

EUROPEAN ECONOMIC COMMUNITY - PAYMENTS AND SUBSIDIES PAID
TO PROCESSORS AND PRODUCERS OF OILSEEDS AND RELATED
ANIMAL-FEED PROTEINS

*Report of the Panel adopted on 25 January 1990
(L/6627 - 37S/86)*

INTRODUCTION

1. On 19 February and 19 April 1988 the United States and the European Economic Community (the Community) held consultations pursuant to Article XXIII:1 on the Community's payments and subsidies paid to processors and producers of oilseeds and related animal-feed proteins. As these consultations did not result in a satisfactory resolution of the matter, the United States, in a communication dated 22 April 1988, requested the CONTRACTING PARTIES to establish a panel to examine the matter under Article XXIII:2 (L/6328).

2. This communication cites the following as being among the United States major concerns with regard to the matter referred to the CONTRACTING PARTIES:

"First, the EC oilseed and related animal-feed proteins régime is prima facie inconsistent with Article III of the General Agreement. The régime provides that EC processors receive a subsidy or preference payment with respect to purchases of EC-produced oilseeds and related animal-feed proteins which is not provided with respect to purchases of the imported like product.

Second, the EC oilseed and related animal-feed proteins régime provides for enormous subsidies to be paid to the EC producers of oilseeds and related animal-feed proteins. These producer subsidies, along with the processor preference payments discussed above, constitute a prima facie nullification and impairment of tariff concessions granted by the EC in 1962 pursuant to Article II of the General Agreement.

Third, the producer subsidies and the processor preference payments have caused severe market distortions and significant damage to United States exports to the EC. Thus, there is factual evidence that the EC policies discussed above have caused actual nullification and impairment of tariff concessions granted by the EC in 1962 pursuant to Article II of the General Agreement."

3. Following discussion of the matter at its meeting on 4 May 1988 and a further round of Article XXIII:1 consultations on 6 June 1988, the Council agreed, at its meeting on 15-16 June 1988, to establish a panel and authorized the Council Chairman to draw up terms of reference and to designate the Chairman and members of the Panel in consultation with the parties concerned (C/M/222).

4. On 1 June 1989 the Council was informed that agreement had been reached on the following terms of reference and panel composition (C/166):

"To examine, in the light of the relevant GATT provisions, the matter referred to the CONTRACTING PARTIES by the United States in document L/6328 and to make such findings as will assist the CONTRACTING PARTIES in making the recommendations or in giving the rulings provided for in Article XXIII:2."

Chairman: Mr. Michael D. Cartland

Members: Mr. János Nyerges
Mr. Pierre Pescatore

5. The Panel met with the parties to the dispute on 27 June and 21 September 1989. It met on 20 September 1989 to consider submissions made by interested third parties. It submitted its report to the parties to the dispute on 30 November 1989.

FACTUAL ASPECTS

Introduction

6. The order in which the factual aspects are presented is intended to facilitate CONTRACTING PARTIES' understanding of the matters in dispute and is without prejudice to the arguments of the parties or to the order in which they are considered by the Panel.

Products in Question

7. The United States complaint relates to Community payments and subsidies paid to processors and producers of oilseeds and related animal-feed proteins. These products are defined in the United States submission as including rapeseed, sunflowerseed and soyabeans and related meals, peas, beans, lupines and skim milk powder. The main products in question are soyabeans, rapeseed, sunflowerseed and the meals derived from these oilseeds.

8. These oilseeds are extensively traded because of the high-quality oils they produce and, equally importantly, because of their protein content. The protein-rich meals derived from the crushing of these oilseeds are used in the manufacture of compound animal feeds. The growth in Community consumption of these protein-rich products has gone hand in hand with an increasing and relatively high rate of incorporation of these meals in compound animal feeds and with the expansion of intensive livestock industries within the Community.

