21.5 panel’s ends.

The Australia – Automotive Leather II (Article 21.5 – US) and Australia – Salmon (Article 21.5 – Canada) panels did not elaborate on which elements of a measure’s nature are relevant in determining that the two measures have a close nexus, nor the timeframe within which two measures must occur in order to be deemed to have a close nexus with one another. For the most part, their approaches seemed to be in the we-know-it-when-we-see-it vein. The two panels did, however, offer some helpful guidance as to certain aspects of the measures’ timing and nature that would be relevant in determining whether the close nexus test was met.

As to timing, Australia – Salmon (Article 21.5 – Canada) noted that the greater a measure’s proximity in time to the adoption of the DSB recommendations and rulings in the original dispute, the more likely the measure would be deemed one taken to comply. And although a measure taken after the establishment of an Article 21.5 panel will generally be excluded from that panel’s purview, in certain circumstances it may not be. As the panel explained, “compliance is often an ongoing or continuous process and once it has been identified as such in the panel request . . . any ‘measures taken to comply’ can be presumed to fall within the panel’s mandate.” Although unintuitive, this seems like the right outcome: otherwise, a responding Member could effectively avoid Article 21.5 review of a measure by implementing it after the initial request for an Article 21.5 panel had been filed, even if the responding Member’s new measures were inextricably linked with the challenged measures. Conversely, if a responding Member implemented measures that brought it into compliance with its WTO obligations after a request for an Article 21.5 proceeding was filed, it would be unfair to prohibit the Article 21.5 panel from considering the subsequent measures because doing so would result in a finding of ongoing inconsistency when there was none. In other words, allowing Article 21.5 panels to review measures implemented after the Article 21.5 panel request was filed serves to avoid the over- and under-inclusion of measures that should fall within the purview of Article 21.5 panels. Avoiding these Type 1 and Type 2 errors in turn allows these panels to better serve their purposes—ensuring compliance with the DSB’s recommendations and rulings, and protecting Members’ rights and obligations.

As to nature, Australia—Salmon (Article 21.5 – Canada) noted that the existence of a close nexus could not depend on whether the challenged measure was one taken to conform with WTO laws or one that maintained or worsened the original violation. Otherwise, one would be faced with an absurd situation: if the implementing Member introduces a ‘better’ measure—in the direction of WTO conformity—it would be subject to an expedited Article 21.5 procedure; if it introduces a ‘worse’ measure—maintaining or aggravating the violation—it would have a right to a completely new WTO procedure.

In other words, this approach would risk the under-inclusion of measures that should properly

56 Id.
57 Id.
58 Id.
60 Panel Report, Australia – Salmon (Article 21.5 – Canada), ¶ 7.10 § 28.
61 Id. ¶ 7.10 § 23.
fall within the purview of Article 21.5 panels. Moreover, it would be difficult for any Article 21.5 panel to determine which measures are “better” and which are “worse.”

2. The elaboration of the close nexus test

The Appellate Body’s language in *US – Softwood Lumber IV (Article 21.5 – Canada)* expanded on the close nexus test and made clear that the purpose of this test is precisely to avoid the under- and over-inclusion of measures in Article 21.5 proceedings. As the Appellate Body explained, the scope of Article 21.5 panels must be sufficiently broad if these panels are “to promote the prompt resolution of disputes.” In a complaining Member should not be forced to instigate new proceedings when an inconsistent measure has not been brought into conformity with the DSB’s recommendations and rulings because this requirement would only delay compliance. On the other hand, “the scope of Article 21.5 proceedings logically must be narrower than the scope of original dispute settlement proceedings.” In other words, over-inclusion must also be avoided, as this Note discusses in more detail in the next sub-section. In *US – Softwood Lumber IV (Article 21.5 – Canada)*, the Appellate Body adopted the close nexus test as the appropriate means to limit the risk of under-inclusion by identifying measures that are sufficiently connected with the declared measure taken to comply.

