

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

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## I. 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 for courts with a narrowly defined purview. 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 was designed.

Because Article 21.5 panels have such a limited scope, one of their primary challenges is avoiding over- and under-inclusion. As the WTO’s Appellate Body has explained, Article 21.5 panels may only consider 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.<sup>1</sup> But what are measures “taken to comply”? If a panel answers this question too narrowly, they will allow offending Members to delay or evade compliance with the intent of the panel’s recommendations by changing only the form, not the substance, of the

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\* B.A. (Princeton), J.D. (Stanford) (expected 2013).

<sup>1</sup> WTO, Appellate Body Report, *Canada—Measures Affecting the Export of Civilian Aircraft (Recourse by Brazil to Article 21.5 of the DSU)* WT/DS70/AB/RW at para 36, online: WTO <[http://docsonline.wto.org/GEN\\_viewerwindow.asp?http://docsonline.wto.org:80/DDFDocuments/t/WT/DS/70ABRW.DOC](http://docsonline.wto.org/GEN_viewerwindow.asp?http://docsonline.wto.org:80/DDFDocuments/t/WT/DS/70ABRW.DOC)> [Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*].

offending behavior. 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 Paper seeks to address three related questions: (1) Is the 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 Paper lays out a brief history of the WTO's dispute settlement process, and explains how the purposes of Article 21.5 panels fit in with the overarching goals of WTO dispute settlement. Part II presents a table of Article 21.5 cases through the end of 2011, and briefly examines their results to draw some conclusions about how well Article 21.5 proceedings are working. Part III explains 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 suggests improvements for each of these tools: (1) how the “effects” prong of the close nexus test could more effectively limit the scope of measures that fall within the purview of Article 21.5 panels, and (2) 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 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's enforcement capabilities will deteriorate, jeopardizing its continued efficacy.

## II. 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.<sup>2</sup> If these consultations do not settle the dispute, the complainant may then request that a panel be established to

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<sup>2</sup> *Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, (1994) 1869 UNTS, article 4.3, online: WTO <[http://www.wto.org/english/docs\\_e/legal\\_e/28-dsu.pdf](http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf)> [DSU].*

adjudicate the matter.<sup>3</sup> 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.<sup>4</sup> Until compliance is achieved, the Dispute Settlement Body (DSB) continues to monitor the offending Member's compliance or lack thereof.<sup>5</sup> If the offending Member fails to comply with its WTO obligations within a reasonable period, the prevailing Member may request compensation—such as a tariff reduction—from the offending Member,<sup>6</sup> or it may suspend its WTO obligations with respect to the offending Member.<sup>7</sup> Alternatively, 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.<sup>8</sup> The panel will review the measures allegedly taken to comply and determine whether they do, in fact, bring the offending Member into compliance.<sup>9</sup>

### 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 dispute to monitor their own compliance and did not provide an independent

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<sup>3</sup> *Ibid* art 6.1.

<sup>4</sup> *Ibid* art 19.1.

<sup>5</sup> *Ibid* art 21.6.

<sup>6</sup> *Ibid* art 22.2.

<sup>7</sup> *Ibid*.

<sup>8</sup> For a discussion of whether Members can resort to Article 22 before convening a compliance panel under Article 21.5, see Cherise M. Valles & Brendan McGivern, "The Right to Retaliate Under the WTO Agreement: the "Sequencing Problem" (2000) 34 *J World Trade* 63.

<sup>9</sup> Jeanne J. Grimmet, *Dispute Settlement in the World Trade Organization (WTO): An Overview*, Congressional Research Service, (2 May 2011), online: Foreign Press Centers <<http://fpc.state.gov/documents/organization/168669.pdf>> at 1.

review of a Member's compliance.<sup>10</sup> 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 effective enforcement mechanisms because they were ad hoc and did not follow set procedures.<sup>11</sup>

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,<sup>12</sup> to preserve the rights and obligations of WTO Members,<sup>13</sup> to clarify these rights and obligations through interpretation of the covered WTO agreements,<sup>14</sup> to settle disputes promptly<sup>15</sup> with a "positive solution,"<sup>16</sup> and to avoid unilateral retaliation.<sup>17</sup> Article 21.5 proceedings serve all of these ends, but they are especially intended, as their procedures reflect, 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.<sup>18</sup> Whenever possible,

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<sup>10</sup> See *Understanding on Notification, Consultation, Dispute Settlement and Surveillance* (28 November 1979), BISD 26S/210, at para 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.").

<sup>11</sup> See Jason E. Kearns & Steve Charnovitz, "Adjudicating Compliance in the WTO: A Review of DSU Article 21.5" (2002) 5 J Intl Econ L 331 at 331-332 [Kearns & Charnovitz].

<sup>12</sup> DSU, *supra* note 2 at art 3.2.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid* 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.").

<sup>16</sup> *Ibid* art 3.7.

<sup>17</sup> See *ibid* art 23.

<sup>18</sup> *Ibid* arts. 12.8, 21.5. Both Article 6 and Article 21.5 panels generally take longer to circulate their

the members of the original dispute panel comprise the members of the Article 21.5 panel.<sup>19</sup> Consequently, the panelists are already familiar with the facts and legal issues of the case.<sup>20</sup>

The very existence of Article 21.5 proceedings promotes prompt dispute resolution 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.<sup>21</sup> The complaining Member can instead initiate expedited proceedings under Article 21.5. Similarly, in the common law context, a court that has mandated equitable relief can monitor compliance with the equitable decree: doing so saves a new judge from having to familiarize herself with the issues and spares the injured party the burden of initiating a separate action.