Tariff Treatment of the Products in Question

9. The tariff treatment accorded by the Community to imports of soyabeans, rapeseed, sunflowerseed and oilcakes or meals as provided for in the current Schedule of Concessions of the Community (Schedule LXXX-EEC) are:

<u>CN CODE</u>	<u>PRODUCT DESCRIPTION</u>	<u>DUTY RATE</u>
1201 00 90	Soyabeans, whether or not broken: - Other	Free
1205 00 90	Rape or colza seeds, whether or not broken: - Other	Free
1206 00 90	Sunflowerseeds, whether or not broken: - Other	Free
2304 00 00	Oilcake and other solid residues, whether or not ground or in the form of pellets, resulting from the extraction of soyabean oil	Free

10. These concessions were originally negotiated as concessions of the Community (EC-6) under Article XXIV:6 in the course of the 1960-61 Geneva Tariff Conference, the Dillon Round, and were bound pursuant to Article II of the General Agreement in Part I of the Schedule of Concessions of

the European Economic Community (XL) annexed to the July 1962 Protocol Embodying the Results of the 1960-61 Tariff Conference. This Protocol entered into force for the Community on 12 January 1963. These concessions have been extended and applied by the Community following its successive enlargements and related negotiations under Article XXIV:6 (see paragraphs 71 et seq. regarding the effect of the Article XXIV:6 negotiations on the status of the concessions). The United States has Initial Negotiating Rights in respect of the bindings on soyabeans and, in conjunction with Canada and Uruguay, on oilcakes.

11. The tariff treatment provided for in the Schedules of Concessions of the individual Member States of the Community prior to the establishment of the original Schedule of Concessions of the Community (XL) comprised, according to available sources, a range of bindings on the products in question, including duty-free bindings on soyabeans, except France (bound at 5 per cent); bindings on rapeseed (colza) in France (10 per cent subject to a minimum charge), Germany (duty free) and in Italy (10 per cent); bindings on sunflowerseed in France and Italy (10 per cent) and Germany (duty free); and duty-free bindings on oilcakes in the Benelux countries and Germany, and at 8 per cent in France in respect of soyacake. Other access measures included, inter alia, an import monopoly in France, quantitative restrictions and minimum import price arrangements in Italy and an import levy in the Netherlands.

The Community Oilseeds Régime

12. The basic arrangements for a common organization of the Community market in oils and fats were adopted as EEC Regulation 136/66 in September 1966.

13. These arrangements were to supersede a diverse range of support measures applied by individual Member States. In summary, these measures included, inter alia, a system of maximum/minimum prices for oilseeds in France, with related intervention purchasing arrangements; in Germany, arrangements funded in part by a tax on the margarine industry under which domestic rapeseed prices were aligned with world market prices; in Italy, mixing regulations and stocking arrangements; and in the Netherlands a system under which the proceeds of a levy were used to pay a disparity allowance on certain oilseeds.

14. The following paraphrases the more important general considerations leading to the adoption of the Community oilseeds régime as recited in the preamble to Regulation 136/66:

(i) the Community market is characterized by high demand and low overall production and Member States depend to a large extent on world market supplies; this situation generally justifies the removal of the various import barriers and their replacement by the Common Customs Tariff which makes it easier for industries to obtain supplies by allowing raw materials to enter the Community duty free;

(ii) taking international commitments into account, provision must be made for appropriate measures to remedy the situation in which the removal of import barriers would leave the Community market in oilseeds without defence against seriously prejudicial disturbances caused either by imports or by disparities, resulting from the action of third countries, between prices for products derived from oilseeds and prices for these oilseeds;

(iii) because of the situation on the world market, certain sectors of agricultural and industrial production in the Community would be adversely affected if the effects of the removal of import barriers were not offset by other measures; oils and oilseeds (other than olive oil and olives) are in direct competition with oils and oilseeds imported from third countries at a reduced rate of duty or duty free;

(iv) growing oilseeds, in particular colza, rape and sunflowerseeds, contribute to the viability of farms by making it possible to improve technical and financial equilibrium and it is therefore necessary to support these activities by appropriate measures; to this end the marketing of Community crops of these products must ensure producers a fair income, the level of which may be determined by a target price in the case of oilseeds, with the difference between this price and prices acceptable to the consumer representing the subsidy which should be granted to attain the desired objective;

(v) farmers can be protected against any risks which may arise, despite the proposed system of subsidies, from the unsettled state of the market by intervention machinery involving the buying-in at intervention prices which must, because the area of production is extensive and the processing centres few, be fixed in the light of natural conditions of price formation;

(vi) the list of seeds to be covered by the system must be drawn up in such a way as to include the species which are most widely grown at the present time, with provision being made for the possibility of extending the system to other seeds where experience shows this to be necessary.