In *US – Softwood Lumber IV (Article 21.5 – Canada)*, Canada claimed that measures the United States had taken to comply with an Appellate Body ruling regarding U.S. countervailing duties on Canadian softwood lumber violated the United States’ WTO obligations. The United States denied that some of the challenged measures were measures “taken to comply,” arguing that that phrase could not include just any “connected” measures that “could have an impact on” or “possibly undermine” the declared implementation measures. Canada argued in response that measures not identified by their implementing Member as measures taken to comply may be reviewed by an Article 21.5 panel when they affect the existence or consistency of measures that have admittedly been taken to comply, since they may undo purported compliance with DSB recommendations and rulings. The Appellate Body sided with Canada, explaining:

Some measures with a particularly close relationship to the declared ‘measure taken to comply,’ and to the recommendations and rulings of the DSB, may also be susceptible to review by a panel acting under Article 21.5. Determining whether this is the case requires a panel to scrutinize these relationships, which may, depending on the particular facts, call for an examination of the *timing, nature, and effects* of the various measures. This also requires an Article 21.5 panel to examine the factual and legal background against which a declared ‘measure taken to comply’ is adopted. Only then is a panel in a position to take a view as to whether there are sufficiently close links for it to characterize such another measure as one ‘taken to comply’ and, consequently, to assess its consistency with the covered agreements in an Article 21.5 proceeding.

The three measures the Appellate Body deemed “measures taken to comply” in *US – Softwood Lumber IV (Article 21.5 – Canada)* were closely connected in terms of their nature: all three

62 Id.
63 Id. ¶ 72.
64 Id.
65 Id.
66 Id.
68 Id. ¶ 62.
involved the issue of pass-through and covered imports of softwood lumber from Canada. Additionally, they were closely connected in terms of timing: the publication of the First Assessment Review and the Section 129 Determination occurred within four days of each other. And, finally, the First Assessment Review directly affected the Section 129 Determination, since the cash deposit rate resulting from the Section 129 Determination was replaced after ten days by the cash deposit rate resulting from the First Assessment Review. Because of these close links between the measures in question, the Appellate Body found that they were all measures taken to comply.

The effects of two measures had not been so explicitly considered in earlier articulations of the close nexus test. By “effects,” the Appellate Body seems to focus on the subsequent measure’s impact on the existence of the inconsistency identified by the original panel. This understanding of a measure’s effects apparently derives from the text of Article 21.5, which 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 . . .”69 For example, in US – Softwood Lumber IV (Article 21.5 – Canada), the changes the United States made to its methodology for determining countervailing duties against Canada after the initial Appellate Body proceedings effectively reinstated the offending measures. Both methodologies committed the United States to examining a pass-through of alleged stumpage subsidies, and both resulted in a similar cash deposit rate.70 Thus, the United States’ subsequent measures perpetuated the existence of the original offending measures, and were consequently inconsistent with the United States’ WTO obligations. Accordingly, they fell within the purview of the Article 21.5 panel.

B. Due Process As a Means to Limit the Risk of Over-Inclusion

While the close nexus test helps compliance panels avoid excluding measures from their purview that they should be able to scrutinize, due process limitations help compliance panels avoid including measures within their purview that they should not be able to scrutinize. For example, in finding that the second loan in Australia – Salmon (Article 21.5 – Canada) was a measure taken to comply, the Appellate Body justified its holding partly on the grounds that this ruling would not “deprive Australia of its right to adequate notice under Article 6.2. On the basis of the Panel request Australia should have reasonably expected that any further measures it would take to comply, could be scrutinized by the Panel.”71 Similarly, where a responding Member could not have reasonably anticipated that a measure might be challenged in compliance proceedings, Article 21.5 panels have found that the measure did not fall within their purview.72 Thus, concerns about notice—an essential component of due process—operate to reduce the risk of over-inclusion of measures in Article 21.5 proceedings.

Additionally, although the WTO has not adopted the doctrines of res judicata or collateral