## *2. Preserving 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 made it possible for Members to avoid compliance.<sup>22</sup> Article 21.5 proceedings were created to ensure 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.<sup>23</sup> The

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reports in practice. Article 21.5 panel reports are still expedited relative to Article 6 panel reports.

<sup>19</sup> *Ibid* art 21.5.

<sup>20</sup> Gene M. Grossman & Alan O. Sykes, "European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India: Recourse to Article 21.5 of the DSU by India" (2006) 5 World Trade Rev 133 at 142 [Grossman & Sykes].

<sup>21</sup> See DSU, *supra* note 2 at art 21.1; WTO, Appellate Body Report, *United States – Final Countervailing Duty Determination with respect to Certain Softwood Lumber from Canada (Recourse by Canada to Article 21.5)* WT/DS257/AB/RW at para 72, online: WTO <[www.wto.org/english/tratop\\_e/dispu\\_e/257abr\\_e.pdf](http://www.wto.org/english/tratop_e/dispu_e/257abr_e.pdf)> [Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*]. ("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.")

<sup>22</sup> Under the GATT, the lack of 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. Locke & Peter N. Barsoom, "Is the Good News About Compliance Good News About Cooperation?" (1996) 50:3 Int'l Org 379 at 379.

<sup>23</sup> DSU, *supra* note 2 at art 21.6.

dispute in *EC – Bananas III*, for example, was on the DSB agenda for years and opened every regular DSB meeting until it was settled.<sup>24</sup>

Members can only obtain an adequate adjudication of substantive issues under Article 21.5 if they stand on procedurally equal footing.<sup>25</sup> Article 21.5 proceedings protect Members' procedural equality in a number of ways. First, the panelists are selected to ensure their independence.<sup>26</sup> Second, the process for appealing Article 21.5 findings provides Members with a procedural protection of their substantive rights. Where they feel that the Article 21.5 panel erred, 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 that protects Members' right to be heard. Either party to the original dispute may request compliance proceedings even if compliance measures were successfully implemented.<sup>27</sup> A responding Member, for example, might initiate proceedings to obtain what is effectively a declaratory judgment that the measures it has taken to comply are consistent with its WTO obligations.<sup>28</sup> This approach to

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<sup>24</sup> WTO, *Dispute Settlement Training Module: Chapter 6: The Process – Stages in a Typical WTO Dispute Settlement Case*, online: WTO <[http://www.wto.org/english/tratop\\_e/dispu\\_e/disp\\_settle\\_ment\\_cbt\\_e/c6s7p2\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/disp_settle_ment_cbt_e/c6s7p2_e.htm)>.

<sup>25</sup> 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 WTO, Appellate Body Report, *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/AB/R at 15, online: WTO <[https://www.wto.org/english/tratop\\_e/dispu\\_e/24abr.pdf](https://www.wto.org/english/tratop_e/dispu_e/24abr.pdf)>. (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* (Cambridge: University of Cambridge Press, 1987) at 292-296, 307-310; V.S Mani, *International Adjudication: Procedural Aspects* (The Hague: Martinus Nijhoff Publishers, 1980) at 15.

<sup>26</sup> DSU, *supra* note 2 at art 8.2; see also Andrew D Mitchell, *Legal Principles in WTO Disputes* (Cambridge: Cambridge University Press, 2008) at 153-57 (explaining the different elements of WTO procedure that guard against bias of adjudicators); John P Gaffney, "Due Process in the World Trade Organization: The Need for Procedural Justice in the Dispute Settlement System" (1999) 14 *Am U Int'l L Rev* 1173 at 1198-1203 (explaining how other aspects of the DSU protect the judges' impartiality).

<sup>27</sup> Jeanne J. Grimmett, *WTO Dispute Settlement: Status of U.S. Compliance in Pending Cases*, Congressional Research Service, online: Federation of American Scientists <<http://www.fas.org/sgp/crs/misc/RL32014.pdf>> at 1.

<sup>28</sup> In *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, 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

standing and the admission of claims may 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 slower Article 6 proceedings.

But this approach may also allow Members to use Article 21.5 proceedings to harass other Members or to delay complying with their WTO obligations. 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 defend itself. The inclusion of more claims in Article 21.5 proceedings will, of course, prolong them, tempering the Article 21.5 panel’s ability to secure prompt compliance with the DSB’s rulings and recommendations.

The WTO’s liberal approach to claims and standing in Article 21.5 proceedings thus both serves and undermines the goals of prompt compliance and preserving Members’ rights and obligations. An overly narrow approach to the scope of Article 21.5 would also undermine these goals by allowing offending Members to delay compliance by changing merely the form of their offenses. The trick, then, is for Article 21.5 panels to avoid the twin risks of over- and under-inclusion.

## B. Article 21.5

An Article 21.5 panel must first determine 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.<sup>29</sup> This Paper does not deal with this second step, as that effort depends on the substance of the WTO obligations at issue and thus varies from case to case. Instead, this Paper

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consistent with its WTO obligations. See WTO, *Request for Consultations by the European Communities, European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/23, online: WTO <[http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds26\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds26_e.htm)>; see also Jeff Waincymer, *WTO Litigation: Procedural Aspects of Formal Dispute Settlement* (London: Cameron May, 2002) at 672 (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) [Waincymer].

