2 December 1977

EEC MEASURES ON ANIMAL FEED PROTEINS

Report of the Panel adopted on 14 March 1978
(L/4599 - 25S/49)

I. Introduction

1.1 In April 1976 the Council (C/M/113) was informed by the United States that the United States had entered into consultations with the EEC under Article XXIII:1 as a result of the implementation on 1 April 1976, of a compulsory purchase programme for skimmed milk powder by the EEC. On 15 July 1976 the United States referred this matter to the CONTRACTING PARTIES (C/M/115) in accordance with the provisions of Article XXIII:2, since it had not been possible, in intensive consultations with the Community, to reach a satisfactory solution of the trade issues involved.

1.2 At its meeting of 17 September 1976 (C/M/116), the Council agreed to establish a Panel with the following terms of reference:

> "To examine the complaint by the United States that the EEC import deposits and purchasing requirements affecting non-fat dry milk and certain animal feed proteins are not consistent with the EEC's obligations under the GATT, including the provisions of Articles I, II and III, and to make such findings as will assist the CONTRACTING PARTIES in making the recommendations or rulings provided for in paragraph 2 of Article XXIII".

1.3 The Chairman of the Council informed the Council of the agreed composition of the Panel on 2 March 1977 (C/M/119, paragraph 19):

Chairman: Mr P. Kaarlehto (Ambassador, Permanent Mission of Finland, Geneva)

Members: Mr. C.G. Barnett (Minister Counsellor, Permanent Mission of Jamaica, Geneva)

Mr. G. Denis (Counsellor, Permanent Mission of Canada, Geneva)

Mr. B. Eberhard (Chief of Section, Division du Commerce, Palais federal, Bern)

Mr. I. Parman (Counsellor, Permanent Mission of Turkey, Geneva)

1.4 In the course of its work, the Panel held consultations with the United States and the European Communities. Background arguments and relevant information submitted by both parties, their replies to questions put by the Panel as well as all relevant GATT documentation served as a basis for the examination of the matter.

II. Factual aspects

2.1 The following is a brief description of factual aspects of the EEC measures as the Panel understood them.

2.2 On 15 March 1976, the Council of the European Communities adopted Council Regulation (EEC) No. 563/76 on the compulsory purchase of skimmed milk powder held by intervention agencies for use in feedingstuffs. Subsequently the Commission adopted, inter alia, the following implementing regulations:

Commission Regulation (EEC) No. 677/76 of 26 March 1976 laying down detailed rules for the application of the system for compulsory purchase of skimmed milk powder provided for in Council Regulation (EEC) No. 563/76.

Commission Regulation (EEC) No. 746/76 of 31 March 1976 amending Regulation (EEC) No. 677/76 laying down detailed rules for the application of the system for compulsory purchase of skimmed milk powder.

Commission Regulation (EEC) 753/76 of 31 March 1976 laying down detailed rules for the sale of skimmed milk powder for use in animal feed pursuant to Regulation (EEC) No. 563/76.

Commission Regulation (EEC) No. 2706/76 of 8 November 1976 amending Regulation (EEC) No. 753/76 laying down detailed rules for the sale of skimmed milk powder for use in animal feed pursuant to Regulation (EEC) No. 563/76.

2.3 The objective of the EEC measures was to allow for increased utilization of denatured skimmed milk powder as a protein source for use in feedingstuffs for animals other than calves, with a view to reducing by 400,000 tons the surplus stocks of skimmed milk powder held by governmental intervention agencies.

2.4 The EEC measures came into force on 19 March 1976 for imported products and on 1 April 1976 for domestically produced products. Their application was expressly intended to be of such a limited duration necessary to achieve the stated objective. They were terminated on 25 October 1976.

2.5 Under these measures, EEC domestic producers or importers of oilseeds, cakes and meals, dehydrated fodder and compound feeds and importers of corn gluten feeds had an obligation to purchase a certain quantity of skimmed milk powder held by intervention agencies and to have it denatured for use as feed for animals other than calves.

2.6 The purchase obligation related to 50 kgs. of skimmed milk powder, at a price of 52.16 UA per 100 kgs. per ton of soya cake and meal. As regards other products subject to the measures, the quantity of skimmed milk powder to be purchased was determined on the basis of: the price relationship between soya cake and other types of oilcakes (50 kgs. for linseed, 45 kgs. for groundnuts, cottonseed and sunflowerseed, 40 kgs. for other oilseeds, and 8.3 kgs. for other corn oil residues); the yields of different oilseeds in terms of oilcakes and the quantity to be purchased for oilcakes of the same kind (37.6 kgs. for soybeans, 30.9 kgs. for linseed, 23.9 kgs. for groundnuts, 22.0 kgs. for rapeseed, 19.4 kgs. for sunflowerseed and 14.4 kgs. for others); the economic and technical characteristics of dehydrated fodder (8.3 kgs.) corn gluten feeds (8.3 kgs.) and forage preparations and compound feeds (50 kgs.).

2.7 Compliance with the purchase obligation was enforced: (a) by making the granting of aid to domestic producers of oilseeds and dehydrated fodder, as provided for under the EEC common agricultural policy, conditional upon the presentation of a document providing proof of the purchase and the denaturing of the skimmed milk powder; (b) by making the free circulation in the EEC of imported oilseeds, cakes and meals, dehydrated fodder, corn gluten and compound feeds subject to the presentation of a protein certificate issued by member States upon the provision of a document of proof of the purchase and the denaturing of the skimmed milk powder.