---

69 DSU art. 21.5 (emphasis added).
71 Id. ¶ 7.10 § 27.
72 See Appellate Body Report, United States – Tax Treatment for “Foreign Sales Corporations” – Second Recourse to Article 21.5 of the DSU by the European Communities, WT/DS108/AB/RW2 (Mar. 14, 2006) [hereinafter US – FSC II (Article 21.5 – EC)], ¶ 68 (“[W]e conclude that the European Communities’ panel request does identify the continued operation of Section 5 of the ETI Act sufficiently to put the United States on notice in this respect.”); see also Panel Report, Australia – Salmon (Article 21.5 – Canada), ¶ 7.10 § 28 (“[A]ny ‘measures taken to comply’ can be presumed to fall within the panel’s mandate, unless a genuine lack of notice can be pointed to.”).
estoppel, it employs some principles of issue and claim preclusion to reduce the risk of the over-inclusion of measures in Article 21.5 proceedings. New claims can sometimes be raised before an Article 21.5 panel: as mentioned earlier, measures taken to comply may well be inconsistent with WTO obligations in ways that the original measures were not, and these inconsistencies properly fall within an Article 21.5 panel’s purview. An Article 21.5 panel could not properly execute its task of assessing measures “taken to comply” for WTO-consistency if it could not examine claims that were different from and additional to those raised in the original proceeding.

But an Article 21.5 panel cannot consider the same claim on an aspect of a measure taken to comply that is unchanged from the original measure and was unsuccessfully challenged in the original proceedings. Allowing Members to assert the same claims against aspects of implementation measures would undermine the ability of Article 21.5 panels to achieve the prompt settlement of disputes that is so “essential to the effective functioning of the WTO,” Members would be able to raise the same claims anew constantly, wasting both Members’ time without proceeding toward a resolution, and squandering limited adjudicatory resources. Consequently, an unappealed finding of no violation that is adopted by the DSB must be treated as a final resolution of the dispute between the parties with respect to that particular claim.

The conclusion that a complaining Member may not challenge an aspect of a measure that was upheld in the original proceeding makes sense from a due process perspective: the responding Member could not reasonably anticipate that the aspect of the measure that was upheld in the original proceeding would be subject to challenge again in the Article 21.5 proceeding. Or, as the panel explained in EC – Bed Linen (Article 21.5 – India): “it would be unfair” to expose the responding Member to a possible finding of violation on an aspect of the original measure that the Member “was entitled to assume was consistent with its obligations under the relevant agreement given the absence of a finding of violation in the original report.”

For the same reasons, that panel also found that if an aspect of a measure is deemed acceptable by the original panel and is not a part of the later measure taken to comply, that aspect of the original measure cannot be challenged during compliance proceedings. The panel explicitly described the rationale for this conclusion as concern for the responding Member’s due

---

73 WAINCYMER, supra note 29 at 519 (regarding res judicata); Appellate Body Report, European Communities – Export Subsidies on Sugar, WT/DS265/AB/R (Apr. 28, 2005), ¶ 312 (“The principle of estoppel has never been applied by the Appellate Body. Moreover, the notion of estoppel . . . would appear to inhibit the ability of WTO Members to initiate a WTO dispute settlement proceeding. We see little in the DSU that explicitly limits the rights of WTO Members to bring an action; WTO Members must exercise their ‘judgement [sic] as to whether action under these procedures would be fruitful’, by virtue of Article 3.7 of the DSU, and they must engage in dispute settlement procedures in good faith, by virtue of Article 3.10 of the DSU. This latter obligation covers, in our view, the entire spectrum of dispute settlement, from the point of initiation of a case through implementation. Thus, even assuming arguendo that the principle of estoppel could apply in the WTO, its application would fall within these narrow parameters set out in the DSU.”)

74 The WTO does not generally use the terms “claim preclusion” or “issue preclusion.”


77 Appellate Body Report, EC – Bed Linen (Article 21.5 – India), ¶ 93.


process rights, stating that “the utility of an Article 21.5 proceeding should not override the basic due process rights of the parties to a dispute.”

Preventing Members from raising such repetitive claims during Article 21.5 proceedings also serves the many other ends cited as rationales for claim preclusion generally: it promotes efficiency and judicial economy, allows parties to reach finality or repose, and enhances the consistency of judicial decisions, and, consequently, public confidence in the legitimacy of the adjudicators. These ends align with the goals of compliance panels. Allowing parties to reach finality and repose promotes the prompt resolution of disputes, as does greater judicial efficiency and economy. And by preventing Members from bringing claims that they have unsuccessfully raised in prior proceedings, compliance panels increase the likelihood of consistency in judicial decisions. This consistency in turn clarifies Members’ rights and obligations, allowing these rights and obligations to be better enforced.