15. As explained by the Community in response to a question put by the Panel the objectives of the common organization of the market were established in order to take account of the realities of the Community situation. The first objective involved trade and was to ensure, given the Community's low overall production and high demand, access to supplies at reasonable prices by opting for opening to world markets and freedom of trade. The second objective was to support Community production and to ensure its necessary protection against market disruption by the grant of a production aid to offset the difference between the price guaranteed to producers, which itself was protected by intervention machinery, and the price acceptable to the consumer, namely, the world market price. It was explained that the system of subsidies or production aids therefore formed part of a set of measures which from the outset accompanied and permitted opening of the Community market to world supplies, and which have the effect of reconciling market opening with support of domestic production and income of the producers concerned.

Rapeseed and Sunflowerseed

16. The arrangements introduced by Regulation 136/66 in respect of rapeseed and sunflowerseed consist of a system of target and intervention prices, with a subsidy being payable on oilseeds harvested and processed within the Community equal to the difference between a calculated world market price and the target price (where the latter price is higher than the former).

17. In terms of the basic Regulation target prices are fixed at a level "which is fair to producers, account being taken of the need to keep Community production at the required level" (Article 23). The intervention price for a normal crop year is the target price less deductions to take account of market fluctuations and of forwarding oilseeds to zones where they are to be utilized (Article 24). Bonus target and intervention prices have been applicable to "double zero" rapeseed since the 1986/87 marketing year. Target and intervention prices are fixed at the wholesale marketing stage (Article 22:2). Provision is made for monthly increments in target and intervention prices from the fourth or fifth month of the marketing year onwards to enable sales to be staggered (Article 25). Data on the evolution of institutional prices for oilseeds, as submitted by the Community, are set out in Annex A.

18. The subsidy payable where the target price is higher than the calculated world market price is granted to or through the processing industry in order to compensate for the additional cost involved in purchasing Community-produced oilseeds at the target price or at prices that are higher than the intervention price. Formally, payment is made to the holder of a certificate, in most cases the processor,

which confirms that the oilseed is eligible for aid and has been processed in the Community. Provision is also made for the advance fixing of the amount of the subsidy.

19. The amount of the subsidy is a matter for determination by the Commission (Article 27:4). Article 29 provides "that the world market price, calculated for a Community frontier crossing point (Rotterdam) shall be determined on the basis of the most favourable purchasing opportunities, prices being adjusted where appropriate, to take the price of competing products into account".

20. The criteria for determining the world market prices of rapeseed and sunflowerseed are laid down in Regulation 115/67 and related Regulations. Provision is made for account to be taken of offer prices on the world market as well as prices quoted on the major commodity markets, with the world market price being determined by the Commission on the basis of the most favourable real purchasing opportunities, excluding offers or prices where shipment would not be carried out within a specified period or which are not considered as representative of real market trends (Article 1). Where the available information is inadequate provision is made for the world market price to be determined or re-constructed on the basis of the value of the average quantities of oil and meal obtained within the Community from 100 kilogrammes of oilseeds after deduction of processing costs, or, if such values cannot be established, by applying the same formula on the basis of last known values for oil and meals adjusted to take account of trends in world prices for competing products (Articles 2 and 3). Provision is also made for adjustments to the calculated world market price to take account of certain price differentials, between rapeseed or sunflowerseed and other oilseeds, which could affect the normal marketing of oilseeds harvested in the Community (Article 6).

21. In practice and because of the availability or reliability of quoted prices the method used by the Commission to calculate the amount of the subsidy is based on oilseed prices reconstructed from recorded Rotterdam prices of oil and oilcake, with adjustments being made pursuant to the relevant provisions of EEC Regulation 115/67. The explanatory notes provided by the Community on the calculation of the aid for June 1989 in respect of sunflowerseed and rapeseed are reproduced in Sections I and II of Annex B. Corresponding data on an annual basis submitted by the Community at the request of the Panel are reproduced in Annexes C.1 and C.2. Data submitted by the United States on EEC and world market prices for rapeseed and sunflowerseed are reproduced in Annexes D.1 and D.2.