<sup>29</sup> DSU, *supra* note 2 at 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).

focuses on the first step: identifying the measures that should properly fall within the Article 21.5 panel's scope.

The Appellate Body has explained that such measures are not “just any measure of a Member of the WTO,”<sup>30</sup> but are limited to “measures taken *in the direction of, or for the purpose of achieving, compliance.*”<sup>31</sup> But 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.<sup>32</sup> Holding otherwise would allow the offending Member to evade review of any new measure by declining to identify it as a measure “taken to comply,” which would risk under-inclusion of measures by Article 21.5 panels. Conversely, the complaining Member does not have the authority to decide what constitutes a measure taken to comply either,<sup>33</sup> as this practice would lend itself to manipulation in the direction of over-inclusion of

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<sup>30</sup> See *supra* text accompanying note 1.

<sup>31</sup> WTO, Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, *supra* note 21 at para 66. The Appellate Body's interpretative approach in this case derives from that outlined in Articles 31 and 32 of the Vienna Convention On the Law of International Treaties Between States and International Organizations or Between International Organizations though the Appellate Body does not explicitly reference these provisions in its decision. While 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 (“*measures prises pour se conformer*” and “*medidas destinadas a cumplir*,” respectively) suggest that the relevant measures are those taken with such an intention. *Ibid.*

<sup>32</sup> WTO, 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 at para 202, online: WTO <[http://www.wto.org/english/news\\_e/news09\\_e/294abrw\\_e.htm](http://www.wto.org/english/news_e/news09_e/294abrw_e.htm)> [Appellate Body Report, *US – Zeroing (Article 21.5 – EC)*], (“[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. Rather the Appellate Body considered that a panel’s mandate under Article 21.5 may extend to measures that the implementing Member maintains are not ‘taken to comply’ with the recommendations and rulings of the DSB.”); Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, *supra* note 21 at para 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*”).

<sup>33</sup> Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, *supra* note 21 at para 73.



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measures in compliance proceedings.<sup>34</sup> 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,<sup>35</sup> it is ultimately up to the panel itself to determine which measures fall within its purview.<sup>36</sup>

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*."<sup>37</sup> 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*

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<sup>34</sup> 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." WTO, 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 at para 6.4 [*Australia – Automotive Leather II (Article 21.5 – US)*]; WTO, Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse by Malaysia to Article 21.5 of the DSU*, WT/DS58/AB/RW at para 82, online: WTO <[docs.wto.org/imrd/directdoc.asp?DDFDocuments/t/WT/DS/58ABRW.doc](http://docs.wto.org/imrd/directdoc.asp?DDFDocuments/t/WT/DS/58ABRW.doc)> [*Appellate Body Report, US – Shrimp (Article 21.5 – Malaysia)*] ("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.").

<sup>35</sup> Appellate Body Report, *US – Zeroing (Article 21.5 – EC)*, *supra* note 32 at para 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)*, *supra* note 21 at para 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 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.)

<sup>36</sup> WTO, 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 at para 78, online: WTO <[www.wto.org/english/tratop\\_e/dispu\\_e/141abrw\\_e.doc](http://www.wto.org/english/tratop_e/dispu_e/141abrw_e.doc)> [*Appellate Body Report, EC – Bed Linen (Article 21.5 – India)*], ("[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)*, *supra* note 21 at para 73; see also WTO, Panel Report, *Australia – Measures Affecting the Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada*, WT/DS18/RW at para 7.10.22, online: World Trade Law <<http://www.worldtradelaw.net/reports/wtopanelsfull/Australiasalmon%28panel%29%2821.5%29%28full%29.pdf>> [*Panel Report, Australia – Salmon (Article 21.5 – Canada)*].

<sup>37</sup> Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, *supra* note 21 at para 67; Appellate Body Report, *US – Zeroing (Article 21.5 – EC)*, *supra* note 32 at para 205.

bring itself into compliance".<sup>38</sup> The inclusion of "omissions" in the purview of Article 21.5 panels serves to avoid the risk of under-inclusion. If an Article 21.5 panel could not consider a responding Member's failure to take 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 both the covered WTO agreements and the original panel's recommendations and rulings.<sup>39</sup> The determination of WTO consistency (or lack thereof) requires that the Article 21.5 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.<sup>40</sup> This approach 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 Article 21.5 proceedings must include an examination of the recommendations and rulings adopted by the original DSB, and of the original measures to

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<sup>38</sup> WTO, Panel Report, *US – Zeroing (Recourse to Article 21.5 of the DSU by the European Communities)*, WT/DS294/RW at para 8.86, online: World Trade Law <<http://www.worldtradelaw.net/reports/wtopanels/us-zeroing%28panel%29%2821.5%29.pdf>> [Panel Report, *US – Zeroing (Article 21.5 – EC)*] [emphasis added]; see also Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, *supra* note 1 at para 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); see also WTO, Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R at para 81, online: WTO <[www.wto.org/english/tratop\\_e/dispu\\_e/244abr\\_e.doc](http://www.wto.org/english/tratop_e/dispu_e/244abr_e.doc)> ("[A]ny act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement.").

<sup>39</sup> Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, *supra* note 21 at para 67.

<sup>40</sup> Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, *supra* note 34 at para 87.

which they refer.<sup>41</sup> Otherwise, Article 21.5 panels would not be able to determine whether measures allegedly taken to comply were actually taken to remedy the inconsistencies found in the original proceedings.