IV. HOW SHOULD THE WTO MODIFY ITS UNDERSTANDING OF DUE PROCESS AND THE CLOSE NEXUS TEST TO BETTER MITIGATE THE RISKS OF OVER- AND UNDER-INCLUSION IN ARTICLE 21.5 PROCEEDINGS?

Due process concerns and the close nexus test help Article 21.5 panels avoid the risks of over- and under-inclusion. But are there ways these tools could be modified to make them more effective in defining the proper scope of Article 21.5 panels? This section will make two suggestions for improvement: First, although the timing and nature elements of the close nexus test likely cannot be defined more precisely, and thus should be applied in the future as they have been in the past, the effects prong of this test demands articulation or abandonment. Second, although the Appellate Body has found to the contrary, due process should bar Members from bringing claims in Article 21.5 proceedings that could have been raised in the initial proceedings but were not.

A. Problems with the Close Nexus Test

As indicated earlier, neither the Appellate Body nor any panels have articulated what aspects of a measure’s nature, timing, and effects will be relevant when considering whether that measure is sufficiently closely connected to another measure so as to fall within the purview of an Article 21.5 panel. How similar must the nature of the two measures be? And how close in time must they occur? What exactly is meant by “effects”? There likely isn’t a more precise standard that can be used regarding the timing of the two measures. If the WTO were to adopt something like a statute of limitations, such that measures enacted a certain date would not fall within the purview of Article 21.5 panels, Members could simply wait one day beyond that time frame and enact their measures then. Through manipulation of this “statute of limitations,” Members could thus avoid the scrutiny of an Article 21.5 panel and force the complaining Member to initiate an entirely new dispute resolution proceeding to address the later measure. Such a result would serve neither the end of prompt compliance nor the end of protecting Members’ rights and obligations.

It will likely be difficult to give a more precise definition as to the nature of the two measures as well. When considering measures’ natures, panels seem to be concerned about whether the two measures are of the same general type and whether they are applied to the same types of products or producers: for example, loans to an automotive leather company in Australia.

---

80 Panel Report, EC – Bed Linen (Article 21.5 – India), ¶ 7.76.
81 See, e.g., 47 AM. JUR. 2D Judgments § 473 (West 2011).
– Automotive Leather II (Article 21.5 – US), or quarantine regulations on salmon in Australia – Salmon (Article 21.5 – Canada). It is difficult to imagine a more elaborate definition of “nature” than “type”—or “kind” or “sort”—that would still allow Article 21.5 panels to assume within their purview all of the measures that they should properly be able to review. A more precise definition would, if anything, produce worse under- and over-inclusion of measures than already exists.

The effects prong of the close nexus test, however, demands articulation. This prong seems designed to capture measures that effectively nullify or impair the declared implementation measure. For example, in Australia – Automotive Leather II (Article 21.5 – US), the panel found that a loan did fall within its purview even though Australia had not identified it as a measure taken to comply; the panel implicitly based this finding on the fact that the loan negated Australia’s efforts to comply with the DSB’s rulings and recommendations. As the panel stated: “because of the loan . . . no withdrawal of the prohibited subsidies[ ] has effectively taken place.”82 Similarly, in US – Zeroing (Article 21.5 – EC), the Appellate Body suggested that two measures can be deemed closely connected in terms of their effects when the later measure results in a “continuation” of the earlier inconsistent measure.83 And in US – Softwood Lumber IV (Article 21.5 – Canada), the panel explained:

Since the pass-through analysis in the First Assessment Review could, therefore, have an impact on, and possibly undermine, any implementation of the DSB rulings and recommendations regarding pass-through by the Section 129 Determination, we consider that the pass-through analysis in the First Assessment Review should also fall within the scope of these DSU Article 21.5 proceedings.84

In other words, because the pass-through analysis in the First Assessment Review effectively negated the change that the United States had made to the pass-through analysis in the Section 129 Determination, the First Assessment review negated U.S. efforts to comply with the DSB’s rulings and recommendations with respect to the Section 129 Determination. Consequently, the pass-through analysis in the First Assessment Review fell within the purview of the Article 21.5 panel.85