Soyabeans

22. Subsidies on the production of soyabeans were first introduced by the Community in 1974. EEC Regulation 1900/74 of July 1974 established a "guide price" system under which subsidies were granted to "producers of soyabeans" based on the difference between the annually fixed guide price and a calculated "average world market price for standard quality soyabeans observed during the same marketing year for a Community crossing point and for a representative period". There were no provisions for "intervention" and the subsidy was payable, not on the volume of production as such, but on an "indicative yield".

23. This Regulation was replaced in 1979 by EEC Regulation 1614/79 which in its preamble stated that experience had shown that the system of aid introduced in 1974 was not the most appropriate for the purpose of attaining the desired objective. In both Regulations the considerations recited were that soyabean production was becoming of increasing interest or importance to the Community and that in order to promote the development of this production, which is in direct competition with soyabeans imported at zero duty from third countries, provision should be made for appropriate measures of support.

24. The main elements of the system of support introduced under Regulation 1614/79 were: (i) the establishment of a "minimum price" at a level guaranteeing sales for producers at a price as close as

possible to the guide price, allowing in particular for market fluctuations and the cost of transporting the beans from the areas where they are produced to the areas where they are used; (ii) making the subsidy payable to the purchaser of soyabeans on condition that such purchaser has, *inter alia*, concluded with individual or associated soyabean producers a contract providing for payment to the producer of a price at least equal to the minimum price; and (iii) the determination of the world market price (Articles 2 and 3).

25. These basic arrangements have continued under subsequent amending or replacement Regulations, with a series of control measures or requirements being introduced under Regulations enacted from 1985 relating to the conditions governing the payment of aid to purchasers of soyabeans, including the advance payment of such aid: EEC Regulations (1985) Nos. 1491, 2194 (which replaced Regulation 1614/79) and 2329 refer.

26. As regards the criteria for the determination of the world market price for soyabeans, Article 1 of EEC Regulation 2194/85 provides that this price "shall be determined by the Commission with regard to beans in bulk of standard quality in respect of which the guide price has been fixed, delivered at Rotterdam". Provision is made for adjustments to offers and prices not meeting these conditions. This determination is to be made on the basis of the most favourable actual purchasing possibilities, with the exception of offers and prices which may not be considered as representative of the actual market trend, account being taken of offers made on the world market and of the prices quoted on exchanges which are important in terms of international trade. It may be noted that since the Community system is based on EEC "standard quality" soyabeans adjustments are made where appropriate to world market prices to take account of quality differences.

27. Article 1 of EEC Regulation 2329/85 provides that the world market price of soyabeans (and consequently the amount of the aid: Article 11) shall be determined twice a month on the basis of the most favourable offers and quotations for delivery within 30 days. Article 2 of the same Regulation provides for the adjustment of world market offers and quotations used in order to compensate for any differences in quality and conditions and place of delivery compared with the product for which the world price must be fixed. Under Article 8 of EEC Regulation 2329/85, which stipulates that the price payable to the producer shall not be lower than the minimum price, provision is also made for adjustments in contracts between purchasers and producers in relation to soyabeans of standard quality for which guide and minimum prices are established. Article 13 of this Regulation establishes procedures for verifying that the price paid to the producer is at least equal to the minimum price.

28. Data submitted by the Community on institutional prices for soyabeans and on the calculation of the amount of the aid are reproduced in Annexes A, B (Section III) and C.3. Corresponding data submitted by the United States on EEC and world market prices for soyabeans are reproduced in Annex D.3.

Pulses

29. In 1978 the Community introduced a system of support for peas and field beans for use in the manufacture of animal feed and in 1984 the system, as amended in 1982, was extended to include sweet lupines (EEC Regulations 1119/78, 1431/82 and 1032/84). In the preambles to the 1978 and 1982 Regulations it is recorded that the production of these products is of increasing interest to the Community and that to encourage the development of this production, which is subject to direct competition from oilcake imported duty free from outside the Community, it is necessary to provide for appropriate support measures.