The scope of Article 21.5 panels is thus in many ways broader than suggested by the language “measures taken to comply,” reflecting the DSU’s concern with avoiding both under- and over-inclusion in Article 21.5 proceedings.

### III. 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: are Members *using* Article 21.5 procedures? If so, are they *abusing* them? 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 importance sense, “work.”

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

Table 1 presents an overview of all requests for Article 21.5 proceedings through the end of 2011.

**Table 1**

WT/DS No.	Case Name (Short Form)	Requesting Member	Date of Request	Appeal	Outcome
18	Australia - Salmon	Canada	7/28/1999	No appeal	Inconsistent
26	EC - Hormones	EU	12/22/2008	N/A	MoU reached

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<sup>41</sup> *Ibid* at para 68.

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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 panel findings	Inconsistent
		US	6/29/2007	Upheld panel findings	Inconsistent
46	Brazil - Aircraft	Canada	11/23/1999	Upheld panel findings	Not consistent
48	EC - Hormones	EU	11/22/2008	N/A	MoU reached
58	US - Shrimp	Malaysia	10/12/2000	Upheld panel findings	Not inconsistent
70	Canada - Aircraft	Brazil	11/23/1999	Upheld panel finding	Some consistent; some inconsistent
99	US - DRAMS	Korea	3/9/2000	N/A	Mutually agreed solution reached

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103, 113	Canada – Dairy	New Zealand & US	2/16/2001	Reversed panel finding; unable to complete analysis for lack of data	Panel found measures inconsistent; second recourse to Article 21.5 initiated to address inadequacies in record on appeal
			12/6/2001	Upheld panel findings‡	Inconsistent
108	US - FSC	EU	12/7/2000	Upheld panel findings‡	Inconsistent
		EU	1/13/2005	Upheld panel findings	Not consistent
126	Australia - Automotive Leather II	US	10/4/1999	No appeal	Not consistent
132	Mexico – Corn Syrup	US	10/12/2000	Upheld panel findings	Inconsistent
141	EC - Bed Linen	India	4/4/2002	Reversed panel finding of no inconsistency	Inconsistent
207	Chile – Price Band System	Argentina	12/29/2005	Upheld panel findings	Inconsistent

212	US - Countervailing Measures on Certain EC Products	EU	9/16/2004	No appeal	Mostly consistent; some inconsistent
245	Japan - Apples	US	7/19/2004	No appeal	Inconsistent
257	US - Softwood Lumber IV	Canada	12/30/2004	Upheld panel findings	Inconsistent
264	US - Softwood Lumber V	Canada	5/19/2005	Reversed panel finding of no inconsistency	Inconsistent
267	US - Upland Cotton	Brazil	8/18/2006	Mostly upheld panel findings	Some inconsistent; some consistent
268	US - OCTGs Sunset Reviews	Argentina	3/6/2006	Reversed some panel findings; upheld others	Mostly not inconsistent; some inconsistent
277	US - Softwood Lumber VI	Canada	2/14/2005	Reversed panel finding of no inconsistency	Appellate Body unable to complete analysis because of inadequacies in record on appeal; mutually agreed solution later reached
282	US - Anti- Dumping Measures on OCTGs	Mexico	4/12/2007	N/A	Request withdrawn

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285	US - Gambling	Antigua & Barbuda	7/6/2006	No appeal	Not consistent
294	US - Zeroing	EU	9/13/2007	Reversed some panel findings; upheld others	Some inconsistent; some consistent
312	Korea - Certain Paper	Indonesia	12/22/2006	No appeal	Inconsistent
316	EC and certain member States - Large Civil Aircraft	EU <sup>42</sup>	12/9/2011	N/A	Proceedings suspended at Members' request
322	US - Zeroing	Japan	4/7/2008	Upheld panel findings	Inconsistent
336	Japan - DRAMS	Korea	9/9/2008	N/A	Proceedings suspended at Members' request
344	US - Stainless Steel	Mexico	9/7/2010	N/A	Panel report forthcoming

‡ The Appellate Body reversed one of the panel's findings of law, but upheld their findings of inconsistencies.

The overview of Article 21.5 proceedings presented in the table above gives rise to a number of observations about their functioning. First, Article 21.5 proceedings generally do not seem to be used for harassment. In the vast majority of cases, WTO-inconsistent actions have been found, suggesting that complainants are generally requesting Article 21.5 panels only when they have good reason to do so in good faith.

Second, the Article 21.5 process is used regularly, suggesting that Members find it an effective way to address noncompliance. Indeed, some Members have chosen to pursue Article 21.5 proceedings in lieu of

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<sup>42</sup> The European Union requested only Article 21.5 consultations, not the composition of an Article 21.5 panel.

suspending concessions under Article 22<sup>43</sup> even though suspension would intuitively seem to compel compliance more quickly than a panel proceeding because of its more immediate economic impact. The fact that Members who can suspend concessions instead opt for recourse to Article 21.5 proceedings suggests that Members see these proceedings 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 each of 2010 and 2011. 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.<sup>44</sup> It would be premature to suggest that this recent trend reflects dissatisfaction with Article 21.5 proceedings, but it will be interesting to see how frequently they occur in the coming years.

One of the main challenges for Article 21.5 panels, if they wish to remain a relevant and effective way to adjudicate disputes, is to determine their proper scope. As suggested above, 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.

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

When both parties agree that a certain measure is one 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

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<sup>43</sup> 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 8.