In its appeal, the United States argued—unsuccessfully—that the effects of a measure could not be the appropriate standard by which to determine whether that measure falls within the purview of an Article 21.5 panel.85 Not only does this approach have no basis in the text of Article 21.5, but also it broadens the scope of Article 21.5 panels to worrisome proportions. Almost any measure could “have an impact on, and possibly undermine” the implementation of a compliance measure, especially where the two measures involve the same type of merchandise from the same country. Under the effects prong as articulated in US – Softwood Lumber IV (Article 21.5 – Canada) above, any assessment reviews subsequent to an original antidumping or countervailing duty investigation that is subject to DSB recommendations and rulings would fall

83 Appellate Body Report, US – Zeroing (Article 21.5 – EC), ¶ 233 (finding that “to the extent that sunset review determinations led to the continuation of the relevant anti-dumping duty orders, which in turn provided the legal basis for the continued imposition of assessment rates and cash deposits calculated with zeroing in subsequent administrative reviews with continued effects after 9 April 2007, these sunset reviews had a sufficiently close line, in terms of effects, with the recommendations and rulings of the DSB”).
84 Panel Report, US – Softwood Lumber IV (Article 21.5 – Canada), ¶ 4.41 (emphasis added). The panel also based its determination that the First Assessment Review fell within the scope of the Article 21.5 proceedings on the “considerable overlap in effect of [the] various measures.” Id.
within the purview of an Article 21.5 panel.\textsuperscript{86} But, as the Appellate Body has explained, not “every assessment review will . . . fall within the jurisdiction of an Article 21.5 panel.”\textsuperscript{87}

Moreover, a Member likely does not know the effects of any particular measure at the time of the measure’s enactment.\textsuperscript{88} Potentially offending Members will thus struggle to anticipate when their actions might fall within the purview of an Article 21.5 panel. This insecurity could lead Members to be overly cautious in enacting any new measures regarding the same products or producers that were affected by the original inconsistent measure.\textsuperscript{89} At the very least, the unpredictability as to which measures would fall within the purview of Article 21.5 panels under the effects prong of the close nexus test presents a challenge to the legitimacy of decisions issued by Article 21.5 panels and the Appellate Body.\textsuperscript{90}

The effects prong must be modified if it is to remain a useful component of the close nexus test, and if the close nexus test is to retain its legitimacy as a tool to avoid the under-inclusion of measures in Article 21.5 proceedings. Simply requiring that the two measures affect and target the same products or producers is not a sufficient limitation on the effects prong,\textsuperscript{91} under this limitation of the effects prong, as suggested above, any two measures of like nature that affect the same products or producers would fall within the purview of an Article 21.5 panel—an untenable result, as the Appellate Body has itself suggested.\textsuperscript{92}

Focusing on the subsequent measure’s effects on the “existence” of the original violation and the “consistency” of the subsequent measure with the Member’s WTO obligations is not a sufficient limitation on the effects prong, either. Although this understanding of one measure’s effect on another is appealing because it is grounded in the text of the DSU,\textsuperscript{93} any subsequent measure that affects the same products and producers as the earlier measure that was deemed inconsistent could be said to affect the “existence” of that earlier measure. And a measure should not fall within the purview of an Article 21.5 panel simply because it is inconsistent with the Members’ WTO obligations. Otherwise, any sort of claim at all could be brought in an Article 21.5—rather than an Article 6—proceeding. The Appellate Body has properly rejected this over-inclusive approach.\textsuperscript{94}

If the effects prong of the close nexus test is to prove a useful tool for limiting under-

\textsuperscript{86} Appellee Submission of the United States, \textit{US – Zeroing (Article 21.5 – EC)}, WT/DS294 (Mar. 10, 2009), n. 57, \textit{available at} http://www.ustr.gov/trade-topics/enforcement/dispute-settlement-proceedings/wto-dispute-settlement/laws-regulations-and-


\textsuperscript{89} For a discussion of how an effects-based test in another area of law is over-inclusive and thus leads to over-deterrence, see Marco Lankhorst, \textit{Improving Accuracy in Effects-Based Analysis: An Incentive-Oriented Approach} (Amsterdam Ctr. for Law & Econ., Working Paper No. 2007-01, 2006), \textit{available at} http://ssrn.com/paper=956330.

