Journal of International Economic Law 14(2), 437–468
doi:10.1093/jiel/jgr021.

PREVENTING OPPORTUNISTIC UNCOMPLIANCE BY WTO MEMBERS

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ABSTRACT

The World Trade Organization's (WTO) Dispute Settlement Understanding is silent on the consequences for members if they comply with trade obligations, but later uncomply, resulting in similar violations as those giving rise to the original dispute. This article shows that WTO members can uncomply without facing economic consequences because the arbitrators that authorize the suspension of WTO concessions have a limited jurisdiction relative to compliance panels and because the DSU does not provide sanctions for past (in contrast to ongoing) violations. Members may thus delay compliance until immediately before panels assess their compliance record and then may uncomply because arbitrators cannot authorize the suspension of concessions for the measure to uncomply. Cases of uncompliance allow members to commit repeated violations with impunity. This contrasts with cases of non-compliance, where trade disputes eventually result in implementation of recommendations, compensation to the aggrieved member, or the suspension of concessions against the violating member. We identify the ongoing *US – Upland Cotton* dispute as a potential case of uncompliance. WTO members have an opportunity to protect themselves from delayed compliance and uncompliance by seeking authorization to suspend concessions where the violating member has not taken measures within the timeframe given to comply. We show that because Brazil forfeited its rights to do so in the *US – Upland Cotton* dispute through a sequencing agreement, the United States may have uncomplied without facing a countermeasure for certain cotton subsidies.

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I. INTRODUCTION

The World Trade Organization (WTO) Dispute Settlement Understanding (DSU)[1] is silent on the consequences for members if they take measures to comply with trade obligations, but later take measures to uncomply, resulting in violations similar to those giving rise to the original dispute. Repeat offenders face the prospect of successive embarrassing findings of DSU panels or the Appellate Body (AB) that they are violating WTO agreements. A member unconcerned about reputational damages can, however, repeatedly breach WTO agreements while also avoiding a suspension of concessions or other obligations (SCOO) or countermeasure[2] from other WTO members if the repeat offender periodically removes WTO-inconsistent measures.

Brazil's ongoing case against US cotton subsidies (*US – Upland Cotton*)[3] illustrates the potential for such systemic abuse of the WTO DSU. During the dispute, the US Congress eliminated certain cotton subsidies (known as Step 2 payments), gained DSU panel acknowledgement of the withdrawal of Step 2 payments, and then re-enacted similar payments in the 2008 Farm Bill.[4] When Brazil asked the *US – Upland Cotton* arbitrator to calculate the countermeasures it could impose against the United States, the measure

[1] Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments – Results of the Uruguay Round 33 ILM 1226 (1994).

[2] A 'SCOO' is the proper textual name for legal remedies under the DSU while a 'countermeasure' is the proper textual name for legal remedies under the Agreement on Subsidies and Countervailing Measures Agreement (SCM Agreement). Compare DSU Article 22 with Agreement on Subsidies and Countervailing Measures, Articles 4 & 7, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments – Results of the Uruguay Round, 1867 UNTS 14 (1994). Thus, when referring to the Brazilian remedy in the *US – Upland Cotton* dispute, this article refers to countermeasures while using SCOOs to refer to remedies under the DSU more broadly. For a discussion of the legal significance of the textual difference, as interpreted by DSU article 22.6 arbitrators, in deciding the level of SCOOs or countermeasures, see Holger Spamann, 'The Myth of "Rebalancing" Retaliation in WTO Dispute Settlement Practice', 9 Journal of International Economic Law 31 (2006), at Section IV.

[3] Decision by the Arbitrator, *United States – Subsidies on Upland Cotton – Recourse to Arbitration by the United States Under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement* (*US – Upland Cotton* (4.11)), WT/DS267/ARB/1, 31 August 2009; Decision by the Arbitrator, *United States – Recourse to Arbitration by the United States Under Article 22.6 of the DSU and Article 7.10 of the SCM Agreement* (*US – Upland Cotton* (7.10)), WT/DS267/ARB/2, 31 August 2009. One decision, *US – Upland Cotton* (4.11), concerns countermeasures for US export credit guarantees and Step 2 payments (prohibited subsidies under the SCM Agreement) and the other decision, *US – Upland Cotton* (7.10), concerns countermeasures for US Marketing Loan (ML), Countercyclical (CC) and Step 2 payments (actionable subsidies under the SCM Agreement). See *US – Upland Cotton* (4.11), above, paras 1.27–31 (discussing why the arbitrator issued two separate reports). In the main body and footnote text, *US – Upland Cotton* denotes the Brazil Cotton case broadly, inclusive of all DSU proceedings concerning that case.

[4] Congress did not re-enact an identical measure. See below, Section II.A.3; see also Decision by the Arbitrator, *US – Upland Cotton* (4.11), above n 3, para 3.62. The problem of uncompliance

identified as reviolating WTO agreements was not considered.[5] In short, the arbitrator declined to consider the Brazilian allegation that the United States uncomplied, leaving Brazil without a remedy for the alleged reviolation.

This article demonstrates how members may uncomply without facing a SCOO and argues that uncompliance poses a serious and unique problem in WTO dispute settlement. Section II of this article shows how WTO members can uncomply with WTO agreements while avoiding immediate countermeasures or SCOOs, identifying *US – Upland Cotton* as a potential case of uncompliance. Section III examines how WTO members can protect themselves from both non-compliance and uncompliance through well-crafted sequencing arrangements that preserve DSU rights. Section IV identifies changes to dispute settlement that could help protect against uncompliance. Finally, Section V brings the analysis to a conclusion.

II. THE UNCOMPLIANCE PROBLEM

This section demonstrates why uncompliance is a problem. The rules of the DSU as well as WTO jurisprudence are discussed to elucidate how members can repeatedly uncomply with WTO agreements without facing a SCOO.

Below is a summary of the basic phases of a dispute under the DSU where there is a failure to comply. The DSU phases for establishing that a WTO member has violated its trade obligations and, if the complaining member desires, imposing a SCOO against the violating member are as follows:

> **Phase One—Initiation:** Member Plaintiff (P) establishes a Dispute Settlement Body (DSB) panel, alleging that Member Defendant (D) violates WTO agreements through X policy.
> **Phase Two—Panel Rulings and Recommendations:** The DSB panel agrees with P, finding that D violates WTO agreements through X policy. This stage usually includes appeals to the WTO Appellate Body (AB).

however is illustrated in *US – Upland Cotton* because Brazil's allegation that the United States reviolated has thus far been ignored.

[5] Decision by the Arbitrator, *US – Upland Cotton* (4.11), above n 3. The arbitrator did however authorize Brazil to impose countermeasures valued in the hundreds of millions of dollars annually against the United States for other cotton programs. See Decision by the Arbitrator *US – Upland Cotton* (4.11), above n 3; Decision by the Arbitrator, *US – Upland Cotton* (7.10), above n 3. The arbitrator authorized annual countermeasures equal to $147.3 million for ML and CC payments, see Decision by the Arbitrator, *US – Upland Cotton* (7.10) above n 3, and provided a yearly formula for calculating countermeasures for export credit guarantees. See Decision by the Arbitrator, *US – Upland Cotton* (4.11) above n 3.

Phase Three—Implementation: D replaces X with Z policy. D claims Z brings it into compliance. P disagrees, asserting Z also violates WTO agreements.
Phase Four—Compliance Panel Findings: P establishes a compliance panel under DSU 21.5 to determine whether Z policy also violates WTO agreements. The 21.5 compliance panel finds Z policy also violates WTO agreements. This stage usually includes appeals to the AB.
Phase Five—Arbitration to Authorize SCOOs/Countermeasures: P then seeks authorization to impose a SCOO against D. D may dispute the size and scope of P's proposed SCOO through arbitration under DSU 22.6.

This shows a case of *non-compliance*: Member D never complied because both policy X and Z violated WTO agreements. When there is simple compliance, then policy Z would be found at Phase Four to conform to D's WTO obligations. The case of uncompliance is different. *Uncompliance* occurs where: (i) first, either the complaining member (P) or a DSU compliance panel confirm D complied by enacting policy Z; (ii) and then D re-enacts policy X or a close variant of X.

WTO jurisprudence interprets DSU rules such that D could repeatedly re-enact and then withdraw policy X prior to the compliance panel determination at Phase Four, depriving P of the ability to impose a SCOO. If P tried to impose a SCOO at Phase Five for the reviolation, the DSU arbitrator would refuse to do so. Thus, D can uncomply with impunity.

Uncompliance poses two unique problems to WTO dispute settlement. First, D could repeatedly uncomply without facing the economic consequences established in the DSU's carefully crafted rules concerning imposition of SCOOs. This potentially endless uncompliance cycle contrasts with non-compliance cases where D either implements the recommendations of the DSB, faces a SCOO, or compensates the aggrieved member to avoid a SCOO. Second, depending on the timing, nature, legal context and ultimate effect of the measure to uncomply, WTO jurisprudence potentially forces P to start *de novo* at Phase One rather than repeating Phase Four. We argue below that the jurisdiction of Phase Four compliance panels should be broad so as to usually prevent P from being forced to confront uncompliance at a renewed Phase One.[6]

Section (A) discusses the facts of the *US – Upland Cotton* case and demonstrates that the United States may have engaged in opportunistic uncompliance. The remainder of this section shows that such uncompliance is a problem because the DSU: (B) confers limited jurisdiction on DSU arbitrators at Phase Five; (C) precludes SCOOs for past violations; and (D)

[6] See Section II.D, for a discussion of why under the DSU, P likely can start at Phase Four instead of Phase One.

provides procedural timelines that open lengthy windows for delayed compliance and uncompliance.

A. Potential Uncompliance in *US – Upland Cotton*

The uncompliance problem only arose for one cotton subsidy in the *US – Upland Cotton* case: Step 2 payments. Other illegal cotton subsidies or their adverse effects, as briefly outlined below, were never removed and thus show simple US non-compliance. The *US – Upland Cotton* arbitrator authorized Brazil to take countermeasures for the US non-compliance.[7] The size and scope of these countermeasures varies annually because the *US – Upland Cotton* arbitrator held that countermeasures are contingent on yearly payments and that Brazil may employ countermeasures outside of goods (for example, intellectual property rights owed to the United States) if the yearly payments exceed specified amounts.[8] Brazil and the United States have reached an understanding that allows the United States to avoid countermeasures in exchange for monetary payments to Brazil and a pledge of future changes to US cotton programs.[9] If Brazil is later authorized to also take countermeasures for Step 2 replacement payments, the size of its authorized countermeasures will increase.

Table 1 provides a summary of the US actions taken to comply with the *US – Upland Cotton* case. Numerous other sources provide analysis of

[7] See Decision by the Arbitrator, *US – Upland Cotton* (4.11), above n 3; Decision by the Arbitrator, *US – Upland Cotton* (7.10), above n 3.

[8] See, e.g. Office of the United States Trade Representative (USTR), 'US, Brazil Agree on Memorandum of Understanding as Section of Path Toward Resolution of the Cotton Dispute' (press release) 21 April 2010 http://www.ustr.gov/about-us/press-office/press-releases/2010/april/us-brazil-agree-memorandum-understanding-part-path-f (visited 2 June 2011) (Office of the USTR concedes that Brazil is authorized under the *US – Upland Cotton* decision to impose countermeasures over $800 million annually for the most recent payments and that this would allow countermeasures under TRIPS equal to $260 million under the decision); Sewell Chan, 'U.S. and Brazil Reach Agreement on Cotton Dispute,' *New York Times*, 6 April 2010, B2. For a critical analysis of the legal standard employed by the *US – Upland Cotton* arbitrator to allow countermeasures or a SCOO outside the agreement breached (cross-retaliation), see David J. Townsend, 'Stretching the Dispute Settlement Understanding: *US – Cotton's* Relaxed Interpretation of Cross-Retaliation in the World Trade Organization', 9 Richmond Journal of Global Law and Business 135 (2010).