2.8 In the case of both domestic and imported products subject to the measures, the EEC regulations allowed for the replacing of the document providing proof of the purchase and the denaturing of the skimmed milk powder by the deposit of a security or a bank guarantee, which was released upon production of the above-mentioned document and with regard to products not used in feedingstuffs.

This security was refunded interest-free upon presentation of that document but forfeited if the obligation of purchase and denaturing of the skimmed milk powder was not carried out.

2.9 The amount of the security to be deposited, either by the domestic producers or importers, was 27 UA/ton for soya cake. As regards other products subject to the measures, the amount of the security was determined, for both imported and domestic products, on the basis of: the price relationship between soya cake and other types of oilcakes, these being classified in three main categories according to their price level (27.0, 24.3 and 21.6 UA/ton); the yields of different oilseeds, flour and meal in terms of oilcakes (multiplying the amount of the security applicable to the corresponding oilcakes by their oilcake yields) and the same type of seed for non-defatted meal (20.3 UA/ton for soybeans, 16.7 UA/ton for linseed, 12.9 UA/ton for cottonseed, 12.4 UA/ton for groundnuts, 11.9 UA/ton for rapeseed and colza, 10.5 UA/ton for sunflowerseed, and 7.8 UA/ton for others); the low protein content for dehydrated fodder (4.5 UA/ton), the need to avoid diversion upon imports of forage preparations and compound feeds (27.0 UA/ton). With respect to corn gluten feeds, the lowest level of the security applicable to other products was applied (4.5 UA/ton). The total amount of security deposits paid was 210 million UA (eight member States) of which 208.2 million UA was released. The amount of securities released did not, however, necessarily correspond to effective purchases of skimmed milk powder, as the EEC regulation foresaw the release of the security for products not intended for animal feed in the Community.

2.10 The level of aid granted to the domestic producers of products subject to the measures was the following:

> Linseed and soybeans: for the 1976/77 crop year, the aid was equivalent to 8,229 UA/100 kgs. for soybeans and averaged 9,180 UA/100 kgs. for linseed;
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> Colza, rapeseed and sunflowerseed: during the period 1 April-31 October 1976, the aid varied between 4 and 10 UA/100 kgs. for colza and rapeseed and between 4 and 7 UA/100 kgs. for sunflowerseed;
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> Dehydrated fodder: for the 1976/77 crop year, the aid was equivalent to 9 UA/ton:

2.11 For the year 1975 preceding the adoption of the measures, the composition of EEC imports (in volume) of products subject to these measures was as follows: soybeans and flour (44 per cent); soybean cakes and meals (24 per cent); other oilseeds and oilseed products (17 per cent); dehydrated forage and feed preparations (9 per cent); and corn gluten feeds (6 per cent). In terms of EEC imports from the United States, 66 per cent was made up by soybeans and flour, 23 per cent by soybean cakes and meals, 10 per cent by corn gluten, 10 per cent by dehydrated forage and 1 per cent by feed preparations.

2.12 In 1975, the United States supplied about half of EEC imports of products subject to the measures. For specific products, the United States share was 78 per cent for corn gluten fees; 70 per cent for soybeans and flour; 45 per cent for soybean cakes and meal; 4 per cent for dehydrated forage and feed preparations; and nil or insignificant for other oilseeds and oilseed cakes and meals.

2.13 About 85 per cent of EEC vegetable protein needs are imported from third countries either in the form of oilseeds or meal. The degree of apparent consumption filled by domestic production in 1975 varied considerably from over 90 per cent for forage products, to almost 70 per cent for soybean cakes mainly from imported beans, about 40 per cent for corn gluten feeds and for oilseeds other than soybeans, 30 per cent for oilcakes other than soybean cakes, and less than 1 per cent for soybeans. With respect to animal and marine proteins, the EEC imported about 45 per cent of its apparent domestic consumption, mainly in the form of fish, flour and meal.

2.14 With respect to customs duty treatment, all of the United States exports subject to the measures enter the EEC under GATT bound rates, with the exception of compound feeds, groundnuts, and other flour or meals of oilseeds or oleaginous fruit, non-defatted, (excluding mustard and castor bean flour) than that of soybeans.

III. Main arguments

3.1 In the course of its examination of the EEC measures, the Panel heard arguments from the representatives of the United States and of the European Communities with respect to the following provisions of the General Agreement: Article III:5; Article III:1; Article III:4; Article III:2; Article II:1(b); Article II:2(a); Article I:1 and Article XXIII.

Like product

3.2 The representatives of both the United States and the European Communities expressed their views on the notion of "like product".

3.3 The representative of the United States noted that there was no clear definition in the General Agreement on what is a like product and that the term had been variously interpreted depending on the issue in question. He suggested that, in the case of the EEC measures, like products should be considered to be those products used for the same purpose of adding protein to animal feeds. He maintained that, because of their interchangeability and substitutability for use in feedingstuffs, vegetable proteins including corn gluten, skimmed milk powder as well as animal, marine and synthetic proteins should be considered as like products.

