

<b>1 ARTICLE 6</b> .....	<b>1</b>
1.1 Text of Article 6.....	1
1.2 Article 6.1 .....	3
1.2.1 Expiry of Article 6.1 .....	3
1.3 Article 6.3 .....	4
1.3.1 Chapeau of Article 6.3: "Serious prejudice ... may arise" .....	4
1.3.2 "the effect of the subsidy" .....	5
1.3.2.1 Quantification of the amount of the subsidy .....	5
1.3.2.2 Genuine and substantial relationship of cause and effect.....	7
1.3.2.3 "But for" approach .....	8
1.3.2.4 Complainant's evidentiary burden .....	9
1.3.2.5 Non-attribution .....	10
1.3.2.6 Unitary vs. two-step approach .....	12
1.3.2.7 Counterfactual analysis.....	14
1.3.2.8 Temporal considerations .....	17
1.3.2.9 "subsidized product" vs. "effect of the subsidy" .....	20
1.3.2.10 Effect of each individual subsidy vs. aggregated analysis.....	20
1.3.3 Article 6.3(a) and 6.3(b) "displaces" or "impedes" .....	25
1.3.4 Article 6.3(b) .....	27
1.3.4.1 "third country market" .....	27
1.3.5 Article 6.3(c).....	27
1.3.5.1 "significant".....	27
1.3.5.2 "price undercutting" .....	29
1.3.5.3 "price suppression" .....	29
1.3.5.4 "price depression" .....	30
1.3.5.5 "lost sales" .....	31
1.3.5.6 "in the same market" .....	33
1.3.6 Article 6.3(d) .....	38
1.3.6.1 "increase in the world market share" .....	38
1.3.7 Relationship with other provisions of the SCM Agreement .....	38
1.3.7.1 Article 5.....	38
1.4 Article 6.4 .....	38

**1 ARTICLE 6**

**1.1 Text of Article 6**

**Article 6**

*Serious Prejudice*

6.1 Serious prejudice in the sense of paragraph (c) of Article 5 shall be deemed to exist in the case of:

- (a) the total ad valorem subsidization<sup>14</sup> of a product exceeding 5 per cent<sup>15</sup>;

*(footnote original)*<sup>14</sup> The total ad valorem subsidization shall be calculated in accordance with the provisions of Annex IV.

*(footnote original)*<sup>15</sup> Since it is anticipated that civil aircraft will be subject to specific multilateral rules, the threshold in this subparagraph does not apply to civil aircraft.

- (b) subsidies to cover operating losses sustained by an industry;
- (c) subsidies to cover operating losses sustained by an enterprise, other than one-time measures which are non-recurrent and cannot be repeated for that enterprise and which are given merely to provide time for the development of long-term solutions and to avoid acute social problems;
- (d) direct forgiveness of debt, i.e. forgiveness of government-held debt, and grants to cover debt repayment.<sup>16</sup>

*(footnote original)*<sup>16</sup> Members recognize that where royalty-based financing for a civil aircraft programme is not being fully repaid due to the level of actual sales falling below the level of forecast sales, this does not in itself constitute serious prejudice for the purposes of this subparagraph.

6.2 Notwithstanding the provisions of paragraph 1, serious prejudice shall not be found if the subsidizing Member demonstrates that the subsidy in question has not resulted in any of the effects enumerated in paragraph 3.

6.3 Serious prejudice in the sense of paragraph (c) of Article 5 may arise in any case where one or several of the following apply:

- (a) the effect of the subsidy is to displace or impede the imports of a like product of another Member into the market of the subsidizing Member;
- (b) the effect of the subsidy is to displace or impede the exports of a like product of another Member from a third country market;
- (c) the effect of the subsidy is a significant price undercutting by the subsidized product as compared with the price of a like product of another Member in the same market or significant price suppression, price depression or lost sales in the same market;
- (d) the effect of the subsidy is an increase in the world market share of the subsidizing Member in a particular subsidized primary product or commodity<sup>17</sup> as compared to the average share it had during the previous period of three years and this increase follows a consistent trend over a period when subsidies have been granted.

*(footnote original)*<sup>17</sup> Unless other multilaterally agreed specific rules apply to the trade in the product or commodity in question.

6.4 For the purpose of paragraph 3(b), the displacement or impeding of exports shall include any case in which, subject to the provisions of paragraph 7, it has been demonstrated that there has been a change in relative shares of the market to the disadvantage of the non-subsidized like product (over an appropriately representative period sufficient to demonstrate clear trends in the development of the market for the product concerned, which, in normal circumstances, shall be at least one year). "Change in relative shares of the market" shall include any of the following situations: (a) there is an increase in the market share of the subsidized product; (b) the market share of the subsidized product remains constant in circumstances in which, in the absence of the subsidy, it would have declined; (c) the market share of the subsidized product declines, but at a slower rate than would have been the case in the absence of the subsidy.

6.5 For the purpose of paragraph 3(c), price undercutting shall include any case in which such price undercutting has been demonstrated through a comparison of prices of the subsidized product with prices of a non-subsidized like product supplied to the same market. The comparison shall be made at the same level of trade and at comparable times, due account being taken of any other factor affecting price comparability. However, if such a direct comparison is not possible, the existence of price undercutting may be demonstrated on the basis of export unit values.

6.6 Each Member in the market of which serious prejudice is alleged to have arisen shall, subject to the provisions of paragraph 3 of Annex V, make available to the parties to a dispute arising under Article 7, and to the panel established pursuant to paragraph 4 of Article 7, all relevant information that can be obtained as to the changes in market shares of the parties to the dispute as well as concerning prices of the products involved.

6.7 Displacement or impediment resulting in serious prejudice shall not arise under paragraph 3 where any of the following circumstances exist<sup>18</sup> during the relevant period:

(*footnote original*)<sup>18</sup> The fact that certain circumstances are referred to in this paragraph does not, in itself, confer upon them any legal status in terms of either GATT 1994 or this Agreement. These circumstances must not be isolated, sporadic or otherwise insignificant.

- (a) prohibition or restriction on exports of the like product from the complaining Member or on imports from the complaining Member into the third country market concerned;
- (b) decision by an importing government operating a monopoly of trade or state trading in the product concerned to shift, for non-commercial reasons, imports from the complaining Member to another country or countries;
- (c) natural disasters, strikes, transport disruptions or other *force majeure* substantially affecting production, qualities, quantities or prices of the product available for export from the complaining Member;
- (d) existence of arrangements limiting exports from the complaining Member;
- (e) voluntary decrease in the availability for export of the product concerned from the complaining Member (including, *inter alia*, a situation where firms in the complaining Member have been autonomously reallocating exports of this product to new markets);
- (f) failure to conform to standards and other regulatory requirements in the importing country.

6.8 In the absence of circumstances referred to in paragraph 7, the existence of serious prejudice should be determined on the basis of the information submitted to or obtained by the panel, including information submitted in accordance with the provisions of Annex V.

6.9 This Article does not apply to subsidies maintained on agricultural products as provided in Article 13 of the Agreement on Agriculture.

## **1.2 Article 6.1**

### **1.2.1 Expiry of Article 6.1**

1. This provision has lapsed pursuant to Article 31.

### 1.3 Article 6.3

#### 1.3.1 Chapeau of Article 6.3: "Serious prejudice ... may arise"

2. In *Korea – Commercial Vessels*, Korea argued, on the basis of the word "may" in the chapeau of Article 6.3, that "a two-step analysis is required to establish the existence of serious prejudice, i.e., that the situations listed in Articles 6.3(a) through (d) are necessary prerequisites to a finding of serious prejudice, but that they do not in themselves constitute serious prejudice." Rather, Korea argued, serious prejudice "is a separate, distinct concept, which must be a *result* of the situations in Articles 6.3(a) through (d)"<sup>1</sup>. According to the Panel, "the fundamental issue raised by this aspect of Korea's argument" is "whether, to demonstrate the existence of serious prejudice, the SCM Agreement requires additional elements beyond those referred to in Article 6, such as injury to the domestic industry, and/or the importance of that industry to the overall interests of the complaining party". The Panel noted that it found "neither textual nor contextual support for Korea's argument". In this regard, the Panel stated:

"We see the fundamental issue raised by this aspect of Korea's argument to be whether, to demonstrate the existence of serious prejudice, the *SCM Agreement* requires additional elements beyond those referred to in Article 6, such as injury to the domestic industry, and/or the importance of that industry to the overall interests of the complaining party. In this respect, we find neither textual nor contextual support for Korea's argument that a finding of serious prejudice requires the establishment of something like 'serious injury' to the domestic industry of the complaining Member, or of the relative importance of the industry to that Member, and we note that Korea offers none. Rather, Korea's entire argument to this effect is based on the premise that the word 'serious' connotes something stronger than the word 'material', that material injury is a lesser standard subsumed within the standards of Articles 5 and 6, and that 'serious' prejudice cannot be easier to prove than 'material' injury. As an initial matter, given that the word 'material' does not appear in the serious prejudice provisions of the *SCM Agreement*, we fail to see the relevance of the juxtaposition of terms proffered by Korea. Nor do we agree that the absence of a requirement for an injury-type analysis in the context of serious prejudice claims would necessarily make it easier to prove serious prejudice than material injury. Rather, we view these as two distinct concepts."<sup>2</sup>

3. The Panel in *Korea – Commercial Vessels* acknowledged that serious prejudice is an entirely different concept from injury and it explained that the former rather than having to do with the condition of a particular domestic industry within the territory of a Member, has to do in the first instance with negative effects on a Member's *trade interests* in respect of a product caused by another Member's subsidization such as lost import or export volume or market share in respect of a given product, adverse price effects, or some combination thereof, in variously-defined markets.

"In short, we see serious prejudice as an entirely different concept from injury. Rather than having to do with the condition of a particular domestic industry within the territory of a Member (the subject matter of injury analysis), in our view serious prejudice has to do in the first instance with negative effects on a Member's *trade interests* in respect of a product caused by another Member's subsidization. Article 6.3 demonstrates this in providing that the recognized 'adverse effects' of subsidies on these interests include, in the context of serious prejudice, lost import or export volume or market share in respect of a given product (displacement or impedance, more than equitable share), and adverse price effects (implying lost trade revenue/income in respect of the product), or some combination thereof, in variously-defined markets."<sup>3</sup>

4. With regard to the use of the word "may", the Panel *Korea – Commercial Vessels* saw this word "as a general cross-reference to other specific requirements elsewhere in Article 6 for the establishment of serious prejudice on the basis of the price and/or volume effects referred to in

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<sup>1</sup> Panel Report, *Korea – Commercial Vessels*, para. 7.572.

<sup>2</sup> Panel Report, *Korea – Commercial Vessels*, para. 7.576.

<sup>3</sup> Panel Report, *Korea – Commercial Vessels*, para. 7.578.

subparagraphs (a)-(d) of Article 6.3." Furthermore, it viewed the word "may" as a cross-reference to "significant" in Article 6.3(c), "operating to rule out serious prejudice findings where any price suppression or price depression resulting from a subsidy is unimportant and inconsequential"<sup>4</sup>.

5. With respect to the nature of "serious prejudice", the Panel in *Korea – Commercial Vessels* noted that this notion is also informed by another provision, i.e. Article 6.2, which established the basis on which the now-expired presumption of serious prejudice in Article 6.1 could be rebutted:

"Article 6.2 provided that the subsidizer could rebut the presumption (in the sense that 'serious prejudice shall not be found ') by demonstrating that the subsidy in question had *not* resulted in any of the effects enumerated in Article 6.3 (displacement or impedance, price undercutting, price suppression/depression, lost sales). We thus view Article 6.2 as defining by implication the situations listed in Article 6.3 to be in themselves serious prejudice."<sup>5</sup>

6. Referring to past disputes involving an examination of serious prejudice, in particular the GATT panel reports in *EC – Sugar Exports (Australia)* and *EC – Sugar Exports (Brazil)*, the Panel in *Korea – Commercial Vessels* said that "in both of these cases, the panels' affirmative serious prejudice determinations were based on a conception of serious prejudice the substance of which was the effect of subsidies on markets, and on trade, in respect of the product, rather than treating these effects simply as stepping stones to a separate and distinct concept of serious prejudice."<sup>6</sup>

7. The Panel in *US – Upland Cotton (Article 21.5 – Brazil)* agreed that serious prejudice exists once the conditions set forth in Article 6.3(a)-(d) are fulfilled:

"Article 6.3(c) of the *SCM Agreement* provides that 'serious prejudice in the sense of paragraph (c) of Article 5 *may arise* in any case where one or several of the following apply '. (emphasis added). The Panel considers that this phrase must be interpreted to mean that 'the situations listed in Article 6.3(a)-(d) in themselves constitute serious prejudice '. As a consequence, a finding of significant price suppression under Article 6.3(c) of the *SCM Agreement* is a sufficient basis for a finding of serious prejudice within the meaning of Article 5(c) of the *SCM Agreement*."<sup>7</sup>

### 1.3.2 "the effect of the subsidy"

#### 1.3.2.1 Quantification of the amount of the subsidy

8. According to the Appellate Body in *US – Upland Cotton*, the text of Article 6.3(c) and the relevant context of the SCM Agreement do not impose an obligation on a panel to quantify the amount of the challenged subsidy:

"Beginning with the text of Article 6.3(c), we note that this provision does not state explicitly that a panel needs to quantify the amount of the challenged subsidy. However, in assessing whether 'the effect of the subsidy is ... significant price suppression', and ultimately serious prejudice, a panel will need to consider the effects of the subsidy on prices. The magnitude of the subsidy is an important factor in this analysis. A large subsidy that is closely linked to prices of the relevant product is likely to have a greater impact on prices than a small subsidy that is less closely linked to prices. All other things being equal, the smaller the subsidy for a given product, the smaller the degree to which it will affect the costs or revenue of the recipient, and the smaller its likely impact on the prices charged by the recipient for the product. However, the size of a subsidy is only one of the factors that may be relevant to the determination of the effects of a challenged subsidy. A panel needs to assess the effect of the subsidy taking into account all relevant factors.

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<sup>4</sup> Panel Report, *Korea – Commercial Vessels*, para. 7.582.

<sup>5</sup> Panel Report, *Korea – Commercial Vessels*, para. 7.583.

<sup>6</sup> Panel Report, *Korea – Commercial Vessels*, para. 7.593.

<sup>7</sup> Panel Report, *US – Upland Cotton*, para. 10.255.

The provisions of the *SCM Agreement* regarding quantification of subsidies reveal that the methodological approaches to quantification may be quite different, depending on the context and purpose of quantification. The absence of any indication in Article 6.3(c) as to whether one of these methods, or any other method, should be used suggests to us that no such precise quantification was envisaged as a necessary prerequisite for a panel's analysis under Article 6.3(c).

...

In sum, reading Article 6.3(c) in the context of Article 6.8 and Annex V suggests that a panel should have regard to the magnitude of the challenged subsidy and its relationship to prices of the product in the relevant market when analyzing whether the effect of a subsidy is significant price suppression. In many cases, it may be difficult to decide this question in the absence of such an assessment. Nevertheless, this does not mean that Article 6.3(c) imposes an obligation on panels to quantify precisely the amount of a subsidy benefiting the product at issue in every case. A precise, definitive quantification of the subsidy is not required."<sup>8</sup>

9. Along the same lines, in *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, the Appellate Body recalled that while the magnitude of subsidies is important, precise quantification is not an indispensable part of a serious prejudice analysis.<sup>9</sup> The Appellate Body added:

"[T]he absolute value or size of a subsidy may not correspond directly to the impact that the subsidy may have in causing adverse effects. Subsidies of a relatively small magnitude may nevertheless have substantial effects in a particular case or market."<sup>10</sup>

10. In *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, the Appellate Body elaborated on the relevance of absolute and relative magnitudes of subsidies:

"[B]oth the absolute and the relative magnitudes of subsidies are likely to be relevant to a panel's analysis of the effects of subsidies on prices. Both considerations may shed light on the impact that those subsidies have on price, although the extent to which either or both considerations shed light on this relationship will depend on the particular subsidies, products, and markets at issue. Through scrutinizing magnitude in the light of and as part of an analysis of the particular subsidies, the particular products, and the particular characteristics of the market within which those products compete, a panel can gain an understanding of the effects that the subsidies have on prices, and of the relevance of the subsidies' magnitude to such effects. In other words, what it means to take account of considerations of 'magnitude' will also depend upon the circumstances of each case and the market phenomenon at issue. Depending on the circumstances of each case, an assessment of whether subsidy amounts are significant should not necessarily be limited to a mere inquiry into *what* those amounts are, either in absolute or per-unit terms. Rather, such an analysis may be situated within a larger inquiry that could, for instance, entail viewing these amounts against considerations such as the size of the market as a whole, the size of the subsidy recipient, the per-unit price of the subsidized product, the price elasticity of demand, and, depending on the market structure, the extent to which a subsidy recipient is able to set its own prices in the market, and the extent to which rivals are able or prompted to react to each other's pricing within that market structure. Considerations of some of these elements formed part of the Appellate Body's analysis of the magnitude of price-contingent subsidies in *US – Upland Cotton (Article 21.5 – Brazil)*."<sup>11</sup>

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<sup>8</sup> Appellate Body Report, *US – Upland Cotton*, paras. 461, 465 and 467. See also Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 1192.