[9] In order to avoid a countermeasure, the United States agreed to change its export credit guarantees, consider allowing greater market access to Brazilian meat previously prohibited because of sanitary reasons, and to monetarily compensate Brazil due to the United States failure to change CC, ML and export credit guarantee payments. See *United States – Subsidies on Upland Cotton*, Framework on a Mutually Agreed Solution to the *Cotton* Dispute in the World Trade Organization (*US – Upland Cotton Settlement*), WT/DS267/45, 31 August 2010. The *Wall Street Journal* called this a 'bribe to Brazil so it won't retaliate.' See 'The Madness of Cotton', *The Wall Street Journal*, 21 May 2010, Editorial. The US House of Representatives has approved a measure that would prevent payments to Brazil as a settlement to the case. See H.R. 2112, 112th Cong. (2011) at Section 751; 'Appropriations Committee Attacks U.S. Payments to Brazil in Cotton Deal' 29(22) *Inside U.S. Trade*, 3 June 2011.

Table 1. *US – Upland Cotton* and US Actions Taken to Comply (and Uncomply)

Program	Description	AB findings under SCM (March 2005)	Time given to comply	Measures taken to comply	Article 21.5 compliance panel findings[a]	Article 22.6 arbitrator findings
Step 2 cotton user subsidies	Subsidy to foreign and domestic users of US cotton to make up the price difference between (cheaper) foreign cotton and (more expensive) US cotton	Held a prohibited export subsidy under Article 3.1(a) & (b) and 3.2 of the SCM agreement Also held an actionable subsidy causing serious prejudice to Brazil in violation of Article 6.3 of the SCM Agreement	1 July 2005	Fall 2005: Congressional Committees approve repealing Step 2 through 2005 Budget Reconciliation 1 August 2006: Step 2 payments terminate pursuant to 2005 Budget Reconciliation 18 June 2008: Congress enacts a subsidy for domestic cotton users in the 2008 Farm Bill (Potential Measure to Uncomply)	Brazil concedes compliance and no findings were made because Step 2 payments had ceased	Arbitrator precludes countermeasures and ignores the 2008 Farm Bill Changes
Export credit guarantees	USDA assistance in financing export transactions	Held a prohibited subsidy in violation of Article 3.1(a) & (b) and 3.2 of the SCM agreement	1 July 2005	30 June 2005: USDA administratively changes to eliminate long term contracts and make contracts more market oriented 18 June 2008: Congress codifies USDA changes and makes additional changes through the 2008 Farm Bill	AB confirms the program continues functioning as a prohibited export subsidy under the SCM	Arbitrator authorizes countermeasures pursuant to a formula to calculate annual countermeasures
Countercyclical (CC) payments	Subsidy contingent upon slumping commodity prices	Actionable subsidy causing serious prejudice to Brazil in violation of Article 6.3 of the SCM Agreement	22 September 2005	18 June 2008: Minor changes through the 2008 Farm Bill	AB confirms the program continues functioning as an actionable subsidy causing serious prejudice to Brazil	Arbitrator authorizes countermeasures up to $147 million annually for CC and ML payments
Marketing Loan (ML) Payments	Subsidy to assist farmers with financing operations through a growing season	Actionable subsidy causing serious prejudice to Brazil in violation of Article 6.3 of the SCM Agreement	22 September 2005	18 June 2008: Minor changes through the 2008 Farm Bill	AB confirms the program continues functioning as an actionable subsidy causing serious prejudice to Brazil	Arbitrator authorizes countermeasures up to $147 million annually for ML and CC payments

[a]Note that the Article 21.5 compliance panels did not consider the 2008 Farm Bill changes because they were not yet enacted as of the AB's report being issued.

the *US – Upland Cotton* dispute and the important precedent it establishes under WTO law.[10]

1. Phases one and two: The original panel finds US cotton subsidies violate WTO agreements

A WTO panel originally found certain US cotton subsidies illegal in 2004,[11] a finding largely confirmed by the AB in 2005.[12] The AB held that two cotton subsidies, export credit guarantees and Step 2 payments, were prohibited subsidies[13] under the SCM Agreement. The AB also held that marketing loan (ML) and countercyclical (CC) payments, along with Step 2 payments, were actionable subsidies causing serious prejudice to Brazil under the SCM Agreement.[14] The AB gave the United States until 1 July 2005 to remove the prohibited subsidies and 22 September 2005 to withdraw the adverse effects of the actionable subsidies.[15]

2. Phases Three and Four: US measures taken to comply—Step 2 removal constitutes compliance, but all other cotton subsidies remain WTO-inconsistent

The United States complied in varying degrees in Phase Three. The US Department of Agriculture (USDA) changed the export credit guarantees by eliminating long-term contracts and making existing contracts more

[10] See, e.g. Karen Halverson Cross, 'King Cotton, Developing Countries and the "Peace Clause": The WTO's US Cotton Subsidies Decision', 9 Journal of International Economic Law 149 (2006), at 153 (asserting the decision has immense consequences because of its reading of the SCM Agreement and Agriculture Agreement); Stephen J. Powell and Andrew Schmitz, 'The Cotton and Sugar Subsidies Decisions: WTO's Dispute Settlement System Rebalances the Agreement on Agriculture', 10 Drake Journal of Agriculture Law 287 (2005), at 312–15, 330 (arguing that *US – Upland Cotton* has 'far reaching' consequences that would have been unanticipated when the WTO agreements were drafted); Phoenix X. F. Cai, 'Think Big and Ignore the Law: US Corn and Ethanol Subsidies and WTO Law', 40 Georgetown Journal of International Law 865 (2009), Section IV (calling *US – Upland Cotton* a 'landmark case' opening the door to future challenges to other US farm programs at the WTO); Dominic Coppens, 'WTO Disciplines on Export Credit Support for Agricultural Products in the Wake of the *US – Upland Cotton* Case and the Doha Round Negotiations', 44 Journal of World Trade 349 (2010), at 382 (arguing that the case 'surprised' agriculture negotiators who believed the Agriculture Agreement provided more flexibility for governments to provide export credit guarantees); Tim Josling, 'Agriculture Trade in Disputes in the WTO,' in James C. Hartigan (ed), *Trade Disputes and the Dispute Settlement Understanding of the WTO*, (Bingley, England: Emerald Group Publishing, 2009) 245–81 at 271 ('[t]he case may or may not usher in a flurry of similar litigation . . . [b]ut the panel report certainly gives encouragement to countries that have refrained from making challenges because they felt that panels would have difficulties in finding evidence of serious prejudice').

[11] WTO Panel Report, *United States – Subsidies on Upland Cotton (US – Upland Cotton)*, WT/DS267/R, Corr.1, and Add.1 to Add.3, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R, DSR 2005:II, 299.

[12] WTO Appellate Body Report, *United States – Subsidies on Upland Cotton (US – Upland Cotton)*, WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, 3.

[13] Ibid, paras 763(d) and (e).

[14] Ibid, para 763(c).

[15] Decision by the Arbitrator, *US – Upland Cotton* (4.11), above n 3, para 1.3.

market oriented.[16] Congress later made further changes to the export credit guarantees in the 2008 Farm Bill[17] and asserted that the changes constituted compliance with the *US – Upland Cotton* case.[18] In 2008, the Phase Four compliance panel found that the export credit guarantees remained prohibited subsidies.[19]

Concerning ML and CC payments, the United States has done nothing substantive to comply with the original panel's findings.[20] Congress may have increased CC payments in the 2008 Farm Bill by providing a new contract option to receive CC payments.[21] This option has been described as a 'time bomb' for the United States under the WTO because it may significantly expand US agriculture subsidies.[22] In short, not only has the United States failed to withdraw the adverse effects of actionable cotton subsidies in accordance with the original *US – Upland Cotton* findings, but it likely has expanded the subsidies.

Finally, in response to the finding that Step 2 payments were illegal, Congress eliminated the Step 2 program in 2006.[23] When Brazil brought a case challenging United States compliance with the original panel's 2005

[16] See US Department of Agriculture, 'USDA Announces Changes to Export Credit Guarantee Programs to Comply with WTO Findings,' (press release) 30 June 2005 http://www.fas.usda.gov/scriptsw/PressRelease/pressrel_dout.asp?PrNum=0092-05 (visited 2 June 2011). The Bush Administration rushed to change the program before the DSB deadline, issuing a notice of administrative changes 'less than two hours before the deadline to act.' Charles Abbott and Sophie Walker, 'US Tweaks Credits for WTO, Key Cotton Aid Untouched,' *Reuters*, 1 July 2005.

[17] US Public Law 110–246, Food, Conservation and Energy Act of 2008, § 3101 (2008 Farm Bill).

[18] See US House Report 110–627, at 758–59 (2008) (Farm Bill Conference Report) (describing that the Farm Bill changes to export credit guarantees were to 'satisfy US commitments to comply with the Brazil cotton case'); US House Report 110–256, at 222 (2007) (House Committee Report) ('[t]his Section codifies some of the changes to the export credit guarantee program implemented administratively by USDA to comply with WTO obligations').

[19] WTO Appellate Body Report, *United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil*, (*US – Upland Cotton (Article 21.5 – Brazil)*), WT/DS267/AB/RW, adopted 20 June 2008, para 448(b).

[20] See Decision by the Arbitrator, *US – Upland Cotton* (4.11), above n 3, para 3.18 (rejecting that the United States achieved substantive compliance with the *US – Upland Cotton* findings).

[21] See 2008 Farm Bill, above n 17, § 1105; see also Cai, above n 10, at 898 (discussing the 2008 Farm Bill and concluding that '[o]verall, the bill increases support to cotton farmers and fails to address the concerns articulated in [*US – Upland Cotton*] and the recent report from the Appellate Body reviewing that decision').

[22] Dan Morgan, 'The Farm Bill and Beyond' at 53 (German Marshal Fund of the United States, January 2010). Whether the new program actually expands US farm subsidies depends on many factors because program payments depend on market factors and farmer participation. See 2008 Farm Bill, above n 17, § 1105. Cotton farmers seem unlikely to participate in the new contract option because it requires forfeiting other subsidies, direct payments, where subsidy levels tend to be higher than other crops. See Morgan, above, at 44 (reporting that southern farmers had 'little interest' in the new subsidy because they preferred direct payments instead of CC payments).

[23] US Public Law 109–171, Deficit Reduction Act of 2005, § 1103 (2005 Budget Reconciliation).

recommendations at Phase Four, Brazil conceded that elimination of Step 2 constituted compliance.[24]

3. After Phase Four and before Phase Five: The United States may have uncomplied by enacting Step 2 replacement payments

The 2008 Farm Bill reinstates a cotton user subsidy, similar to the Step 2 program, giving domestic cotton mills a four cents per pound payment.[25] The new subsidy, unlike the old one, gives the payment regardless of the cotton's origin[26] but continued tariffs, and potentially a quota, prevent fair competition between domestic and foreign cotton.[27] The new subsidy increases the per pound payment to cotton users, from an average of 2.6 cents per pound under the Step 2 program to 4 cents per pound in the replacement program.[28] Due to various US cotton subsidies and other economic factors, US cotton mills have not imported cotton over the last several years.[29] Brazil argued to the arbitrator that the new payment is a prohibited subsidy under the SCM Agreement which 'negated the compliance' achieved by the United States.[30]

[24] See WTO Panel Report, *United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil* (*US – Upland Cotton (Article 21.5 Brazil)*), WT/DS267/RW, and Corr. 1, adopted 20 June 2008 as modified by Appellate Body Report WT/DS267/AB/RW, para 4.1 (Brazil acknowledges the elimination of Step 2 as compliance).