\textsuperscript{90} \textit{See} \textit{CLARENCE J. MANN, THE FUNCTION OF JUDICIAL DECISION IN EUROPEAN ECONOMIC INTEGRATION} 176 (1972) (“[M]odes of legitimacy may vary in effectiveness by area of law. . . . Rules of economic regulation and commercial transactions . . . are measured to a large extent by standards of efficiency, utility and predictability.”).

\textsuperscript{91} Kearns & Charnovitz, \textit{supra} note 12 at 347 (suggesting this limitation).


\textsuperscript{93} DSU, art. 21.5 (“Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply . . . “).

\textsuperscript{94} Appellate Body Report, \textit{Canada – Aircraft (Article 21.5 – Brazil)}, ¶ 36.
inclusion of measures in Article 21.5 proceedings without running the risk of vast over-inclusion, Article 21.5 panels must, at the very least, employ a narrow conception of what it means for a challenged measure to “have an impact on, and possibly undermine” the implementation measure. But even such a narrow articulation of the effects prong of the close nexus test is possible, it does not seem necessary. The timing and nature prongs of this test are alone sufficient to capture measures that should be reviewed by an Article 21.5 panel even though they have not been identified as “measures taken to comply.” Especially if we consider the nature prong to be satisfied only if the subsequent measure is applied to the same products or producers as the original measure, as *Australia – Salmon (Article 21.5 – Canada)* and *Australia – Automotive Leather II (Article 21.5 – US)* suggest, the close nexus test does not need the effects prong. This prong should therefore be abandoned. Its usage threatens only undesirable over-inclusion of measures in Article 21.5 proceedings.

**B. Problems with Due Process in the Article 21.5 Context**

For the same reasons that the Appellate Body found that Members cannot, during Article 21.5 proceedings, raise claims about unchanged aspects of a measure that were upheld in the original proceeding or aspects of the original measure that are not part of the measure taken to comply, one might expect the Appellate Body to prevent a Member from raising objections to a measure taken to comply that it did not raise—but could have raised—in the original panel proceeding. And, indeed, some panels have suggested as much.95 In particular, the panel in *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)* explained that “an Article 21.5 panel can consider a new claim on an aspect of the measure taken to comply that constitutes a new or revised element of the original measure, which claim could not have been raised in the original proceedings.”96 In that case, the panel decided that the challenged measures did fall within the purview of the Article 21.5 panel, but only after determining that the new claims referred to aspects of the measure taken to comply that had changed vis-à-vis the original measure.97 The panel explained that allowing the complaining Member to raise claims in an Article 21.5 proceeding that it could have raised—but did not raise—in the initial proceeding would result in “procedural unfairness.”98

The goal of prompt settlement of disputes seems to weigh against excluding certain claims simply because they had not been raised during the initial proceeding. Intuitively, the more claims that can be heard during expedited proceedings, the faster Members’ disputes can be settled. But the goal of prompt resolution must be balanced against the goal of preserving Members’ rights and obligations. Deciding Members’ disputes by coin toss would of course allow for faster resolution, but not better resolution—it would be patently procedurally unfair.

95 See, e.g., Panel Report, *EC – Bed Linen (Article 21.5 – India)*, ¶ 6.43 (finding that India would not be afforded “an opportunity to obtain a ruling in an Article 21.5 proceeding that they could have sought and obtained in the original dispute”); Grossman & Sykes, supra note 21 at 140 (“This language [just cited] suggests that all legal issues that could have been raised in the earlier proceeding, but were not, are waived.”); Panel Report, *EC – Bed Linen (Article 21.5 – India)*, ¶ 6.40 (explaining that allowing a Member to bring such claims in an Article 21.5 proceeding “would not seem to be consistent with the overall object and purpose of the DSU to achieve satisfactory resolution of disputes, effective functioning of the WTO, to maintain a proper balance between the rights and obligations of Members, and to ensure that benefits accruing to any Member under covered agreements are not nullified or impaired”).


97 Id. ¶ 7.217.

98 Id. n. 294.
Similarly in the domestic context, when we allow a court that has mandated equitable relief to maintain oversight of compliance with the equitable decree, we do not grant it the ability to hear claims that should have been raised in the original proceeding but were not.

