contingent upon the use of domestic over imported goods. The Appellate Body distinguished these two situations as follows:

> "We recall that, by its terms, Article 3.1(b) does not prohibit the subsidization of domestic 'production' per se but rather the granting of subsidies contingent upon the 'use', by the subsidy recipient, of domestic over imported goods.[3] Subsidies that relate to domestic production are therefore not, for that reason alone, prohibited under Article 3 of the SCM Agreement.[4] We note in this respect that such subsidies can ordinarily be expected to increase the supply of the subsidized domestic goods in the relevant market, thereby increasing the use of these goods downstream and adversely affecting imports, without necessarily requiring the use of domestic over imported goods as a condition for granting the subsidy."[5]

1.3 "Except as provided in the Agreement on Agricultur e"

3. In US – Upland Cotton, the Appellate Body noted that the introductory phrase "[e]xcept as provided in the Agreement on Agriculture" applies to both paragraphs (a) and (b) of paragraph 1 of Article 3, which deal with both export subsidies and import substitution subsidies, respectively. However, the Appellate Body found no provision in the Agreement on Agriculture that dealt specifically with import substitution subsidies:

> "We are mindful that the introductory language of Article 3.1 of the SCM Agreement clarifies that this provision applies '[e]xcept as provided in the Agreement on Agriculture'. Furthermore, as the United States has pointed out, this introductory language applies to both the export subsidy prohibition in paragraph (a) and to the prohibition on import substitution subsidies in paragraph (b) of Article 3.1. As we explained previously, in our review of the provisions of the Agreement on Agriculture relied on by the United States, we did not find a provision that deals specificallyi

export performance. Such conditionality can also be derived by necessary impli

Article 3.1(a) also includes footnote 4, which states that the standard of 'in fact' contingency is met if the facts demonstrate that the subsidy is 'in fact tied to actual or

face, that a subsidy is 'contingent … in fact … upon export performance'. Instead, the existence of the relationship of contingency, between the subsidy and export performance, must be inferred from the total configuration of the facts constituting and surrounding the granting of the subsidy, none of which on its own is likely to be decisive in any given case." [22]

15. The Appellate Body in Canada –

of the grant of … contributions to the … industry is indeed such an expectation, in the form of projected export sales anticipated to 'flow' directly from these contributions."[26]

17. The Panel in Canada – Aircraft Credits and Guarantees considered that a Member's awareness that its domestic market is too small to absorb its domestic production of a subsidized product "may indicate" that the subsidy is granted upon export performance. However, after referring to statements by the Appellate Body in Canada – Aircraft[27], the Panel clarified that even if a Member was to anticipate that exports would result from the grant of a subsidy, such anticipation "alone is not proof that the granting of the subsidy is tied to the anticipation of exportation" within the meaning of the footnote 4 to Article 3.1(a).[28]

18. In EC and certain member States – Large Civil Aircraft, the Appellate Body established the following "Export Inducement Test" for determining whether a subsidy is de facto contingent on export performance:

> "The existence of de facto export contingency, as set out above, 'must be inferred from the total configuration of the facts constituting and surrounding the granting of the subsidy', which may include the following factors: (i) the design and structure of the measure granting the subsidy; (ii) the modalities of operation set out in such a measure; and (iii) the relevant factual circumstances surrounding the granting of the subsidy that provide the context for understanding the measure's design, structure, and modalities of operation."[29]

19. However, the Appellate Body in EC and certain member States – Large Civil Aircraft also suggested that, where relevant evidence exists, an assessment could be based on ratios:

> "Moreover, where relevant evidence exists, the assessment could be based on a comparison between, on the one hand, the ratio of anticipated export and domestic sales of the subsidized product t

issue on the basis of other evidence, such as the design, structure and modalities of operation of the challenged measure, in cases where the evidence required to perform a Ratios Analysis does not exist."[31]

21. The Appellate Body emphasized that the test for determining whether a subsidy is de facto contingent on export performance is an objective one, and addressed the relevance of a government's reasons for granting a subsidy:

"The standard for determining whether the granting of a subsidy is 'in fact tied to … anticipated exportation' is an objective standard, to be established on the basis of the total configuration of facts constituting and surrounding the granting of the subsidy, including the design, structure, and modalities of operation of the measure granting the subsidy. Indeed, the conditional relationship between the granting of the subsidy and export performance must be objectively observable on the basis of such evidence in order for the subsidy to be geared to induce the promotion of future export performance by the recipient. The standard for de facto export contingency is therefore not satisfied by the subjective motivation of the granting government to promote the future export performance of the recipient. In this respect, we note that the Appellate Body and panels have, on several occasions, cautioned against undue reliance on the intent of a government behind a measure to determine the WTO-consistency of that measure. The Appellate Body has found that 'the intent, stated or otherwise, of the legislators is not conclusive' as to whether a measure is consistent with the covered agreement. In our view, the same understanding applies in the context of a determination on export contingency, where the requisite conditionality between the subsidy and anticipated exportation under Article

> Third, we evaluate whether the United States has demonstrated that the granting of such subsidies was tied to, or contingent upon, such anticipation." [34]

23. The Panel in EC and certain member States – Large Civil Aircraft (Article 21.5 – US) then undertook its analysis. First, the Panel recalled that, earlier in the Report, it had found each of the measures to be specific subsidies within meaning of Article 3.1(a) of the SCM Agreement. [35] Second, the Panel "detect[ed] no reason to on the record of this compliance proceeding" that called into the question the finding of the original panel, as affirmed by the Appellate Body, that the A380 LA/MSF contracts were granted in anticipation of exportation or export earnings [36]; and, relatedly, the Panel recalled that the original panel and Appellate Body both had found that the

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this matter, and resonates with relevant considerations regarding the design and structure of the SCM Agreement and the inherent characteristics of a Ratios Analysis." [43]

28. Having concluded that a Ratios Analysis alone cannot determine a de facto export contingency, the Panel in EC and certain member States – Large Civil Aircraft (Article 21.5 – US) proceeded to evaluate the evidence submitted by the United States. It concluded that the United States had not submitted sufficient evidence to make a prima facie case that the contested subsidy programs were contingent upon export perf11.3 (22y. ( )-1 0 Tw 2.24 0 Td ( )Tj.3 126e)2 (d)2.3 (2.3 (m)19 17.6 (t)-20 -0.0 -0.003.

31. The Panel in Canada – Aircraft, in a finding expressly endorsed by the Appellate Body [47], confirmed this broad and case-by-case approach to the factual analysis of the Panel in Australia – Automotive Leather II. While it also emphasized that no factual considerations should automatically prevail over others, it pointed out that its finding that a broad range of facts should be considered as relevant did not mean that the de facto export contingency standard is easily met:

> "In our view, no fact should automatically be rejected when considering whether the facts demonstrate that a subsidy would not have been granted but for anticipated exportation or export earnings. We note that footnote 4 provides that the 'facts' must demonstrate de facto export contingency. Footnote 4 therefore refers to 'facts' in general, without any suggestion that certain factual considerations should prevail over others. In our opinion, it is clear from the ordinary meaning of footnote 4 that any ___ fact could be relevant, provided it 'demonstrates' (either individually or in conjunction with other facts) whether or not a subsidy would have been granted but for anticipated exportation or export earnings. We consider that this is true of the export-orientation of the recipient, or of the reason for the grant of the subsidy, just as it is true of a host of other facts potentially surrounding the grant of the subsidy in question. In any given case, the relative importance of each fact can only be determined in the context of that case, and not on the basis of generalities.
>
> We would emphasise, however, that our finding that a broad range of facts could be relevant in this context does not mean that the de facto export contingency standard is easily met. On the contrary, footnote 4 of the SCM Agreement makes it clear that the facts must 'demonstrate' de facto export contingency. That is, de factoit inoCu3 ( )0.a7 (st)6.3 0.7 (S)10 (C

be exported to satisfy this condition, "then, the requirement of use outside the United States makes the grant of the tax benefit contingent upon export". [61]

40. The Appellate Body in US – FSC (Article 21.5 – EC) noted that its conclusion was not affected by the fact that the subsidy could also be obtained through production abroad, and that there was no export contingency in this second situation. The Appellate Body recalled:

> "[T]he measure at issue in the original proceedings in US – FSC contained an almost identical condition relating to 'direct use … outside the United States' for property produced in the United States. In that appeal, we upheld the panel's finding that the combination of the requirements to produce property in the United States and use it outside the United States gave rise to export contingency under Article 3.1(a) of the SCM Agreement. We see no reason, in this appeal, to reach a conclusion different from our conclusion in the original proceedings, namely that there is export contingency, under Article 3.1(a), where the grant of a subsidy is conditioned upon a requirement that property produced in the United States be used outside the United States.
>
> We recall that the ETI measure grants a tax exemption in two different sets of circumstances: (a) where property is produced within the United States and held for use outside the United States; and (b) where property is produced outside the United States and held for use outside the United States. Our conclusion that the ETI measure grants subsidies that are export contingent in the first set of circumstances is not affected by the fact that the subsidy can also be obtained in the second set of circumstances. The fact that the subsidies granted in the second set of circumstances might not be export contingent does not dissolve the export contingency arising in the first set of circumstances. Conversely, the export contingency arising in these circumstances has no bearing on whether there is an export contingent subsidy in the second set of circumstances. Where a United States taxpayer is simultaneously producing property within and outside the United States, for direct use outside the United States, subsidies may be granted under the ETI measure in respect of both sets of property. The subsidy granted with respect to the property produced within the United States, and exported from there, is export contingent within the meaning of Article 3.1(a) of the SCM Agreement, irrespective of whether the subsidy given in respect of property produced o

1.4.5.2 Article 27

42. The Panel in Brazil – Aircraft addressed the relationship between Articles 3.1(a), 27.2(b)

1.5 Article 3.1(b)

1.5.1 General

53. In Canada – Renewable Energy, the Appellate Body noted that Article 3.1(b) of the SCM Agreement "regulates so-called import-substitution subsidies, which are one of only two kinds of subsidies prohibited under the SCM Agreement". [70]

54. In US – Tax Incentives, the Appellate Body noted that Article 3.1(b) of the SCM Agreement does not prohibit the subsidization of domestic production per se but rather the granting of subsidies contingent upon the use of domestic over imported goods. The Appellate Body distinguished these two situations as follows:

> "We recall that, by its terms, Article 3.1(b) does not prohibit the subsidization of domestic 'production' per se but rather the granting of subsidies contingent upon the 'use', by the subsidy recipient, of domestic over imported goods. [71] Subsidies that relate to domestic production are therefore not, for that reason alone, prohibited under Article 3 of the SCM Agreement. [72] We note in this respect that such subsidies can ordinarily be expected to increase the supply of the subsidized domestic goods in the relevant market, thereby increasing the use of these goods downstream and adversely affecting imports, without necessarily requiring the use of domestic over imported goods as a condition for granting the subsidy." [73]

55. Based on the Appellate Body's prior findings, the Panel in EC and certain member States – Large Civil Aircraft (Article 21.5 – US) [illegible]

provide the context for understanding the measure's design, structure, and modalities of operation."[75]

1.5.2

1.5.2.4 Contingency

60.

> "In examining this issue, the Panel appears to have taken the view that the terms of Article 3.1(b), on their own, do not answer the question, and, therefore, it turned to the context provided by Article 3.1(a). In this respect, the Panel relied on the fact that, in Article 3.1(a), there is explicit language applying to subsidies contingent 'in law or in fact' while in Article 3.1(b) there is not. In the view of the Panel, the absence of such an explicit reference in the adjacent and closely-related provision of Article 3.1(b) indicates that the drafters intended Article 3.1(b) to apply only to those subsidies which are contingent 'in law' upon the use of domestic over imported goods.
>
> In our view, the Panel's analysis was incomplete. As we have said, and as the Panel recalled, 'omission must have some meaning.' Yet omissions in different contexts may have different meanings, and omission, in and of itself, is not necessarily dispositive. Moreover, while the Panel rightly looked to Article 3.1(a) as relevant context in interpreting Article 3.1(b), the Panel failed to examine other contextual elements for Article 3.1(b) and to consider the object and purpose of the SCM Agreement." [89]