3.4 The representative of the European Communities also noted that there was no clear and generally applicable definition in the General Agreement of what is a like product. In his view, the concept of "like product" was not based on purely legal criteria but should be determined case-by-case in a pragmatic manner, on the basis of criteria of an essentially economic character, such as the nature of the product, its intended use, commercial value and price, its character and substitutability. He maintained that price could be a fundamental criterion for the evaluation of what constituted a like product in the case of the EEC measures. Price considerations, for example, justified the exclusion of fish meal and meat meal because their higher prices did not make them competitive and substitutable with vegetable proteins. The representative of the European Communities also took the view that, to consider as like products, as the representative of the United States would do - all products, including skimmed milk powder, used for the same purpose would risk leading to a substantial revision of tariff schedules, because products which were considered to be like products should be subjected to the same tariff treatment, and that was certainly not now the case in most countries.

Article III:5

3.5 The representative of the United States argued that the purchase of denatured skimmed milk powder required by the EEC measures clearly worked as a mixing regulation prohibited under Article III:5.* The purchase requirement had the effect of: (a) raising the price of substitutable vegetable protein products and feeds in order to make skimmed milk powder price competitive, particularly with soybean cakes and meal; and (b) cutting down imports of the vegetable protein products by an amount almost equivalent to 365,000 tons of denatured skimmed milk powder actually disposed of under the measures.

3.6 He said that Article III:5 prohibits regulations which require, directly or indirectly, that any specified amount or proportion of a domestic product be mixed, processed or used and that this provision was reinforced by the language in Article III:6 which exempted mixing schemes already in effect. He maintained that the purpose and effect of the Council Regulation (EEC) No. 563/76 was to require that a specified amount of skimmed milk powder from domestic intervention agencies stocks, which held only domestically produced products, be purchased and denatured and thereby used as a source of proteins in feedingstuffs, replacing imported vegetable proteins. In addition, Article III:5 also prohibits mixing regulations to protect domestic production by its reference to the fact that such regulations cannot be applied in a manner contrary to Article III:1.

3.7 The representative of the United States held the view that even though the security deposit or the purchase requirement applied to both domestic and imported vegetable proteins, the mixing regulation was not exempted from Article III:5 because: (a) the alternative of losing the deposit was a penalty for not following the requirement of the regulation and made it economically unprofitable not to purchase a certain amount of skimmed milk powder. In fact, if the importer had ceased to import, the measures would not have applied to imports but would still have affected trade in violation of the General Agreement; (b) the purchase requirement mandated purchase from EEC intervention stocks of substitutable domestic denatured skimmed milk powder; and (c) the EEC did not produce a substantial amount of its own domestic needs of vegetable proteins. In his view, the EEC measures had only one clear effect and intent, that of encouraging domestic use of domestic skimmed milk powder and penalizing the use of directly substitutable vegetable protein imports.

3.8 He said that an additional argument could also be made that the denaturing process itself constituted a mixing or processing requirement in that, in order to denature skimmed milk powder under applicable EEC regulations, other elements had to be mixed with domestic skimmed milk powder in specific quantities.

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*Article III:5 reads: "No contracting party shall establish or maintain any internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions which requires, directly or indirectly, that any specified amount or proportion of any product which is the subject of the regulation must be supplied from domestic sources. Moreover, no contracting party shall otherwise apply internal quantitative regulations in a manner contrary to the principles set forth in paragraph 1."

Ad. Article III:5: "Regulations consistent with the provisions of the first sentence of paragraph 5 shall not be considered to be contrary to the provisions of the second sentence in any case in which all the products subject to the regulations are produced domestically in substantial quantities. A regulation cannot be justified as being consistent with the provisions of the second sentence on the ground that the proportion or amount allocated to each of the products which are the subject of the regulation constitutes an equitable relationship between imported and domestic products."

3.9 The representative of the European Communities argued that Article III:5 was not applicable to the EEC measures which were appropriately covered by Article III:1. He maintained that the measures provided for purchase of denatured skimmed milk powder but did not compel the user to maintain any specified mixing proportion nor to use it in any particular way. In his view, this called into question the notion of mixing itself, particularly since the purchase of denatured skimmed milk could have been replaced by the security deposit and the possible loss of this security.

3.10 The representative of the European Communities held the view that, notwithstanding the relatively low EEC self-sufficiency in respect of protein products, domestic production of these products must be considered as substantial in absolute terms. The fact that the domestic producers as well as importers were subject to the purchase obligation meant that the measures were not covered by either the spirit or the letter of Article III:5.

3.11 He also considered that the argument that the denaturing process itself constituted a mixing requirement was irrelevant to the examination of the measures.

Article III:1

3.12 The representative of the European Communities argued that the EEC measures were covered by and consistent with the provisions of Article III:1* and that Article III:5 was not applicable in the case in question.

3.13 He maintained that Article III:1 contains specific practical obligations not to afford protection to domestic production, not just any domestic production, but rather a production directly competing with the imported products covered by the measures. He said that the underlying reasons for the adoption by the EEC of the measure concerning skimmed milk powder were clearly not inspired by any concern to afford protection to domestic production of this product. The essential purpose of the measure was to restrict and reduce existing surpluses. That was confirmed by the adoption and examination of other measures designed to restore a balance in the milk product markets of the EEC and thus to restrain such production. In his view, the fact of wishing to encourage the use of skimmed milk powder for animal feeding for a fairly limited period, and in respect of a small quantity in relation to the annual volume of imports into the Community of protein substances, could not reasonably have been considered as a violation of Article III:1.