<sup>9</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 1006 (referring to Appellate Body Report, *US – Upland Cotton*, para. 467).

<sup>10</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 1006.

<sup>11</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 1193 (referring to Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 362).

### 1.3.2.2 Genuine and substantial relationship of cause and effect

11. The Appellate Body has repeatedly stated that to satisfy the causation requirement under Articles 5(c) and 6.3, it must be shown that there is a "genuine and substantial relationship of cause and effect" between the subsidies and the alleged market phenomenon. In *EC and certain member States – Large Civil Aircraft*, the Appellate Body confirmed that the "genuine and substantial relationship of cause and effect" standard applies in respect of all of the forms of serious prejudice under Article 6.3:

"[T]he Appellate Body has observed that to satisfy the causation requirement under Articles 5(c) and 6.3(c), it must be shown that there is a 'genuine and substantial relationship of cause and effect' between the subsidies and the alleged market phenomenon'.<sup>12</sup> In addition, the Appellate Body has stated that panels assessing claims under Articles 5(c) and 6.3(c) must ensure that the effects of other factors are not improperly attributed to the challenged subsidies.<sup>13</sup> The Appellate Body's guidance concerning the assessment of causation was provided in the context of a dispute involving Article 6.3(c) of the *SCM Agreement*. The language of subparagraphs (a) and (b) of Article 6.3 of the *SCM Agreement* expresses the causation requirement in very similar terms to those used in subparagraph (c). Under subparagraphs (a) and (b), displacement or impedance must be shown to be 'the effect of the subsidy'. We see no reason why the standard for causation and non-attribution should be different under subparagraphs (a) and (b) than under subparagraph (c), and the participants and third participants have not suggested that a different standard applies."<sup>14</sup>

12. In *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, the Appellate Body summarized this standard as follows:

"[T]he subsidies must contribute, in a 'genuine' and 'substantial'<sup>15</sup> way, to producing or bringing about one or more of the effects, or market phenomena, enumerated in Article 6.3"<sup>16</sup>

13. In the same case, the Appellate Body stated that a determination of whether the causal link in question meets the requisite standard of a "genuine and substantial" causal relationship is a "fact-intensive exercise"<sup>17</sup> that should take into account other causal factors:

"[A] panel will often be confronted with multiple factors that may have contributed, to varying degrees, to that effect. Indeed, in some circumstances, it may transpire that factors other than the subsidy at issue have caused a particular market effect. Yet the mere presence of other causes that contribute to a particular market effect does not, in itself, preclude the subsidy from being found to be a 'genuine and substantial' cause of that effect. Thus, as part of its assessment of the causal nexus between the subsidy at issue and the effect(s) that it is alleged to have had, a panel must seek to understand the interactions between the subsidy at issue and the various other causal factors, and make an assessment of their connections to, as well as the relative importance of the subsidy and of the other factors in bringing about, the relevant effects. In order to find that the subsidy is a genuine and substantial cause, a panel need not determine it to be the *sole* cause of that effect, or even that it is the *only* substantial cause of that effect. A panel must, however, take care to ensure that it does not attribute the effects of those other causal factors to the subsidies at issue, and that the other causal factors do not dilute the causal link between those subsidies

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<sup>12</sup>(footnote original) Appellate Body Report, *US – Upland Cotton*, para. 438; Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 374.

<sup>13</sup>Appellate Body Report, *US – Upland Cotton*, para. 437.

<sup>14</sup>Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1232.

<sup>15</sup> (footnote original) As for the "substantial" component of the causal relationship, this concerns the relative importance of the causal agent (the subsidies at issue) in bringing about the adverse effect(s) in question. Dictionary definitions of "substantial" include "{h}aving solid worth or value, of real significance; solid; weighty; important, worthwhile" and "{o}f ample or considerable amount or size; sizeable, fairly large". (*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 3088)

<sup>16</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 913.

<sup>17</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 915.

and the alleged adverse effects such that it is not possible to characterize that link as a genuine and substantial relationship of cause and effect. The subsidy at issue may be found to exhibit the requisite causal link notwithstanding the existence of other causes that contribute to producing the relevant market phenomena if, having given proper consideration to all other relevant contributing factors and their effects, the panel is satisfied that the contribution of the subsidy has been demonstrated to rise to that of a genuine and substantial cause."<sup>18</sup>

### 1.3.2.3 "But for" approach

14. The Panel in *Korea – Commercial Vessels*, noting that Article 6.3(c) provides in relevant part that "the effect of the subsidy is ... significant price suppression [or] price depression ... in the same market", stated that "there must be a causal relationship between the *subsidy* and the significant price suppression or price depression."<sup>19</sup> To establish the existence of such a relationship, the Panel, having recalled that "the text of Article 6.3(c) implies a 'but for' approach to causation in respect of price suppression/price depression", concluded:

"Looking at a counterfactual situation, i.e., trying to determine what prices would have been in the absence of the subsidy, seems to us the most logical and straightforward way to answer this question.<sup>20</sup> ... The question to be answered in respect of the affirmative link between subsidies and prices is, in the case of alleged price depression, whether in the absence of the subsidies prices for ships would not have declined, or would have declined by less than was in fact the case. For price suppression, the question would be whether, in the absence of the subsidies, ship prices would have increased, or would have increased by more than was in fact the case."<sup>21</sup>

15. The Panel in *US – Upland Cotton (Article 21.5 – Brazil)* adopted a similar "but for" approach to causation. In particular, the Panel determined whether, *but for* the relevant subsidies, the world market price for upland cotton would have increased significantly, or would have increased by significantly more than was in fact the case.<sup>22</sup> The Appellate Body upheld the approach taken by the Panel:

"We recall that 'a panel has a certain degree of discretion in selecting an appropriate methodology for determining whether the 'effect' of a subsidy is significant price suppression'. Articles 5(c) and 6.3(c) of the *SCM Agreement* do not exclude, therefore, that a panel could examine causation based on a 'but for' approach. We have explained that a price suppression analysis is counterfactual in nature. The Panel's choice of a 'but for' approach reflects this. In consequence, the Panel had to determine whether the world price of upland cotton would have been higher in the absence of the subsidies (that is, *but for* the subsidies).

In the original proceedings, the Appellate Body observed that:

... the ordinary meaning of the transitive verb 'suppress' implies the existence of a subject (the challenged subsidies) and an object (in this case, prices in the world market for upland cotton). This suggests that it would be difficult to make a judgement on significant price *suppression* without taking into account the effect of the subsidies. The Panel's definition of price suppression, explained above, reflects this problem; it includes the notion that prices 'do not increase when they *otherwise* would have' or 'they do actually increase, but the increase is less than it *otherwise* would have been'. The word 'otherwise' in this context refers to the hypothetical situation in which the challenged subsidies are absent. Therefore, the fact that the Panel may have

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<sup>18</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 914. See also Panel Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint) (Article 21.5 – EU)*, para. 9.61.

<sup>19</sup> Panel Report, *Korea – Commercial Vessels*, para. 7.604.

<sup>20</sup> Panel Report, *Korea – Commercial Vessels*, para. 7.612.

<sup>21</sup> Panel Report, *Korea – Commercial Vessels*, para. 7.615.

<sup>22</sup> Panel Report, *US – Upland Cotton*, para. 10.49.



addressed some of the same or similar factors in its reasoning as to significant price suppression and its reasoning as to 'effects' is not necessarily wrong. (original emphasis; footnotes omitted)

The Panel's choice of a 'but for' approach, therefore, is consistent with the definition of price suppression endorsed by the Appellate Body in the original proceedings, insofar as the counterfactual determination of whether price suppression exists cannot be separated from the analysis of the effects of the subsidies.

We note that Article 6.3(c) does not use the word 'cause' but, rather, provides that serious prejudice may arise where 'the effect of the subsidy is ... significant price suppression'. The Appellate Body stated in the original proceedings that the text of Article 6.3(c) nevertheless requires the establishment of a causal link between the subsidy and the significant price suppression. We agree that Article 6.3(c) requires the establishment of a causal link, but we observe that, while the term 'cause' focuses on the factors that may trigger a certain event, the term 'effect of' focuses on the results of that event. The effect—price suppression—must result from a chain of causation that is linked to the impugned subsidy."<sup>23</sup>

16. In *EC and certain member States – Large Civil Aircraft*, the Appellate Body reiterated that the "genuine and substantial relationship of cause and effect" standard applies in respect of all of the forms of serious prejudice under Article 6.3, and then said this about the "but for" approach:

"The Appellate Body has said furthermore that it may be possible to assess whether the particular market phenomena are the effect of the subsidies by recourse to a 'but for' approach.<sup>24</sup> Thus, one possible approach to the assessment of causation is an inquiry that seeks to identify what would have occurred 'but for' the subsidies. In some circumstances, a determination that the market phenomena captured by Article 6.3 of the *SCM Agreement* would not have occurred 'but for' the challenged subsidies will suffice to establish causation. This is because, in some circumstances, the 'but for' analysis will show that the subsidy is both a necessary cause of the market phenomenon *and* a substantial cause. It is not required that the 'but for' analysis establish that the challenged subsidies are a sufficient cause of the market phenomenon provided that it shows a genuine and substantial relationship of cause and effect. However, there are circumstances in which a 'but for' approach does not suffice. For example, where a necessary cause is too remote and other intervening causes substantially account for the market phenomenon. This example underscores the importance of carrying out a proper non-attribution analysis.

... As we noted above, a 'but for' test is one possible approach to the assessment of causation. Nevertheless, in applying a 'but for' test, a panel must ensure that the assessment demonstrates that the subsidies are a 'genuine and substantial' cause of the particular market situation that is alleged. Thus, the Panel in this case should have clearly indicated that, in applying a 'but for' standard, it would seek to establish whether there was a 'genuine and substantial relationship of cause and effect'<sup>25</sup> between the challenged subsidies and the displacement and lost sales. Furthermore, it should have indicated that, in doing so, it would also ensure that the effects of other factors were not improperly attributed to the challenged subsidies."<sup>26</sup>

#### **1.3.2.4 Complainant's evidentiary burden**

17. The Panel in *Korea – Commercial Vessels* observed that the nature of the demonstration that the complainant will need to make to establish causation in any given case, and the difficulty

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<sup>23</sup>Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 370 - 372.

<sup>24</sup> Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 374 and 375. The Appellate Body explained that a "but for" test may be "too undemanding" if the subsidy is "necessary, but not sufficient, to bring about" a market phenomenon, and "too rigorous if it required the subsidy to be the only cause." Instead, the "but for" test should determine that there is a "genuine and substantial relationship of cause and effect". (Ibid. para. 374)

<sup>25</sup> (footnote original) Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 374.

<sup>26</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1233-1234.

of doing so, will depend on a number of factors and factual circumstances, including but not limited to the breadth of the description of the product on which the complainant brings its case, and that the burden is on the complainant to furnish specific factual evidence affirmatively demonstrating the causal link alleged:

"In this regard, we would observe that the nature of the demonstration that the complainant will need to make to establish causation in any given case, and the difficulty of doing so, will depend on a number of factors and factual circumstances, including but not limited to the breadth of the description of the product on which the complainant brings its case. Such factors might include among others the nature of the subsidy, the way in which the subsidy operates, the extent to which the subsidy is provided in respect of a particular product or products, conditions in the market, the conceptual distance between the activities of the subsidy recipient and the products in respect of which price suppression/price depression is alleged.<sup>27</sup> Whatever the factual situation in a given case, the burden will be on the complainant to furnish specific factual evidence affirmatively demonstrating the causal link alleged, and the difficulty and ways of meeting this burden may be very different from one case to another.<sup>28</sup> In all cases, if the complainant fails to meet this evidentiary burden, its serious prejudice claim will fail."<sup>29</sup>

18. Referring to guidance from the Appellate Body in *US – Upland Cotton*, the Panel in *US – Upland Cotton (Article 21.5 – Brazil)* found that "the existence of a correlation between a subsidy and a particular level of prices is not in and of itself sufficient to establish that the subsidy causes significant price suppression."<sup>30</sup>

### 1.3.2.5 Non-attribution

19. Regarding the need for a non-attribution analysis (i.e., an analysis to ensure that adverse effects caused by other factors are not attributed to subsidies) in the context of Article 6.3(c) of the SCM Agreement, the Appellate Body in *US – Upland Cotton* agreed with the Panel "that it is necessary to ensure that the effects of other factors on prices are not improperly attributed to the challenged subsidies."<sup>31</sup>

20. In terms of the manner in which non-attribution should be ensured, the Appellate Body in *US – Upland Cotton* found no legal error with the Panel's approach of first examining whether or not the "effect of the subsidy" constitutes significant price suppression, and then considering whether other causal factors had the effect of attenuating such causal link between the challenged subsidies and significant price suppression:

"Pursuant to Article 6.3(c) of the *SCM Agreement*, '[s]erious prejudice in the sense of paragraph (c) of Article 5 may arise ' when 'the effect of *the subsidy* is ... significant price suppression '. (emphasis added) If the significant price suppression found in the world market for upland cotton were caused by factors other than the challenged subsidies, then that price suppression would not be 'the effect of ' the challenged subsidies in the sense of Article 6.3(c). Therefore, we do not find fault with the Panel's approach of 'examin[ing] whether or not 'the effect of the subsidy' is the significant price suppression which [it had] found to exist in the same world market ' and separately 'consider[ing] the role of other alleged causal factors in the record before

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<sup>27</sup> (*footnote original*) Of course, factors such as these presumably would be relevant in all types of serious prejudice cases.

<sup>28</sup> (*footnote original*) For example, in a case involving alleged significant suppression or depression of the price for a given kind of narrowly-defined product due to product-specific subsidization of a physically identical product produced by another Member, product definition issues presumably would figure little if at all in respect of the evidence necessary to demonstrate causation. The situation presumably would be quite different where the alleged subsidy was in respect of an input product, while significant price suppression or depression was alleged in respect of a downstream product of the complainant, or where a subsidy in respect of one product was alleged to cause significant price suppression or depression in respect of a completely unrelated product. Clearly in the latter two cases, product definition issues would create a significant, if not insurmountable, evidentiary hurdle in respect of causation

<sup>29</sup> Panel Report, *Korea – Commercial Vessels*, para. 7.560.

<sup>30</sup> Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 10.133.

<sup>31</sup> Appellate Body Report, *US – Upland Cotton*, para. 437.

[it] which may affect [the] analysis of the causal link between the United States subsidies and the significant price suppression."

21. Reflecting on whether and how to conduct a non-attribution analysis, the Panel in *Korea – Commercial Vessels* noted the logic and appropriateness of the *US – Upland Cotton* panel, which analysed other possible causal factors, with a view to determining whether such factors 'would have the effect of attenuating [the] causal link, or of rendering not 'significant' the effect of the subsidy'.<sup>32</sup> Thus, in conducting its causation analysis, it would:

"[B]ear in mind the need to take into account the effects of identified factors other than the subsidies, to determine whether such factors would attenuate any affirmative causal link that we may find, or render insignificant any price suppression or price depression effect of the subsidy that we may find."<sup>33</sup>

22. Having adopted a "but for" test for causation (see paragraph 281 above), the Panel in *US – Upland Cotton (Article 21.5 – Brazil)* considered that it was "not necessary ... to undertake a comprehensive evaluation of factors affecting the world market price for upland cotton"<sup>34</sup>:

"Rather the question is whether the evidence before the Panel supports the conclusion that in the absence of the US marketing loan and counter-cyclical subsidies the world market price would increase significantly. The Panel considers, based on the evidence before it, that while China may play a significant role in the market for upland cotton, this does not diminish the significance of the impact of US subsidies on the world price for upland cotton as a result of their effect on US supply to the world market. Developments concerning the role of China's demand and supply do not change the fact that, with a share of world exports of around 40 per cent, the United States is capable of exerting a substantial proportionate influence on the world market."<sup>35</sup>

23. The United States appealed from the Panel's decision not to carry out a comprehensive evaluation of other factors affecting the world market price for upland cotton. The Appellate Body upheld the approach adopted by the Panel, on the basis that the Panel's counterfactual analysis for the purpose of the "but for" test was sufficient to establish that significant price suppression was the effect of the relevant subsidies, despite the existence of other relevant causal factors:

"The Panel does not clearly articulate the standard implicated in its 'but for' approach. Brazil submits that the Panel's 'but for' standard 'effectively *isolated* the effects of [United States] subsidies from the effects of other factors.' New Zealand asserts that the Panel's finding—that without the United States subsidies the price of upland cotton would be higher—'stands independent of any other global factors that might also be suppressing world market prices'. This may somewhat oversimplify the position. A subsidy may be necessary, but not sufficient, to bring about price suppression. Understood in this way, the 'but for' test may be too undemanding. By contrast, the 'but for' test would be too rigorous if it required the subsidy to be the only cause of the price suppression. Instead, the 'but for' test should determine that price suppression is the effect of the subsidy and that there is a 'genuine and substantial relationship of cause and effect'.