[25] See 2008 Farm Bill, above n 17, § 1207(c). The subsidy is contingent on the purchaser using the payment to expand or modernize their businesses. Ibid. The original Step 2 program provided payments to domestic users and exporters of US cotton equal to the difference in prices between Northern European cotton and US cotton if US cotton became significantly more expensive to purchase. See 7 USC § 7937(a) (2005). The new payment will be reduced to three cents in 2012. See 2008 Farm Bill, above n 17, § 1207(c).

[26] Compare 2008 Farm, above n 17, § 1207(c) (providing the subsidy to users of cotton 'regardless of the origin of the cotton'), with 7 USC § 7937(a) (2005) (providing subsidy to purchasers of higher priced US cotton).

[27] See Heading 5201 of the United States Harmonized Tariff Schedule; see also 7 USC § 7937(b) & (c) (2005).

[28] Compare Jasper Womach, Congressional Research Services, 'Cotton Production and Support in the United States,' at 24, 24 June 2004 (calculating the old payment at 2.6 cents per pound); with 2008 Farm Bill, above n 17, § 1207(c) (mandating that the new payment is 4 cents per pound). The new program's projected cost appears significant: payments to US cotton mills in 2010 were over $73 million and long term spending on the program roughly equals that of the original Step 2 program. The authors obtained these figures from USDA. The projected cost of the new program is $319 million from 2010 through 2014, while the elimination of Step 2 payments saved $282 million over five years. Compare Congressional Budget Office, March 2011 Baseline (providing outlays of $319 million for the new user subsidy over five years); with US House Report 109–276, at 22 (2005) (House Budget Committee Report) ('CBO estimates that eliminating Step 2 . . . [saves] $282 million over the 2006–2010 period').

[29] See US Department of Agriculture, Cotton and Wool Yearbook Dataset 2010, http://usda.mannlib.cornell.edu/MannUsda/viewDocumentInfo.do?documentID=1282 (visited 2 June 2011) at Table-01 (showing zero US imports of cotton in 2008, 2009 and 2010).

[30] See SCM Agreement, Article 3.1(b) (prohibiting subsidies contingent on the use of domestic over imported goods); see also Decision by the Arbitrator, *US – Upland Cotton* (4.11), above n 3, para 3.9 ('Brazil further argues that the United states . . . replaced this subsidy with other

We do not believe the new subsidy is as clear of a reviolation of SCM Agreement Article 3 as Brazil claimed before the arbitrator. Foreign cotton is, after all, subsidized the same as US cotton under the new law.[31] On the other hand, tariffs on certain imported cotton would cut in half the subsidy for mills sourcing certain foreign cotton over US cotton, suggesting the subsidy may be contingent in fact on using US cotton instead of foreign cotton.[32] Moreover, the new payment, as the AB found with the original Step 2 program in *US – Upland Cotton*, may be actionable under Article 5 of the SCM Agreement because it displaces Brazilian cotton or causes significant price suppression in global markets.[33] We reach no conclusion here as to whether the United States has reviolated the SCM Agreement.[34] The important point for our purposes is not the WTO-consistency of the new measure, but that Brazil alleged a reviolation, this allegation was not adjudicated, and Brazil remains without a remedy for the alleged reviolation.

Congress thus complied by withdrawing Step 2 payments in 2006 and ceasing any cotton user subsidy for a 24 month period from 2006–08, but then may have uncomplied by re-enacting a similar program in 2008.[35] Compliance was achieved prior to the Phase Four Article 21.5 compliance panel and the alleged uncompliance happened after the compliance panel but before the arbitrator at Phase Five. At the compliance panel, Brazil conceded that the United States complied with the *US – Upland Cotton* case concerning Step 2 payments.[36] In addition to all of the remaining WTO-inconsistent cotton subsidies, Brazil asked the *US – Upland Cotton*

prohibited subsidies in the 2008 Farm Bill . . . [and]considers that [the 2008 Farm Bill Section 1207(c)] is *de facto* contingent upon the use of domestic over imported cotton').

[31] See 2008 Farm Bill, above n 17, § 1207(c).

[32] This figure was calculated subtracting the highest tariff rate on US cotton, see Heading 5201 of the United States Harmonized Tariff Schedule (tariff of up to 4.4 cents/kg), from the subsidy rate for cotton users. See 2008 Farm Bill, above n 17, § 1207(c) (subsidy equals 4 cents/lb, or 8.8 cents/kg). Additionally, if a surge of foreign cotton occurs, the imported cotton may be subject to import quotas, although those quotas are generally too high to reach the above quota tariff rate. See Chapter 52 of the United States Harmonized Tariff Schedule, Notes 5–10 (detailing the quota).

[33] See SCM Agreement, Article 6.3(a) and (c); See Appellate Body Report, *US – Upland Cotton*, above n 12, para 496.

[34] Observers of US farm policy and the *US – Upland Cotton* dispute have stated that the replacement payments raise WTO issues. See Randy Schnepf, Brazil's WTO Case Against the U.S. Cotton Program, Congressional Research Services at 31–32 (2010) (citing the new cotton user subsidy's 'vulnerability to WTO challenge' because it 'is similar to the WTO-illegal Step 2 payment' and 'most payments would still likely go to domestically sourced cotton'); see also Morgan, above n 22, at 52 (the replacement payments 'some said effectively restores a subsidy that USDA had terminated after the original WTO ruling').

[35] Congress terminated the payments on 1 August 2006, see 2005 Budget Reconciliation, above n 23, § 1103, and then reauthorized the new user subsidies starting on 1 August 2008. See 2008 Farm Bill, above n 17, § 1207(c)(2)(A). The shared 1 August date appears to be coincidental.

[36] See Decision by the Arbitrator, *US – Upland Cotton* (4.11), above n 3, para 3.57.

arbitrator at Phase Five to authorize countermeasures against the United States for the delay in withdrawing Step 2 and also to take into consideration the Step 2 replacement measures.[37]

4. Phase Five: The arbitrator refuses to consider the alleged uncompliance

The *US – Upland Cotton* arbitrator authorized significant countermeasures for certain US cotton subsidies, while failing to consider Brazil's request to impose countermeasures for the identified reviolation concerning Step 2 payments. Brazil gained the right to impose a countermeasure against the United States annually for failing to remove the export credit guarantees in an amount based on program usage.[38] The *US – Upland Cotton* arbitrator also held that Brazil could take countermeasures equal to $147.3 million annually against the United States for continued ML and CC payments.[39]

The arbitrator refused, however, to consider authorizing a countermeasure for the Step 2 replacement measure.[40] The next section explains why the arbitrator refused to allow a countermeasure for the new measure, demonstrating that DSU 22.6 arbitrators in Phase Five have limited jurisdiction to address measures not yet examined by 21.5 compliance panels in Phase Four.

B. DSU arbitrators have limited jurisdiction to consider the conformity of measures with WTO agreements

The DSU divides responsibility between the DSU arbitrator, whose job is ensuring SCOOs are not excessive or levied inappropriately against obligations outside of the WTO agreement breached, and Article 21.5 compliance panels tasked with assessing whether the defending member remains in violation of WTO agreements.[41] Arbitrators under DSU Article 22.6 at Phase Five have a narrow jurisdiction, limited to assessing the size and scope of proposed SCOOs.[42] Article 21.5 compliance panels at Phase Four, however, are authorized to adjudicate disputes concerning the legality of the violating member's measures 'taken to comply.'[43] Establishing a DSU Article 21.5

[37] See ibid, para 3.54 ('Brazil invites the Arbitrator to consider the existence of [replacement] measures in the context of its assessment of whether the proposed countermeasures are "appropriate"').

[38] See ibid, para 4.278 (authorizing countermeasures as a remedy to the United States continued use of export credit guarantees). The United States has since agreed to further changes concerning export credit guarantees as part of an agreement to avoid countermeasures. See *US – Upland Cotton Settlement*, above n 9, at Section II.

[39] Decision by the Arbitrator, *US – Upland Cotton* (7.10), above n 3, para 4.195.

[40] Decision by the Arbitrator, *US – Upland Cotton* (4.11), above n 3, para 3.62.

[41] Compare DSU, Article 21 with DSU, Article 22.

[42] See DSU, Article 22.7 (limiting DSB arbitrators to assess the size of a SCOO and the 'principles and procedures set forth in paragraph 3' of DSU Article 22). DSU Article 22.3 establishes when a member may employ a SCOO against the violating member outside the WTO agreement breached, or cross-retaliate, against the violating member.

[43] DSU, Article 21.5.

compliance panel is 'the proper course of action' for WTO members where they disagree whether new measures are WTO-inconsistent and required according to the AB.[44]

In the absence of a Phase Four Article 21.5 compliance panel finding of non-compliance concerning the Step 2 replacement measure, the *US – Upland Cotton* arbitrator refused to consider its WTO-consistency because that determination is properly reserved for an Article 21.5 compliance panel rather than the arbitrator.[45] The *US – Upland Cotton* arbitrator stated 'we make no determination with respect to . . . measures under the 2008 Farm Bill identified by Brazil as Step 2 "replacement" measures.'[46] The arbitrator emphasized that there had 'been no multilateral determination that the United States has failed' to comply with respect to Step 2 payments.[47] It therefore found 'no legal basis' for authorizing Brazilian countermeasures for re-enacted Step 2 payments.[48] In short, if there has not been a Phase Four determination with respect to the WTO-consistency of the US measure, there cannot be a Phase Five authorization for a SCOO.

The arbitrator's narrow jurisdiction could allow a member to formally replace WTO-inconsistent measures with new WTO-inconsistent measures after Phase Four and argue this change precludes authorization for a SCOO at Phase Five. This describes the ML and CC payments at dispute in *US – Upland Cotton*. The United States argued to the arbitrator that ML and CC payments 'expired' with the rest of the 2002 Farm Bill and thus 'there is no longer a basis to authorize countermeasures with respect to these payments.'[49] The Office of the United States Trade Representative (USTR)

[44] WTO Appellate Body Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute* (*US – Continued Suspension*), WT/DS320/AB/R, adopted 14 November 2008, paras 345, 340.

[45] See Decision by the Arbitrator, *US – Upland Cotton* (4.11), above n 3, para 3.61. Brazil agreed that the arbitrator could not assess the WTO-consistency of the replacement measure (para 3.12).

[46] Ibid. The *US – Upland Cotton* arbitrator's passivity is similar to that of the *US – Gambling* arbitrator who refused to consider whether a compliance hypothetical used as a counterfactual to calculate the level of the SCOO would, in fact, be compliant with the WTO Services Agreement. Decision by the Arbitrator, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Recourse to Arbitration by the United States under Article 22.6 of the DSU*, WT/DS285/ARB, 21 December 2007, paras 3.55–3.56, 3.59, 3.67.

[47] Decision by the Arbitrator, *US – Upland Cotton* (4.11), para 3.42. The Step 2 replacement payments were enacted *after* the Article 21.5 compliance panel issued its report, thus there could be no multilateral finding concerning those measures at the time of the report.

[48] Ibid, para 3.64.