30. Under this system minimum prices for the products concerned are fixed at levels which, allowing for market fluctuations and the cost of transport of the product from producer to processor, enable

producers to obtain a fair return. An aid is paid, inter alia, to manufacturers of animal feedingstuffs who guarantee that the producer has received not less than the minimum price. This aid is calculated on the basis of a proportion of the difference (45 per cent for peas and field beans, 60 per cent for sweet lupines) between an annually fixed "activating price" for soyacake and an average world market price for soyacake. The Regulations provide that the "activating price" shall be fixed for soyacake (having a total raw protein content of 44 per cent and a humidity content of 11 per cent: EEC Regulation 1120/78) at a level which enables peas, field beans and lupines to be used in animal feed under conditions of fair competition with oilcake and which ensures a fair return to producers. The average world market price for soyacake is determined under these Regulations on the basis of the most favourable purchasing possibilities on the world market in accordance with specified criteria.

EEC system of stabilizers

31. In order to control production in the oils and fats sector the Community introduced a system under which prices and related aid payments are subject to adjustment if production exceeds a guaranteed maximum quantity or threshold. Threshold systems were introduced for rapeseed in the 1982/83 marketing year, for sunflowerseed in 1984/85, and for soyabeans, field peas and lupines in 1987/88. These systems were subsequently reinforced with effect from the 1988/89 marketing year as a result of decisions made by the European Council of Heads of State in February 1988. These arrangements are valid for three marketing years.

32. At the beginning of the marketing year the Commission estimates production for the current marketing year. If this estimate, adjusted as necessary by estimates of actual production in the year just ended, exceeds the "guaranteed maximum quantity" established for each category of oilseed, the amount of aid to production is reduced for all quantities marketed during the marketing year.

33. Specifically, the target or guide prices are reduced by a coefficient (0.45 per cent in 1988/89, and 0.5 per cent in the 1989/90 and 1990/91 marketing years) for each 1 per cent by which estimated production exceeds the guaranteed maximum quantities. The level of the aid is reduced by an amount in absolute terms corresponding to the percentage reduction of the target price for rapeseed and sunflowerseed and of the guide price for soyabeans. The intervention buying-in price (the minimum price in the case of soyabeans) is reduced by the same amount as the aid.

34. In the 1988/89 marketing year institutional (target/guide) prices and aids (for Member States other than Portugal and Spain for which special accession arrangements applied) were reduced under this system of stabilizers by 7.65 per cent and 3.44 ECU/100 kg. in the case of rapeseed, 19.8 per cent and 11.55 ECU/100 kg. in the case of sunflowerseed, and by 10.35 per cent and 5.78 ECU/100 kg. in the case of soyabeans. The magnitude of the reductions in national currency terms may not correspond to the reductions in terms of ECUs. The maximum guaranteed quantities and estimates of production for the 1988/89 marketing year (EUR-10) were: 4.5 and 5.3 million tonnes respectively for rapeseed; 2.0 and 2.888 million tonnes for sunflowerseed; and 1.3 and 1.6 million tonnes for soyabeans.

STATISTICAL DATA

35. The following selected statistical data are attached as annexes hereto:

Annex E: EEC Vegetable Protein Meal Consumption, Imports and Production

Annex F: EEC Balance Sheet for Oilseeds

Annex G: Evolution of EEC Production and Area Cultivated

MAIN ARGUMENTS

National Treatment: Article III

36. The United States complaint is that, contrary to Article III, the Community oilseeds régime accords oilseeds imported from the United States and other exporting countries less favourable treatment than that accorded to like products of Community origin. Domestic products benefit from subsidies paid only to purchasers and processors of domestically grown oilseeds. As a result, under the Community oilseed régime imported oilseeds are accorded less favourable treatment and like products of Community origin are afforded protection over imported oilseeds. The United States submitted that such treatment was in clear violation of Article III, in particular of paragraph 4 of Article III, and that it constituted prima facie nullification or impairment of benefits accruing to the United States under the General Agreement.