The United States argues that the Panel was required to conduct a non-attribution analysis as part of its 'but for' approach. While we agree that Article 6.3(c) requires the Panel to have ensured that the effects of other factors on prices did not dilute the 'genuine and substantial' link between the subsidies and the price suppression, Article 6.3(c) leaves some discretion to panels in choosing the methodology used for this assessment. In the light of this flexibility, it would not have been improper for the Panel to have assessed the effect of other factors as part of its counterfactual analysis, rather than conducting a separate analysis of non-attribution. In our view, the Panel's 'but for' standard, understood as we have set out above, is permissible

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<sup>32</sup> Panel Report, *Korea – Commercial Vessels*, para. 7.617.

<sup>33</sup> Panel Report, *Korea – Commercial Vessels*, para. 7.618.

<sup>34</sup> Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 10.243.

<sup>35</sup> Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 10.243.

under Article 6.3(c) of the *SCM Agreement*, and it is consistent with the Panel's counterfactual analysis of price suppression.

... Therefore, while the Panel agreed with the United States that 'China may play a significant role in the market for upland cotton'<sup>36</sup>, it properly concluded that this does not diminish price suppressing effects of marketing loan and counter-cyclical payments."<sup>37</sup>

24. The Appellate Body in *US – Large Civil Aircraft (2<sup>nd</sup> complaint)* explained how a panel should assess the effects of other factors:

"[W]hen confronted with multiple factors that may have contributed to the alleged adverse effects, a panel must seek to understand the interactions between the subsidies at issue and the various other factors, and make some assessment of their connection to, as well as the relative contribution of the subsidies and the other factors in bringing about, the relevant effect. Although a panel need not determine that a subsidy is the sole or the only substantial cause of that effect, it must ensure that the other factors do not dilute the causal link between those subsidies and the alleged adverse effects such that it is not possible to characterize that link as a genuine and substantial relationship of cause and effect."<sup>38</sup>

#### **1.3.2.6 Unitary vs. two-step approach**

25. In the context of a case concerning alleged significant price suppression, the Panel in *US – Upland Cotton* determined in three separate analytical steps: (i) whether there was price suppression in the world market for upland cotton; (ii) whether such price suppression was significant; and (iii) whether a causal relationship existed between such significant price suppression and the effects of certain price-contingent subsidies. The Appellate Body in *US – Upland Cotton* found no legal error with the Panel's approach of first determining whether there is "significant price suppression" before addressing the issue of "the effect of the subsidy" on the basis that nothing in the text of Article 6.3(c) precludes such an approach.<sup>39</sup> Although the Appellate Body stated that it was possible for the Panel to have focused on price developments in the world market of upland cotton in its analysis of significant price suppression and then address causal factors related to the subsidies in question, including examining causal factors other than the subsidies in its "effects" analysis, it nevertheless acknowledged that it would be difficult to separate these two analyses in determining whether significant price suppression has occurred and the fact that the Panel may have addressed similar factors in both these analyses does not necessarily amount to a legal error:

"One might contend that, having decided to separate its analysis of significant price suppression from its analysis of the effects of the challenged subsidies, the Panel's price suppression analysis should have addressed prices without reference to the subsidies and their effects. For instance, in its significant price suppression analysis, the Panel could have addressed purely price developments in the world market for upland cotton, such as whether prices fell significantly during the period under examination or whether prices were significantly lower during that period than other periods. Then, in its 'effects' analysis, the Panel could have addressed causal factors related to the nature of the subsidies, their relationship to prices, their magnitude, and their impact on production and exports. In this causal analysis, the Panel could also have addressed factors other than the challenged subsidies that may have been suppressing the prices in question.

However, the ordinary meaning of the transitive verb 'suppress' implies the existence of a subject (the challenged subsidies) and an object (in this case, prices in the world market for upland cotton). This suggests that it would be difficult to make a judgement on significant price *suppression* without taking into account the effect of

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<sup>36</sup> (footnote original) Panel Report, para. 10.243.

<sup>37</sup> Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 373 – 375 and 378.

<sup>38</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 1206. See also Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 914.

<sup>39</sup> Appellate Body Report, *US – Upland Cotton*, para. 431.

the subsidies. The Panel's definition of price suppression, explained above<sup>522</sup>, reflects this problem; it includes the notion that prices 'do not increase when they *otherwise* would have' or 'they do actually increase, but the increase is less than it *otherwise* would have been'. The word 'otherwise' in this context refers to the hypothetical situation in which the challenged subsidies are absent. Therefore, the fact that the Panel may have addressed some of the same or similar factors in its reasoning as to significant price suppression and its reasoning as to 'effects' is not necessarily wrong.

The specific factors that the Panel examined in determining whether or not 'price suppression' had occurred were: '(a) the relative magnitude of the United States' production and exports in the world upland cotton market; (b) general price trends; and (c) the nature of the subsidies at issue, and in particular, whether or not the nature of these subsidies is such as to have discernible price suppressive effects'.<sup>525</sup> In the absence of explicit guidance on assessing significant price suppression in the text of Article 6.3(c), we have no reason to reject the relevance of these factors for the Panel's assessment in the present case. An assessment of 'general price trends' is clearly relevant to significant price suppression (although, as the Panel itself recognized, price trends alone are not conclusive). The two other factors—the nature of the subsidies and the relative magnitude of the United States' production and exports of upland cotton—are also relevant for this assessment. We are not persuaded that the fact that these latter factors were also considered in connection with the Panel's analysis of 'the effect of the subsidy'<sup>528</sup> amounts to legal error for that reason alone."<sup>40</sup>

26. By contrast, the Panel in *US – Upland Cotton (Article 21.5 – Brazil)* did not determine whether significant price suppression existed separately from whether significant price suppression was the effect of the subsidies at issue. Instead, that Panel adopted a "unitary" approach to these issues,<sup>41</sup> on the basis of the finding of the Appellate Body in the original proceedings that "it would be difficult to make a judgement on significant price suppression without taking into account the effect of the subsidies".<sup>42</sup> The Appellate Body concluded that, because "it is difficult to separate price suppression from its causes", the Panel's unitary analysis "at least in respect of identifying price suppression and its causes, has a sound foundation".<sup>43</sup> The Appellate Body cautioned, though, that the adoption of a unitary approach "did not absolve the Panel from clearly explaining its position on the question of 'significance'".<sup>44</sup>

27. In *EC and certain member States – Large Civil Aircraft*, the Appellate Body recalled its prior precedent that either a "unitary" or a "two-step" approach may be taken, and reiterated its preference for the unitary approach:

"The Appellate Body has found that panels may undertake an analysis of serious prejudice under either a unitary or two-step approach.<sup>45</sup> Under a unitary approach, the analysis of the particular market phenomena identified in the subparagraphs of Article 6.3 of the *SCM Agreement* is not conducted separately from the analysis of whether there is a causal relationship between those market phenomena and the challenged subsidies. By contrast, under a two-step approach like the one adopted by the Panel, the analysis first seeks to identify the market phenomena and then, as a second step, examines whether there is a causal relationship. The Appellate Body has indicated a preference for the unitary approach, observing that such approach 'has a sound conceptual foundation' and explaining that it may be difficult to ascertain the existence of some of the market phenomena in Article 6.3 without considering the effect of the subsidy at issue.

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<sup>40</sup> Appellate Body Report, *US – Upland Cotton*, paras. 432-434.

<sup>41</sup> Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 10.46.

<sup>42</sup> Appellate Body Report, *US – Upland Cotton*, para. 433.

<sup>43</sup> Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 354.

<sup>44</sup> Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 361.

<sup>45</sup> (footnote original) See Appellate Body Report, *US – Upland Cotton*, para. 431; and Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 354.

In this case, the Panel justified its choice of a two-step approach by stating that 'the arguments and evidence advanced by the United States (including in respect of price suppression) renders a two-step approach entirely appropriate to assessing its claims under Articles 6.3(a), (b) and (c) in the present controversy.' There is no further explanation by the Panel as to why such a two-step approach was 'entirely appropriate'. The Panel acknowledged the reservations concerning a two-step approach expressed by the Appellate Body in *US – Upland Cotton*, but the Panel did not indicate why it considered that those reservations were not relevant.

Our view remains that a unitary approach that uses a counterfactual will generally be the more appropriate approach to undertaking the assessment required under Article 6.3 of the *SCM Agreement*. As we further explain in section C below, it is difficult to understand the market phenomena described in the various subparagraphs of Article 6.3 in isolation from the challenged subsidies. Rather, consideration of the effects of the challenged subsidies is intrinsic to the identification of those market phenomena. Any attempt to identify one of the market phenomena in Article 6.3 without considering the subsidies at issue can only be preliminary in nature since Article 6.3 requires that the market phenomenon be the effect of the challenged subsidy. This also means that a two-step approach simply defers the core of the analysis to the second step. In other cases, the problem might be the opposite. By artificially leaving aside the question of whether the market phenomenon is the effect of the subsidy, one could overlook market phenomena that are in fact occurring."<sup>46</sup>

28. In *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, the Panel conducted a "unitary" analysis of causation in assessing the United States' serious prejudice claims:

"In keeping with how the parties have presented their arguments, our evaluation of the United States' serious prejudice claims will proceed on the basis of a 'unitary' analysis of causation. The Appellate Body clarified in the original proceeding that when performing a 'unitary' analysis, the effects of the relevant subsidies should be determined by conducting a counterfactual analysis, which 'entails comparing the actual market situation that is before the adjudicator with the market situation that would have existed in the absence of the challenged subsidies'."<sup>47</sup>

### 1.3.2.7 Counterfactual analysis

29. In *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, the Appellate Body explained that a counterfactual analysis is a form of analysis that a panel may find useful in resolving questions of causation.<sup>48</sup> The Appellate Body further considered that how such a counterfactual analysis should be conducted would "vary depending on how the causal problem presents itself in a particular dispute" and it may be "highly quantitative, or predominantly qualitative in nature, or it may involve both quantitative and qualitative elements".<sup>49</sup> As to how a panel should use a counterfactual analysis in its assessment, the Appellate Body stated:

"In seeking to discharge its burden of demonstrating the effects of relevant subsidies, a complaining party may elect to employ a counterfactual analysis. Indeed, a complaining party may well find it difficult to establish causation of certain Article 6.3 phenomena (for example, impedance and price suppression) without counterfactual argumentation. A panel evaluating the respective claims and defences of the parties will also have to give due consideration to the use of a counterfactual analysis, especially when such an analysis forms part of the arguments submitted by the parties. The panel might decide to accept the counterfactual scenario(s) proposed by one party as to the market situation that would have prevailed absent the subsidies, but it is not bound to do so. Rather, as part of its objective assessment of the matter,

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<sup>46</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1107-1109.

<sup>47</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1453.

<sup>48</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 1019 (referring to *EC and certain member States – Large Civil Aircraft*, para. 1110; Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 351).

<sup>49</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 1019.

a panel will have to form its own view as to what a market unaffected by subsidies would have looked like and may find it appropriate to construct its own counterfactual scenario(s). A panel is not required to identify and explore every possible hypothetical market scenario, especially where the parties themselves have not elaborated upon, or substantiated the likelihood of, such possible scenarios. The extent to which a panel may or must elaborate upon the specific details of its constructed alternative will vary by case, but, having selected a reasonable scenario, a panel should pursue its counterfactual analysis in a coherent and consistent fashion."<sup>50</sup>

30. In *EC and certain member States – Large Civil Aircraft*, the Appellate Body explained that the use of a counterfactual analysis provides an adjudicator with a useful analytical framework to isolate and properly identify the effects of the challenged subsidies:

"The use of a counterfactual analysis provides an adjudicator with a useful analytical framework to isolate and properly identify the effects of the challenged subsidies. In general terms, the counterfactual analysis entails comparing the actual market situation that is before the adjudicator with the market situation that would have existed in the absence of the challenged subsidies. This requires the adjudicator to undertake a modelling exercise as to what the market would look like in the absence of the subsidies. Such an exercise is a necessary part of the counterfactual approach. As with other factual assessments, panels clearly have a margin of discretion in conducting the counterfactual analysis."<sup>51</sup><sup>52</sup>

31. The Appellate Body in *US – Upland Cotton (Article 21.5 – Brazil)* stated that both price depression and price suppression should be established on the basis of counterfactual analyses:

"The identification of price suppression, therefore, presupposes a comparison of an observable factual situation (prices) with a counterfactual situation (what prices would have been) where one has to determine whether, in the absence of the subsidies (or some other controlling phenomenon), prices would have increased or would have increased more than they actually did. Price depression, by contrast, can be directly observed, in that falling prices are observable. The determination of whether such falling prices are the effect of the subsidies will require consideration of what prices would have been absent the subsidies. Thus, counterfactual analysis is an inescapable part of analyzing the effect of a subsidy under Article 6.3(c) of the *SCM Agreement*."<sup>53</sup>

32. The relevant subsidies in *US – Upland Cotton (Article 21.5 – Brazil)* were alleged to have affected pricing indirectly, through their effects on production. The Appellate Body made the following remarks regarding the nature of the counterfactual analysis required in such circumstances:

"In this case, the Panel was required to consider the impact of marketing loan and counter-cyclical payments on the prices of upland cotton on the world market. Brazil did not allege that marketing loan and counter-cyclical payments to United States upland cotton farmers have a direct impact on world market prices. Rather, these payments are alleged to have had an impact on farmers' planting decisions and, consequently, on domestic upland cotton production levels. Thus, the analysis should initially focus on the effects of the subsidies on production levels by examining whether there was more production than there otherwise would have been as a result of the marketing loan and counter-cyclical payments. It is the marginal production attributable to the marketing loan and counter-cyclical payments that matters. If there were to be increased upland cotton production, the analysis would then focus on whether that increase in supply had effects on prices in the world market. All else being equal, the marginal production attributable to the subsidy would be expected to have an effect on world prices, particularly if the subsidy is provided in a country with a meaningful share of world output.

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<sup>50</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 1020.

<sup>51</sup>(footnote original) See Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 357.

<sup>52</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1110.

<sup>53</sup> Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 351.