[49] See Written Submission of the United States, *United States – Subsidies on Upland Cotton: Arbitration Under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, *United States – Subsidies on Upland Cotton: Arbitration Under Article 22.6 of the DSU and Article 7.10 of the SCM Agreement*, DS267, 9 December 2008, at 78 (asserting the payments 'expired' with the rest of the 2002 Farm Bill and thus 'there is no longer a basis to authorize countermeasures with respect to these payments').

never argued to the arbitrator that the law was substantively *changed* but merely that it was *formally replaced* by the 2008 Farm Bill.[50]

The *US – Upland Cotton* arbitrator acknowledged its limited legal authority to evaluate the 2008 Farm Bill,[51] but confirmed that the United States remained in non-compliance with respect to CC and ML payments.[52] The arbitrator stated 'we are not persuaded that the United States has demonstrated to us that it has complied . . .'[53] and therefore authorized countermeasures for the ML and CC payments continued under the 2008 Farm Bill.[54] Here the arbitrator made a judgment on compliance without the benefit of an Article 21.5 panel decision, as contrasted with the arbitrator's decision that Step 2 replacement payments in the 2008 Farm Bill were beyond its jurisdiction.

The arbitrator's inconsistency suggests that DSB arbitrators at Phase Five have jurisdiction to consider measures that Article 21.5 compliance panels have never assessed at Phase Four, but that this authority is quite limited. The question of whether to consider measures enacted after Article 21.5 proceedings in authorizing a countermeasure or a SCOO has received almost no consideration under previous decisions.[55] Opportunistic WTO members can take advantage of the arbitrator's limited jurisdiction by making changes between Phases Four and Five with the understanding that the replacement measure will not accord the complaining member the right to a SCOO. The issue for future arbitrators will be whether the opportunistic changes are more akin to the formal replacement of ML and CC payments, or the Step 2 replacement measure.

This gap between the jurisdiction of Phase Four compliance panels and Phase Five arbitrators could allow endless reviolations if D removes WTO-inconsistent measures repeatedly before Phase Four. The uncompliance problem is further exacerbated because SCOOs may only be imposed

[50] Ibid; see also Decision by the Arbitrator, *US – Upland Cotton* (7.10) at 3.28 (the arbitrator described that the ML and CC payments 'continue to be offered and may continue to be under a new legal basis').

[51] Decision by the Arbitrator, *US – Upland Cotton* (7.10), above n 3, para 3.30 ('[t]o the extent that we might be entitled to review, in the context of these proceedings whether compliance has been achieved, we would therefore not have a sufficient basis to conclude . . . that it has been').

[52] Ibid, para 3.18.

[53] Ibid, para 3.18; see also ibid, para 3.28 ('[w]e have not been provided with any indication that the payments that may be made under the 2008 Farm Bill would be of a different nature than those that gave rise to the rulings at issue').

[54] Ibid, para 3.32 (the arbitrator concludes that the United States has failed to establish that there is no longer any legal basis for Brazil to seek countermeasures).

[55] Cf. Decision of the arbitrator, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU (EC – Bananas III (US) (Article 22.6 – EC))*, WT/DS27/ARB, 9 April 1999, DSR 1999:II, paras 5.96–98 (the arbitrator assessed on the merits the EC's banana import regime because the arbitrator agreed to issue its report simultaneously with the 21.5 report, instead of allowing the 21.5 panel to issue its report first).

for ongoing, rather than past, violations and DSU procedural timelines. Each is explored in turn.

C. Remedies for past non-compliance and uncompliance are disallowed under the DSU

Members do not face SCOOs for past, non-continuing violations of WTO agreements. Instead, the DSU text allows SCOOs only for ongoing violations. This creates further incentive to both remain non-compliant or to uncomply.[56]

The DSU authorizes SCOOs only upon the failure of a member to bring measures into compliance with WTO agreements.[57] Imposing a SCOO is 'temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed.'[58] WTO jurisprudence also finds that the DSU precludes SCOOs for past violations,[59] allowing members to 'hit and run.'[60]

The *US – Upland Cotton* case shows starkly that SCOOs for past violations are not allowed. The United States delayed removing Step 2 payments until August 2006, over a year after the time given to comply with the DSB recommendations.[61] After Phase Four and before Phase Five, the United States allegedly uncomplied by re-enacting cotton user subsidies in the 2008 Farm Bill. The *US – Upland Cotton* arbitrator held that Brazil could not impose countermeasures against the United States for either the period of non-compliance or the alleged uncompliance.[62] This ruling prevented Brazil from imposing countermeasures for the failure by the United States

[56] See, e.g. William J. Davey, 'Implementation in WTO Dispute Settlement: An Introduction to the Problems and Possible Solutions,' RIETI Discussion Paper Series 05-E-013 (2005) at 14 ('the prospective nature of WTO remedies currently gives countries no incentive to comply promptly and may even encourage foot-dragging').

[57] See DSU, Article 22.2.

[58] DSU, Article 22.8.

[59] Cf. Petros C. Mavroidis, 'Remedies in the WTO Legal System: Between a Rock and a Hard Place', 11 European Journal of International Law 763 (2000), at 790 (noting that a WTO panel has allowed remedies for past violations and asserting this is the correct interpretation of the DSU).

[60] See, e.g. Decision by the Arbitrator, *Canada – Export Credits and Loan Guarantees for Regional Aircraft* (*Canada – Aircraft II* (22.6)), WT/DS222/ARB, 17 February 2003, paras 3.108-13 (addressing Brazil's argument that countermeasures should be increased to deter future hit and run subsidies held to be illegal).

[61] See Decision by the Arbitrator, *US – Upland Cotton* (4.11), above n 3, para 3.5 (noting that the United States was required to remove Step 2 by 1 July 2005, but the payments continued until 31 July 2006).

[62] Ibid, para 3.62. Brazil did not assert a right to take countermeasures solely because the United States allegedly uncomplied through enacting Step 2 replacement measures, see ibid, para 3.57, but asked the arbitrator to authorize a one-time countermeasure because the United States failed to comply on a timely basis *and* to take into consideration the replacement measures. See ibid, paras 3.12–13.

to withdraw Step 2 payments within the time given to comply.[63] The United States course of action in *US – Upland Cotton* provides a roadmap for recidivist members to emulate: delay compliance until immediately before Phase Four, take measures to gain confirmation of compliance at Phase Four under Article 21.5, and then uncomply.

Members cannot, however, delay compliance too long. In *US – Continued Suspension*,[64] the AB held that after the DSB authorizes a member to impose a SCOO, the SCOO may remain in place until the violating member proves 'substantive compliance' in an Article 21.5 compliance proceeding.[65] Thus, if the violating member delays compliance until after Phase Five, it may face a SCOO and will be required to show that its measures to comply constitute compliance before the SCOO has to be removed.[66]

Compliance between Phases Four and Five has murky consequences. As discussed above, the DSB arbitrator at Phase Five has a very limited jurisdiction, suggesting that the arbitrator will give strong deference to the DSU 21.5 compliance panel.[67] A member delaying compliance until after the 21.5 decision at Phase Four risks that the arbitrator will ignore changes following that decision—indeed, the *US – Upland Cotton* arbitrator essentially ignored the 2008 Farm Bill, which was enacted after the 21.5 compliance panel decisions.[68] The AB has held that establishing a DSU Article 21.5 compliance panel is 'the proper course of action' for WTO members where they disagree whether WTO-inconsistent measures are removed and is 'obligatory.'[69] This suggests that members delaying compliance until after Phase

[63] Ibid, para 3.50 ('we conclude that there is no legal basis for Brazil to seek countermeasures in relation to the absence of compliance by the United States . . . during the period from' expiration of the time given to the United States to comply and the cessation of Step 2 payments). This issue has recently arisen again in relation to the appropriate level of retaliation rights to complaining members for the United States continuing use of zeroing in anti-dumping cases. See Written Submission of the United States, *United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 22.6 of the DSU by the United States*, DS322, 8 July 2010, para 77 ('Japan erroneously . . . [is] requesting cumulative suspension for all past nullification or impairment after the end of the RPT, as opposed to the estimated level from the current year').

[64] Appellate Body Report, *US – Continued Suspension*, above n 44.

[65] Ibid, para 308 ('[t]o require the termination of suspension of concessions before substantive compliance is achieved would significantly weaken the effectiveness of the WTO dispute settlement mechanism').

[66] Ibid, para 305.

[67] See Decision by the Arbitrator, *US – Upland Cotton* (7.10), above n 3, para 3.14 ('[i]t is in our view, appropriate for us, as arbitrators acting under Article 22.6 of the DSU, to take into account this determination made in the context of compliance proceedings under Article 21.5 of the DSU [finding the United States in non-compliance] and *assume a priori, on that basis, that the United States has not complied* . . .') (emphasis added).

[68] See ibid; Decision by the Arbitrator, *US – Upland Cotton* (4.11), above n 3.

[69] Appellate Body Report, *US – Continued Suspension*, above n 44, paras 345, 340.

Four might be too late and confront a SCOO as well as the burden of proving compliance per the *US – Continued Suspension* decision.[70]

For an opportunistic member wishing to both delay compliance for the maximum period while avoiding a SCOO, the optimal course of action is replicating the United States alleged reviolation in *US – Upland Cotton*: delay compliance until immediately before the DSU 21.5 compliance panel decision in Phase Four and then uncomply at any time thereafter. This process could be repeated without ever facing a SCOO. The next section shows how DSU timelines create large windows to delay compliance and uncomply.

D. DSU timelines create windows for non-compliance and uncompliance

The time taken to adjudicate disputes under the DSU also lends itself to recalcitrant members delaying compliance and engaging in uncompliance.[71]

The rules of the DSU prevent members from obtaining authorization to impose a SCOO against the violating member until at least 3 years after the initiation of the dispute.[72] Delays well-beyond these timeframes are common.[73] In the *US – Upland Cotton* case for example, Brazil obtained the right to impose countermeasures against the United States roughly 7 years after initiating the dispute.[74] These delays led one close observer of US farm policy to conclude that the lessons of *US – Upland Cotton* for lawmakers was that 'they can ignore the WTO without serious consequences' and that the DSU is a 'clumsy tool for trade conflicts in the here and now.'[75]

These lengthy delays may create a significant problem if a member engages in uncompliance. A member in Brazil's situation could start *de novo* at Phase One, allowing the United States to continue violating WTO agreements without facing a SCOO for years. WTO jurisprudence demonstrates, however, that Brazil should be able to initiate a new DSU 21.5 compliance panel at Phase Four to challenge the Step 2 replacement measure.

[70] See ibid, para 362 ('it is appropriate that the Member whose measure has brought about the suspension of concessions should make some showing that it has removed the measure . . . [t]his requires that the original respondent will have an onus to show that its implementing measure has cured the defects identified in the DSB's recommendations and rulings').

[71] See Davey, above n 56, at 13 ('because remedies are prospective, there is an incentive to delay the time at which point they might be implemented, such as by seeking a long reasonable period of time for compliance and then forcing a complainant to go through an Article 21.5 panel (and Appellate Body) proceeding').

[72] See DSU, Articles 4, 6, 12, 15, 16, 17, 19, 20, 21 and 22.

[73] See, e.g. William J. Davey, 'Process and Procedure in WTO Dispute Settlement: Comment: Compliance Problems in WTO Dispute Settlement', 42 Cornell International Law Journal 119 (2009), at 121 ('panels typically exceed the targets set in the DSU by many months').

[74] Delays beyond the timelines established in the DSU were due to both the parties and the arbitrator. See Decision by the Arbitrator, *US – Upland Cotton* (4.11), above n 3, paras 1.20–26 (discussing various delays in the case).