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*Article III:1 reads: "The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts of proportions, should not be applied to imported or domestic products so as to afford protection to domestic production."

Ad. Article III: "Any internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in paragraph 1 which applies to an imported product and to the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as an internal tax or other internal charge, or a law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III."

3.14 Furthermore, although skimmed milk powder could be used in animal feed, it could not be generally considered as being directly competitive with imported protein products, in view of the prices of skimmed milk powder in the EEC together with the objective limits of its possible uses. In addition, over a period of several years, EEC imports of proteins, mainly vegetable proteins, had been increasing substantially while the level of domestic milk powder stocks had been rising continually. He also added that from the point of view of the quantities involved, any allegation that the measures were not consistent with Article III:1 was not justified, since the measures covered a quantity of 400,000 tons of skimmed milk powder compared with annual EEC requirements of approximately 15 million tons of oil cake equivalent.

3.15 The representative of the European Communities also held the view that the provision of a security did not aim to protect domestic production. In practice, the security could be regarded as some sort of a constraint, in which case it could only have had the same effects on domestic production and imports alike; or as neutral, because it had no effect or only a negligible effect, and therefore no problem arose.

3.16 The representative of the European Communities was of the opinion that the measures had not worked to restrict or adversely affect imports. He said that the import data provided sufficient evidence that EEC imports of protein-based products increased over the limited period of application of the measures.

3.17 The representative of the United States argued that the requirement under the EEC measures to purchase denatured skimmed milk powder from intervention agencies, which was entirely of domestic origin, did afford protection to the domestic dairy industry in violation of Article III:1.

3.18 He maintained that the measures protected domestic dairy producers against the natural consequences of surplus and over-production, resulting in the displacement of an almost equivalent quantity of vegetable proteins.

3.19 In addition, the representative of the United States maintained that the measures also protected EEC producers of meat meal, which was excluded from the application of the measures, and of corn gluten because only imports were subject to them.

3.20 The representative of the United States expressed the view that even if the EEC measures had been in conformity with the provisions of Article III:1 which was simply a general exhortation against certain types of laws and regulations and did not contain specific obligations, the measures would still have been inconsistent with Article III:5 since each of the provisions of Article III were self-contained statements.

Articles II and III:2

3.21 The representative of the United States noted that his country had negotiated duty-free treatment in the EEC on soybeans, cottonseed, flaxseed and oilseed cakes and meals and tariff concessions on other products such as soybean flour, covering US$2 billion worth of exports in 1975. He added that these tariff concessions had been granted unconditionally.

3.22 He argued that the compulsory purchase requirement, the security deposit and the protein certificate introduced by the EEC were conditions placed on the EEC tariff bindings, unforeseen and unanticipated when the duty rates were negotiated. These measures nullified or impaired the tariff bindings on the affected products and were in direct violation of Article II:1(b)*, which prohibits the imposition upon imports of products on which tariff concessions have been granted of "charges of any kind" in excess of those imposed on the date of the negotiation. He noted that the terminology of Article II:1(b) was all-inclusive, the only specific exemptions being those in Article II:2(a), concerning legitimate charges arising from countervailing or anti-dumping duties and other charges commensurate with the cost of services rendered or charges equivalent to internal taxes.

3.23 The representative of the United States held the view that the security deposit on imported vegetable proteins introduced under the EEC measures constituted an additional charge in excess of the bound duty rates, whether or not this charge was an alternative to the compulsory purchase requirement. This additional charge was equal to the loss of interest on the security and the normal debt servicing charges. In the case of forfeiture, the additional charge was equal to the full amount of the security plus the interest; however, it was in the economic interest of importers to purchase skimmed milk powder instead of forfeiting the deposit because the deposit exceeded by 7 UA/ton the cost incurred in purchasing skimmed milk powder.

3.24 He maintained that even where the importer chose to purchase the skimmed milk powder and received a refund of the security, the importer incurred a substantial additional charge. In order to obtain the refund of the 27 UA deposited per ton of soybean cake and meal, the importer had to buy and denature 50 kgs. of skimmed milk powder at a price of $20 to $25 above its value as animal feedingstuffs. He also mentioned that, for at least the first month or two of the EEC measures, skimmed milk powder from intervention stocks was not available for prior purchase, and for the first two weeks the protein certificate and security deposit only applied to imports. In addition the security requirement was eliminated for most forage products when it appeared that the measures might cause some problems for dehydrated forage which is predominantly domestically produced.

3.25 The representative of the United States also maintained that the security deposit could not be considered equivalent to an internal tax imposed on imported and like domestic products within the meaning of Article II:2(a) and within the meaning of III:2, because it was an enforcement mechanism to ensure that the EEC requirement of compulsory purchase of skimmed milk powder was complied with.

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*Article II:1(b) reads: "The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date."

3.26 He argued that, while the security deposit was a cost incurred by both the importer and the domestic producer, it was not uniformly applied on all imported and like domestic products nor with regard to importers and domestic producers. He perceived a clear difference between the penalty applied to an importer and that applied to a domestic producer not meeting the purchase requirement. Upon payment of the security, the importer received a protein certificate which allowed him to carry his normal import transactions; the domestic producer received an aid as an incentive to produce more domestically and, if he chose not to buy skimmed milk powder, he would only forego this incentive and therefore was in no way constrained from producing or selling his product.