Given the focus on production and price effects, an analysis of price suppression would normally include a quantitative component. There is some inherent difficulty in quantifying the effects of subsidies, because, as we have indicated, the increase in prices, absent the subsidies, cannot be directly observed. One way to undertake the analysis is to use economic modelling or other quantitative techniques. These techniques can be used to estimate whether there are higher levels of production resulting from the subsidies and, in turn, the price effects of that production. Economic modelling and other quantitative techniques provide a framework to analyze the relationship between subsidies, other factors, and price movements."<sup>54</sup>

33. The Panel in *Korea – Commercial Vessels* noted that whereas it is "relatively simple" to show that prices have declined, remained steady, or increased slightly, "it is likely to be more difficult to show that prices should not have decreased, or should have increased by more than they did." For such a conclusion, it said, "the *causes* of these observed trends would need to be examined," that is, "price depression is not simply a decline in prices but a situation where prices have been 'pushed down' *by something*" and "[p]rice suppression is where prices have been restrained *by something*." According to the Panel, "the analysis that seems to be called for by the Agreement (by virtue of the concepts of price suppression and price depression themselves), concerns what the price movements for the relevant ships *would have been* in the absence of (i.e., 'but for') the subsidies at issue."<sup>55</sup>

34. In *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, the Appellate Body opined that "a counterfactual analysis is likely to be of particular utility for panels faced with claims that subsidies have caused price suppression" since price suppression is "concerned with 'whether prices are less than they would otherwise have been in consequence of ... the subsidies'".<sup>56</sup>

35. In this same case, the Appellate Body further noted that "a panel's counterfactual analysis will usually involve both factual and legal elements, which may not be easily distinguishable".<sup>57</sup>

36. In its unitary causation analysis, the Panel in *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)* found it appropriate to use the counterfactual directed at identifying the market situation in the absence of the challenged subsidies:

"Although explicitly recognizing that in order to make out its claims of serious prejudice the United States 'must establish a present 'genuine and substantial relationship of cause and effect' between the alleged subsidies and the alleged market phenomena', the European Union argues that the 'proper counterfactual' for this purpose should be one that asks 'for example, whether absent "the non-subsidized investments, ... the product originally launched with subsidies {would} be competitive in the LCA markets today'". We are unable to accept the European Union's proposed line of inquiry. In our view, the correct counterfactual, *for the purpose of determining the effects of the challenged LA/MSF subsidies*, should not be focused on identifying the relevant market situation in the absence of Airbus' post-launch investments in the A320 and A330, or any other alleged non-attribution factors. Rather, as the Appellate Body has previously emphasized, when performing a 'unitary' analysis of causation by means of a 'but for' test, the appropriate counterfactual must be directed at identifying the market situation *in the absence of the challenged subsidies*, not the market situation in the absence of any events that, over time, have allegedly severed the causal link between the challenged subsidies and the alleged instances of serious prejudice. While we agree with the European Union that any such events must be taken into account in determining the market situation *in the absence of the challenged LA/MSF subsidies*, they cannot, by definition, be the sole focus of a counterfactual analysis that is intended to isolate the effects of the challenged LA/MSF subsidies."<sup>58</sup>

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<sup>54</sup> Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 355-356.

<sup>55</sup> Panel Report, *Korea – Commercial Vessels*, paras. 7.536-537.

<sup>56</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 1092 (quoting Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 351).

<sup>57</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 1028.

<sup>58</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1456.



37. The Panel in *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)* added that, in conducting its causation analysis, it would also assess the impact of factors other than the challenged subsidies and refrain from attributing such impact to the challenged subsidies:

"[I]n exploring the merits of the parties' causation arguments in this dispute, we will seek to determine whether the United States has established that there is a 'genuine and substantial relationship of cause and effect' between the challenged LA/MSF subsidies and the United States' claims of serious prejudice by performing a counterfactual analysis that is directed at identifying the situation in the relevant product markets in the absence of the challenged LA/MSF subsidies after 1 December 2011. We are mindful that this determination must be guided by the need to ensure that the effects of factors other than the challenged LA/MSF subsidies are not improperly attributed to those subsidies. Moreover, we recognize that the results of a 'but for' analysis will not always suffice to demonstrate causation, particularly 'where a necessary cause is too remote and other intervening causes substantially account for the market phenomenon' alleged to constitute a form of serious prejudice. Accordingly, in performing our counterfactual analysis, we will seek to 'understand the interactions between the {challenged LA/MSF subsidies} and the various other {alleged} causal factors, and make an assessment of their connection to, as well as the relative importance of the {challenged LA/MSF subsidies} and of the other factors in bringing about, the relevant effects' in the post-implementation period."<sup>59</sup>

#### 1.3.2.8 Temporal considerations

38. The Panel in *Indonesia – Autos* rejected the argument that it was precluded from considering the effects of a subsidy programme which has expired when analysing whether the subsidies caused serious prejudice to the interests of the complainants. The Panel stated:

"[W]e must assess the 'effect of the subsidies' on the interests of another Member to determine whether serious prejudice exists, not the effect of 'subsidy programmers'. We note that at any given moment in time some payments of subsidies have occurred in the past while others have yet to occur in the future. If we were to consider that past subsidies were not relevant to our serious prejudice analysis as they were 'expired measures' while future measures could not yet have caused actual serious prejudice, it is hard to imagine any situation where a panel would be able to determine the existence of actual serious prejudice."<sup>60</sup>

39. In addressing the issue of whether the effect of a subsidy may continue beyond the year in which it is paid, the Appellate Body in *US – Upland Cotton* found that neither the text of Article 6.3(c) nor the immediate context precludes the possibility that the effect of a subsidy may continue beyond the year it was paid out:

"The context of Article 6.3(c) within Part III of the *SCM Agreement* does not support the suggestion that the effect of a subsidy is immediate, short-lived, or limited to one year, regardless of whether or not it is paid every year. Article 6.2 of the *SCM Agreement* refers to the possibility of the subsidizing Member demonstrating that 'the subsidy in question *has not resulted* in any of the effects enumerated in paragraph 3'. (emphasis added) The word 'resulted' in this sentence highlights the temporal relationship between the subsidy and the effect, in that one might expect a time lag between the provision of the subsidy and the resulting effect. In addition, the use of the present perfect tense in this provision implies that some time may have passed between the granting of the subsidy and the demonstration of the absence of its effects.

Article 6.4 of the *SCM Agreement* is also relevant context for interpreting Article 6.3(c). Article 6.4 requires that the displacement or impeding of exports be demonstrated 'over an appropriately representative period', which 'shall be at least one year', so that 'clear trends' in changes in market share can be demonstrated. This suggests that the effect of a subsidy under Article 6.4 must be examined over

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<sup>59</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1463.

<sup>60</sup> Panel Report, *Indonesia – Autos*, para. 14.206.

a sufficiently long period of time and is not limited to the year in which it was paid. As the Panel has also pointed out in the context of Article 6.3(c), '[c]onsideration of developments over a period of longer than one year ... provides a more robust basis for a serious prejudice evaluation than merely paying attention to developments in a single recent year."<sup>61</sup>

40. On a related issue, the Appellate Body in *US – Upland Cotton (Article 21.5 – Brazil)* asserted that:

"[N]othing in Article 6.3(c) of the *SCM Agreement* suggests that the examination of the effect of a subsidy must focus exclusively on the short-term perspective. Whether production of a particular product is higher than it would have been in the absence of the subsidy is often a critical issue in establishing whether the effect of the subsidy is significant price suppression. In our view, the effect of a subsidy on production can also be assessed on the basis of a long-term perspective that focuses on how the subsidy affects decisions of producers to enter or exit a given industry."<sup>62</sup>

41. Regarding the relevant period of review for assessing the effect of the subsidy, the Panel in *US – Upland Cotton (Article 21.5 – Brazil)* noted that Article 6.3(c) of the *SCM Agreement* required an analysis of whether "the effect of the subsidy ... is ... significant price suppression". According to the Panel, "the use of the present tense logically implies the need to make a determination with respect to the present period".<sup>63</sup> For this reason, the Panel accepted to consider evidence submitted by the United States regarding subsidies provided during the marketing year in which the Panel proceeding occurred. The Panel found:

"Given that our task is to decide whether or not significant price suppression 'is' the effect of the marketing loan and counter-cyclical payments at issue in this proceeding we see no reason to exclude data relating to MY 2006 to the extent that it is available."<sup>64</sup>

42. In *EC and certain member States – Large Civil Aircraft*, the European Communities argued that several of subsidies in this dispute were "decades old" and could not, for that reason, be causing present serious prejudice to the United States' interests. The Appellate Body stated that:

"In previous sections of this Report, we have found that a challenge to subsidies granted prior to 1 January 1995 is not precluded. We have also found, however, that, in order properly to assess a claim under Article 5 of the *SCM Agreement*, a panel must take into account in its *ex ante* analysis how a subsidy is expected to materialize over time. A panel is also required to consider whether the life of a subsidy has ended, for example, by reason of the amortization of the subsidy over the relevant period or because the subsidy was removed from the recipient. Moreover, we have emphasized that the effects of a subsidy will generally diminish and come to an end with the passage of time.

Regarding the effects of subsidies over time, the Panel found that:

While the effect of a single subsidy may well dissipate over time ... the fact that the subsidies at issue in this dispute were repeatedly granted over the entire history of Airbus' LCA development with respect to that same product has had rather the opposite effect, through the learning and spillover effects, and production synergies that are inherent in this industry, which spread the effect of LA/MSF for the development of one

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<sup>61</sup> Appellate Body Report, *US – Upland Cotton*, paras. 477-478.

<sup>62</sup> Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 392.

<sup>63</sup> Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 10.18.

<sup>64</sup> Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 10.18. The Panel added in footnote 199 of its Report that "the failure to take into account relevant and available data placed before us pertaining to the period since July 2006 would not be consistent with the requirement under Article 11 of the DSU that a panel "make an objective assessment of the matter before it, including an objective assessment of the facts of the case".

model of LCA, and of other subsidies, to both subsequent and earlier models.

We do not agree that it is only the effect of a 'single subsidy' that would dissipate over time, while multiple subsidies may have the 'opposite effect'. To the contrary, in general, the effects of *any subsidy* can be expected to diminish and eventually come to an end with the passage of time. This is true for single as well as multiple acts of subsidization. The question of whether there are residual effects is a fact-specific matter that may have to be considered."<sup>65</sup>

43. The Panel in *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)* addressed the appropriate reference period to assess whether the European Union had complied with its obligation under Article 7.8 of the SCM Agreement to remove the adverse effects of the subsidies found to be inconsistent with Article 6 of the SCM Agreement in the original proceedings. The Panel stated that it would base its assessment on the totality of the evidence presented, rather than limiting it to a particular period:

"It is well established that a panel tasked with reviewing the merits of claims made under Article 6.3(a), (b) and (c) of the SCM Agreement must focus its efforts on determining the extent to which the challenged subsidies are a 'genuine and substantial' cause of serious prejudice *in the present*, or as the compliance panel in *US – Upland Cotton (Article 21.5 – Brazil)* termed it, '*under current factual conditions*'.<sup>66</sup> However, as we explained in the original proceeding, the unavailability of immediate data means that 'it is impossible to assess the 'present' situation, ... and thus a review of the past is necessary to draw conclusions' about the present.

The parties agree that as far as the findings that must be made in this proceeding are concerned, it may be possible and even appropriate for the Panel to examine data from a historical period that predates the end of the implementation period. We share this view. Moreover, we see no need to make any *a priori* choice of reference period. In the absence of any specific guidance on this issue in the relevant legal provisions, we consider that our duty to conduct an objective assessment of the matter pursuant to Article 11 of the DSU would be best served if we were to examine the entirety of the evidence put forward by the United States, and the full rebuttal evidence advanced by the European Union, including the most recent information where relevant and reliable. Given the nature of the United States' arguments concerning the lasting effects of the challenged subsidies, the relatively long marketing lives of the subsidized LCA products, and the timing of some of the European Union's declared compliance measures, this approach we believe implies that parts of our analysis must be informed by developments over a relatively long period of time. Thus, rather than make *a priori* judgements as to a defined and limited reference period, we will consider all the relevant information that has been put before us, and assess it in the light of the parties' arguments. We will do so, however, recognizing that the United States will only succeed in its non-compliance claims if it can establish the existence of *present* serious prejudice *in its interests* within the meaning of Article 6.3(a), (b) and (c) of the SCM Agreement *in the post-implementation period*, that is, *present* serious prejudice in the period *after 1 December 2011*. For this reason, our ultimate conclusion on the extent to which the United States has established its claims of serious prejudice will be focused on the most recent market data presented by the parties in this dispute from the *post-implementation period*, as it is only with respect to the effects found to exist in the period *after 1 December 2011* that the European Union and certain member States may be found to have failed to comply with its obligation to 'take appropriate steps to remove the adverse effects' by the end of the implementation period."<sup>67</sup>

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<sup>65</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1236-1238.

<sup>66</sup>(footnote original) Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 10.104 and 10.248. (emphasis original)

<sup>67</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 6.1443-6.1444.

### 1.3.2.9 "subsidized product" vs. "effect of the subsidy"

44. The Panel in *US – Upland Cotton* rejected the argument of the United States that the focal point of a serious prejudice analysis under Article 6.3(c) of the SCM Agreement is the "subsidized product" rather than the "effect of the subsidy":

"Finally, to the extent that the United States argues that it is the 'subsidized product' – rather than the 'effect of the subsidy' – which must cause 'significant price suppression' within the meaning of Article 6.3(c) of the *SCM Agreement*, we disagree. The text of Articles 5 and 6 of the *SCM Agreement* support the conclusion that it is the effects of the United States subsidies – not the effects of the 'subsidized product' – that are at issue in a claim of price suppression under Article 6.3(c). The chapeau of Article 5 states: 'No Member should cause, through the use of any subsidy ... adverse effects to the interests of another Member.' (emphasis added) Similarly, Article 6.3(c) provides: 'Serious prejudice in the sense of paragraph (c) of Article 5 may arise in any case where ... (c) the effect of the subsidy is ... significant price suppression ... These references in Articles 5(c) and 6.3(c) to the 'effect of the subsidy' contrast with the language used in the countervailing duty provisions in Part V of the Agreement.<sup>68</sup>

### 1.3.2.10 Effect of each individual subsidy vs. aggregated analysis

45. In *US – Upland Cotton*, the Panel concluded that the reference to the effect of the "subsidy" in the singular in Article 6.3(c), did not mean that a serious prejudice analysis of price suppression must clinically isolate each individual subsidy and its effects:

"We do not see the Article 6.3(c) reference to 'the effect of the subsidy' (in the singular, rather than the plural) as meaning that a serious prejudice analysis of price suppression must clinically isolate each individual subsidy and its effects. Rather, these textual references to 'any subsidy', 'the subsidy' and the 'subsidized product' in Articles 5(c) and 6.3(c) suggest that while due attention must be paid to each subsidy at issue as it relates to the subsidized product, a serious prejudice analysis may be integrated to the extent appropriate in light of the facts and circumstances of a given case. In our view, these textual references to 'any subsidy' and 'the effect of the subsidy' permit an integrated examination of effects of any subsidies with a sufficient nexus with the subsidized product and the particular effects-related variable under examination. Thus, in our price suppression analysis under Article 6.3(c), we examine one effects related variable – prices – and one subsidized product – upland cotton. To the extent a sufficient nexus with these exists among the subsidies at issue so that their effects manifest themselves collectively, we believe that we may legitimately treat them as a 'subsidy' and group them and their effects together. We derive contextual support for this view from Article 6.1 and Annex IV, which referred to the concept of total *ad valorem* subsidization and envisaged that, '[i]n determining the overall rate of subsidization in a given year, subsidies given under different programmes and by different authorities in the territory of a Member shall be aggregated'.<sup>69</sup>

46. In *EC and certain member States – Large Civil Aircraft*, the Panel considered it appropriate to undertake an analysis of the effects of the subsidies on what it termed an "aggregated" basis. Specifically, the Panel first analysed the effects of Launch Aid / Member State Financing subsidies (LA/MSF) on Airbus' ability to launch and bring to the market particular models of LCA, and then sought to determine whether non-LA/MSF subsidies had similar effects. On the basis of a separate—and more abbreviated—assessment of the collective effect of measures comprised under each group of non-LA/MSF subsidies, the Panel came to the conclusion that the effect of LA/MSF was "complemented and supplemented" by the other specific subsidies it found to exist in this dispute.<sup>70</sup>

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<sup>68</sup> Panel Report, *US – Upland Cotton*, para. 7.1227.

<sup>69</sup> Panel Report, *US – Upland Cotton*, para. 7.1192.

<sup>70</sup> Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1956.

47. On appeal, the Appellate Body concluded that the Panel's analysis was not properly characterized as an "aggregated" analysis, because the Panel did not actually undertake an analysis of the effects of the subsidies on an aggregated basis. However, the Appellate Body concluded that it was appropriate for the Panel to do what it actually did, namely to focus its causation analysis on whether the non-LA/MSF subsidies at issue - equity infusions, infrastructure measures, and R&TD subsidies - "complemented and supplemented" the effects of LA/MSF. The Appellate Body stated that:

"In the particular circumstances of this dispute, the Panel chose first to discern the effects of each of the LA/MSF measures, which according to the United States were the primary subsidies benefiting Airbus. The Panel came to the conclusion that each of the LA/MSF measures enabled Airbus to launch and bring to the market each of its models of LCA as and when it did, thus resulting in the displacement and significant lost sales of Boeing LCA under Article 6.3(a), (b), and (c) of the *SCM Agreement*. In other words, a 'genuine and substantial relationship of cause and effect' had been established between the LA/MSF measures and the displacement and lost sales of Boeing LCA during the reference period. The Panel then sought to determine whether the non-LA/MSF subsidies at issue had similar effects by 'shift{ing} costs of LCA development from Airbus to the governments, giving Airbus an edge and allowing it to enter the LCA market with new LCA models at a pace that would otherwise not have been possible.' The Panel concluded that, insofar as the three sets of non-LA/MSF subsidies 'complemented and supplemented' the 'product effect' of LA/MSF, these subsidies 'had the same effect on Airbus' ability to launch the LCA it launched at the time that it did.'