[75] Morgan, above n 22, at 53.

As the following discussion of case law demonstrates, the AB has defined 'the existence of measures taken to comply' under the DSU text broadly, authorizing 21.5 jurisdiction over almost all measures enacted subsequent to the original illegality finding.[76]

The question of whether a member must start *de novo* at Phase One to prove measures taken to uncomply with WTO agreements concerns the jurisdiction of DSU 21.5 compliance panels.[77] Article 21.5 compliance panels assess not only the 'consistency' but also 'if there is a disagreement as to the *existence* . . . of measures *taken to comply*.'[78] Under WTO jurisprudence

[76] The cases discussed below demonstrate how the AB has significantly clarified the scope of 21.5 compliance proceedings over the past ten years. See Jason Kearns and Steve Charnovitz, 'Adjudicating Compliance in the WTO: A Review of DSU Article 21.5', 5 Journal of International Economic Law 331 (2002) at Section III.B (summarizing cases interpreting the scope of measures within 21.5 Panel's jurisdiction as finding that the DSB had not 'yet ruled that a dispute brought before an Article 21.5 compliance panel was beyond the scope of Article 21.5. Yet future Article 21.5 compliance panels will almost inevitably be confronted with measures or matters that are better addressed by a first instance Article 6 panel'). Kearns and Charnovitz summarize two approaches to determining the scope of jurisdiction under Article 21.5 proceedings: one giving deference to the complaining member and the other looking for a clear connection between the new measure and the original violation (at 345–47). This article shows that both approaches have evolved significantly.

[77] The DSU text differs from the SCM text concerning resolutions of disputes. For example, the DSU requires the violating member to 'bring the measure into conformity.' DSU, Article 19.1. The SCM obligates members to 'withdraw' and 'remove' prohibited subsidies or 'remove the adverse effects of the subsidy.' SCM Agreement, Articles 4.7, 7.8. This section analyses these provisions collectively although some have pointed out that the different textual commands, as well as political problems with disciplining subsidies, make resolution of subsidies disputes especially difficult. See 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* (*Australia – Automotive Leather II (Article 21.5 – US)*), WT/DS126/RW and Corr. 1, adopted 11 February 2000, DSR 2000: III, 1189, para 6.31 (holding that SCM Agreement Article 4.7 requires a violating member to 'withdraw' subsidies and should be contrasted with 'bring into conformity' in Article 19.1 of the DSU, thus allowing for retrospective remedies in the SCM Agreement); but see Ivan Krmpotic, '"Brazil – Aircraft: Qualitative and Temporal Aspects of Withdrawal" Under SCM Article 4.7', 33 Law and Policy in International Business 653 (2002), at 672–74 (arguing that the AB rejected the *Australia – Leather II (Article 21.5 – US)* reading in *Brazil – Aircraft,* by giving 'withdraw' the same meaning as 'to bring into conformity' with DSU Article 19.1); Davey, above n 73, at 127 (noting the particular problems in implementation of subsidy, SPS and agriculture disputes); Kyle Bagwell and Robert W. Staiger, *Subsidy Agreements*, Working Paper 10292, (National Bureau of Economic Research 2004) (arguing that strict SCM Agreement disciplines 'are increasingly disrupting the world trading system' and that this in turn has a 'chilling effect on the desire of governments to make further market access commitments'). Cf. C. O'Neal Taylor, 'Impossible Cases: Lessons From the First Decade of WTO Dispute Settlement', 28 University of Pennsylvania Journal of International Economic Law 309 (2007), at 444 (emphasizing the politics behind the WTO's most difficult disputes and attributing the failure to resolve them to 'very dissimilar reasons').

[78] DSU, Article 21.5 (emphasis added). For another overview of the jurisdictional scope of Article 21.5 compliance panels, see Yuka Fukunaga, 'Securing Compliance Through the WTO Dispute Settlement System: Implementation of DSB Recommendations', 9 Journal of International Economic Law 383 (2006), at 409–11.

discussed below, Article 21.5 compliance panels have broad jurisdiction to scrutinize new measures, thereby preventing recidivist members from escaping SCOOs by replacing WTO-inconsistent measures with new WTO-inconsistent measures. We argue that this jurisprudence should extend to cases of uncompliance, allowing assessment of reviolations at Phase Four rather than at a new Phase One.

An argument could be made that the DSU text requires a member to start over after compliance is achieved.[79] After adoption of DSB reports, the DSU requires parties to accept them as final.[80] Violating members have argued that compliance panels should not assess follow-on measures because this short-circuits the lengthier, more deliberative timelines under the DSU to establish a WTO violation.[81] Violating members also ask Article 21.5 compliance panels to ignore new measures, declaring such measures are not taken to comply and therefore beyond Article 21.5 compliance panel jurisdiction.[82]

The AB has generally rejected such arguments. The violating member's designation of a measure as one taken to comply is, according to the AB, 'relevant' but ultimately the Article 21.5 compliance panel must determine its own jurisdiction.[83] In determining the scope of this jurisdiction, the AB has put forth a number of very similar legal standards while failing to clearly

[79] See DSU, Article 21.6 ('the DSB shall keep under surveillance the implementation of adopted recommendations or rulings . . . until the issue is resolved'); DSU, Article 22.8 ('the DSB shall continue to keep under surveillance the implementation of adopted recommendations or rulings, including those cases where . . . concessions or other obligations have been suspended, but the recommendations to bring a measure into conformity with the covered agreements have not been implemented'); Decision by the Arbitrator, *US – Upland Cotton* (4.11), above n 3, para 3.55 (holding Brazil's request to take into consideration the re-enactment of cotton user-subsidies as 'without object and we need not consider it.').

[80] See DSU, Article 16.4 (automatic adoption of DSB reports unless WTO Members by consensus reject the decision). The AB said in *US – Continued Suspension* that '[o]nce substantive compliance has been confirmed . . . the authorization to suspend concessions lapses by operation of law (*ipso jure*).' Appellate Body Report, *US – Continued Suspension*, above n 44, para 308.

[81] See DSU, Articles 4, 6, 7, 8, 11, 16–22 (pertaining to members consultations, establishment of DSB panels, adoption of panel reports and AB review of panel findings); WTO Appellate Body Report, *United States – Final Countervailing Duty Determinations with Respect to Certain Softwood Lumber from Canada – Recourse to Article 21.5 by Canada* (*US – Softwood Lumber IV (Article 21.5)*), WT/DS257/AB/RW, adopted 20 December 2005, DSR 2005: XXIII, 11357 (summarizing the United States argument that the DSU precludes liberal examination of new measures because a party may establish a new panel to find the consistency of those measures).

[82] See Appellant Submission of the United States of America, *United States – Subsidies of Upland Cotton – Recourse to Article 21.5 by Brazil* (Submission to the Appellate Body), 19 February 2008, Section I.A (arguing that CC and ML payments after the expiry of the time to comply as well as certain export credit guarantees were not within the jurisdiction of the compliance panel).

[83] See Appellate Body Report, *US – Softwood Lumber IV (Article 21.5)*, above n 81, para 73.

specify when the different standards apply or whether they are substantively different.[84]

Generally, however, the AB focuses on the relationship between the new measure, the original violation, and the recommendations and rulings of the DSB.[85] The AB has directed Phase Four compliance panels to assess whether the new measure is part of a '*continuum of events* relating to compliance.'[86] If multiple measures relate to compliance, Article 21.5 panel jurisdiction depends on whether there is a *'close nexus*' between the measures undertaken to comply and the recommendations and rulings of the DSB.[87] Article 21.5 compliance panels should examine 'the *timing, nature and effects* of the various measures' and 'the *factual and legal background*' against which new measures are adopted.[88] New measures undermining compliance should also be assessed because the role of the Article 21.5 panel is to determine

[84] See 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, adopted 11 December 2008, and Corr.1 / *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States*, WT/DS27/AB/RW/USA and Corr.1, adopted 22 December 2008 (collectively, *EC – Bananas III (Article 21.5 – Ecuador II, Article 21.5 – United States)*), para 252 (after determining that a measure was one taken to comply and therefore within the Article 21.5 panel jurisdiction, the AB noted that 'strictly speaking' the *US – Softwood Lumber IV* test did not apply, but that because 'the Panel made findings in this respect, and given that the parties advance several arguments relating thereto, we briefly address these additional findings').

[85] See WTO Appellate Body Report, *US – Softwood Lumber IV (Article 21.5)*, above n 81, para 77 (the AB held that measures 'with a particularly close relationship to the declared "measure taken to comply," and to the recommendations of the rulings of the DSB, may also be susceptible to review by a panel acting under Article 21.5').

[86] WTO Appellate Body Report, *United States – Tax Treatment of 'Foreign Sales Corporations' – Second Recourse to Article 21.5 of the DSU by the European Communities (US – FSC (Article 21.5 – EC II))*, WT/DS108/AB/RW2, adopted 14 March 2006, DSR 2006:XI, 4721, para 87 (emphasis added).

[87] See 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* (*US – Zeroing (EC) – Article 21.5 – EC*), WT/DS294/AB/RW, adopted 11 June 2009, para 226 (emphasis added).

[88] WTO Appellate Body Report, *US – Softwood Lumber* IV (Article 21.5), above n 81, para 77 (emphasis added); The AB went on to say that a panel should look for 'close links' between the challenged new measure and the measure pointed to by the defending Member as its measure taken to comply. See also, Joost Pauwelyn, 'Proposals for Reforms of Article 21 of the DSU,' in Federico Ortino and Ernst-Ulrich Petersmann (eds) *The WTO Dispute Settlement System 1995–2003* (The Hague: Kluwer Law International, 2004), at 57 (asserting that measures 'taken to comply' in Article 21.5 should be assessed by looking at the new measure's timing and subject matter). In *Australia – Salmon*, a compliance panel found it had jurisdiction to consider both a new measure by the Australian government as well as a regional government measure enacted subsequent to the panel's composition. See WTO Panel Report, *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada (Australia – Salmon (Article 21.5 – Canada))*, WT/DS18/RW, adopted 20 March 2000, DSR 2000:IV, 2031. The AB later approvingly cited the *Australia – Salmon* panel decision, emphasizing that the regional ban appeared timed in response to the earlier panel decision and the subject matter of the ban were the same as that in the dispute. See Appellate Body Report, *US – Softwood Lumber IV (Article 21.5)*, above n 81, para 74.

whether a measure taken to comply is 'fully consistent with WTO obligations.'[89] The AB has rarely precluded Article 21.5 compliance panel review of measures.[90]

The AB faced an instance of apparent uncompliance in *EC – Bananas III*.[91] There, the United States was authorized in 1999 to impose a SCOO against the EC for its discriminatory quota on bananas.[92] The EC then reached an understanding in 2001 with complainants that the EC would change its import regime.[93] Through various measures between 2005 and 2007, the EC appeared to comply, and then uncomplied by re-instituting discriminatory measures.[94] The complainants established a second 21.5 compliance panel to confirm the EC had re-enacted illegal measures.[95] One of the primary issues was whether the agreement between the EC and the complainants extinguished the compliance panel jurisdiction over the dispute.[96]

The AB held that the agreement with complainants was not a final resolution of the dispute because the agreement was aspirational.[97] EC measures subsequent to the understanding were themselves 'measures taken to comply' and within the jurisdiction of the compliance panel.[98] The AB

[89] WTO Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton – Type Bed-Linen from India – Recourse by India to Article 21.5* (*EC – Bed Linen (Article 21.5 – India)*), WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, 965, para 79.