<sup>44</sup> WTO, Appellate Body Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320/AB/R, online: WTO <[www.wto.org/english/tratop\\_e/dispu\\_e/320abr\\_e.doc](http://www.wto.org/english/tratop_e/dispu_e/320abr_e.doc)>.



between the measure at issue and the declared measure taken to comply.”<sup>45</sup> This approach (called the “close nexus” test) is designed to prevent Members from avoiding the scrutiny of Article 21.5 panels by simply failing to identify a connected measure as a measure taken to comply.<sup>46</sup> Panels rely on the close nexus test to limit the risk of under-inclusion. Likewise, Article 21.5 panels rely on due process safeguards to avoid the risk of over-inclusion: they protect Members from having to answer to an Article 21.5 panel about measures that they could not reasonably foresee would fall within that panel’s purview.<sup>47</sup>

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

The close nexus test 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 both to any declared measures taken to comply and to the recommendations and rulings of the DSB.<sup>48</sup> The test allows Article 21.5 panels to avoid the under-inclusion of measures that do not seem, superficially, to be measures taken to comply, even though substantively they 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 that the Article 21.5 panel could not review the Tasmanian ban as it was not a measure that Australia had taken with

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<sup>45</sup> WTO, 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/DS27/AB/RW2/ECU, at para 243, online: WTO <[www.wto.org/english/tratop\\_e/dispu\\_e/27abrw\\_e.doc](http://www.wto.org/english/tratop_e/dispu_e/27abrw_e.doc)>.

<sup>46</sup> *Ibid* at para 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.”).

<sup>47</sup> Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, *supra* note 36 at para 7.10.26.

<sup>48</sup> This test was first articulated in *Australia – Salmon (Article 21.5 – Canada)*, *supra* note 36 and *Australia – Automotive Leather II (Article 21.5 – US)*, *supra* note 34 and was elaborated upon in *US – Softwood Lumber IV (Article 21.5 – Canada)*, *supra* note 21.

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'."<sup>49</sup> 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.<sup>50</sup> Limiting the purview of an Article 21.5 panel to measures intentionally taken to comply would result in the under-inclusion of measures in Article 21.5 proceedings.

To avoid such under-inclusion, the panel explained that Article 21.5 panels can 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 would consider them measures 'taken to comply,'" then they are, in fact, measures taken to comply, even if the implementing Member has not identified them as such (emphasis added).<sup>51</sup> That panel did not attempt to define "clearly connected" in a way that would suit all contexts,<sup>52</sup> but its determination that the two measures were closely connected 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 dispute<sup>53</sup>). The effects of the two measures (both of which effectively prevented the importation of certain salmon products into various parts of Australia) were also relevant. Though the panel spent little time focusing on those effects, this

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<sup>49</sup> Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, *supra* note 36 at para 4.28.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid* at para 7.10.2; see also *ibid* at para 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.").

<sup>52</sup> *Ibid* at para 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.'").

<sup>53</sup> *Ibid.*

part of the close nexus test would become more prominent in later cases (emphasis added).<sup>54</sup>

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*” (emphasis added).<sup>55</sup> Australia had withdrawn a private sector grant that had been found to be a prohibited subsidy. Around same time, it had 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 DSB’s ruling.”<sup>56</sup> 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 the similarity of their timing and nature.<sup>57</sup> Thus, the close nexus approach was again used 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 whether the two measures have a close nexus nor on 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 like Justice Potter Stewart’s approach to pornography: it is hard to define, but one knows it when one sees it.<sup>58</sup> The two panels did, however, offer some guidance as to certain aspects of the measures’ timing and nature that would be relevant in determining whether the close nexus test was met.

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<sup>54</sup> See *ibid* at 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’.”).

<sup>55</sup> Panel Report, *Australia – Automotive Leather II (Article 21.5 – US)*, *supra* note 34 at para 6.5.

<sup>56</sup> *Ibid*.

<sup>57</sup> *Ibid*.

<sup>58</sup> *Jacobellis v Ohio*, 378 U.S. 184, 197 (1964).

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.<sup>59</sup> A measure taken after the establishment of an Article 21.5 panel will generally (but not always) be excluded from that panel's purview.<sup>60</sup> 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."<sup>61</sup> This ability to examine measures taken after the formation of the Article 21.5 panel is necessary to fulfill those panels' purposes; without it, 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 had the same effect as 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. Allowing Article 21.5 panels to review measures implemented after Article 21.5 panel requests are filed serves to avoid the over- and under-inclusion of measures that should fall within the purview of Article 21.5 panels.

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 is taken to conform with WTO rules or is taken to maintain or worsen 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.<sup>62</sup> This approach would risk the under-inclusion of measures that should properly fall within the purview of Article 21.5 panels, thereby allowing offending Members to persist in their

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<sup>59</sup> *Ibid.*

<sup>60</sup> Panel Report, *US – Zeroing (Article 21.5 – EC)*, *supra* note 38 at para 8.115-8.116.

<sup>61</sup> Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, *supra* note 36 at para 7.10.28.

<sup>62</sup> *Ibid.* at para 7.10.23.

offenses. Moreover, Article 21.5 panels would face great difficulty in determining which measures are “better” and which are “worse.”<sup>63</sup>

## 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 clarified that its purpose is 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.”<sup>64</sup> 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, as that requirement would delay compliance.<sup>65</sup> On the other hand, “the scope of Article 21.5 proceedings logically must be narrower than the scope of original dispute proceedings” to avoid over-inclusion.<sup>66</sup>

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.<sup>67</sup> 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 negate purported compliance with DSB recommendations and rulings.<sup>68</sup> 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

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<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid* at para 72.