We consider that the approach used by the Panel is permissible under Article 6.3 of the *SCM Agreement*, provided that a genuine causal link between the non-LA/MSF subsidies and the market phenomena alleged under Article 6.3 is established. Having determined that each of the LA/MSF measures enabled launches of particular Airbus LCA models and therefore were a substantial cause of the displacement and significant lost sales of Boeing LCA, the Panel sought to determine whether non-LA/MSF subsidies 'complemented and supplemented' the effects of LA/MSF measures, even if each of the non-LA/MSF subsidies, taken individually, would not have enabled launches of particular Airbus LCA models, and therefore would not have been a substantial cause of the displacement and significant lost sales. Once the Panel determined that LA/MSF subsidies were a substantial cause of the observed displacement and lost sales, it was not necessary to establish that non-LA/MSF subsidies were also substantial causes of the same phenomena. Moreover, the fact that LA/MSF subsidies were the substantial cause of adverse effects does not exclude that non-LA/MSF subsidies had similar effects. Rather, it was conceivable that non-LA/MSF subsidies complemented or supplemented the effects of LA/MSF subsidies. For these reasons, we do not agree with the European Union that Articles 5(c) and 6.3 of the *SCM Agreement* preclude an affirmative finding that non-LA/MSF subsidies cause adverse effects where they 'complement and supplement' the effects of LA/MSF subsidies that have been found to be a substantial and genuine cause of adverse effects. Given that the Panel had determined that LA/MSF subsidies were a substantial cause of the alleged market phenomena, it was permissible and sufficient for the Panel to assess whether a genuine causal connection between non-LA/MSF subsidies and the same market phenomena existed such that these non-LA/MSF subsidies complemented or supplemented the effects of LA/MSF. Contrary to the European Union's submission, the Panel was not required, in those circumstances, to establish that non-LA/MSF subsidies were themselves a substantial cause or 'necessary to enable a launch decision at a particular point in time.'

As we observed above, the Panel's approach to the analysis of causation did not absolve it from establishing a genuine causal link between the different categories of non-LA/MSF subsidies and Airbus' ability to launch and bring to the market its LCA models, thereby similarly causing the displacement and significant lost sales of Boeing LCA during the reference period. The fact that LA/MSF measures enabled certain product launches, and therefore were a genuine and substantial cause of displacement and lost sales during the reference period, does not in and of itself establish that non-LA/MSF subsidies had similar effects. Instead, the Panel had to establish that non-

LA/MSF subsidies had a genuine causal connection with Airbus' ability to launch and bring to the market its models of LCA, thus contributing to the adverse effects of LA/MSF measures."<sup>71</sup>

48. In *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, the Appellate Body reiterated that Articles 5(c) and 6.3 of the SCM Agreement do not require that a serious prejudice analysis "clinically isolate each individual subsidy and its effects".<sup>72</sup> The Appellate Body added that how a panel should conduct a collective causation analysis regarding the effect of multiple subsidies will vary from case to case:

"[T]he way in which a panel structures its evaluation of a claim that multiple subsidies have caused serious prejudice will necessarily vary from case to case. Relevant circumstances that will bear upon the appropriateness of a panel's approach include the design, structure, and operation of the subsidies at issue, the alleged market phenomena, and the extent to which the subsidies are provided in relation to a particular product or products. A panel must also take account of the manner in which the claimant presents its case, and the extent to which it claims that multiple subsidies have similar effects on the same product, or that the effects of multiple subsidies manifest themselves collectively in the relevant market. A panel enjoys a degree of methodological latitude in selecting its approach to analyzing the collective effects of multiple subsidies for purposes of assessing causation. However, a panel is never absolved from having to establish a "genuine and substantial relationship of cause and effect" between the impugned subsidies and the alleged market phenomena under Article 6.3, or from assessing whether such causal link is diluted by the effects of other factors. Moreover, a panel must take care not to segment unduly its analysis such that, when confronted with multiple subsidy measures, it considers the effects of each on an individual basis only and, as a result of such an atomized approach, finds that no subsidy is a substantial cause of the relevant adverse effects."<sup>73</sup>

49. In *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, the Appellate Body pointed out that there are "at least two ways"<sup>74</sup> of conducting a collective causation analysis, namely, (i) "aggregation", the approach taken by the panel in *US – Upland Cotton*, and (ii) "cumulation", the approach followed by the panel in *EC and certain member States – Large Civil Aircraft*.<sup>75</sup> On the issue of which approach to take, the Appellate Body stated:

"Whether either, or both, or neither of these approaches is appropriate in a particular case will be a function of the specific subsidy measures at issue and their effects on prices and sales in the relevant market, as well as upon the manner in which a complainant presents its claim and the panel decides to structure its causation analysis. In deciding how to undertake its analysis of serious prejudice, however, a panel is subject to the constraint that it must employ an approach that will enable it to take due account of all of the subsidies that provide a relevant and identifiable competitive advantage to the recipient and its products in the market and that relate to alleged adverse effects phenomena. Only by doing so can a panel ensure a full appreciation of all of the challenged subsidies that may be contributing, or conducing, to the serious prejudice. At the same time, a panel must be careful not to combine multiple measures in such a way as to absolve a complainant of its burden of proving that each challenged measure is a genuine cause of, or genuinely contributes to producing, the market phenomena identified in Article 6.3 and that the challenged subsidies, taken together, are a genuine and substantial cause of such adverse effects."<sup>76</sup>

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<sup>71</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1377-1379.

<sup>72</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 1284 (quoting Panel Report, *US – Upland Cotton*, para. 7.1192).

<sup>73</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 1284.

<sup>74</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 1284 See also Panel Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint) (Article 21.5 – EU)*, para. 9.62.

<sup>75</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, paras. 1286, 1288, 1290, and fn 2615 to para. 1291.

<sup>76</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 1290.

50. With regard to the "aggregation" approach, the Appellate Body further explained:

"[A] panel may group together subsidy measures that are sufficiently similar in their design, structure, and operation in order to ascertain their aggregated effects in an integrated causation analysis and determine whether there is a genuine and substantial causal relationship between these multiple subsidies, taken together, and the relevant market phenomena identified in Article 6.3 of the *SCM Agreement* (such as significant price suppression, lost sales, displacement or impedance). In such circumstances, the panel is not required to find that each subsidy measure is, individually, a genuine and substantial cause of the relevant phenomenon. Nor is it required to assess the relative contribution of each subsidy within the group to the resulting effects. When such an analysis is appropriate in the light of the design, structure, and operation of multiple subsidies, a panel may also add together the *amounts* of the subsidies as part of its analysis of the collective effects of that group of subsidies. Whether such an analysis is appropriate will depend upon the particular features of the subsidies at issue and the case presented by the complainant. The causal mechanism through which a subsidy produces effects is one criterion that will be relevant to the issue of whether aggregation is appropriate in any given instance.

...

A decision to aggregate subsidies that share a similar design, structure, and operation is both a useful tool that a panel can use to avoid having to repeat the same analysis for each and every measure and a substantive recognition that the measures in question are of such kind that they are likely to conduce to the same result. Indeed, an aggregate analysis of such a group of subsidies may establish a genuine and substantial causal link in circumstances where no such link could have been established for each subsidy measure, analyzed in isolation. A decision by a panel to aggregate multiple subsidy measures represents an exercise of judgement by the panel to the effect that, given the degree of similarity among the subsidy measures, there is a reasonable likelihood that the examination of the causal relationship between each such subsidy and the alleged effects will be largely similar, and that it can be anticipated that the effects of the subsidy measures and their causal relationship to the serious prejudice alleged will be largely the same. In adopting such an approach, a panel must explain why it considers such similarity to exist. Such explanation should be grounded in the characteristics of the particular subsidies at issue, particularly the nature and design of those subsidy measures, the implications of that nature and design for the operation of the subsidies, their relationship to the subsidized product, and the structure of the market in which that product competes."<sup>77</sup>

51. With regard to the "cumulation" approach, the Appellate Body further explained:

"[A] panel may begin by analyzing the effects of a *single* subsidy, or an *aggregated* group of subsidies, in order to determine whether it constitutes a genuine and substantial cause of adverse effects. Having reached that conclusion, a panel may then assess whether *other* subsidies—either individually or in aggregated groups—have a *genuine* causal connection to the same effects, and complement and supplement the effects of the *first* subsidy (or group of subsidies) that was found, alone, to be a *genuine* and *substantial* cause of the alleged market phenomena. The other subsidies have to be a "genuine" cause, but they need not, in themselves, amount to a "substantial" cause in order for their effects to be combined with those of the first subsidy or group of subsidies that, alone, has been found to be a genuine and substantial cause of the adverse effects.

...

[A] decision as to whether the *effects* of different subsidies can be cumulated can be taken only *after* there has been a determination, for at least one subsidy or group of aggregated subsidies, that it has a genuine and substantial link to the alleged market

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<sup>77</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, paras. 1285 and 1291.

phenomena. Once such a causal link has been established, then a panel will have to address the question of whether other subsidies have a genuine connection to such phenomena. Considerations that may bear upon a panel's assessment of whether a genuine causal connection exists include the design, structure, magnitude, and operation of the subsidy, as well as the nexus between the subsidy and the subsidized product. In our view, a genuine causal connection may be established in different ways. One way is to demonstrate that the subsidy or subsidies cause effects that follow the same causal pathway as a subsidy that has already been found to be a genuine and substantial cause of the alleged market phenomena under Article 6.3 of the *SCM Agreement*. We do not, however, consider that this is the only way in which the requisite genuine causal connection can be established. A genuine causal connection may also be found when a complainant succeeds in demonstrating that, even though other subsidies do not operate along the same causal pathway, those subsidies nevertheless, either singly or in combination, meaningfully contribute to, and thereby complement and supplement, the adverse effects, within the meaning of Article 6.3, caused by the first subsidy. In other words, the effects of such other subsidy or group of subsidies must be shown to be non-trivial in order to be found to supplement or complement effects for which a genuine and substantial connection has already been established."<sup>78</sup>

52. In *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, the Appellate Body also clarified that the characteristics of the market would affect the decision on how to conduct the causation analysis regarding the effects of multiple subsidies:

"[T]he characteristics of the market within which the subsidized products compete may affect the analysis of whether the effects of different subsidies complement and supplement each other, and that panels should give consideration to whether the specific market at issue enhances the scope for complementarity among subsidies—even those subsidies that differ in nature. For example, when a subsidy recipient exercises market power, it may be more likely to be able to take advantage of potential interaction between different subsidies, and to exploit these effects to the disadvantage of its competitors, than would be the case in a perfectly competitive market."<sup>79</sup>

53. In *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, the Panel conducted an aggregated assessment of the effects of the various subsidy programmes at issue, as the panel in the original proceeding had done:

"By asking the Panel to aggregate the effects of the challenged LA/MSF subsidies in this proceeding, we understand the United States to be arguing that the Panel should follow essentially the same approach used to analyse causation in the original proceeding, an approach that was affirmed by the Appellate Body. While generally not disagreeing with the view that LA/MSF subsidies 'may be aggregated for purposes of assessing their alleged present causal link to the launch of a particular product and, subsequently, {any} present adverse effects', the European Union maintains that in this compliance dispute, the Panel may proceed to aggregate the effects of the challenged LA/MSF subsidies *only* if they are '*shown to exist at present* and thus not withdrawn'.

Having previously rejected the European Union's submissions concerning the alleged withdrawal of the LA/MSF subsidies and the purported requirement to demonstrate 'present subsidization' in the context of Article 7.8 of the SCM Agreement, we see no basis to support the European Union's objection to the United States' request to aggregate the effects of the LA/MSF subsidies. In our view, there is no impediment to conducting an evaluation of the effects of challenged LA/MSF subsidies in this proceeding in essentially the same manner as the panel in the original dispute. However, as both parties have emphasized, in this compliance proceeding, our evaluation of the effects of the LA/MSF subsidies must be undertaken with a view to determining the merits of the United States' claims of serious prejudice in three

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<sup>78</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, paras. 1287 and 1292.

<sup>79</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 1293.



different product markets – the single-aisle, the twin-aisle and the VLA markets – rather than *one single LCA product market* (as the panel did in the original proceeding)."<sup>80</sup>

### 1.3.3 Article 6.3(a) and 6.3(b) "displaces" or "impedes"

54. The Panel in *Indonesia – Autos* explored the meaning of the terms "displacement" and "impedance" and considered that:

"[A] complainant need not demonstrate a decline in sales in order to demonstrate displacement or impedance. This is inherent in the ordinary meaning of those terms. Thus, displacement relates to a situation where sales volume has declined, while impedance relates to a situation where sales which otherwise would have occurred were impeded."<sup>81</sup>

55. The Panel in *Indonesia – Autos* addressed the argument that "there is no reason why the type of analysis set forth in Article 6.4 should not be appropriate also in the case of claims of displacement and impedance of imports from the market of the subsidizing country".<sup>82</sup> The Panel rejected this argument, but nevertheless agreed that market share data may be "highly relevant" for an analysis pursuant to Article 6.3(a):

"Article 6.4 is not relevant in this case. The drafting of the provision is unambiguous, and the specific reference to Article 6.3(b) creates a strong inference that an Article 6.4 type of analysis is *not* appropriate in the case of Article 6.3(a) claims. The complainants have identified nothing in the context of the provision or the object and purpose of the SCM Agreement that would suggest a different conclusion.

Our conclusion does not of course mean that market share data are irrelevant to the analysis of displacement or impedance into a subsidizing Member's market. To the contrary, market share data may be highly relevant evidence for the analysis of such a claim. However, such data are no more than evidence of displacement and impedance caused by subsidization, and a demonstration that the market share of the subsidized product in the subsidizing Member has increased does not *ipso facto* satisfy the requirements of Article 6.3(a)."<sup>83</sup>

56. In *EC and certain member States – Large Civil Aircraft*, the Appellate Body considered the meaning of the terms "displace" and "impede", stating that:

"[W]e understand the term displacement to connote that there is a substitution effect between the subsidized product and the like product of the complaining Member.<sup>84</sup> This means that displacement arises under subparagraph (a) of Article 6.3 where the effect of the subsidy is that imports of a like product of the complaining Member are substituted by the subsidized product in the market of the subsidizing Member. Similarly, under subparagraph (b), displacement arises where exports of the like product of the complaining Member are substituted in a third country market by exports of the subsidized product.

We are not called upon in this appeal to interpret the term 'impede' in Article 6.3. Nevertheless, consideration of the term can provide context for a better understanding of displacement. The term connotes a broader array of situations than the term 'displace'.<sup>85</sup> It refers to situations where the exports or imports of the like

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<sup>80</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 6.1449-6.1450.

<sup>81</sup> Panel Report, *Indonesia – Autos*, para. 14.218.

<sup>82</sup> Panel Report, *Indonesia – Autos*, para. 14.208.

<sup>83</sup> Panel Report, *Indonesia – Autos*, paras. 14.210-14.211.