37. The Community argued that the aids were to be considered as production aids in terms of Article III:8(b) and that as such they could not constitute an infringement of Article III:4, or of Article III as a whole. The Community drew attention to the fact that a different interpretation of Article III:8(b) would improperly limit the rights recognized by Article XVI as regards subsidies. In the view of the Community, Article III:8(b) was just one application of the general principle that the GATT disciplines with regard to subsidies, which are concerned with the effects of subsidies and not the legal beneficiaries thereof, are entirely laid down in Article XVI. The Havana Conference Reports confirmed this view (page 66, paragraph 69) since the Sub-Committee which proposed the text of Article III:8(b) "recorded its view that nothing in this sub-paragraph or elsewhere in Article [III] would override the provisions of Article [XVI]".

38. The United States submitted that the exception in paragraph 8(b) of Article III in favour of "the payment of subsidies exclusively to producers" was not applicable in the present case because the subsidies complained of were paid to purchasers and not to producers. In support of this point the United States referred, inter alia, to the 1958 Panel on Italian Tractors (BISD 7S/60) in which special credit facilities made available under Italian law for the purchase by farmers of Italian but not imported tractors were considered in relation to paragraphs 4 and 8(b) of Article III. In that case the Panel declined to follow the reasoning of the respondent that Article III:4 extended only to laws and regulations directly concerning conditions of sale and not to a broader range of factors "affecting" the treatment of imported products once they had been cleared through customs. The Panel found that these credit facilities were granted to purchasers of agricultural machinery and could not be considered in terms of Article III:8(b) as subsidies accorded to the producers of agricultural machinery. The United States considered that the purchaser incentives in the Italian Tractor case and those in the present case were identical in terms of their effects on the market place in the sense that both incentives encouraged the purchase and consumption of domestic over imported products.

39. In the Community's view the Italian Tractor case was distinguishable from a factual point of view because: (i) the credit facilities granted to purchasers of Italian agricultural machinery were not subsidies for the production of, or for ensuring, a certain price to producers of such machines, whereas the aim of the Community subsidies was to enable the producer to be paid a price higher than the market price by offsetting the extra cost resulting from such payments; (ii) the real benefit of the subsidies paid went to the oilseed producer; and (iii) the effects on the market in each case were very different and in no way comparable.

40. The less favourable treatment complained of by the United States in relation to Article III:4 was that the Community measures provided substantial incentives to oilseed processors to purchase oilseeds of Community origin in preference to imported oilseeds and that these measures provided payments to processors in excess of their costs of purchasing higher priced domestic oilseeds. The United States

contended that the cost to processors of purchasing domestic oilseeds was the difference between an administratively determined price payable to growers (which was equal or close to the intervention price for rapeseed and sunflowerseed or to the "minimum price" for soyabeans) and the price of competing oilseeds, whereas the subsidy paid to processors was equal to the difference between the relatively higher target or guide price on the one hand and an administratively determined world market price on the other.

41. The United States argued that these arrangements involved two elements of over-compensation which created incentives to purchase domestically produced oilseeds in preference to imported oilseeds. The first was the margin between the target or guide prices on the one hand and transaction prices for domestic oilseeds at or close to the minimum or intervention prices on the other. The second margin was that between the import price of competing oilseeds and the administratively calculated world market price which the United States submitted was generally lower than world market transaction prices. The price data supplied by the United States in support of this contention are reproduced in Annex D. Moreover, the United States submitted that the existence and effectiveness of these purchase incentives were borne out both by the fact that increasing levels of Community production were regularly and fully absorbed by the processing industry without the need for intervention purchasing or accumulation of stocks even in times of world surpluses of oilseeds, and by the fact that large changes in market share have occurred since the system came into effect, particularly in the 1980s.

42. The Community submitted that a basic point to be borne in mind was that Article III:4 did not provide that imported products should be accorded treatment identical to that received by domestic products. Rather what was required was that an advantage should not be granted on the domestic product when the situation of the imported and the domestic products were comparable. What had to be compared therefore was the effect of the respective treatments accorded to imported and domestic products. The Community also argued that, from a legal viewpoint, the obligations of Article III:4 could not apply to production subsidies. It was impossible to ensure equality of treatment between domestic and imported products given that the conditions under which imported products were produced, including subsidization in their country of origin, were outside the control of the importing country. Lower priced imported products would in any event not qualify for subsidies when processed in the Community since there were no extra costs to be offset. Moreover, since the United States also paid production subsidies at a later marketing stage and could be presumed to interpret Article III as permitting such subsidization, it could not dispute the right of the Community to rely on the same interpretation.