3.27 The representative of the United States also maintained that the security deposit could not be regarded as an internal tax, because: EEC producers of soybeans and linseed were not affected by the security requirement since domestic producers did not have to apply for aids until 31 December 1976; only importers were required to pay the security in the case of corn gluten feed and the security deposit was not levied by the government. The representative of the United States was of the opinion that the import orientation of the measures was clearly illustrated by the fact that over 95 per cent of the security deposits collected were derived from imports.

3.28 The representative of the United States also said that he regarded the protein certificate as an import licence placing conditions on the bound items, unforeseen and unanticipated when the duty rates were negotiated, and bearing no reasonable relationship to the administration of the concessions. Furthermore, the introduction of the protein certificate for imported products two weeks before the rest of the EEC measures increased the additional charges on imports and exacerbated the element of discrimination of the measures.

3.29 In relation to Article II, the representative of the European Communities stated that the existence of a tariff binding did not prevent a contracting party from taking measures consistent with the provisions of the General Agreement. He was of the view that the application of the security deposit could not have been considered as an additional financial charge on imported products under Article II:1(b). He argued that the security deposit was not an immediate obligation since it was required only failing production of a document providing proof of the purchase of the skimmed milk powder. Where the security deposit was effectively required, the requirement could only have fallen in the field of application of Article II:2(a)* which permitted the introduction of charges "equivalent to an internal tax" imposed consistently with the provisions of paragraph 2 of Article III.

3.30 In his view, the application of a tax, whether for the purpose of creating budgetary resources or of influencing consumption, resulted in increased costs for the user of a given product, which was the effect of the security deposit; when the security deposit was forfeited, it accrued to the competent budgetary authority and, when it was not forfeited, any costs were likewise the consequences of a government action.

3.31 The representative of the European Communities maintained that, as the amount of the security was fixed on the basis of the nature of the products regardless of origin and as the amount of the security was the same for the like product, whether domestically produced or imported, there was no possibility of any discrimination whatsoever.

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* Article II:2(a) reads: "Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of Article III in respect of the like domestic product or in respect of an article from which the imported product has been manufactured or produced in whole or in part."

3.32 He was of the opinion that, taking into account the external trade régime of the EEC at the time the measures were introduced, domestic producers of vegetable proteins would not have been able to produce without production aids, which were not granted to them if they did not comply with the measures. With respect to soybeans and linseed specifically, period of applicability of the measures and the granting of aid did not coincide, as the production season began in the autumn in the EEC and the amount of aid was normally fixed thereafter; however, the principle of equality of treatment had been observed since soybeans and linseed had both been included in the measures. As regards dehydrated forage products, he said that all these products were subject to the measures, with the sole exception of dehydrated forage products not intended for marketing.

3.33 He also maintained that the security deposit was equally consistent with the provisions of the second sentence of Article III:2 which requires that taxes and other internal charges not be applied to imported or domestic products so as to afford protection to domestic production, because the measures were in conformity with Article III:1. The fact that 96 per cent of total securities were provided by importers underlined that the EEC measures did not restrict imports from the United States, which increased during the period of their applicability, including in relation to the normal proportion (85 per cent) of supplies purchased outside the EEC.

3.34 The representative of the European Communities took the view that no new condition had been imposed on the tariff bindings by the protein certificate. It was not an import licence but a purely administrative document without any legal or economic value. It was only to satisfy the customs authorities that certain conditions had been respected, namely, the purchase of skimmed milk powder or the security deposit. Even domestic producers had to have a document to prove that they had fulfilled the same requirements. The protein certificates for the importers and the corresponding documents for the domestic producers were issued automatically as soon as the specified conditions were fulfilled.

3.35 He also explained that the protein certificate had been applicable to imports for the period of 19-31 March 1976 without any corresponding obligation for domestic producers of oilseeds and oilcakes because the disposal period of EEC output of these products had begun, in significant terms, in the early days of April.

3.36 The representative of the European Communities further commented that skimmed milk powder had always been available from EEC intervention agencies. The Regulation (EEC) No. 753/76 adopted on 31 March 1976 concerned denaturing and, during the ten days preceding its adoption, provision of the security would have sufficed to allow imports. The Commission had also adopted special measures to finance transport of skimmed milk powder to the Italian market, which was not normally in surplus, to ensure the availability of the necessary quantities in that market.

Article III:4

3.37 The representative of the United States argued that the EEC measures accorded domestic products a treatment more favourable than that of imported products, in violation of Article III:4.*

3.38 He stated that domestic corn gluten was not subject to the purchase requirement, the security deposit and the protein certificate, but imported corn gluten was subject to these measures.

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* Article III:4 reads: "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use …"

3.39 The representative of the United States took the view that the measures focused the impact more directly on imported vegetable proteins, particularly soybeans, because they did not apply to animal, marine and synthetic proteins even though such proteins were, with vegetable proteins, substitutable for use in feeds. He maintained that animal, marine and synthetic proteins were excluded from the measures because there was substantial domestic production in the EEC and not because these products were not like products, taking account of their generally higher protein content and certain technical advantages.

3.40 He also maintained that the requirement of a protein certificate and other specific administrative requirements applied only to imported vegetable proteins, placing a heavier burden on imported than on domestic products in purchase, sale and distribution of the products in the EEC. In his view, the protein certificate was a condition placed upon imports not related in any way to normal customs procedures.