<sup>84</sup> (*footnote original*) The term "displace" is defined as to "remove; replace with something else; take the place of, supplant". (*The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), Vol. 1, p. 698)

<sup>85</sup> (*footnote original*) The term "impede" is defined as to "obstruct, hinder". (*The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), Vol. 1, p. 1319)

product of the complaining Member would have expanded had they not been 'obstructed' or 'hindered' by the subsidized product. It could also refer to a situation where the exports or imports of the like product of the complaining Member did not materialize at all because production was held back by the subsidized product.<sup>86</sup>

We recognize that it may be difficult to draw a clear demarcation between the concepts of displacement and impedance. One possibility is to draw a distinction similar to the one drawn by the Appellate Body in *US – Upland Cotton (Article 21.5 – Brazil)* between the concepts of 'price depression' and 'price suppression' in Article 6.3(c) of the *SCM Agreement*. On this approach, evidence that actual sales have declined would be relevant for a determination of displacement, whereas evidence that sales would have increased more than they did, or would have declined less than they did, would be relevant to a claim of impedance. We do not need to resolve this issue in this appeal because the United States premised its allegations of displacement on there being an observable decline in Boeing's market share."<sup>87</sup>

57. The Appellate Body in *US – Large Civil Aircraft (2<sup>nd</sup> complaint)* summarized its prior reasoning on "displacement" under Article 6.3(a) and (b) as follows:

"Referring to Article 6.4 of the *SCM Agreement*, which provides, *inter alia*, that, for purposes of Article 6.3(a) and (b), changes in relative market shares shall be demonstrated 'over an appropriately representative period sufficient to demonstrate clear trends in the development of the market for the product concerned', the Appellate Body considered that this suggests that the effect of a subsidy must be examined 'over a sufficiently long period of time and is not limited to the year in which it was paid' because consideration of developments over a longer period 'provides a more robust basis for a serious prejudice evaluation'. The Appellate Body also noted that a panel assessing a claim of displacement would have to look at whether trends are discernible. The Appellate Body explained that the identification of a trend will be more accurate the larger the data set used in the analysis."<sup>88</sup>

58. The Appellate Body added that this reasoning suggests that two characteristics will normally be necessary before a panel can reach a finding of displacement under Article 6.3(b):

"[F]irst, that at least a portion of the market share of the exports of the like product of the complaining Member must have been taken over or substituted by the subsidized product; and second, it must be possible to discern trends in volume and market share."<sup>89</sup>

59. With regards to "impedance", the Appellate Body recalled that it refers to "a situation where the exports or imports of the like product of the complaining Member would have expanded more had they not been 'obstructed' or 'hindered' by the subsidized product, or where exports or imports of the like product did not materialize at all because production was 'held back' by the subsidized product"<sup>90</sup> and added:

"We observe that Article 6.4 of the *SCM Agreement*, which applies to both phenomena referred to in Article 6.3(a) and (b), requires that, as with displacement, a finding of impedance should be supported by evidence of changes in the relative market share in favour of the subsidized product, over a sufficiently representative period, to demonstrate 'clear trends' in the development of the market concerned. Since, unlike with displacement, however, impedance may not be a visible phenomenon, evidence

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<sup>86</sup> (*footnote original*) There also could be situations where displacement and impedance overlap. However, in the light of the principle of effective treaty interpretation, a distinction needs to be made as to the concepts covered by each term. (See Appellate Body Report, *US – Gasoline*, p. 23, DSR 1996:I, 3, at 21; and Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 12, DSR 1997:I, 97, at 106)

<sup>87</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1160-1162.

<sup>88</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 1081 (referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1166-1167).

<sup>89</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 1082 (referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1170).

<sup>90</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 1086 (referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1161).

of trends may not be dispositive, or may hold less probative value, for a finding of impedance."<sup>91</sup>

60. As in *EC and certain member States – Large Civil Aircraft*, the Appellate Body in *US – Large Civil Aircraft (2<sup>nd</sup> complaint)* stated that displacement and impedance may overlap, but they are not interchangeable concepts.<sup>92</sup>

61. In *EC and certain member States – Large Civil Aircraft (Article 21.5 – EU)*, with respect to the assessment of impedance, the Panel looked at data concerning the volume of deliveries and market shares of the United States' Boeing from four geographic markets in the 2013-2018 period and considered that data from 2016 was "insufficiently recent to demonstrate *present* impedance".<sup>93</sup> In contrast, the Panel found that data from the two most recently completed calendar years, i.e. 2017 and 2018, was "sufficiently recent to evidence *present* impedance".<sup>94</sup>

62. The Panel proceeded to assess the United States' claims of displacement and noted that its understanding of the notion of "displacement" for the purpose of Article 6.3(a) and (b) of the SCM Agreement is "premised on the existence of product deliveries or a market share of some kind which are supplanted by new or increased deliveries, and/or market share, of a subsidized like product."<sup>95</sup> The Panel reviewed the market share trend using data on Boeing's market shares in the years 2014-2018 and considered the overall picture "insufficient to establish a *present* trend evidencing a replacement of the 747-8I with the A380".<sup>96</sup>

### 1.3.4 Article 6.3(b)

#### 1.3.4.1 "third country market"

63. In *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, the Appellate Body stated that a "market", under Article 6.3(a) and (b) of the SCM Agreement, is a particular set of products that are in actual or potential competition with each other within a particular geographical area.<sup>97</sup> In *EC and certain member States – Large Civil Aircraft*, the Appellate Body stated that an assessment of the competitive relationship between products in the market is required in order to determine "whether and to what extent one product may displace another".<sup>98</sup>

64. The Appellate Body in *US – Large Civil Aircraft (2<sup>nd</sup> complaint)* added that, in contrast with the definition of "market" under Article 6.3(a), a finding of displacement or impedance under Article 6.3(b) is limited to the territory of the third country at issue:

"[F]indings of displacement and impedance are to be made only with respect to the territory of the third country involved, even though, from an economic perspective, the geographic market may not be national in scope. Thus ... even in cases where the geographic dimension of a particular market exceeds national boundaries or is worldwide, a panel faced with a claim under Article 6.3(b) should 'focus the analysis of displacement and impedance on the territory of the ... third countries involved'."<sup>99</sup>

### 1.3.5 Article 6.3(c)

#### 1.3.5.1 "significant"

65. In rejecting the United States contention that the Panel did not provide a basic rationale as to the extent to which it considered price suppression to be "significant", the Appellate Body in *US*

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<sup>91</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 1086.

<sup>92</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 1017 and 1085; and Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, fn 2548 to para. 1161.

<sup>93</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – EU)*, para. 7.423.

<sup>94</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – EU)*, para. 7.424.

<sup>95</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – EU)*, para. 7.425.

<sup>96</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – EU)*, para. 7.426.

<sup>97</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 1076.

<sup>98</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1119.

<sup>99</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 1076 (referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1117).

– *Upland Cotton* found that the Panel had adequately provided its reasoning in accordance with Article 12.7 of the DSU in support of its conclusion that the price suppression was "significant".<sup>100</sup> Accordingly, the Panel examined the ordinary meaning of word "significant" and its relevant context in finding that the United States subsidies in question for the purposes of its serious prejudice analysis were "significant" within the meaning of Article 6.3(c). The Panel found that the ordinary meaning of the word in its context refers to something "important, notable or consequential"<sup>101</sup> before looking at the degree of significance of price suppression:

"Such significance may be manifest in a number of ways. The 'significance' of any degree of price suppression may vary from case to case, depending upon the factual circumstances, and may not solely depend upon a given level of numeric significance. Other considerations, including the nature of the 'same market' and the product under consideration may also enter into such an assessment, as appropriate in a given case.

We cannot believe that what may be significant in a market for upland cotton would necessarily also be applicable or relevant to a market for a very different product. We consider that, for a basic and widely traded commodity, such as upland cotton, a relatively small decrease or suppression of prices could be significant because, for example, profit margins may ordinarily be narrow, product homogeneity means that sales are price sensitive or because of the sheer size of the market in terms of the amount of revenue involved in large volumes traded on the markets experiencing the price suppression."<sup>102</sup>

66. The Appellate Body in *US – Upland Cotton (Article 21.5 – Brazil)* clarified that, in cases where a finding of significant price suppression is based on several different factors, there is no need to demonstrate that each such factor is "significant":

"What Article 6.3(c) does require is that the price suppression be 'significant', which the Appellate Body has understood as 'connoting something that can be characterized as 'important, notable or consequential'. However, the fact that the price suppression must be 'significant' does not mean that a panel examining various factors that support a finding of significant price suppression, as did the Panel, must make a determination precisely quantifying the effects of each factor. A factor that itself is not 'significant' may, together with other factors (whether individually shown to be of a significant degree or not), establish 'significant price suppression'. What needs to be significant is the degree of price suppression, not necessarily the degree of each factor used as an indicator for establishing its existence. Nor does each factor necessarily have to be capable of demonstrating, to the same extent, significant price suppression."<sup>103</sup>

67. The Panel in *Korea – Commercial Vessels* deemed that the approach taken by the *US – Upland Cotton* panel, which considered that it is the price suppression itself that must be "significant" and that it is useful to consider the degree of price suppression in the context of the prices that have been affected, was broadly consistent with that taken by the *Indonesia – Autos* panel, which read the term "significant" as a *de minimis* concept intended to screen out very small, unimportant price effects that might be caused by subsidies but that would have no real impact in the market:

"We agree, and are of the view that only price suppression or price depression of sufficient *magnitude* or degree, seen in the context of the particular product at issue, to be able to meaningfully affect suppliers should be found to be "significant" in the sense of SCM Article 6.3(c)."<sup>104</sup>

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<sup>100</sup> Appellate Body Report, *US – Upland Cotton*, para. 490.

<sup>101</sup> Panel Report, *US – Upland Cotton*, para. 7.1326.

<sup>102</sup> Panel Report, *US – Upland Cotton*, paras. 7.1329-7.1330.

<sup>103</sup> Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 416.

<sup>104</sup> Panel Report, *Korea – Commercial Vessels*, para. 7.571.

68. In *EC and certain member States – Large Civil Aircraft*, the Panel referred to several factors that it considered relevant to the question of whether the lost sales at issue were "significant":

"In our view, it is clear that Boeing lost sales to Airbus involving purchases by easyJet, Air Berlin, Czech Airlines, Air Asia, Iberia, South African Airways, Thai Airways International, Singapore Airlines, Emirates Airlines, and Qantas. Moreover, it is apparent to us that if winning a particular sale is of "strategic importance" to Airbus, as the European Communities asserts with respect to the easyJet campaign discussed above, the loss of that sale to Boeing is similarly important, and can justifiably be considered a significant lost sale. In addition, lost sales are important to the extent that they delay a manufacturer's ability to benefit from the important learning effects and economies of scale in this industry, and thus have a significance beyond their direct revenue effects. Moreover, both parties recognize the advantages to being the incumbent supplier with a given customer with respect to subsequent purchases, which also adds to the significance of lost sales. While it is true that a manufacturer may be able to recoup some of these disadvantages by finding another customer to take advantage of delivery slots, this does not, in our view, detract from the significance of a lost sale. Given the number of aircraft and the dollar amounts involved in those sales, as well as the considerations just described, we conclude that these lost sales are significant."<sup>105</sup>

69. The Appellate Body in *US – Large Civil Aircraft (2<sup>nd</sup> complaint)* recalled its understanding of "significant" as "important, notable or consequential" and one that has both quantitative and qualitative dimensions.<sup>106</sup>

#### **1.3.5.2 "price undercutting"**

70. The Panel in *Indonesia – Autos* stated the following on the use of the term 'significant' in connection with the term "price undercutting" in Article 6.3(c):

"Although the term 'significant' is not defined, the inclusion of this qualifier in Article 6.3(c) presumably was intended to ensure that margins of undercutting so small that they could not meaningfully affect suppliers of the imported product whose price was being undercut are not considered to give rise to serious prejudice."<sup>107</sup>

#### **1.3.5.3 "price suppression"**

71. The Panel in *US – Upland Cotton* was of the view that the text of Article 6.3(c) read in its context required it to examine "whether upland cotton prices either were pressed down, prevented or inhibited from rising, or while they did actually increase the degree and magnitude of increase was less than it otherwise would have been".<sup>108</sup> In its assessment of whether "price suppression" has taken place in the same "world market", the Panel considered the following three factors relevant: "(a) the relative magnitude of the United States' production and exports in the world upland cotton market; (b) general price trends; and (c) the nature of the subsidies at issue, and in particular, whether or not the nature of these subsidies is such as to have discernible price suppressive effects".<sup>109</sup>

72. The Appellate Body in *US – Upland Cotton* agreed with the Panel's interpretation of the ordinary meaning of the term "price suppression".<sup>110</sup> According to the Panel, the ordinary meaning of "price suppression" within the meaning of Article 6.3(c) of the *SCM Agreement* refers to "the situation where "prices" – in terms of the "amount of money set for sale of upland cotton" or the "value or worth" of upland cotton – either are prevented or inhibited from rising (i.e. they do not

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<sup>105</sup> Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1845.

<sup>106</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 1052 (referring to Appellate Body Report, *US – Upland Cotton*, para. 426; and Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1218).

<sup>107</sup> Panel Report, *Indonesia – Autos*, para. 14.254.

<sup>108</sup> Panel Report, *US – Upland Cotton*, para. 7.1279.

<sup>109</sup> Panel Report, *US – Upland Cotton*, para. 7.1280.

<sup>110</sup> Appellate Body Report, *US – Upland Cotton*, para. 424.

increase when they otherwise would have) or they do actually increase, but the increase is less than it otherwise would have been."<sup>111</sup>

73. The Appellate Body in *US – Large Civil Aircraft (2<sup>nd</sup> complaint)* recalled its analysis in *US – Upland Cotton (Article 21.5 – Brazil)* and added that "a counterfactual analysis is likely to be of particular utility for panels faced with claims that subsidies have caused price suppression".<sup>112</sup>

74. With regard to the use of price trend data to demonstrate the existence of significant price suppression, the Appellate Body in *US – Large Civil Aircraft (2<sup>nd</sup> complaint)* recalled that in *US – Upland Cotton* it had found price trend data relevant to a determination of significant price suppression but had "declined to deem such evidence conclusive". The Appellate Body stated that general price trends were "clearly relevant" because the "particular counter-cyclical and price-contingent nature of the subsidies at issue in that dispute".<sup>113</sup>

Furthermore, with respect to the use of price trends that are "unavailable, unreliable, or unpersuasive", the Appellate Body in *US – Large Civil Aircraft (2<sup>nd</sup> complaint)* stated: "[I]t will ordinarily be useful for a panel to take into account evidence relating to price trends in a price suppression analysis. At the same time, there may be circumstances in which such evidence is unavailable, unreliable, or unpersuasive. We do not exclude that, in such circumstances, it may nevertheless be possible to conduct an analysis and to reach a finding of significant price suppression, provided that such a finding is properly supported by other evidence on the record.

...

While we recognize that the fact that Boeing received FSC/ETI benefits over a long period might have made the Panel's task more difficult because there was no prior, subsidy-free period against which to compare market share and price trend data occurring during the reference period, this does not mean that there is nothing to be gained from examining such data in a price suppression analysis. As we have noted, for example, the fact that prices of a subsidized product were lower during a period of lower subsidization might require further consideration or explanation in order to demonstrate a genuine and substantial relationship between the subsidies and any alleged price effects."<sup>114</sup>

#### **1.3.5.4 "price depression"**

75. The Appellate Body in *US – Upland Cotton (Article 21.5 – Brazil)* recognized that the concepts of price suppression and price depression "could overlap", but also pointed out that Article 6.3(c) of the SCM Agreement mentions them as distinct concepts.<sup>115</sup> The Appellate Body distinguished price depression from price suppression in the following terms:

"While price depression is a directly observable phenomenon, price suppression is not so. Falling prices can be observed; by contrast, price suppression concerns whether prices are less than they would otherwise have been in consequence of various factors, in this case, the subsidies."<sup>116</sup>

76. The Panel in *Korea – Commercial Vessels* explained the difference between price suppression and price depression as follows:

"It may be relatively simple to establish that, as a threshold factual matter, the price of a particular product has decreased. Similarly, it may be relatively simple to establish that the price of a product has been flat or has increased only slightly.

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<sup>111</sup> Panel Report, *US – Upland Cotton*, para. 7.1277.

<sup>112</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 1092 (referring to Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 351).

<sup>113</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 1117.

<sup>114</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, paras. 1225 and 1226.

<sup>115</sup> Appellate Body Report, *China – GOES*, fn 230 to para. 141 (referring to Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 351).

<sup>116</sup> Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 351.

Conceptually, however, it is likely to be more difficult to show that prices should not have decreased, or should have increased by more than they did.

In particular, the existence of a flat or declining price trend, on its own, would not be a sufficient basis on which to conclude that prices were 'suppressed' or 'depressed'. For such a conclusion to be reached, the *causes* of these observed trends would need to be examined. In other words, price depression is not simply a decline in prices but a situation where prices have been 'pushed down' *by something*. Price suppression is where prices have been restrained *by something*. In other words, for a finding of 'price suppression' or 'price depression' in the sense of *SCM* Article 6.3(c), there must not only be a flattened or downward price trend as a prerequisite, but in addition this trend must be the result of an exogenous factor, namely the subsidy or subsidies in question. Thus, the analysis that seems to be called for by the Agreement (by virtue of the concepts of price suppression and price depression themselves), concerns what the price movements for the relevant ships *would have been* in the absence of (i.e., 'but for') the subsidies at issue."<sup>117</sup>

#### 1.3.5.5 "lost sales"

77. In *EC and certain member States – Large Civil Aircraft*, the Appellate Body considered the meaning of "lost sales" in the context of Article 6.3(c):

"We consider that a sale that is 'lost' is one that a supplier 'failed to obtain'. We further understand lost sales to be a relational concept that includes consideration of the behaviour of both the subsidized firm(s), which must have won the sales, and the competing firm(s), which allegedly lost the sales. In *US – Upland Cotton*, the Appellate Body held that the phrase 'in the same market' applied to all four situations set forth in Article 6.3(c), including 'lost sales'. According to the Appellate Body, the subsidized product and the like product of the complaining Member will be in the same market 'if they were engaged in actual or potential competition in that market.' Thus, sales can be lost 'in the same market' within the meaning of Article 6.3(c) if the subsidized product and the like product are competing products in the same product market.