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

<sup>67</sup> Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, *supra* note 21 at para 21, 22.

<sup>68</sup> *Ibid* at para 62.

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 another measure as one 'taken to comply' and, consequently, to assess its consistency with the covered agreements in an Article 21.5 proceeding.<sup>69</sup>

The three measures the Appellate Body deemed "measures taken to comply" in *US – Softwood Lumber IV (Article 21.5 – Canada)* were measures implemented to determine the countervailing duty liability for imports of Canadian softwood lumber. According to the Appellate Body, they were closely connected in terms of their nature: all three measures involved the issue of pass-through and covered imports of softwood lumber from Canada. They were also closely connected in terms of timing: the publication of two of the three measures occurred within four days of each other. Finally, one measure directly affected the implementation of another: the cash deposit rate calculated by one measure was replaced after ten days by the cash deposit rate calculated by another measure. 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 explicitly considered in earlier articulations of the close nexus test. In considering two measures' "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 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" (emphasis added).<sup>70</sup> 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

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<sup>69</sup> *Ibid* at para 77.

<sup>70</sup> DSU, *supra* note 2 at art 21.5.

deposit rate.<sup>71</sup> Thus, the United States' subsequent measures perpetuated the existence of the original offending measures, and were 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 Article 21.5 panels avoid excluding measures from their purview that they *should* be able to scrutinize, due process limitations help Article 21.5 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 it did 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.”<sup>72</sup> 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.<sup>73</sup> 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.

Although the WTO has not adopted the doctrines of *res judicata* or collateral estoppel,<sup>74</sup> it employs some principles of issue and claim

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<sup>71</sup> Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, *supra*, note 21 at para 33.

<sup>72</sup> Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, *supra* note 36 at para 7.10.27.

<sup>73</sup> See WTO, 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, at para 68, online: WTO < [www.wto.org/english/tratop\\_e/dispu\\_e/108abr2\\_e.doc](http://www.wto.org/english/tratop_e/dispu_e/108abr2_e.doc) > [US – FSC II (Article 21.5 – EC)], (“[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)*, *supra* note 36 at para 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.”).

<sup>74</sup> Waincymer, *supra* note 28 at 519 (regarding *res judicata*); Appellate Body Report, *European Communities – Export Subsidies on Sugar*, WT/DS265/AB/R, online: WTO < [www.wto.org/english/tratop\\_e/dispu\\_e/265\\_266\\_283abr\\_e.pdf](http://www.wto.org/english/tratop_e/dispu_e/265_266_283abr_e.pdf) > at para 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

preclusion to reduce the risk of the over-inclusion of measures in Article 21.5 proceedings.<sup>75</sup> New claims are sometimes 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 rightly 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.<sup>76</sup> 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."<sup>77</sup> Members would be able to raise the same claims anew, wasting both Members' time without achieving any resolution, and squandering limited adjudicatory resources. Consequently, an unappealed finding of no violation that the DSB adopts must be treated as the final resolution of the dispute between the parties with respect to that particular claim.<sup>78</sup>

The conclusion that a complaining Member may not challenge an aspect of a measure that was upheld in the original proceeding makes sense in terms of due process: the responding Member could not reasonably anticipate that the aspect of the measure that was upheld in the original proceeding would be challenged again in the Article 21.5 proceeding. 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 that Member "was entitled to assume was consistent with its obligations under the

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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.").

<sup>75</sup> The WTO does not generally use the terms "claim preclusion" or "issue preclusion."

<sup>76</sup> Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, *supra* note 36 at para 80.

<sup>77</sup> Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, *supra* note 34 at para 97; Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, *supra* note 36 at para 90.

<sup>78</sup> *Ibid* at para 93.



relevant agreement given the absence of a finding of violation in the original report.”<sup>79</sup>

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.<sup>80</sup> The panel explicitly described the rationale for this conclusion as concern for the responding Member’s due 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.”<sup>81</sup> Preventing Members from raising such repetitive claims during Article 21.5 proceedings promotes efficiency and judicial economy, allows parties to reach finality or repose, helps to ensure swift dispute resolution, enhances the consistency of judicial decisions, and, consequently, public confidence in the legitimacy of the adjudicators.<sup>82</sup>

## V. 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 that these tools could be modified to make them more effective in defining the proper scope of Article 21.5 panels? This section makes two suggestions for improvement: First, while 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—but were not—raised in the initial proceedings.

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<sup>79</sup> WTO, Panel 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/R, at para 7.75. [Panel Report, *EC – Bed Linen (Article 21.5 – India)*].

<sup>80</sup> Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, *supra* note 34 at para 97; see also Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, *supra* note 36 at para 87-93.

<sup>81</sup> Panel Report, *EC – Bed Linen (Article 21.5 – India)*, *supra* note 79 at para 7.76.

<sup>82</sup> See e.g. 47 *American Jurisprudence* 2d “Judgments”, § 473 (West 2011).

### A. Problems with the Close Nexus Test

As indicated above, 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 closely in time must they occur? What exactly is meant by "effects?"

Moving towards a more precise standard to determine whether two measures were implemented sufficiently closely in time would be overly restrictive. If the WTO adopted something like a statute of limitations, 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.