3.41 The representative of the European Communities stated that the United States complaint regarding the exclusion of domestic corn gluten from the measures had no economic justification. Taking into account the economic situation of this product in the EEC and its very limited production, it was considered superfluous to subject domestic production to the measures.

3.42 He explained that corn gluten consisted of residues of maize starch with a protein content less than or equal to 40 per cent. This product was imported into the EEC free of duty and was supplied at fairly competitive prices in relation to the product of domestic origin. From the point of view of the starch industry, corn gluten was unfavourably affected by a series of factors concerning the price régime applicable to maize in the EEC. The domestic production of corn gluten was therefore declining from an already modest level, while imports from the United States showed a sharp increase, including during the period April-October 1976 as compared to the same period of the previous year. The amount of the security applicable to the imported product had also been fixed at a very low figure, hardly appropriate to its rich protein content. Furthermore, the competitiveness of the imported product had in no way been affected, as was demonstrated by the development of imports, particularly from the United States.

3.43 The representative of the European Communities took the view that the protein certificate created no additional obligation for imported products as it merely served as an administrative document for customs operations, providing evidence that the obligation of either purchasing denatured skimmed milk powder or providing a security had been complied with. Furthermore, in case of non-utilization of the protein certificate, the security was released. On the domestic market, compliance with similar obligations was ensured by the procedures laid down for the granting of EEC aid. Therefore, he was of the opinion that the protein certificate was only a simple question of form without any juridical or economic implication.

3.44 The representative of the European Communities was of the opinion that animal, marine and synthetic proteins were not products like vegetable proteins, within the meaning of Article III:4. In addition, price considerations justified the exclusion of these products, particularly fish flour and meal.

Article I:1

3.45 The representative of the United States argued that the impact of the EEC measures was affording products of other countries better treatment than like products originating in the United States, because they focused on specific vegetable proteins and excluded other like protein products, such as animal, marine and synthetic proteins. They thus resulted in discrimination between countries in violation of Article I:1.*

3.46 The representative of the United States also argued that the EEC measures had a discriminatory impact on United States products because the levels of securities on the vegetable proteins did not correspond to the levels of protein contents in those products. He considered that the result of the graduations of the levels of securities for different products afforded more favourable treatment to products of certain countries than to the like products imported from other countries.

3.47 The representative of the European Communities stated that the most-favoured-nation treatment concept implied, inter alia, that any advantage granted to any product originating in any other country shall be extended to the like product originating in the territories of all other contracting parties. He maintained that all like products covered by the measures were accorded non-discriminatory treatment regardless of their origin in full conformity with the principles of Article I:1.

3.48 The representative of the European Communities further maintained that, from an economic point of view the United States complaint was not justified since all the main products imported into the EEC for use in feeding stuffs, with the exception of flour and meals of animal origin, were subject to the measures. As regards fish flour and meal, he said that: these products only accounted for 4.2 per cent of EEC imports of protein feeding stuffs; their utilizations could not be controlled within the EEC because they were not subject to a Common Market organization; price considerations justified their exclusion because their higher prices did not make them competitive and substitutable with vegetable proteins; and imports of such products into the EEC during the application of the measures had not increased compared with the corresponding period of the previous year and, therefore, no trade diversion to the detriment of United States exports had taken place. With respect to meat flour and meal, he said that these products only accounted for 0.06 per cent of EEC imports of protein feeding stuffs and their exclusion can be accounted for by their very small level of trade. Finally, the representative of the European Communities underlined that animal flour had not been considered as like products to those covered by the EEC régime.

* Article I:1 reads: "With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."

Article XXIII *

3.49 The representative of the United States argued that the EEC measures had adversely affected its exports of vegetable proteins by amounts almost equivalent to the amount of domestic denatured skimmed milk powder disposed of under these measures. He took the view that the increase of imports into the EEC during the period of application of the measures was due to, inter alia, the heavy drought conditions then prevailing and better economic conditions. He maintained that United States exports of vegetable proteins would have been still larger in the absence of the EEC measures.

3.50 The representative of the United States did not ask the Panel to examine whether, or the extent to which, the EEC measures may have damaged United States exports. However, he recalled that in the Uruguayan case (BISD, 11th Suppl., p. 100) the Panel reported that "in cases where there is a clear infringement of the provisions of the General Agreement, or in other words, where measures are applied in conflict with the provisions of the GATT … the action would, prima facie, constitute a case of nullification or impairment …".

3.51 The representative of the European Communities argued that the measures had not violated any of the Articles of the General Agreement invoked by the United States and had not resulted in any damage to United States exports. In his view, this was evidenced by the increase of United States exports to the EEC of vegetable proteins, including corn gluten, during the period of application of the EEC measures compared to the same period of the previous year. He took the view that the reduction of EEC imports of fish flour and meal also showed that the exclusion of these products from the measures had not resulted in any substitution of imported vegetable proteins by these products. As regards meat flour and meal, EEC imports are insignificant.

3.52 Finally, the representative of the European Communities maintained that the United States was not entitled to any compensation as no damage to its exports had been caused by the EEC measures.

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*Article XXIII reads: "1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as a result of:

(a) the failure of another contracting party to carry out its obligations under this Agreement, or

(b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or

(c) the existence of any other situation,

the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.