It should, then, also be “procedurally unfair” to allow a WTO Member to raise new claims that could have been but were not raised in the original proceeding: Because of the abbreviated nature of Article 21.5 proceedings, the responding Member would have limited opportunity to respond to these new claims. The record of the original proceedings will not contain any evidence on the new claims, and thus the Article 21.5 panel will have “an extremely limited evidentiary basis on which to rule.”

Finally, the shorter timeline provided for by Article 21.5 “significantly limits both the panel’s opportunity to interact with the parties and the panel’s time to deliberate.”

Despite these concerns, the Appellate Body rejected the idea that claims that could have been raised in original proceedings but were not are excluded from Article 21.5 proceedings in US – Zeroing (Article 21.5 – EC). It stated:

While claims in Article 21.5 proceedings cannot be used to re-open issues that were decided on substance in the original proceedings, the unconditional acceptance of the recommendations and rulings of the DSB by the parties to a dispute does not preclude raising new claims against measures taken to comply that incorporate unchanged aspects of original measures that could have been made, but were not made, in the original proceedings.

In other words, while the complainant may not, during an Article 21.5 proceeding, challenge aspects of the original measure that it did not challenge in the original proceeding, it may challenge aspects of the measure taken to comply that were part of the original measure that it did not challenge in the original proceeding. Such claims are allowed because they do not grant the complaining Member a “second chance” to take issue with the original measure. Rather, they allow Members to argue claims that were not decided in the original proceedings. The Appellate Body expressly rejected the argument that allowing such claims “jeopardize[s] the principles of fundamental fairness and due process.”

This seems like exactly the wrong conclusion. The measures a Member takes to comply with the original panel’s rulings and recommendations are designed to correct the inconsistencies identified in the panel proceedings. Accordingly, the Member should not be liable for failing to correct a violation that was not identified by those rulings and recommendations. When it is forced to address new claims that could have been but were not raised before the original panel during the Article 21.5 proceedings, it has little time to respond to the new allegations, and no time to correct the violation if one is found.

The WTO could employ the doctrine of good faith to limit which new claims could be

---

99 Id.
100 Id. (“The panel typically has only one opportunity to meet with the parties, unlike the normal proceedings where two substantive meetings taking place.”)
103 Id.
104 While responding Members in original panel proceedings have a “reasonable period of time” to comply with the panel’s recommendations and rulings, responding Members in Article 21.5 proceedings do not expressly have this grace period. Compare DSU art. 21.3 (providing for a “reasonable period of time” to comply after Article 6 proceedings) with id. art. 21.5 (making no such provision for Article 21.5 proceedings). A good argument can be made that responding Members in Article 21.5 proceedings should have a “reasonable period of time” to comply after the adoption of the Article 21.5 panel or Appellate Body report, but research has revealed no instances of this argument being made to a panel or the Appellate Body.
brought in Article 21.5 proceedings. If a complainant had an objectively reasonable and legitimate expectation that the WTO violation would be corrected even though that violation was not raised in the original proceeding, then the Member could bring the new claim. But, as Andrew D. Mitchell has noted, the WTO often links good faith obligations and due process concerns. If good faith does require Members to act consistently with the objective of protecting due process in WTO proceedings, then good faith would seem to caution against including measures that could have been but were not challenged in original proceedings within the purview of Article 21.5 panels.

Policy concerns, often raised with respect to claim preclusion in the domestic context, also indicate that Members should not be able to raise such claims during Article 21.5 proceedings. The central role of any dispute settlement system is to provide answers to adversaries: by so doing, the system frees litigants from the “uncertain prospect of litigation, with all its costs to emotional peace and the ordering of future affairs.” In other words, claim preclusion promotes not only a formal, but also a more holistic, resolution of disputes. Such resolution of disputes enhances respect for the judiciary’s ability to resolve inter-party issues—and thus enhances respect for the judiciary overall.

True, one of the most commonly cited rationales for claim preclusion in the domestic context—encouraging litigants to bring all their claims at the outset of the procedure—may not justify its application in Article 21.5 proceedings. Grossman and Sykes explain encouraging litigants to bring all their claims at the outset of compliance proceedings will not necessarily make these compliance proceedings more efficient. Indeed, it might be preferable to allow a complaining Member may to bring its strongest claims first, leaving the weaker ones aside should the initial claims fail in order to reduce the costs of litigation. And because Article 21.5 panels are comprised of the same members of the original panel, minimal additional effort is needed to familiarize the judges with the facts and legal issues in a compliance proceeding. In other words, the fixed costs of the second proceeding will generally be small relative to the variable costs of litigating more issues, suggesting that Members should not be obligated to bring all of their claims about a measure in the original proceeding if they wish the raise them before an Article 21.5 panel. Otherwise, Members could be encouraged to “throw the ‘kitchen sink’ into their initial complaints and arguments, so that initial panel proceedings become even more . . . cumbersome.”