The term 'significant' in the second clause of Article 6.3(c) appears before the terms 'price suppression, price depression or lost sales'. We read the term 'significant' as qualifying all three situations. In other words, a complaining Member invoking Article 6.3(c) must show that the alleged 'lost sales' are 'significant'.

As with the other market phenomena referred to in Article 6.3 of the *SCM Agreement*, the lost sales must be the 'effect' of the challenged subsidy. Thus, like the analysis of displacement under Article 6.3(a) and (b), we believe that a useful and appropriate approach to assessing whether lost sales are the effect of the challenged subsidy is through a counterfactual analysis. This would involve a comparison of the sales actually made by the competing firm(s) of the complaining Member with a counterfactual scenario in which the firm(s) of the respondent Member would not have received the challenged subsidies. There would be lost sales where the counterfactual scenario shows that sales won by the subsidized firm(s) of the respondent Member would have been made instead by the competing firm(s) of the complaining Member, thus revealing the effect of the challenged subsidies. It is not impermissible to assess lost sales under Article 6.3(c) of the *SCM Agreement* using a two-step approach like the one adopted by the Panel. However, as we have discussed above, any conclusions reached under the first step are preliminary because they will show only who lost and who made the sales. A definitive determination that the lost sales are the effect of the challenged subsidy within the meaning of Article 6.3(c) must await completion of the second step of the analysis.

The United States directed its allegations of lost sales in this case against specific sales campaigns and the Panel focused its analysis on those sales campaigns. The European Union has not challenged the Panel's approach on appeal. We agree that an

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<sup>117</sup> Panel Report, *Korea – Commercial Vessels*, paras. 7.536-537.

assessment of lost sales focused on an examination of specific sales campaigns may be appropriate given the particular characteristics of a market. At the same time, we note that Article 6.3(c) is concerned with lost sales 'in the same market'. It will sometimes be necessary to look beyond individual sales campaigns fully to understand the competitive dynamics that are at play in a particular market. Thus, an approach in which sales are aggregated by supplier or by customer, or on a country-wide or global basis, rather than examined individually, is also permissible.

We acknowledge that when looked at from this broader, market-wide perspective, there could be some overlap between the concept of lost sales and the concepts of displacement and impedance in Article 6.3(a) and (b) of the *SCM Agreement*. Although the concepts of displacement and impedance are presented from the perspective of imports or exports under subparagraphs (a) and (b) of Article 6.3, those imports or exports are a function of the firms' sales. At the same time, we see some distinctions between the concepts. First, the assessment of displacement or impedance under subparagraphs (a) and (b) of Article 6.3 has a well-defined geographic focus. By contrast, the reference to the 'same market' in subparagraph (c) allows more flexibility in defining the relevant market, which can include the world market. Second, the requirement in Article 6.3(c) that the lost sales be 'significant' implies that the assessment can have quantitative and qualitative dimensions. The assessment of displacement and impedance under Article 6.3(a) and (b) is primarily quantitative in nature."<sup>118</sup>

78. In *EC and certain member States – Large Civil Aircraft*, the Appellate Body summarized its analysis of "lost sales" as follows:

"[W]e consider that, under Article 6.3(c), 'lost sales' are sales that suppliers of the complaining Member 'failed to obtain' and that instead were won by suppliers of the respondent Member. It is a relational concept and its assessment requires consideration of the behaviour of both the subsidized firm(s), which must have won the sales, and the competing firm(s), which allegedly lost the sales. The assessment can focus on a specific sales campaign when such an approach is appropriate given the particular characteristics of the market or it may look more broadly at aggregate sales in the market. The complainant must show that the lost sales are significant to succeed in its claim. Where lost sales are assessed under a two-step approach such as the one adopted by the Panel in this case, the finding of lost sales in the first step is necessarily preliminary and of limited significance in coming to a conclusion under Article 6.3(c). Similarly to the phenomena of displacement under Article 6.3(a) and (b), a definitive determination under Article 6.3(c) must await consideration of whether such lost sales are the effect of the challenged subsidy. While a two-step approach to the assessment of lost sales is permissible, in our view, the most appropriate approach to assess whether lost sales are the *effect* of the challenged subsidy is through a unitary counterfactual analysis. This would involve a comparison of the sales actually made by the competing firm(s) of the complaining Member with a counterfactual scenario in which the firm(s) of the respondent Member would not have received the challenged subsidies. There would be lost sales where the counterfactual analysis shows that, in the absence of the challenged subsidy, sales won by the subsidized firm(s) of the respondent Member would have been made instead by the competing firm(s) of the complaining Member."<sup>119</sup>

79. Recalling these findings, the Appellate Body in *US – Large Civil Aircraft (2<sup>nd</sup> complaint)* summarized its interpretation of "lost sale" as follows:

"The Appellate Body has defined a 'lost sale' as one that a supplier 'failed to obtain'. The Appellate Body has understood that concept as 'relational', entailing consideration of 'the behaviour of both the subsidized firm(s), which must have won the sales, and the competing firm(s), which allegedly lost the sales', due to the effect of the subsidy.

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<sup>118</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1214-1218.

<sup>119</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1220.



Sales can be lost 'in the same market', within the meaning of Article 6.3(c), only if the subsidized product and the like product compete in the same product market."<sup>120</sup>

80. In this same case, the Appellate Body added that a "lost sales claim may be supported with evidence of lost sales taking place throughout a geographical and product market, or with evidence of particular sales campaigns occurring within that market".<sup>121</sup>

81. The Arbitrator in *EC and certain member States – Large Civil Aircraft (Article 22.6 – EU)* found, with regards to the time in which lost sales may be determined, that "the time at which lost sales can occur and temporally valued need not be the time of the resulting physical transfer of goods from the seller to the purchaser. Instead, the value of a lost sale can be determined at the time at which an agreement to transfer goods in exchange for money is reached".<sup>122</sup>

82. The Panel in *EC and certain member States – Large Civil Aircraft (Article 21.5 – EU)*, in discussing what constitutes an "ongoing" or "continued lost sale", recalled earlier Appellate Body findings that "there would need to be some indication that subsequent developments following the initial order confirm the ongoing existence of such market phenomena[]" and that "[t]he continued lost sale must also be found to be 'significant' within the meaning of Article 6.3(c)".<sup>123</sup> On this basis, the Panel found that:

"[P]resently outstanding deliveries in the LCA industry stemming from a previous lost sale are, by themselves, insufficient to establish that a significant lost sale within the meaning of Article 6.3(c) of the SCM Agreement is presently ongoing such that a responding party could have a continued compliance obligation to 'remove' that particular lost sale within the meaning of Article 7.8 of the SCM Agreement. Rather, something more must be shown, relating to the 'nature, timing, and scope of those underlying transaction' [sic.], further indicating that it would be proper to consider the lost sale as presently ongoing."<sup>124</sup>

#### **1.3.5.6 "in the same market"**

83. The Appellate Body agreed with the interpretation of the Panel in *US – Upland Cotton* that the phrase "same market" can also refer to "a world market" for the purposes of a claim of significant price suppression pursuant to Article 6.3(c) of the SCM Agreement if the facts on the case warrant such a determination.<sup>125</sup> The Appellate Body agreed with the Panel that the ordinary meaning of the word "market" in Article 6.3(c) "neither requires nor excludes the possibility of a national market or a world market"<sup>126</sup> when read in the immediate context of the other three subparagraphs of Article 6.3, which contrastingly place a geographical limitation on the scope of the relevant market.

84. With respect to the issue of when two products can be considered as being "in the same market" within the meaning of Article 6.3(c) of the SCM Agreement, the Appellate Body in *US – Upland Cotton* explained that it would depend on the competitive nature of the subsidized product at issue:

"However, recalling that one accepted definition of 'market' is 'the area of economic activity in which buyers and sellers come together and the forces of supply and demand affect prices', it seems reasonable to conclude that two products would be in the same market if they were engaged in actual or potential competition in that market. Thus, two products may be 'in the same market' even if they are not necessarily sold at the same time and in the same place or country. As the Panel correctly pointed out, the scope of the 'market', for determining the

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<sup>120</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 1052 (referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1214).

<sup>121</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 1230.

<sup>122</sup> Decision by the Arbitrator, *EC and certain member States – Large Civil Aircraft (Article 22.6 – EU)*, para. 6.100.

<sup>123</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 7.438.

<sup>124</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 7.439.

<sup>125</sup> Appellate Body Report, *US – Upland Cotton*, para. 410.

<sup>126</sup> Appellate Body Report, *US – Upland Cotton*, para. 406.

area of competition between two products, may depend on several factors such as the nature of the product, the homogeneity of the conditions of competition, and transport costs. This market for a particular product could well be a 'world market'. However, we agree with the Panel that the fact that a world market exists for one product does not necessarily mean that such a market exists for every product. Thus the determination of the relevant market under Article 6.3(c) of the *SCM Agreement* depends on the subsidized product in question. If a world market exists for the product in question, Article 6.3(c) does not exclude the possibility of this 'world market' being the 'same market' for the purposes of a significant price suppression analysis under that Article.

... As we have explained above, there is no *per se* geographical limitation of a market under Article 6.3(c). It could well be a national market, a world market, or any other market. It is for the complaining party to identify the market where it alleges significant price suppression and to establish that that market exists. In doing so, it is for the complaining party to establish that the subsidized product and its product are in actual or potential competition in that alleged market. If that market is established to be a 'world market', it cannot be said, for that reason alone, that the two products are not in the 'same market' within the meaning of Article 6.3(c).<sup>127</sup>

85. The European Communities in *Korea – Commercial Vessels* argued that "nothing in Article 6.3(c) would preclude defining the 'world' market as the 'same market' for purposes of price suppression/price depression analysis."<sup>128</sup> By contrast, Korea argued that 'the same market' can only refer to a national market, not to the world market. The Panel noted that Article 6.3(c) "places no geographic limitations on the concept of 'the same market':

"We find no basis in the text to construe this term as exclusively referring to 'national markets'. Nor are we persuaded that the explicit references to particular national markets in Articles 6.3(a) and 6.3(b), and the explicit reference to the 'world market' in Article 6.3(d) mean, by implication, that 'the same market' in Article 6.3(c) can only be a national market.

... Given the very specific and carefully crafted references to particular geographic markets in the other subparagraphs of Article 6.3, we do not find it plausible that the absence of such a reference in Article 6.3(c) either was the result of an oversight by the drafters, or was intended to imply that the market in question could only be a national one."<sup>129</sup>

Our view is consistent with the approach taken in the two GATT *Sugar* disputes, and the *US – Upland Cotton* dispute, in all of which serious prejudice was found based on suppression or depression of world market prices."<sup>130</sup>

86. The Panel in *Korea – Commercial Vessels* then stated, "however defined, to be 'the same market,' the market in question must be one in which the EC and Korea compete for sales of commercial vessels of particular types." In this regard, it said, "it would seem to be for the EC first to substantiate the geographic scope in which it alleges that the European and Korean industries compete in respect of each of the three types of commercial vessels, rather than necessarily having to prove as a general matter that the overall market for commercial vessels is a global market."<sup>131</sup>

87. In *EC and certain member States – Large Civil Aircraft*, the Appellate Body elaborated on the concept of a "market":

"An examination of the competitive relationship between products is therefore required so as to determine whether such products form part of the same market. We

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<sup>127</sup> Appellate Body Report, *US – Upland Cotton*, paras. 408-409.

<sup>128</sup> Panel Report, *Korea – Commercial Vessels*, para. 7.562.

<sup>129</sup> Panel Report, *Korea – Commercial Vessels*, para. 7.564.

<sup>130</sup> Panel Report, *Korea – Commercial Vessels*, para. 7.565.

<sup>131</sup> Panel Report, *Korea – Commercial Vessels*, para. 7.566.

conclude therefore that a 'market', within the meaning of Articles 6.3(a) and 6.3(b) of the *SCM Agreement*, is a set of products in a particular geographical area that are in actual or potential competition with each other. An assessment of the competitive relationship between products in the market is required in order to determine whether and to what extent one product may displace another. Thus, while a complaining Member may identify a subsidized product and the like product by reference to footnote 46, the products thereby identified must be analyzed under the discipline of the product market so as to be able to determine whether displacement is occurring. Ordinarily, the subsidized product and the like product will form part of a larger product market. But it may be the case that a complainant chooses to define the subsidized and like products so broadly that it is necessary to analyze these products in different product markets. This will be necessary so as to analyze further the real competitive interactions that are taking place, and thereby determine whether displacement is occurring.

Our interpretation is consistent with the fundamental economic proposition that a market comprises only those products that exercise competitive constraint on each other. This is the case when the relevant products are substitutable. Although physical characteristics, end-uses, and consumer preferences may assist in deciding whether two products are in the same market, they should *not* be treated as the exclusive factors to consider in deciding whether those products are sufficiently substitutable so as to create competitive constraints on each other. Indeed, whether two products compete in the same market is not determined simply by assessing whether they share particular physical characteristics or have the same general uses; it may also be relevant to consider whether customers demand a range of products or whether they are interested in only a particular product type. In the former case, when customers procure a range of products to satisfy their needs, this may give an indication that all such products could be competing in the same market.

Demand-side substitutability—that is, when two products are considered substitutable by consumers—is an indispensable, but not the only relevant, criterion to consider when assessing whether two products are in a single market. Rather, a consideration of substitutability on the supply-side may also be required. For example, evidence on whether a supplier can switch its production at limited or prohibitive cost from one product to another in a short period of time may also inform the question of whether two products are in a single market.

Our analysis is supported by Appellate Body jurisprudence. In *US – Upland Cotton*, the Appellate Body defined a 'market' as 'the area of economic activity in which buyers and sellers come together and the forces of supply and demand affect prices', and considered that 'two products would be in the same market if they were engaged in actual or potential competition in that market'. The Appellate Body also agreed with the panel in that case that 'the scope of the 'market', for determining the area of competition between two products, may depend on several factors such as the nature of the product, the homogeneity of the conditions of competition, and transport costs.' While the Appellate Body was, in that case, considering a claim of price suppression under Article 6.3(c) of the *SCM Agreement*, we believe that similar considerations would also be relevant in assessing claims of serious prejudice brought under the remainder of Article 6.3, including Articles 6.3(a) and 6.3(b). This is consistent with the fact that each of the subparagraphs of Article 6.3 is concerned with the effects of a subsidy in a market. In the absence of actual or potential competition between two products in the marketplace, we fail to see how the effect of a subsidy provided to one of those products could be found to be the displacement of the other product.