Giving a more precise definition as to the nature prong of the close nexus test would also likely yield worsen the under- and over-inclusion of measures in Article 21.5 proceedings. 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 – 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.

The effects prong of the close nexus test demands articulation. This prong seems designed to capture measures that effectively nullify or impair the identified implementation measure. For example, in *Australia – Automotive Leather II (Article 21.5 – US)*, the panel found that a loan fell within its purview even though Australia denied that it was 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.”<sup>83</sup> 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.<sup>84</sup> 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.<sup>85</sup>

In other words, because the pass-through analysis in the First Assessment Review reversed 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.

In its appeal of *US – Softwood Lumber IV (Article 21.5 – Canada)*, 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 an Article 21.5 panel’s purview.<sup>86</sup> Not only does this standard 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

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<sup>83</sup> Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, *supra* note 34 at para 6.

<sup>84</sup> Appellate Body Report, *US – Zeroing (Article 21.5 – EC)*, *supra* note 32 at para 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”).

<sup>85</sup> WTO, Panel Report, *United States – Final Duty Determination with Respect to Certain Softwood Lumber from Canada Recourse by Canada to Article 21.5 of the DSU*, WT/DS257/R, at para 4.41, online: World Trade Law <<http://www.worldtradelaw.net/reports/wtopanels/us-lumbercvsfinal%28panel%29.pdf>>. 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.” *Ibid*.

<sup>86</sup> Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, *supra* note 21 at para 23.

implementation of a compliance measure, especially where the two measures involve the same type of merchandise from the same country. For example, any assessment reviews subsequent to an original antidumping or countervailing duty investigation could fall within the purview of an Article 21.5 panel.<sup>87</sup> But this cannot be true; as the Appellate Body has explained: not “every assessment review will . . . fall within the jurisdiction of an Article 21.5 panel.”<sup>88</sup>

Moreover, a Member may not know the effects of any particular measure at the time of the measure’s enactment.<sup>89</sup> 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 measure previously deemed inconsistent with WTO obligations.<sup>90</sup> 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.<sup>91</sup> The effects prong must be modified if it is to remain a useful component of the close nexus test. Simply requiring that the two

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<sup>87</sup> Appellee Submission of the United States, *US – Zeroing (Article 21.5 – EC)*, WT/DS294 n. 57, online: United States Trade Representative <<http://www.ustr.gov/trade-topics/enforcement/dispute-settlement-proceedings/wto-dispute-settlement/laws-regulations-and>>.

<sup>88</sup> Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, *supra* note 21 at para 93.

<sup>89</sup> History is rife with examples of government measures’ unintended consequences. See e.g. Marc Benitah, “U.S. Agricultural Export Credits After the WTO Cotton Ruling: *The Law of Unintended Consequences*”(2005) 6:2 *Estey Center J Int’l L & Trade Pol’y* 107 at 108; WTO, Committee on Trade in Financial Services, Communication from Barbados, *Unintended Consequences of Remedial Measures Taken to Correct the Global Financial Crisis: Possible Implications for WTO Compliance*, JOB/SERV/38, at para 3; Stephen J. Dubner & Steven D. Levitt, “Unintended Consequences”, *New York Times Magazine* (20 January 2008) online: *New York Times* <[http://www.nytimes.com/2008/01/20/magazine/20wwlnfreakt.html?pagewanted=1&\\_r=1&sq=unintended](http://www.nytimes.com/2008/01/20/magazine/20wwlnfreakt.html?pagewanted=1&_r=1&sq=unintended)>.

<sup>90</sup> 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, “Improving Accuracy in Effects-Based Analysis: An Incentive-Oriented Approach” (2007) Amsterdam Ctr. for Law & Econ. Working Paper No. 2007-01, 2006, online: Social Science Research Network <http://ssrn.com/paper=956330>.

<sup>91</sup> See Clarence Mann, *The Function of Judicial Decision Making in European Economic Integration* (The Hague: Nijhoff, 1972) at 176 (“[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.”).

measures affect and target the same products or producers does not sufficiently constrain the effects prong.<sup>92</sup>

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,<sup>93</sup> 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. Furthermore, a measure should not fall within the purview of an Article 21.5 panel simply because it is inconsistent with the Members' WTO obligations lest any sort of claim at all be brought in an Article 21.5—rather than an Article 6—proceeding.<sup>94</sup>

While the close nexus test as a whole is designed to remedy the problem of under-inclusion, Article 21.5 panels must take care to avoid using it in a way that creates the problem of over-inclusion. In particular, they must narrowly define the effects prong of this test and clearly articulate what it means for a challenged measure to "have an impact on and possibly undermine" the implementation measure.

But even if such a narrow articulation of the effects prong of the close nexus test is possible, the prong does not seem necessary. The timing and nature prongs of this test are 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." If we consider the nature prong 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 effects prong is unnecessary and should be abandoned. Its usage threatens only undesirable over-inclusion of measures in Article 21.5 proceedings.

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<sup>92</sup> Kearns & Charnovitz, *supra* note 11 at 347 (suggesting this limitation).

<sup>93</sup> DSU, *supra* note 3 at art 21.5 ("Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply...").

<sup>94</sup> Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, *supra* note 1 at para 36.

## B. Problems with Due Process Protections 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. Indeed, some panels have suggested as much.<sup>95</sup> In particular, the panel in *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)* explained: “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*” (emphasis added).<sup>96</sup> 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 the new claims referred to aspects of the measure taken to comply that had changed vis-à-vis the original measure.<sup>97</sup> 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.”<sup>98</sup>

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.