[90] See Appellate Body Report, *US – Zeroing (EC) – Article 21.5 – EC*, paras 225–26 (overturning a panel decision to exclude administrative reviews finishing prior to the adoption of DSB reports concerning the US practice of zeroing and holding those administrative reviews could be measures taken to comply and within the Article 21.5 panel's jurisdiction); cf. Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, above n 89, para 99 (holding a measure as not within a compliance panel's jurisdiction because the measure was not new and previous rulings on that measure were not appealed by the complaining Member).

[91] See WTO Appellate Body Report, *EC –Bananas III (Article 21.5 – Ecuador II, Article 21.5 – United States)*, above n 84, para 7. Numerous commentators have documented this dispute and its implications for the DSB. See, e.g. Friedl Weiss, 'Manifestly Illegal Import Restrictions and Non-compliance with WTO Dispute Settlement Rulings: Lessons from the Banana Dispute', in Ernst-Ulrich Petersmann and Mark A. Pollack (eds), *Transatlantic Economic Disputes* (Oxford, England: Oxford University Press, 2003) 121–39.

[92] Decision by the Arbitrator, *EC – Bananas III (US) (Article 22.6 – EC)*, above n 55.

[93] See Appellate Body Report, *EC – Bananas III (Article 21.5 – Ecuador II, Article 21.5 – United States)*, above n 84, para 8.

[94] Ibid, paras 12–17.

[95] Ibid, para 16–17.

[96] Ibid, Parts VII and VIII.

[97] See ibid, Section VI. The AB also held that an Article 21.5 Compliance Panel has considerable discretion to 'decide how it takes into account subsequent modifications or a repeal of the measure at issue.' Ibid, para 270. This statement was directed at the EC argument that the case was moot because the measure at issue had already been removed.

[98] Ibid, para 252 ('[w]e find that the Understanding on Bananas is in itself a "measure taken to comply" within the sense of Article 21.5 of the DSU'). Because the Understanding was a measure taken to comply, it was unnecessary for the AB to consider the relationship between the EC's actions and other measures taken to comply with DSB recommendations under the *US – Softwood Lumber IV* test described above. See ibid, paras 252–260; see also Fernando

stated that it did not 'consider that the mere agreement to a "solution" necessarily implies that parties waive their right to have recourse to the dispute settlement system.'[99] WTO members thus retain the right to seek 21.5 compliance panel rulings even after compliance is achieved in order to protect against future measures taken to uncomply.

Applying the AB's factors for determining compliance panel jurisdiction to *US – Upland Cotton* suggests arguments both against and for a 21.5 compliance panel finding that the Step 2 replacement measures within its jurisdiction. In terms of timing, the replacement measures went into effect two years after the termination of Step 2 payments, which is significantly longer than measures examined above.[100] Furthermore, the replacement measures were adopted in a Congressional enactment separate from the repeal of Step 2 payments, unlike in *US – FSC* where Congress repealed and replaced the illegal measures in one enactment.[101]

On the other hand, the factual background of the lingering dispute favors jurisdiction because the new cotton subsidies are part of a 'continuum of events' of the old subsidies.[102] Also in favor of jurisdiction is that the new Step 2 payments, according to Brazil,[103] have a similar effect as the old payments and undermine the previously achieved compliance.[104] Weighing both sides, we believe that a 21.5 panel would find it had jurisdiction over the new payments. As the AB explained in *US – FSC*, 'an Article 21.5 panel may examine either the "existence"... or, when such measures exist, the "consistency" of those measures... where the measures taken to comply, through omissions or other deficiencies, may achieve only partial compliance.'[105]

Pierola, 'The Issue of Exclusion of Jurisdiction in the Light of the Appellate Body *Report in European Communities – Banans III (Article 21.5 II)*', 4 Global Trade and Customs Journal 129 (2009), at 129–30 (discussing the ability of WTO panels to decline jurisdiction).

[99] See Appellate Body Report, *EC –Bananas III (Article 21.5 – Ecuador II, Article 21.5 – United States)*), above n 84, para 212.

[100] Compare Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, above n 88, paras 1.3, 4.26 (the Australian measure taken to comply was in July 1999 and the regional measure was in October, roughly three months later) with Decision by the Arbitrator, *US – Upland Cotton* (4.11), above n 3, para 3.59 (noting the withdrawal of user subsidies from August 2006 through June 2008). Cf. Appellate Body Report, *US – FSC (Article 21.5 – EC II)*, above n 86 (four years between the original replacement measures and the new replacement measures, although, unlike *US – Upland Cotton*, the earlier replacement measures had been confirmed as illegal under the SCM Agreement).

[101] See above Section II.A (describing how Step 2 was eliminated through the 2005 Budget Reconciliation Act and the replacement measures through the 2008 Farm Bill); Appellate Body Report, *US – FSC (Article 21.5 – EC II)*, above n 86, para 6 (describing how both the repeal and the allegedly violative measures were in the JOBS Act).

[102] Appellate Body Report, *US – FSC (Article 21.5 – EC II)*, above n 86, para 87.

[103] See above n 30.

[104] See above Section II.A.

[105] Appellate Body Report, *US – FSC (Article 21.5 – EC II)*, above n 86, para 93.

Certainly, if the Step 2 replacement payments were the only cotton subsidy at dispute that would make for a more difficult decision concerning whether Brazil should start at Phase One or Phase Four.[106] The two year cessation of subsidies in *US – Upland Cotton* likely pushes the limits of continued jurisdiction for an Article 21.5 panel, especially if that new payment were the only measure at dispute. We believe, however, that an Article 21.5 compliance panel could have jurisdiction to consider measures taken to reviolate where such measures are the only issue at dispute in the case.

Articles 21 and 22 read together suggest that Article 21.5 compliance panels should have broad discretion to consider any new measure that would undermine compliance with WTO agreements concerning the dispute.[107] Indeed, the AB's emphasis on full compliance suggests that a WTO member 'does not achieve full withdrawal' where 'it leaves . . . part of the original prohibited subsidy in place.'[108] In other words, the AB has placed emphasis on 'fully' suggesting perhaps that a series of measures resulting in compliance followed by uncompliance could not possibly be full compliance. Further, Article 21.5 compliance panels are ordinarily the same jurists who comprised the original panel.[109] Finally, the circumstances of the DSU's adoption can be seen as a response to the lack of GATT procedures to monitor compliance with rulings.[110] The potential for repeated violations suggest a broad Article 21.5 compliance panel jurisdiction to consider new measures in order to reduce the window for opportunistic states to engage in uncompliance.

In Brazil's case, it must launch another 21.5 panel proceeding before knowing whether it may impose a countermeasure for the Step 2 replacement payments. This still creates lengthy delays in obtaining the right to impose countermeasures. The next section argues that members in Brazil's position can protect themselves from delayed compliance and uncompliance by gaining authorization to impose a SCOO where the violating member has clearly taken no measures to comply while litigating areas of disagreement concerning compliance in an Article 21.5 panel.

[106] The DSB has jurisdiction over an entire 'dispute' and is allowed to examine 'measures' (plural) taken to comply. DSU, Article 21.5.

[107] See, e.g. Appellate Body Report, *US – Softwood Lumber IV (Article 21.5)*, above n 81 (holding that separate measures may be considered to prevent members from circumventing compliance).

[108] Appellate Body Report, *US – FSC (Article 21.5 – EC II)*, above n 86, para 84.

[109] See DSU, Articles 22.6, 21.5.

[110] See Vienna Convention on the Law of Treaties, Article 32, opened for signature 23 May 1969, 1155 UNTS 331 (Vienna Convention) (supplementary means of interpretation include the circumstances of a treaty's adoption); Robert E. Hudec, 'Broadening the Scope of Remedies in the WTO Dispute Settlement', in Friedl Weiss (ed), *Improving WTO Dispute Settlement Procedures* (London, UK: Cameron, May 2000), 345–76 (discussing GATT procedures that required a complainant to bring a case *de novo* to show that implementing measures failed to achieve compliance).

III. MEMBERS SHOULD SEEK AUTHORIZATION TO IMPOSE A SCOO WHERE NO MEASURES HAVE BEEN TAKEN TO COMPLY UPON EXPIRY OF THE REASONABLE TIME GIVEN TO COMPLY

During Phase Three, violating members are given a reasonable period of time to comply with rulings and recommendations adopted by the DSB.[111] If measures are taken to comply, the Article 21.5 compliance panel resolves whether compliance has in fact been achieved in Phase Four.[112] The AB has found that where disagreement exists concerning compliance, resolution of that dispute through DSU compliance panels is 'obligatory.'[113]

The DSU is ambiguous whether Phase Four actually must precede Phase Five in cases of disagreement as to measures taken to comply,[114] but it is now well-established that members will sequence Phase Four before Phase Five.[115] Typically, members to a dispute reach a 'sequencing agreement' providing that the member seeking to impose a SCOO will not do so prior to the Phase Four Article 21.5 compliance panel and the AB finishing assessment of the violating member's measures taken to comply.[116] Thus, members generally agree to allow the 21.5 compliance panel to finish prior to seeking authorization to SCOO.

If the violating member *takes no measures to comply* at Phase Three within the reasonable period of time given to comply, however, the DSU provides members the right to skip the compliance panel at Phase Four and go immediately to the Phase Five to seek authorization for a SCOO.[117] The DSU text provides that upon expiry of the time given to comply, plus 20 days of negotiations, the DSB 'shall grant authorization to suspend concessions' after conclusion of the arbitration to determine the size and scope

[111] DSU Article 21.3. The SCM Agreement establishes shorter periods for a violating member to remove prohibited subsidies than for the DSU baseline of a 'reasonable period'. Compare SCM Agreement, Article 4.7 with DSU, Article 21.3.

[112] See above n 44.

[113] Appellate Body Report, *US – Continued Suspension*, above n 44, para 340.

[114] See Mavroidis, above n 59, at 796 (arguing that the terms of the DSU require multilateral confirmation of the right to make a SCOO through the compliance process prior to arbitration); see also Petros C. Mavroidis, 'Proposals for Reform of Article 22 of the DSU' in Federico Ortino and Ernst-Ulrich Petersmann (eds), *The WTO Dispute Settlement System 1995-2003* (The Hague, Netherlands: Kluwer Law International, 2004), 61–73, at 64–65 (outlining why sequencing is required).

[115] See Sylvia A. Rhodes, 'The Article 21.5/22 Problem: Clarification Through Bilateral Agreements?', 3 Journal of International Economic Law 553 (2000).

[116] Ibid.

[117] DSU, Articles 22.2 and 22.6. The procedural equivalent for actionable subsidies is SCM Agreement Article 7.9 providing that the 'DSB shall grant authorization' to take countermeasures where the violating member fails to withdraw the adverse effects of the subsidy within six months.

of the SCOO.[118] Thus, Phase Four may be skipped because, where there are no measures taken to comply, there is no dispute as to the existence or consistency of measures taken to comply under Article 21.5.[119] Members should exercise this right because gaining the right to impose a SCOO will guard against non-compliance and prevent uncompliance. The *US – Upland Cotton* case shows the perils of failing to exercise this right.