2. If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1(c) of this Article, the matter may be referred to the CONTRACTING PARTIES …".

IV. Conclusions

Like product

4.1 The Panel began by examining whether all products used for the same purpose of adding protein to animal feeds should be considered as "like products" within the meaning of Articles I and III. Having noted that the General Agreement gave no definition of the concept of "like product" the Panel reviewed how it had been applied by Contracting Parties in previous cases.*

4.2 The Panel noted, in this case, such factors as the number of products and tariff items carrying different duty rates and tariff bindings, the varying protein contents and the different vegetable, animal and synthetic origins of the protein products before the Panel - not all of which were subject to the EEC measures. Therefore, the Panel concluded that these various protein products could not be considered as "like products" within the meaning of Articles I and III.

Substitutable products

4.3 The Panel noted that the General Agreement made a distinction between "like products" and "directly competitive and substitutable" products. The Panel therefore also examined whether these products should be considered as directly competitive and substitutable within the meaning of Article III. In this regard the Panel noted that both the United States and the EEC considered most of these products to be substitutable under certain conditions. The Panel also noted that the objective of the EEC Regulation during the period of its application, in its own terms, was to allow for increased utilization of denatured skimmed milk powder as a protein source for use in feedingstuffs for animals other than calves. Furthermore, the Panel noted that the security deposit had been fixed at such a level as to make it economically advantageous to buy denatured skimmed milk powder rather than to provide the security, thus making denatured skimmed milk powder competitive with these products. The Panel concluded that vegetable proteins and skimmed milk powder were technically substitutable in terms of their final use and that the effects of the EEC measures were to make skimmed milk powder competitive with these vegetable proteins.

Security deposit as an enforcement mechanism

4.4 The Panel examined the effects of the possibility for the buyers of vegetable proteins of providing a security as an alternative to the requirements of purchasing a certain quantity of skimmed milk powder. The Panel was of the opinion that the security deposit was not of a fiscal nature because, if it had been, it would have defeated the stated purpose of the EEC Regulation which was to increase utilization of denatured skimmed milk powder. In addition the revenue from the security deposit accrued to EEC budgetary authorities only when the buyer of vegetable proteins had not fulfilled the purchase obligations. The Panel further noted that less than 1 per cent of the security deposits paid, were not released, indicating compliance with the purchase obligation. The Panel therefore considered that the security deposit, including any associated cost, was only an enforcement mechanism for the purchase requirement and, as such, should be examined with the purchase obligation.

Articles III:5 and III:1

4.5 The Panel examined the obligation under the EEC Regulation, to purchase a certain quantity of denatured skimmed milk powder from intervention agencies, in terms of the provisions of Article III:5, that is whether the EEC measures constituted an "internal quantitative regulation relating to the mixture, processing or use" within the meaning of Article III:5.

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*See for instance BISD, VOL. II/188, BISD S1/53 and BISD VOL. II/181, 183.

4.6 The Panel noted that the Council Regulation (EEC) No. 563/76 referred, in its stated considerations, to the considerable stocks of skimmed milk powder held by intervention agencies and to the objective of increasing the utilization of skimmed milk powder as a protein in feedingstuffs for animals other than calves. In other words, the Regulation was intended to dispose on the internal market ("utilization") of a given quantity ("stocks") of skimmed milk powder in a particular form ("denatured" i.e. utilizable only for the intended purposes). The Panel therefore considered that the EEC Regulation was an "internal quantitative regulation" in the sense of Article III:5. However, the Panel found that this "internal quantitative regulation" as such was not related to "the mixture, processing or use … in specified amounts or proportions within the meaning of Article III:5 because, at the level of its application, the EEC Regulation introduced basically an obligation to purchase a certain quantity of skimmed milk powder and the purchase obligation falls under Article III:1.

4.7 Given the reference in Article III:5, second sentence, to Article III:1, the Panel then examined the consistency of the EEC Regulation as an "internal quantitative regulation" with provisions of Article III:1, particularly as to whether the Regulation afforded protection to domestic production. The Panel noted that the EEC Regulation considered, in its own terms, that denatured skimmed milk powder was an important source of protein which could be used in feedingstuffs. The Panel also noted that surplus stocks could originate either from domestic production or imports, but that the intervention agencies from which the buyers of vegetable proteins had to purchase a certain quantity of denatured skimmed milk powder only held domestically produced products. The Panel further noted that, although globally about 15 per cent of the EEC apparent consumption of vegetable protein was supplied from domestic sources, not all the individual products subject to the EEC measures were produced domestically in substantial quantities.

4.8 The Panel concluded that the measures provided for by the Regulation with a view to ensuring the sale of a given quantity of skimmed milk powder protected this product in a manner contrary to the principles of Article III:1 and to the provisions of Article III:5, second sentence.

4.9 The Panel was of the opinion that the requirement to denature the skimmed milk powder purchase from the intervention agencies was only an element designed to secure the final utilization of that product. In addition, the Panel did not consider it necessary to examine the legal implications arising from any temporary administrative difficulties initially associated with the introduction of the EEC measures.

Article III:4

4.10 The Panel also examined whether the EEC measures accorded imported protein products less favourable treatment than that accorded to like products of EEC origin within the meaning of Article III:4. In this regard the Panel noted the economic considerations, including the level of domestic production and of the applicable security deposit, put forward by the EEC to justify the non-application of the measures to corn gluten of foreign origin only. The Panel was not convinced that these considerations justified the non-application of these measures to domestic corn gluten and therefore concluded that the measures accorded imported corn gluten less favourable treatment than that accorded corn gluten of national origin in violation of Article III:4.