But claim preclusion does not yield an overwhelming “kitchen sink” result in the domestic context—why would it be expected to do so in the WTO context? And even if it did yield this result, compliance panels are empowered to dismiss unmeritorious claims.

105 See id. art 3.10 (“[I]f a dispute arises, all Members will engage these procedures in good faith in an effort to resolve the dispute.”); Appellate Body Report, United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan, WT/DS192/AB/R (Oct. 8, 2002), ¶ 81 (referring to the “general principle of good faith that underlies all treaties”); Andrew D. Mitchell, Good Faith in WTO Dispute Settlement, 7 MELB. INT’L L. 339, 352 (2006) (“A responding Member could claim that the complainant was using the dispute settlement mechanism as a mere strategy or tactic to achieve some unrelated result instead of in an effort to resolve the dispute . . .”).
106 Id. at 147.
107 Id. at 142.
109 Id.
110 Id. at 141.
112 See 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4403 (2d ed. 2011) (describing the policies underlying res judicata).
113 Id.
Additionally, even if requiring Members to bring all their claims at the outset of Article 21.5 proceedings does slightly slow these proceedings, the goal of prompt resolution of disputes must, as explained earlier, be balanced against protection of Members’ procedural rights. Finally, even Grossman and Sykes do not advocate that new claims should categorically be allowed in Article 21.5 proceedings; they simply advocate that the understanding of “same” claim be narrow. In other words, they are concerned about a use of claim preclusion that could result in the under-inclusion of measures in Article 21.5 proceedings. That concern is consistent with preventing Members from, during Article 21.5 proceedings, raising claims that could have been raised during initial proceedings but were not.

A potentially more serious challenge to the suggestion that Article 21.5 proceedings should employ principles of claim preclusion is evidence that the WTO does not want to provide repose. The panel in US – Shrimp (Article 21.5 – Malaysia), for example, stated that the WTO-consistency of implementation measures may be “reassessed at any time.” This suggests that the WTO sees its dispute settlement system not as primarily concerned with providing finality, but with coming to the right conclusion about the WTO consistency of a measure.

While being right is a laudable goal, it should not control. At some point, Members must get on with their activities in peace. And they cannot do so if the WTO-conformity of their measures are always subject to challenge, even when they have implicitly been deemed consistent before.

CONCLUSION

Although Article 21.5 seems to be working reasonably well, the frequency of Article 21.5 panel requests has declined over the past three years. One of the challenges for Article 21.5 panels if they wish to maintain their relevancy and efficacy is determining how best to define their scope—in particular, how to avoid including measures that should not be reviewed in compliance proceedings within their scope (over-inclusion), and excluding measures that should be reviewed in compliance proceedings from their scope (under-inclusion).

This note has suggested that the tools to avoid the twin risks of under- and over-inclusion are already present in the past Article 21.5 reports. The close nexus test serves to reduce the likelihood of under-inclusion, while due process concerns reduce the risk of over-inclusion. These tools, while useful, do have certain defects: The effects prong of the close nexus test demands abandonment, or at least further articulation. And due process concerns should—but currently do not—bar Members from bringing claims in Article 21.5 proceedings that could have been raised in the initial proceedings but were not.

Identifying the appropriate scope of Article 21.5 panels is essential because, without this understanding, these panels will fail to serve their primary ends: promoting the prompt resolution of disputes and protecting the rights and obligations of Members. And without effective compliance proceedings, the WTO, like the GATT before it, will cease to be a successful mechanism for enhancing the security and predictability of the multilateral trading system.

114 Id.
116 This is especially true in the WTO context, where decisions do not, strictly speaking, have precedential value. Thus, if a decision is wrong, a different decision can be made in a similar future dispute without disrupting the repose of the parties to the erroneously decided dispute.