Table 2 provides a timeline of actions in the *US – Upland Cotton* case. In *US – Upland Cotton*, Brazil asked for authorization to impose countermeasures on 4 July 2005, three days after the expiration of the time given to the United States to remove prohibited subsidies and at the conclusion of Phase Three for prohibited subsidies.[120] The United States objected to Brazil's request and invoked its right to arbitration under Article 22.6.[121] Brazil then reached a 'sequencing agreement' with the United States in July 2005, staying all arbitration proceedings to establish its right to take countermeasures at Phase Five until the Article 21.5 compliance panel was finished at Phase Four.[122] Brazil asked for an Article 21.5 compliance panel in August 2006 to examine the United States failure to remedy prohibited and actionable subsidies.[123] Brazil won, which the United States appealed, and the AB confirmed the United States was not in compliance except for eliminating Step 2 payments.[124]

Brazil arguably had the right to impose countermeasures for all unwithdrawn measures in late 2005. The United States had taken no measures concerning CC, ML or Step 2 as of September 2005, following expiration of the time given to the United States to withdraw or remove the adverse effects of all WTO-inconsistent cotton subsidies.[125] Thus, because the United States failed to act within the time given to comply, Brazil had the

[118] DSU, Articles 22.2, 22.6; see Cherise M. Valles and Brendan P. McGivern, 'The Right to Retaliate Under the WTO Agreement: The Sequencing Problem', 34 Journal of World Trade 63 (2000), at 72–74 (outlining the United States argument in *EC – Bananas III* that there is a window to impose a SCOO upon expiration of the time to comply when DSU Articles 22.2 and 22.6 are read together).

[119] DSU, Articles 22.2 and 22.6.

[120] Decision by the Arbitrator, *US – Upland Cotton* (4.11), above n 3, para 1.13.

[121] Ibid, para 1.14.

[122] See *United States – Subsidies on Upland Cotton – Understanding Between Brazil and the United States Regarding Procedures Under Articles 21 and 22 of the DSU and Article 4 of the SCM Agreement* (US-Brazil Sequencing Agreement), WT/DS267/22, paras 3, 10, 8 July 2005) ('Brazil and the United States will . . . request the arbitrator . . . to suspend its work . . . [i]n the event that the DSB finds that measures taken by the United States to comply with the relevant recommendations and rulings of the DSB are inconsistent with the covered agreements referred to in the Article 21.5 compliance panel request, the arbitrator will resume its work at Brazil's request).

[123] See *United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil – Request for the Establishment of a Panel* (Brazil 21.5 Panel Request), WT/DS267/30, 21 August 2006.

[124] See Decision by the Arbitrator, *US – Upland Cotton* (7.10), above n 3, para 1.8.

[125] See above Section II.A.

Table 2. Sequence of Events in *US – Upland Cotton*

March 2005	DSB adopts findings that cotton subsidies violate the SCM
30 June 2005	USDA administratively changes export credit guarantees
1 July 2005	Deadline expires for removal of prohibited subsidies—export credit guarantees and Step 2 payments
4-19 July 2005	Brazil seeks authorization to take countermeasures for unwithdrawn prohibited subsidies, US seeks Article 22.6 arbitrator
8 July 2005	Brazil and US agree to stay arbitrator proceedings [SEQUENCING AGREEMENT]
Fall 2005	Congressional Committees and the US House/Senate approve eliminating Step 2 payments
22 September 2005	Deadline expires to remove adverse effects of actionable subsidies—CC, ML, and Step 2 payments
December 2005	22.6 arbitrator report would have been due, authorizing countermeasures if Brazil had requested for unremoved cotton subsidies
8 February 2006	Budget Reconciliation enacted, requiring USDA to cease Step 2 payments, starting in August 2006
August 2006	Step 2 payments cease [COMPLIANCE]
August 2006	Brazil establishes an Article 21.5 compliance panel alleging non-compliance
2 June 2008	AB confirms non-compliance in all cotton subsidies except the AB affirms compliance with regard to Step 2 payments
18 June 2008	Step 2 replacement measures enacted in the 2008 Farm Bill [POTENTIAL UNCOMPLIANCE]
August 2009	Arbitrator authorizes countermeasures for all cotton subsidies at dispute except Step 2 replacement measures

right to immediately begin Phase Five by seeking countermeasures under DSU Article 22 and SCM Agreement Article 7. If Brazil immediately sought authorization to take countermeasures in September 2005, the Phase Five *US – Upland Cotton* arbitrator should have finished before the end of 2005[126] and prior to the elimination of Step 2.[127]

It is an interesting legal question whether the United States could have forced Brazil into a Phase Four Article 21.5 compliance proceeding in late 2005[128] by arguing the parties had a 'disagreement as to the existence' of

[126] See DSU, Article 22.6 (giving arbitrators 60 days to issue reports from expiration of the time given to comply). See the timeline in Table 2 illustrating the Brazilian opportunity.

[127] See 2005 Budget Reconciliation, above n 23, § 1103. Note however that if the United States had eliminated Step 2 payments prior to arbitration, then a 'dispute' would have existed under Article 21.5 as to all three actionable subsidies because the DSB would have to disentangle the effects of Step 2 payments' elimination with the continued CC and ML payments. Our argument does not extend to extinguishing sequencing altogether, but would simply allow a SCOO immediately after the time given to comply if no actions are taken with regard to a measure.

[128] In the *US – Upland Cotton* Article 21.5 compliance report, the AB held, at Brazil's request, that the continued ML and CC *payments* were themselves measures to comply and remained illegal under the SCM Agreement. See Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, above n 19, para 248 (quoting the panel report, the AB held 'Brazil's claim that the United States failed to comply with its obligations under Article 7.8 with respect to

measures taken to comply even where Step 2 payments, a prohibited subsidy, remained in place and all actionable subsidies were entirely unchanged.[129] The United States could have argued that its changes to *cotton export credit guarantees* created a disagreement as to compliance concerning *all cotton subsidies* at dispute in the case. If the United States were correct, Brazil could not impose countermeasures because doing so would be a prohibited unilateral determination outside the 'rules and procedures' of the DSU.[130] We acknowledge that allowing Brazil to impose countermeasures for the ML, CC and Step 2 while forcing Brazil to enter Phase Four for the export credit guarantees would have been an unprecedented action.[131] Nonetheless, in the *US – Upland Cotton* case, authorization to SCOO would have been appropriate because there were not any measures taken to comply with respect to Step 2, ML or CC payments.

those payments was properly within the scope of the Article 21.5 proceedings, because the 'claim pertains to a disagreement between the parties as to the "existence or consistency with a covered agreement of measures taken to comply" with the recommendations and rulings of the DSB'). This suggests that the United States could have created a disagreement necessitating a Phase Four Article 21.5 compliance panel decision. We believe this decision is, or should be, limited to where Brazil, rather than the United States, sought an Article 21.5 compliance panel to confirm the ML and CC payments remained illegal. If payment of actionable subsidies are automatically measures to comply, the violating member can do nothing and delay a SCOO through an Article 21.5 compliance panel. This reading renders the right established in Article 22 meaningless, which clearly contemplates a right to impose a SCOO where a Member 'fails' to 'comply . . . within the reasonable period of time.'

[129] See Brazil 21.5 Panel Request, above n 123, para 13 (the 'United States has taken no measures whatsoever to comply with the recommendations and rulings of the DSB concerning the US marketing loan and counter-cyclical payment programs . . . In this respect, *measures taken to comply do not exist*, within the meaning of Article 21.5 of the DSU') (emphasis added). Step 2 payments functioned both as a prohibited and actionable subsidy, suggesting failure to eliminate the Step 2 as of August 2005 allowed a countermeasure regardless of other actions because prohibited subsidies do not require a factual showing of injury. Compare SCM Agreement, Articles 4 and 7.

[130] DSU, Articles 23.1, 23.2. A panel held that a 'determination' under DSU Article 23.2 is prohibited only where it violates other portions of the DSU or DSB recommendations. See WTO Panel Report, *United States – Sections 301-310 of the Trade Act of 1974* (*US – Section 301 Trade Act*), WT/DS152/R, adopted 27 January 2000, DSR 2000:II, 815, at footnote 657.

[131] See Valles and McGivern, above n 118, at 72–74 (outlining the arguments in *EC – Bananas III* of the United States that such a right exists where no measures have been taken to comply and comparing it to the EC argument that a compliance panel finding of continuing non-compliance is required to impose a SCOO). The *EC – Bananas III* dispute allowed the United States to seek and receive the right to make a SCOO prior to the Article 21.5 compliance panel finishing its work as to the consistency of the EC's new import regime. See Decision by the Arbitrator, *EC – Bananas III (US) (Article 22.6 – EC)*, above n 55, para 4.11 (finding 'if we accepted the EC's argument, we would in fact read the time-limit foreseen in Article 22.6 out of the DSU since an Article 21.5 proceeding, which in the EC view includes consultations and an appeal, would seldom, if ever, be completed before the end of the time-limit specified within Article 22.6 (i.e. thirty days of the expiry of the reasonable period of time)'); cf Mavroidis, above n 114, at 65 (arguing this interpretation makes parts of Article 21.5 redundant).

Certainly, some authority exists under the DSU for the Article 22.6 arbitrator to authorize a SCOO absent an Article 21.5 compliance panel confirmation of non-compliance.[132] One example is the *US – Upland Cotton* arbitrator decision concerning ML and CC payments: the arbitrator found, as discussed above in Section III.B, that the 2008 Farm Bill 'has not wrought any substantive changes' to ML and CC payments. This suggests a limited jurisdiction to bypass Phase Four compliance panels if the violating member has made no substantive changes to a program within the time given to comply.[133]

A DSU arbitrator also authorized the United States and Canada to impose a SCOO against the EC for the EC's continued meat ban in *EC – Hormones*[134] without an Article 21.5 compliance panel. In that case, the EC undertook studies of hormones in meat to comply with the Agreement on the Application of Sanitary and Phytosanitary Measures, but the EC did not, as of the expiry of its time given to comply, assert those studies brought it into compliance.[135] In *US – Continued Suspension*, the AB held that the continued SCOO by the United States and Canada following the EC's new meat import ban was permissible.[136] The AB noted that members have a right to make a SCOO when the violating member 'fails to implement the

[132] See DSU, Article 21.5 (establishing terms of reference for compliance panels as limited to areas where disagreement concerning the 'existence' of measures taken to comply exist); DSU, Article 3.3 (establishing that that the DSU's object and purpose is the prompt settlement of disputes); but see DSU ibid, Article 23 (precluding unilateral determination of the right to impose a SCOO under the DSU); WTO Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the European Communities* (*EC – Bananas III (Article 21.5 – EC)*), WT/DS27/RW/EEC, 12 April 1999, and Corr.1, unadopted, DSR 1999:II, 783, paras 4.16–17 (panel refuses to hold that authorization to impose a SCOO absent an Article 21.5 report is precluded by the DSU); *US – Continued Suspension*, above n 44, para 345 (holding that Article 21.5 is required where a dispute exists as to the consistency of measures taken to comply). Neither the *US – Continued Suspension* nor the *EC – Bananas III* situation is directly on point because in both cases there clearly were measures taken to comply. In *US – Upland Cotton* by contrast, the question is whether a 'dispute' can exist where no measures have been taken to comply.

[133] Decision by the Arbitrator, *US – Upland Cotton* (7.10), above n 3, para 3.25. This is consistent with *US – Continued Suspension* which held that after a DSB finding of non-compliance, a violating Member must prove substantive compliance to an Article 21.5 compliance panel. See Appellate Body Report, *US – Continued Suspension*, above n 44. One of us has previously called this 'one of the most remarkable holdings of the Appellate Body during its thirteen-year history', see Steve Charnovitz, 'Trade, Investment and Dispute Settlement: The Enforcement of WTO Judgments', 25 Yale Journal of International Law 558 (2009), at 565.

