1 ARTICLE 6 1
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

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[14] of a product exceeding 5 per cent[15];

(*footnote original*)[14] The total ad valorem subsidization shall be calculated in accordance with the provisions of Annex IV.

(*footnote original*)[15] Since it is anticipated that civil aircraft will be subject to specific multilateral rules, the threshold in this subparagraph does not apply to civil airciv1h

FMee LtheD Lp

subparagraphs (a)-(d) of Article 6.3." Furthermore, it viewed the word "may" as a cross-reference to "significant" in Article

> 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."[18]

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 …

n op a (n)6-s7 1d7 c3 [(pTJ.76 8(n.7 1d7d- ").)]T4p1maTJui48 wsa1(n

addressed some of the same or similar factors in its reasoning as to

of doing so, will de

[32] 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

considered that it was "not necessary to undertake a comprehensive evaluation of factors affecting the world market price for upland cotton"

22. Having adopted a "but for" test for causation (see paragraph 281 above), the Panel in *US – Upland Cotton (Article 21.5 – Brazil)* [34]:

> "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."[35]

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

In this case, the Panel justified its choice of a two-step approach by stating that 'the arguments and evide

> 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."[50]

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 adjudicaenc

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."[59]

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. "[60]

39. In addressing the issue of whether the effect of a subsidy may continue beyond the year in

> 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."[61]

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."[62]

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".[63] 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 i-4q10.3 (g y (o7do,-15di)-7 (ssu)5.3 (

> 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." h o n

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

44.

47. On appeal, the Ap

> 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."[71]

48. In *US – Large Civil Aircraft (2nd 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".[72] 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."[73]

49. In *US – Large Civil Aircraft (2nd complaint)*, the Appellate Body pointed out that there are "at least two ways"[74] 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*.[75] 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."[76]

---

[71] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1377-1379.

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

[73] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 1284.

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

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

[76] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 1290.

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

"[A] panel a[u] [A] [Arte70 Twgd[(S)7 (an)t[(f)5hc 03San[A[A] nf] a45 [([u)-d( )Tj7 (an)asupan[Artf[u[Aan[

> 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)."[80]

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."[81]

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".[82] 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

product of the complaining Member would have expanded had they not been

– *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".[100] Accordingly, the Panel examined the ordinary meaning of word "significant" and its relevant context in finding that the United State

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 impor(n)-1 (in)12.3 (gy.1 (s)7 (b)2)6.9 (tr

do not increase when they otherwise would have) or they do actually increase, but the increase is less than it otherwise would have been."[111]

73. The Appellate Body in *US – Large Civil Aircraft (2nd complaint)* recalled its analysis in *US – Upland Cotton (Article 21.5 ii* Td ( )Tj T4.347 0 Tdr[(an)-8 .(S)]TJ 1 0 Tc[Tc-180 (-1w 4.4 0 Tc1( )]T76.4 0 T (,004 Tc -0.004 Tw)m (111)Tj EMC /LBody

assessmen

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'.

o n 7 . 3

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

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 geographical0.7 ()i rerd

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

subsidization

through which to demonstrate serious prejudice within the meaning of Article 6.3(b)."[152] 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 Ans s (e)2 (ta)20.l(p)2.3 (r)198.6 (p)-4e424

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 originalnts 2s6 T2.60.213 0 Tdp (a)5 (n)-2 (e)13. (a