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<sup>95</sup> See e.g. Panel Report, *EC – Bed Linen (Article 21.5 – India)*, *supra* note 79 at para 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”); *ibid* at para 6.4 (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”). Grossman & Sykes, *supra* note 20 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.”).

<sup>96</sup> Panel Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities (Recourse to Article 21.5 of the DSU by the European Communities)* WT/DS212/RW at para 7.207, online: World Trade Law <<http://www.worldtradelaw.net/reports/wtopanels/us-countervailing%28panel%29%2821.5%29.pdf>>.

<sup>97</sup> *Ibid* at para 7.217.

<sup>98</sup> *Ibid* n. 294.

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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. Similarly, at common law, 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.”<sup>99</sup> 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.”<sup>100</sup>

Despite these concerns, the Appellate Body rejected the idea that claims that could have been raised in original proceedings but were not should be excluded from Article 21.5 proceedings, stating:

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.<sup>101</sup>

In other words, the complaining Member is barred from challenging aspects of the original measure during an Article 21.5 proceeding if it did not challenge that aspect in the original proceeding. It may, however, 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

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<sup>99</sup> *Ibid.*

<sup>100</sup> *Ibid.* (“The panel typically has only one opportunity to meet with the parties, unlike the normal proceedings where two substantive meetings taking place”).

<sup>101</sup> Panel Report, *US – Zeroing (Article 21.5 – EC)*, *supra* note 38 at para 8.240-8.242.

“second chance” to take issue with the original measure.<sup>102</sup> 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.”<sup>103</sup> 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.<sup>104</sup>

The WTO could employ the doctrine of good faith to limit which new claims could be brought in Article 21.5 proceedings.<sup>105</sup> 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.<sup>106</sup> If good faith requires Members to act consistently with the objective of protecting due process in WTO

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<sup>102</sup> Appellate Body Report, *US – Zeroing (Article 21.5 – EC)*, *supra* note 32 at para 427.

<sup>103</sup> *Ibid.*

<sup>104</sup> 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, *supra* note 2 art. 21.3 (providing for a “reasonable period of time” to comply after Article 6 proceedings) with *ibid.* 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.

<sup>105</sup> See *ibid.* art 3.10 (“[I]f a dispute arises, all Members will engage these procedures in good faith in an effort to resolve the dispute.”); WTO, Appellate Body Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R at para 81, online: WTO <[http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds192\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds192_e.htm)> (referring to the “general principle of good faith that underlies all treaties”); Andrew D. Mitchell, “Good Faith in WTO Dispute Settlement” 7 *Melb. J. Int’l L.* 339, 352 (2006) [Mitchell] (“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...”).

<sup>106</sup> Mitchell, *supra* note 105 at 353-355.



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proceedings,<sup>107</sup> then good faith would seem to caution against including measures that could have been but were not challenged in the original proceedings within the purview of Article 21.5 panels.

The same policy concerns that justify claim preclusion at common law also support that Members should not be able to raise such claims during Article 21.5 proceedings.<sup>108</sup> 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.”<sup>109</sup> 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.

Still, 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 that 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 to bring its strongest claims first, leaving the weaker ones aside should the initial claims fail in order to reduce the costs of litigation.<sup>110</sup> 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.<sup>111</sup> 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 to raise them before an Article 21.5 panel.<sup>112</sup> Otherwise, Members could be encouraged to “throw the ‘kitchen sink’ into their initial

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<sup>107</sup> Appellate Body Report, *US – FSC II (Article 21.5 – EC)*, *supra* note 73 at para 166; Mitchell, *supra* note 105 at 354.

<sup>108</sup> See *Federal Practice and Procedure* vol 18, 2d ed (Rochester, NY: Lawyer’s Cooperative, 2011) § 4403 (describing the policies underlying *res judicata*).

<sup>109</sup> *Ibid.*

<sup>110</sup> Grossman & Sykes, *supra* note 20 at 141.

<sup>111</sup> *Ibid* at 142.

<sup>112</sup> *Ibid* at 147.

complaints and arguments, so that initial panel proceedings become even more . . . cumbersome.”<sup>113</sup>

But if 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, Article 21.5 panels are empowered to dismiss unmeritorious claims. 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 above, 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.<sup>114</sup> 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.”<sup>115</sup> 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, as the mission of the WTO is to facilitate trade between its Members. At some point, Members must get on with their activities in peace.<sup>116</sup> They cannot do so if the WTO-conformity of their measures is always subject to challenge, even when they have implicitly been deemed consistent before.

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<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid.*

<sup>115</sup> WTO, Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Recourse to Article 21.5 by Malaysia)*, WT/DS58/RW, at para 5.88, online: World Trade Law <<http://www.worldtradelaw.net/reports/wtopanels/us-shrimp%28panel%29%2821.5%29.pdf>>.

<sup>116</sup> 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.

## VI. 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 (over-inclusion), and how to avoid excluding measures that should be reviewed (under-inclusion).

This Paper suggests that the tools to avoid the twin risks of under- and over-inclusion are already present in 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. But these tools could be improved: The effects prong of the close nexus test should be abandoned, or at least further articulated. 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.

Properly tailoring the scope of Article 21.5 panels is essential to promoting the prompt resolution of disputes and protecting the rights and obligations of Members—the very purposes of these panels. 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.