65. Having found that the omission of an explicit reference to de facto contingency in Article 3.1(b) was not dispositive of the question whether Article 3.1(b) actually [illegible]

words, the existence of contingency under Article 3.1(b) is not limited to cases where the measure requires the recipient of the subsidy to use domestic goods to the "complete exclusion" of imported goods.[99]

71. Reiterating the legal standard it had articulated in US – Tax Incentives for Article 3.1(b) analysis, the Appellate Body in EC and certain member states - Large Civil Aircraft (Article 21.5 – US) explained that "the relevant question in determining the existence of contingency under Article 3.1(b) is not whether the eligibility requirements under a subsidy may result in the use of more domestic and fewer imported goods. Rather, the question is whether a condition requiring the use of domestic over imported goods can be discerned from the terms of the measure itself, or inferred from its design, structure, modalities of operation, and the relevant factual circumstances constituting and surrounding the granting of the subsidy that provide context for understanding the operation of these factors."[100]

72. The Appellate body in Brazil – Taxation reiterated the legal standard of contingency under Article 3.1(b), as analysed in Canada – Autos and US – Tax Incentives.[101] Even though the Panel did not expressly indicate whether it conducted a de jure oi.3 (s)14(a)18.3 (t)-2 tedu(a)]TJ 3.TJ /TT Tc 0 Tw 4.31J /TT3 1 T

> permitted under the Agreement on Agriculture, giving rise to a conflict, that measure would be WTO-consistent because the Agreement on Agriculture would prevail over the SCM Agreement. By contrast, if an export subsidy were prohibited under both the Agreement on Agriculture and the SCM Agreement, no conflict would arise, and the measure would be inconsistent with both Agreements.
>
> Consequently, the WTO-consistency of an alleged export subsidy for agricultural products has to be examined, in the first place, under the Agreement on Agriculture, followed by the SCM Agreement, if necessary." [103]

1.5.4.2 Article III of the GATT 1994

78. The Panel in EC and certain member States – Large Civil Aircraft (Article 21.5 – US) noted the "well established" practice that provisions of the GATT 1994, specifically Article III:8(b), may be considered relevant context when interpreting the SCM Agreement. The Panel recalled that the Appellate Body in Canada – Autos "specifically indicated that because Article III of the GATT 1994 and Article 3.1(b) of the SCM Agreement both discipline subsidies that are contingent on the use of domestic over imported goods a degree of consistency is called for in their interpretation." [104]

79. In addition, the Panel in EC and certain member States – Large Civil Aircraft (Article 21.5 in

obligation by virtue of Article III:8(b) may still be found to be contingent upon the use by those producers of domestic over imported goods under Article 3.1(b) of the SCM Agreement.[108]

82. Distinguishing import substitution subsidies from "subsidies that may relate to domestic production", the Appellate Body in EC and certain member States – Large Civil Aircraft (Article 21.5 – US) noted that although subsidies that relate to domestic production may foster the use of subsidized domestic goods and result in displacement in respect of imported goods, such effects do not, in and of themselves, demonstrate the existence of a requirement to use domestic over imported goods. The Appellate Body noted that the legal standard under Article 3.1(b) is "not whether conditions for eligibility and access to subsidy may result in the use of more domestic and fewer imported goods, but whether the measure reflects a condition requiring the use of domestic over imported goods".[109] The Appellate Body agreed with the Panel's reasoning that "basing the legal standard under Article 3.1(b) on the market effects of a subsidy would result in significantly blurring – and with respect to at least certain subsidies, potentially erasing – the line between the disciplines of Part II of the SCM Agreement [prohibited subsidies] and the effects-based disciplines on actionable subsidies contained in Part III of the SCM Agreement".[110]

83. The Appellate Body in Brazil – Taxation assessed the relationship between Article 3.1(b) and Article III:4 of the GATT 1994:

> "We note that the legal standard under Article 3.1(b) of the SCM Agreement is not the same as that under Article III:4 of the GATT 1994. In order to establish an inconsistency with Article 3.1(b) of the SCM Agreement, a measure must be 'contingent … upon the use of the domestic over imported goods'. By contrast, to find an inconsistency with Article III:4 of the GATT, it is sufficient that the measure at issue alters the conditions of competition to the detriment of the imported products by providing an incentive to use domestic goods. Establishing the existence of a contingency requirement to use domestic over imported products under Article 3.1(b) of the SCM Agreement is thus a more demanding standard than demonstrating that an incentive to use domestic goods exists under Article III:4 of the GATT 1994. Accordingly, while establishing that a measure provides an incentive to producers to use domestic goods would be sufficient to find an inconsistency with Article III:4 of the GATT 1994, it would not suffice to also find that the same measure is contingent upon the use of domestic over imported goods under Article 3.1(b) of the SCM Agreement.
>
> … [A]s long as the Panel made findings of inconsistency with Article III:4 due to the existence of a contingency requirement, as opposed to a mere incentive, to use domestic goods, it could rely on these findings as a basis for its findings of inconsistency with Article 3.1(b) of the SCM Agreement. However, if we were to find that the Panel relied in its analysis under Article 3.1(b) on findings it made under Article III:4 that merely establish the existg mea Tw -30 c4elmin

88. The Panel in Brazil – Aircraft, in a find

> "We therefore view this claim as wholly dependent upon our resolution of the claims under Article 3.1 of the SCM Agreement. Recalling our finding that the Act involves prohibited export subsidies in breach of Article 3.1(a) of the SCM Agreement by reason of the requirement of 'use outside the United States', we find that by maintaining the subsidies under the Act, the United States has acted inconsistently with its obligation under Article 3.2 of the SCM Agreement not to maintain subsidies referred to in paragraph 1 of Article 3 of the SCM Agreement." [123]

1.7 Relationship with other WTO Agreements

1.7.1.1 GATT 1994

92. In Canada – Autos, the Panel, after finding violations of Article III:4 of the GATT 1994 and Article XVII of the GATS, exercised judicial economy with respect to alternative claims under Article 3.1(a). The Appellate Body upheld this exercise of judicial economy:

> "In our view, it was not necessary for the Panel to make a determination on the … alternative claim relating to the CVA requirements under Article 3.1(a) … in order 'to secure a positive solution' to this dispute. The Panel had already found that the CVA requirements violated both Article III:4 of the GATT 1994 and Article XVII of the GATS. Having made these findings, the Panel, in our view, exercising the discretion implicit in the principle of judicial economy, could properly decide not to examine the alternative claim … that the CVA requirements are inconsistent with Article 3.1(a) of the SCM Agreement." [124]

1.7.1.2 Agreement on Agriculture

93. In Canada – Dairy (Article 21.5 – New Zealand and US), the Panel considered that Article 9.1 of the Agreement on Agriculture and Articles 1.1 and 3.1 of the SCM Agreement can be said to be "closely related" and "part of a logical continuum." Thus, the Panel considered that its reasoning regarding the claims made under Article 10.1 of the Agreement of Agriculture was equally relevant for the claims made under Articles 1.1 and 3.1of the SCM Agreement. The Panel noted that:

> "[T]he facts underlying the Article 9.1(c) and Article 10.1 claims are, in this case, fully co-extensive. The Panel believes that this conclusion also applies to the facts underlying the claims made under the Agreement on Agriculture, on the one hand, and those made under Articles 1.1 and 3.1 of the SCM Agreement, on the other. In addition, the Panel considers that Article 9.1 of the Agreement on Agriculture and Articles 1.1 and 3.1 of the SCM Agreement can be said to be 'closely related' and 'part of a logical continuum'. Thus, the Panel's reasoning set forth supra regarding the claims made under Article 10.1 of the Agreement on Agriculture is equally relevant for the claims made under Articles 1.1 and 3.1 of the SCM Agreement." [125]

94. The Appellate Body in Canada – Dairy (Article 21.5 – New Zealand and US), noted that with regard to agricultu(g)2.3 (0a 2.067 0 Td [(y)10.3 (()i0f)ee

clause, therefore, indicates that the WTO-consistency of an export subsidy for agricultural products has to be examined, in the first place, under the Agreement on Agriculture.

This is borne out by Article 13(c)(ii) of the Agreement on Agriculture, which provides that 'export subsidies tha