4.11 The Panel also examined whether the fact that the EEC measures were not applicable to animal, fish and synthetic proteins was consistent with the provisions of Article III:4. Having regard to its own conclusion with respect to "like products", the Panel was satisfied that animal, fish and synthetic proteins could not be considered as "like products" for the purpose of Article III:4. Since the obligations under Article III:4 relate to "like products", the Panel concluded that the non-application of the EEC measures to these products was not inconsistent with the EEC obligations under the Article.

Protein certificate

4.12 The Panel examined whether the protein certificate requirement and other specific administrative requirements accorded to imported products treatment less favourable than that accorded to "like products" of EEC origin in respect of the purchase, sale and distribution of the products in the EEC within the meaning of Article III:4. The Panel was of the opinion that these requirements should be considered as enforcement mechanisms to ensure that the obligation, of either purchasing a certain quantity of denatured skimmed milk powder or of providing a security, had been complied with. The Panel noted that the protein certificate applied only to imports but that there was an equivalent document required for products of national origin except for a relatively short period at the beginning of the application of the EEC measures. The Panel concluded that the various administrative requirements, including the protein certificate, were not inconsistent with the EEC obligations under Article III:4.

Article II

4.13 The Panel also examined whether the EEC measures were consistent with the EEC obligations under Article II.

4.14 The Panel first noted the United States view that the EEC purchase obligation, the security deposit and the protein certificate; (a) constituted "charges of any kind" in excess of the bound duty rates within the meaning of Article II:1 (b); and (b) were conditions which did not bear any relationship to the administration of the tariff binding; and (c) could not have been reasonably foreseen at the time the duty rates were negotiated. The Panel also noted the view of the European Communities that, to the extent that the security deposit constituted a charge in excess of the bound duty rates, such a charge was covered by Article II:2(a) and that the protein certificate was not a condition imposed on the tariff bindings.

4.15 The Panel then considered the question of whether the EEC measures should be examined both as internal measures under Article III and border measures under Article II. In this regard, the Panel reviewed the drafting history of Articles II and III and their subsequent application by contracting parties, particularly with a view to ascertaining the relationship between these two Articles.

4.16 In the light of that review, the Panel noted the following:

(a) The note Ad Article III states that: "Any internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in paragraph 1 which applies to an imported product and to the like domestic product and is collected or enforced in the case of the imported product at the time of importation, is nevertheless to be regarded as an internal tax or other internal charge, or a law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provision of Article III."

(b) The Sub-Committee at the Havana Conference considered (Havana Reports pp. 62-63, paragraphs 42-43, E/CONF.2/C.3/A/W.30 page 2) that "certain charges … were import duties and not internal taxes because … (a) they are collected at the time of, and as a condition to, the entry of the goods into the importing country, and (b) they apply exclusively to imported products without being related in any way to similar charges collected internally on like domestic products".

(c) The wording of Article II:2(a) which refers to "charges equivalent to internal taxes" is different from that of Article III:2 which refers to "internal taxes and other charges of any kind", but it appeared to be the common understanding of the drafters of these articles that their scope should be the same as to the kind of measures being covered;

> (d) The Panel established to consider charges imposed by Belgium on certain imported products (IS/60, paragraph 2) found as follows: "after examining the legal provisions regarding the methods of collection of that charge, the panel came to the conclusion that the … levy was collected only on products purchased by public bodies for their own use and not on imports as such, and that the levy was charged, not at the time of importation, but when the purchase price was paid by the public body. In those circumstances, it would appear that the levy was to be treated as an 'internal charge' within the meaning of paragraph 2 of Article III of the General Agreement", and not as an import charge within the meaning of paragraph 2 of Article II.

4.17 The Panel also recalled its own findings that (a) the EEC measures applied to both imported and domestically produced vegetable proteins (except in the case of corn gluten); (b) the EEC measures basically instituted an obligation to purchase a certain quantity of skimmed milk powder and, as an "internal quantitative regulation" fell under Article III:1; (c) the EEC security deposit and protein certificate were enforcement mechanisms for the purchase obligation.

4.18 Having regard to the legal considerations referred to above and taking account of its own findings in relation to Article III:5 and Article III:1 that the EEC measures were an "internal quantitative regulation", the Panel concluded that the EEC measures should be examined as internal measures under Article III and not as border measures under Article II.

Article I:1

4.19 The Panel examined whether the EEC measures discriminated against the exports of the United States within the meaning of Article I:1.

4.20 The panel noted that the general most-favoured-nation treatment provided for in Article I:1 applied to "like products" regardless of territorial origin but did not mention "directly competitive or substitutable products". In this regard the Panel did not consider animal, marine and synthetic proteins to be products like those vegetable proteins covered by the measures. The Panel also noted that a significant proportion of EEC imports of "like products", including soybeans, subject to the measures originated from contracting parties other than the United States.

4.21 Having heard no evidence that either the purchasing obligation, the security deposit or the protein certificate discriminated against imports of "like products" from any contracting party, the Panel concluded that the EEC measures were not inconsistent with the EEC obligations under Article I:1.