[134] Decision by the Arbitrator, *European Communities – Measures Concerning Meat and Meat Products (Hormones), Original Complaint by the United States – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU* (*EC – Hormones (US) (Article 22.6)*), WT/DS26/ARB, 12 July 1999, DSR 1999:III, 1105.

[135] See Appellate Body Report, *US – Continued Suspension*, above n 44, para 7.

[136] See ibid, para 401 (holding that the imposition of the SCOO was permissible because it was not a unilateral determination in violation of DSU Article 23.2(a)).

panel (or the Appellate Body's) findings within a reasonable period of time.'[137]

Thus, the right to take countermeasures or a SCOO absent a 21.5 compliance panel determination is explicit in the DSU and reflected in prior AB decisions. Further, this interpretation is necessary to protect members from non-compliance and uncompliance.

Brazil's actions in the dispute are consistent with seeking to resolve the dispute in good faith without resorting to countermeasures, the DSU's 'preferred'[138] method of resolution.[139] But the sequencing agreement continues to disallow *any* basis for a countermeasure concerning the allegedly prohibited Step 2 payments, and delayed all countermeasures for over four years pending the *US – Upland Cotton* Article 21.5 compliance panel, the appeal of that ruling and the Article 22.6 arbitrator authorization to impose countermeasures.[140]

Brazil instead should have gained authorization to impose countermeasures for Step 2, ML and CC payments in late 2005, *and then*, if it wanted to, it could then have withheld countermeasures so long as the United States was making good faith efforts towards compliance. In *US – FSC*, the EC employed a similar strategy by gaining the right to impose a SCOO, but refraining from fully implementing the SCOO as a way to encourage the US Congress to comply with the case.[141] A sequencing agreement *after* gaining authorization to impose countermeasures could be crafted in a way to automatically give Brazil the right to impose countermeasures if the

[137] Appellate Body Report, *US – Continued Suspension*, above n 44, para 374. It is clear that any SCOO not authorized by the DSB is prohibited. For example, when the United States imposed sanctions in *EC – Bananas III*, pending the decision of both the arbitrator and the 21.5 panel, the United States was found to have violated Article 21.5. See WTO Appellate Body Report, *United States – Import Measures on Certain Products from the European Communities* (*US –Certain EC Products)*, WT/DS165/AB/R, adopted 10 January 2001, DSR 2001:I, 373, para 127.

[138] DSU, Article 3.7.

[139] Brazil's agreement to forego seeking countermeasures came immediately after USDA changed export credit guarantees and as Congress was in the process of eliminating Step 2 payments. See US-Brazil Sequencing Agreement, above n 122, Preamble ('[r]ecognizing that a legislative proposal has been sent to the United States' Congress with a view to repealing, as soon as possible, the user marketing (Step 2) program for exporters of upland cotton and domestic users of upland cotton'); House Budget Committee Report, above n 28, at 7 (dated November 2005 and providing that the House version of budget reconciliation eliminated Step 2); see also US House Report Report 109-362, at 187-94 (2005) (2005 Budget Reconciliation Conference Report) (dated December 2005 and showing that the House-Senate Conference Committee approved eliminating Step 2).

[140] Compare US-Brazil Sequencing Agreement, above n 122 (dated July 2005) with Decisions by the Arbitrator, *US – Upland Cotton* (4.11/7.10), above n 3 (dated August 2009). Delays beyond the timelines established in the DSU were due to both the parties and the arbitrator. See Decision by the Arbitrator, *US – Upland Cotton* (4.11), above n 3, paras 1.20-26 (discussing various delays in the arbitration).

[141] See Davey, above n 56, at 15 (describing the effectiveness of increasing sanctions over time within the context of the *US – FSC* case).

United States reviolated.[142] This tough-nosed negotiating posture reduces the window of time to delay compliance and also, later, to reviolate.

The consequences if Brazil had received the right to take countermeasures in late 2005 for the failure to withdraw Step 2 payments would have been threefold. First, it would have shortened the timeframe to delay compliance and engage in what Brazil later deemed to be opportunistic uncompliance by eliminating the period it took to litigate the other measures in the 21.5 compliance panels at Phase Four. In *US – Upland Cotton*, this was the period from the end of 2005 until the AB issued its 21.5 report on 2 June 2008.

Second, it would have sharpened focus for the US Congress on the consequences of failing to remove Step 2 payments quickly and the consequences of taking measures that Brazil perceived as uncompliance. If Brazil had the right to immediately impose countermeasures upon a perceived act of uncompliance, Congress would be less likely to take measures that might be perceived as a reviolation. Similarly, it also would have clarified the cost to American economic interests of non-compliance for other cotton subsidies at dispute in the case.[143]

Third, under *US – Continued Suspension*, Brazil would have maintained the right take countermeasures until the United States demonstrated in a 21.5 panel that its measures brought it into substantive compliance.[144] This would have applied to ML and CC payments as well.

IV. PROPOSED CHANGES TO PROTECT AGAINST UNCOMPLIANCE

Seeking authorization to impose a SCOO immediately where the violating member fails to take remedial action within a reasonable period of time will help guard against delayed compliance and uncompliance. To fully address the incentive to delay compliance or engage in uncompliance, WTO members would have to change the DSU text to allow retrospective remedies. Changes of that magnitude seem unlikely given the lethargic WTO Doha Round negotiations.

More limited changes to or interpretations of the DSU could be made to guard against delayed compliance or uncompliance. The suggestions in this section would apply equally to delayed compliance as well as uncompliance because it is difficult to imagine members specifically addressing uncompliance while ignoring problems in cases of non-compliance.

[142] If Brazil had the right to impose a countermeasure and the United States subsequently took action, Brazil has the right to retaliate until the United States proves substantive compliance under *US – Continued Suspension*. See above n 70.

[143] It seems doubtful however that the US Congress would have changed the ML and CC payments to comply with the *US – Upland Cotton* case given their central role in US agriculture policy. See Townsend, above n 8, at 158–65.

[144] Appellate Body Report, *US – Continued Suspension*, above n 44, para 362.

It is currently assumed that only parties to a dispute may initiate an Article 21.5 compliance panel.[145] This understanding of DSU Article 21.5 is susceptible to challenge. DSU Article 21.5 could be read to allow non-parties to a dispute to challenge measures taken to comply at Phase Four, even though that party did not initiate the case at Phase One.[146] DSU Article 21.5 does not say that only the original plaintiff can initiate the compliance proceedings.[147] Further, the AB's emphasis on achieving full compliance and allowing compliance panel jurisdiction to assess matters not enacted as of the time of the original dispute suggests that the focus in compliance proceedings is on the measures taken to comply, regardless of the party initiating the proceeding.[148]

Similarly, Brazil has proposed[149] amending the DSU text to allow an 'expedited procedure' where 'the same measure nullifying or impairing benefits of this member has already been found WTO inconsistent in previous panel or appeal proceedings.'[150] Brazil's change would allow a non-member to a dispute to show the measure at issue is the same as one previously held WTO-inconsistent, and establishes shorter time-tables for a DSU panel to

[145] See Contribution of Brazil to the Improvement of the WTO Dispute Settlement Understanding (Brazilian Proposal), at 1 TN/DS/W/45/Rev.1, 4 March 2003 ('Brazil understands that one of the drawbacks of the current dispute settlement mechanism is the necessity for a Member to litigate a case *de novo* through all the established phases and time-frames even if the same measure nullifying or impairing benefits of this Member has already been found WTO inconsistent in previous panel or appeal proceedings initiated by another Member').

[146] See DSU, Articles 21.1 (prompt compliance is essential to the multilateral trading system); DSU, Article 21.5 (failing to specify which Members can or cannot initiate a compliance panel assessment of measures taken to comply).

[147] See Appellate Body Report, *US – Continued Suspension*, above n 44, para. 368 (rejecting the argument that only a complainant, rather than a respondent, can initiate Article 21.5 proceedings).

[148] See ibid; Appellate Body Report, *US – FSC*, above n 86, para 84.

[149] Another relevant proposal has been proposed by Japan and would guard against WTO Members maintaining laws that allow administrative discretion for actions that are WTO-inconsistent. See Proposal by Japan for Amendment of the Understanding of the Rules and Procedures Governing the Settlement of Disputes, TN/DS/W/32, 22 January 2003, at 2.

[150] See Brazilian Proposal, above n 145, at 1. In stating the need for its proposal, Brazil describes many of the same problems that uncompliance poses to WTO dispute settlement: 'Brazil understands that one of the drawbacks of the current dispute settlement mechanism is the necessity for a Member to litigate a case *de novo* through all the established phases and time-frames even if the same measure nullifying or impairing benefits of this Member has already been found WTO inconsistent in previous panel or appeal proceedings initiated by another Member. In the present instance, Brazil seeks to provide an adequate manner to prevent the need of complete, long and costly litigation about measures already ruled as inconsistent by adopted reports. *This proceeding would have the effect of providing an incentive for full implementation of reports, since no longer there would be the possibility of "playing with the time periods" of the complete panel proceedings as they stand today for regular cases*. Furthermore, several cases that today only "stress the system" could be channeled to the new fast track and less resources would be spent with cases already clearly decided by a panel or by the Appellate Body.' (emphasis supplied).

decide whether the measure identified by the complaining member is indeed the same as that previously found WTO-inconsistent.[151]

This proposal could also guard against uncompliance by allowing the *original complaining* WTO members to utilize the expedited procedure.[152] The expedited procedure would determine whether replacement measures are the same or very similar to those originally found WTO-inconsistent.[153] The complaining member would initiate the process by identifying congruent measures that are merely repeat violations, rather than good faith measures taken to comply. The legal standard used by the DSU panel would be similar, but more stringent, than the standard discussed above concerning the jurisdiction of Article 21.5 compliance panels. If the new congruent measure is fairly viewed as designed to circumvent the DSU findings, looking at the timing, nature, effect as well as legal and factual circumstances of the new measure's adoption, then the panel could find the new measure to be a continuing violation.[154]

These abbreviated procedures would encourage compliance sooner rather than later because opportunistic changes would only delay a SCOO by a very short period.

V. CONCLUSION

The DSU currently precludes remedies for past violations and creates lengthy delays, opening the door for members to engage in opportunistic uncompliance. The cost of delayed compliance and potential uncompliance can be significant to victims of trade law violations. Moreover, a perception that members can evade WTO obligations without economic consequences, a problem unique to cases of uncompliance, weakens the multilateral trading system.

[151] Ibid.

[152] Brazil's proposal would have to be changed to clarify whether it also applied to original complaining members and to clarify the interaction with Articles 21 and 22 within the context of a continuing dispute.

[153] The new Phase Three would determine whether there exists measures taken to comply or instead whether the measures remain 'the same.' If there exists measures taken to comply, the traditional Article 21.5 compliance panel would determine the measure's consistency with WTO agreements. If there are no measures taken to comply and the violating Member has kept the same measures in place, the violating Member could quickly face a SCOO per the Article 22.6 arbitrator authorization.

[154] While we argued in Section II.D that the Step 2 replacement payments would be measures to comply within an Article 21.5 compliance panel jurisdiction, those replacement payments would not be the 'same' measure for purposes of the DSU change proposed here. There are too many dissimilarities between the original Step 2 payments and the new payments for them to be considered the 'same.' Thus, this proposal would only address blatant cases of uncompliance.

This article recommends ways to make the DSU more workable. The jurisdiction of compliance panels should be broad and SCOOs should be authorized against members leaving in place measures after the reasonable period of time to comply expires. We also highlight changes in the interpretation of the DSU and potential changes to the text itself that would shorten DSU timetables and protect against delayed compliance and opportunistic uncompliance.