In sum, we conclude, therefore, that the scope of the 'market' to be examined for the purposes of Articles 6.3(a) and 6.3(b) of the *SCM Agreement* is likely to vary from case to case depending upon the particular factual circumstances, including the nature of the products at issue, as well as demand-side and supply-side factors. It should be emphasized that the scope of the relevant product market in any given case will depend on the nature and degree of competition between the products of the complaining Member and the allegedly subsidized products of the responding Member. In some cases, the entire product range offered by the complainant may compete with the range of products of the respondent

that is allegedly subsidized. In other cases, an assessment of the conditions of competition may reveal the existence of multiple product markets in which particular products of the complaining Member compete with particular subsidized products of the respondent. However, it is important to note that whether or not a broad or narrow range of products benefit from subsidization says little about whether all these products compete in the same market. Indeed, products benefiting from subsidies may compete in very different markets. A panel is therefore required to make an objective assessment of the competitive relationship between specific products in the marketplace and to define the relevant product market in order to determine whether particular products can be treated as forming part of a single product market or several product markets for purposes of an analysis of displacement under Articles 6.3(a) and 6.3(b)."<sup>132</sup>

88. The Appellate Body in *US – Large Civil Aircraft (2<sup>nd</sup> complaint)* recalled these findings made in *EC and certain member States – Large Civil Aircraft* and summarized the geographic dimension of a market as follows:

"In principle, the manner in which the geographic dimension of a market is determined will depend on a number of factors: in some cases, the geographic market may extend to cover the entire country concerned; in others, an analysis of the conditions of competition for sales of the product in question may provide an appropriate foundation for a finding that a geographic market exists *within* that area, for example, a region. There may also be cases where the geographic dimension of a particular market exceeds national boundaries or could be the world market."<sup>133</sup>

89. The Panel in *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)* recalled the Appellate Body's findings in the original proceedings implying that, to show serious prejudice under Article 6.3 of the SCM Agreement, the complainant, as a threshold matter, must demonstrate that the products in question are "like", that is, they compete in the same market:

"The Appellate Body findings reveal that in order to show that a 'subsidized product' causes serious prejudice to a 'like product' for the purpose of making out a claim under Article 6.3 of the SCM Agreement, it must first be demonstrated that the two products in question are in actual or potential competition. Thus, a key *threshold* question that will need to be addressed in serious prejudice disputes will be the extent to which the 'subsidized product' and the 'like product' compete in the same product market. Where a complainant cannot demonstrate that these two products compete in the same product market, it will be unable to substantiate a claim of serious prejudice. In other words, a finding that the two products are in separate product markets will imply that those products are so distinct from one another, and that the competitive relationship between them is so remote that, *as a matter of law*, any degree or amount of subsidization of a respondent's product cannot logically cause serious prejudice to the complaining Member's interests through its effects on the complainant's product. Thus, the Appellate Body's ruling appears to imply that the identification of relevant product markets will be a critical, and potentially decisive, part of the analysis that will have to be undertaken in all serious prejudice disputes."<sup>134</sup>

90. The Panel in *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)* further noted that while the Appellate Body had "explicitly declined to make any findings with respect to the relevant product markets for the purpose of the original proceeding, it ... appear[s] to have provided a degree of guidance on how such markets might be identified."<sup>135</sup> The Panel explained:

"The Appellate Body explained that 'two products would be in the same market if they were engaged in actual or potential competition in that market'. The Appellate Body clarified that this would be the case when two products are 'sufficiently substitutable

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<sup>132</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1119-1123.

<sup>133</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 1076 (referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1117).

<sup>134</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1161.

<sup>135</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1168.

so as to create competitive constraints on each other'. Although the Appellate Body did not explicitly qualify the nature or degree of competitive constraints that need to be present in order to conclude that two products are substitutable, it did refer with approval to the views of one particular commentator who explains that the relevant market for the purpose of competition policy should consist of 'the set of products (and geographical areas) that exercise *some* competitive constraint on each other'. Moreover, the Appellate Body also explained that where the evidence shows that the competitive relationship is not direct and 'at most, indirect or remote', this must be properly taken into account in the analysis."<sup>136</sup>

91. In *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, the Panel rejected the European Union's argument that the Appellate Body's statements in the original proceeding suggested that "a complainant bringing a serious prejudice complaint *must* identify the relevant product markets by using evidence that is 'rooted in' *quantitative analyses*."<sup>137</sup>

92. The Panel in *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)* disagreed with the European Union's view that the Appellate Body in the original proceeding had suggested for two products to be considered in the same product market, a complainant must show those products exercise significant competitive constraints on one another. Rather, in rejecting this interpretation, the Panel stressed that in defining product markets in serious prejudice cases, the distorting impact of the subsidies on competition between different products should be taken into account. The Panel explained:

"[W]e can see no textual basis for interpreting the word 'market' that appears in Article 6.3(a), (b) and (c) of the SCM Agreement in a way that would mean that 'serious prejudice' could only ever be found to exist in the context of product markets where there is vigorous ('significant' or 'close') competition, as opposed to markets where competition between products is relatively weak or, in certain circumstances, even markets where strong competitive constraints are imposed by one product on one or more other products, which themselves impose little, if any, competitive constraint on the stronger competitor. In this regard, it is important to recall that the fundamental purpose of identifying relevant product markets in a serious prejudice dispute is to determine whether certain specific trade effects have been caused by the use of subsidies. In our view, the fact that the competitive relationships examined for this purpose may have been shaped by the very subsidies that are claimed to cause adverse trade effects implies that it may be necessary, depending upon the circumstances, to account for the distorting impact of those subsidies in the assessment of relevant product markets. Otherwise, as already noted, the adverse trade effects of a subsidy that transforms an otherwise vigorous competitive relationship into one of no competition at all or competition that is insignificant could never be addressed under the disciplines of Articles 5 and 6 of the SCM Agreement; and WTO Members would be left without a remedy under the SCM Agreement against the use of subsidies to marginalize or completely eradicate the ability of a like product to compete in international trade."<sup>138</sup>

93. The Panel in *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, applying the above considerations to the large civil aircraft (LCA) market at issue, concluded that the LCA market was an effective Airbus-Boeing duopoly:

"[T]he LCA industry today continues to be an effective Airbus-Boeing duopoly, with each producer having a comparable range of aircraft to offer potential customers, and where competition takes place between these two players at different levels, including with respect to price, technology and the timing and availability of new and improved aircraft, reflecting the complex and often idiosyncratic nature of aircraft demand."<sup>139</sup>

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<sup>136</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1169.

<sup>137</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 6.1178 and 6.1208.

<sup>138</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1211.

<sup>139</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1223.

94. The Panel in *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)* then proceeded to assess the United States' argument that there were three product markets, namely, single-aisle LCA, twin-aisle LCA, and very large aircraft (VLA). The Panel concluded that the United States showed the existence of each of these three product markets.<sup>140</sup>

### 1.3.6 Article 6.3(d)

#### 1.3.6.1 "increase in the world market share"

95. In *US – Upland Cotton*, the Appellate Body decided to exercise judicial economy regarding the interpretation of the phrase "world market share" in Article 6.3(d) of the SCM Agreement. The Panel had found that it did not refer to either a Member's share of the world market for exports as argued by Brazil, nor did it refer to all consumption of upland cotton by a Member as contended by the United States; rather, the phrase referred to the "share of the world market supplied by the subsidizing member of the product concerned".<sup>141</sup> In finding that Brazil had failed to establish a prima facie case of violation of Article 6.3(d) constituting serious prejudice within the meaning of Article 5(c) of the SCM Agreement due to its erroneous legal interpretation of the phrase "world market share", the Panel emphasized that this interpretation of the ordinary meaning of the phrase read in its context and in light of the object and purpose of the subsidy disciplines set out in the SCM Agreement "is clear and unambiguous" and additionally, is confirmed by the drafting history of the provision.<sup>142</sup>

### 1.3.7 Relationship with other provisions of the SCM Agreement

#### 1.3.7.1 Article 5

96. The Appellate Body in *US – Large Civil Aircraft (2<sup>nd</sup> complaint)* noted that Articles 5, 6.2 and 6.3 require the showing of a causal link between a subsidy and its effects:

"A plain reading of the language of Article 5 ('No Member should *cause*, through the use of any [specific subsidy] ... (c) serious prejudice to the interests of another Member'); of Article 6.2 ('serious prejudice shall not be found if the subsidizing Member demonstrates that the subsidy in question has not *resulted in* any of the *effects* enumerated in [Article 6.3]'); and of Article 6.3 (which provides that serious prejudice may arise when 'the *effect* of the subsidy' is one or more of the market phenomena listed in that provision) makes clear that, in disputes involving claims under Part III of the *SCM Agreement*, a complainant must demonstrate not only the existence of the relevant subsidies and the adverse effects to its interests, but also that the subsidies at issue have *caused* such effects."<sup>143</sup>

### 1.4 Article 6.4

97. The Appellate Body in *US – Large Civil Aircraft (2<sup>nd</sup> complaint)* noted that Article 6.4 of the SCM Agreement applies to "both phenomena referred to in Article 6.3(a) and (b)".<sup>144</sup>

98. In *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, the Panel addressed the relationship between Articles 6.3(b) and 6.4 of the SCM Agreement. The European Union contended that, for the United States to make out its claim under Article 6.3(b), the United States must demonstrate that its allegedly displaced or impeded product in a relevant third-country market is a "non-subsidized like product".<sup>145</sup> The Panel acknowledged that should Article 6.4 be the exclusive means through which Article 6.3(b) claims be made out, then the European Union's argument would prevail. However, the Panel disagreed and recalled that the original panel had clarified that Article 6.4 does not provide the exclusive means to demonstrate the effect of

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<sup>140</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 6.1292, 6.1370, and 6.1410.

<sup>141</sup> Panel Report, *US – Upland Cotton*, para. 7.1464.

<sup>142</sup> Panel Report, *US – Upland Cotton*, para. 7.1455.

<sup>143</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 913.

<sup>144</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 1086.

<sup>145</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1129.

subsidization within meaning of Article 6.3(b). The Panel also noted that the European Union had put forward two additional reasons that the original panel's findings should be revisited:

"[T]he original panel agreed with the United States that Article 6.4 does not set out the 'exclusive basis' on which to establish Article 6.3(b) serious prejudice claims. In particular, the original panel found 'nothing in the text of Article 6.4, or in its object and purpose, ... {to} suggest that the analysis set out therein is the exclusive means of demonstrating displacement or impedance of exports for purposes of Article 6.3(b)'.<sup>146</sup> The panel explained that the use of the phrase 'shall include' in Article 6.4 indicates that 'there may be other circumstances not set out in Article 6.4, in which a Member could demonstrate displacement or impedance for purposes of Article 6.3(b)'. Thus, the panel concluded that '{r}ather than limiting the circumstances in which Article 6.3(b) may be satisfied, we read Article 6.4 as simply setting out additional guidance for the application of Article 6.3(b) in certain particular circumstances'."

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The European Union did not appeal the original panel's findings on this point; and the panel report, as modified by the Appellate Body in relation to other matters, was adopted by the DSB. Notwithstanding these facts, the European Union argues that the Panel in this compliance dispute should rule on what is essentially the same legal question that was resolved in the original proceeding and/or review and modify the original panel's legal findings. To this end, we understand the European Union's submissions to raise the following two threshold questions: (i) whether the fact that there has been a multilateral finding of subsidization in *US – Large Civil Aircraft (2<sup>nd</sup> complaint)* means that there is a new "matter" that must be addressed in this compliance proceeding; and (ii) whether there are "cogent reasons" to review the original panel's interpretation of the relationship between Articles 6.3(b) and 6.4 of the SCM Agreement that formed the basis of the relevant legal findings adopted by the DSB in the original proceeding."<sup>147</sup>

99. The Panel in *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)* then turned to each of the European Union's arguments that the original panel's findings on the relationship between Article 6.4 and 6.3(b) should be revisited. First, the Panel rejected the European Union's argument that there was a multilateral finding that Boeing was subsidized because "the extent to which Boeing ... [was] subsidized played no role at all in the original panel's legal analysis, which was ultimately decisive."<sup>148</sup> Next, the Panel rejected the European Union's second argument, on the basis that it would be a "legal error" for a compliance panel to reopen the original panel's findings that were not appealed in the original proceeding and, became part of the DSB's recommendations and rulings.<sup>149</sup>

100. In any case, if it were legally permissible to review findings from the original proceeding that were neither appealed nor adopted by the DSB, the Panel in *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)* found that the grounds advanced by the European Union did not constitute "cogent reasons" to review such findings.<sup>150</sup> To begin, the Panel reasoned that a panel is "entitled to make an objective assessment of the matter on the basis of its own legal reasoning that does not necessarily follow the arguments of the parties and third parties". Consequently, the Panel disagreed with the European Union's first argument — that the original panel's legal reasoning did not reflect the parties' arguments but appeared for the first time in the original panel's report — to justify reviewing a panel's unappealed findings.<sup>151</sup> Next, the Panel addressed the European Union's second ground that the legal basis of the original panel's finding concerned the issue of "causation" and would thereby merit review. Rather, the Panel clarified that "it was the original panel's interpretation of the relationship between Articles 6.3(b) and 6.4 that enabled it to decide the relevant question ... [of] whether Article 6.4 is the exclusive means

<sup>146</sup> (footnote original) Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.1763-7.1769.

<sup>147</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 6.1129 and 6.1131.

<sup>148</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1136.

<sup>149</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1142.

<sup>150</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1143.

<sup>151</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1147.

through which to demonstrate serious prejudice within the meaning of Article 6.3(b)."<sup>152</sup> Finally, the Panel rejected the remaining grounds presented by the European Union and explained why they did not constitute cogent reasons:

"In our view, the European Union's submissions articulate reasons why the European Union *disagrees* with the original panel's findings concerning the relationship between the relevant provisions and certain 'other related matters referenced' in the panel report. We note that a number of the points made by the European Union were already raised and dismissed during the original panel proceeding. To the extent that they were not, the European Union's submissions appear to be arguments that a party might raise in an appeal of a legal interpretation before the Appellate Body – which this compliance Panel is not. The fact that a party disagrees with a legal interpretation developed by an original panel, that has not been appealed and was the subject of adopted DSB recommendations and rulings, cannot be a 'cogent reason' for a compliance panel in the same dispute to reopen those findings."<sup>153</sup>

101. In *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, the Appellate Body first found that the Panel had breached its duties under Article 11 of the DSU by refusing to give full consideration to the specific facts and circumstances of the present case and to the legal arguments raised by the parties to the dispute. Accordingly, the Appellate Body declared moot and of no legal effect the Panel's finding concerning the European Union's reliance on Article 6.4 to reject the United States claims under Article 6.3(b) of the SCM Agreement.<sup>154</sup>

102. Thereafter, the Appellate Body in *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)* proceeded to address the European Union's arguments regarding the relationship between Article 6.3 (b) and Article 6.4. The Appellate Body noted that the issues raised by the European Union on appeal related to two fundamental questions: "(i) what is the role of Article 6.4 for the purposes of serious prejudice claims asserted under Article 6.3 (b) including whether Article 6.4 can be considered as providing an exclusive pathway for demonstrating displacement or impedance of exports in a third country market for purposes of Article 6.3 (b) and (ii) to what extent, if any, should the subsidization of the like product be taken into account in an adverse effects analysis under Article 6.3 (b)?"<sup>155</sup>

103. Starting with the text of Article 6.3(b), the Appellate Body in *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)* noted that Article 6.3(b) speaks to the question of whether there is a causal relationship between the challenged subsidy and its effects. In turn, Article 6.4 speaks more directly to the relevant market phenomenon caused by the subsidy, that is, the displacement or impeding of exports. Noting the distinct function of each provision, the Appellate Body disagreed with the European Union's argument that "where a complainant raises claims under both Article 6.3(a) and Article 6.3(b), it would be required to demonstrate that its like product is non-subsidized for the purposes of any claim it brings under Article 6.3(b), but not for purposes of its claims under Article 6.3(a)."<sup>156</sup> The Appellate Body stated:

"[W]e note that Article 6.3(b) provides that serious prejudice within the meaning of Article 5(c) of the SCM Agreement may arise when 'the effect of the subsidy is to displace or impede the exports of a like product of another Member from a third country market'. Article 6.3(b) thus speaks to the question of whether there is a 'causal relationship' between the challenged subsidy and its effects. Article 6.4, in turn, speaks more directly to the relevant market phenomenon caused by the subsidy, that is, 'the displacement or impeding of exports'.

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<sup>152</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1151.

<sup>153</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1153.

<sup>154</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.443.

<sup>155</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.445.

<sup>156</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.449.



We do not read Article 6.4 as dispensing with the requirement to assess causation – i.e. whether any change in relative shares of the market to the disadvantage of the non-subsidized like product is the 'effect of the subsidy' in question. Given that Article 6.4 contemplates a finding of 'the displacement or impeding of exports' to be made '{f}or the purpose of' Article 6.3(b), it would appear that the required nexus between the subsidy and the relevant effects must be demonstrated on the basis of an evaluation of whether the former amounts to a genuine and substantial cause of the latter. Thus, rather than indicating that a complainant would not be required to demonstrate a 'causal link' between the subsidy and its effects to the extent that it has shown that its like product is not subsidized, as the original panel appears to have suggested, Article 6.4 provides guidance as to *how* displacement or impendance of exports can be demonstrated to exist in particular cases or situations.

...

While we agree with the European Union that Article 6.4 is context for a proper interpretation of Article 6.3(b), we do not consider that it follows from this that a complainant is required in each case to demonstrate that its like product is non-subsidized to establish the existence of displacement or impendance under Article 6.3(b)."<sup>157</sup>

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Current as of: December 2022

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<sup>157</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 5.446, 5.448 and 5.452.