43. The Community submitted that the subsidies in question were simply aids for the production of oilseeds that were paid, in common with the practice of many contracting parties, at a later stage of marketing. The Community provided a sample list of fourteen support arrangements notified under Article XVI:I, including three by the United States, where production subsidies were granted at a later stage of marketing and not directly to producers. The Community further submitted that the aid paid to processors of domestic oilseeds was neutral and did not constitute a purchase premium to processors nor did the aid have the effect of according a preference to purchase of domestic over imported oilseeds.

44. In response to questions put by the Panel, the Community pointed out that the oilseeds régime was directed and confined to the granting of aid to production and producers which, for administrative and supervisory reasons, was paid at subsequent marketing stages. In the Community's view the explanatory and statistical information which it had provided to the Panel (Annexes B and C refer) confirmed that the system was confined to compensating for the additional costs arising for processors and feed compounders from the purchase of Community oilseeds without there being any additional bonus which constituted a financial incentive to purchase domestic products in preference to imported products. The essential point was, as explained in the notes provided to the Panel (Annex B), that the Community had in practice modified the application of its legislation, which allowed the Commission a margin of assessment, without formally amending the text thereof to ensure that there was no

over-compensation or additional bonus. The Community also noted that Community aid was fixed under conditions that, within the limits of the powers available to a public authority, the necessary steps were taken to guarantee that Community aid was confined merely to compensating for the additional cost.

45. The Community also noted that provision was made under the Regulations for adjustments where the amount of the aid in respect of rapeseed and sunflowerseed could otherwise create a preference in favour of one oilseed in relation to others, whether of Community origin or imported, and that in recent crop years this provision had been applied systematically to avoid any such preference. In the case of soyabeans any difference between the prices paid to producers under annual contracts and the price used to calculate the aid was explained by the undertakings by buyers to provide costly technical assistance throughout the agricultural year and by the additional costs actually incurred in the preparation of Community products from the farmgate to the processing stage.

46. The United States considered that the calculations presented in Annex B were hypothetical and uninformative. In this regard the United States submitted that the data it had provided in Annex D, which were largely drawn from published EEC sources or from recognized trade publications, were accurate. It also noted that it had not been refuted that the Community had not taken on any significant stocks of oilseeds despite the fact that there had been significant accumulations of world stocks on a number of occasions since the Community régime was introduced. In the view of the United States the absence of significant Community stocks at any stage was further evidence of the bonus aspects of the Community system. Moreover, the United States considered that even if, contrary to the evidence it had submitted, world market prices as calculated by the Commission were not below actual world market price levels, the incentive created by paying processors on the basis of the higher target or guide prices constituted a bonus or over-subsidization.

47. In a supplementary submission to the Panel by the United States the following points were made with regard to the information provided by the Community on the calculation of its aids in Annexes B and C hereto. The United States submitted a graph illustrating these points on the basis of the data provided by the Community (attached as Annex H):

- (a) The Community does not establish its calculated world price based on any actual market prices for oilseeds. Rather, the Community computes its calculated world price for oilseeds based on actual market prices for "oilmeal" and "vegetable oil". The way in which the Community performed this calculation resulted in the calculated world price for oilseeds being consistently lower than the actual Rotterdam price for oilseeds. This difference between the calculated world price and the actual world price (which was the price the Community processor would pay for imported oilseeds) was a subsidy to processors that purchased domestically.
- (b) The Community listed an adjustment factor (Annex C-1 and C-2, Column E), which was always a positive number, and which had become larger over time. It was not clear how the Community computed this number, but it essentially served to create a subsidy: the size of the subsidy depending on the number chosen. The Community adjustment factor could be examined in two ways:
 - (i) as the difference between the target price (Column C) and the French (intervention) price, which was the price received by the French farmer (Column B) (which difference was clearly a subsidy to the processor conditioned on domestic purchase); or
 - (ii) as the difference between the two calculated world prices (Columns A and F), which merely adjusted an artificially low calculated world price, to arrive at a price closer to the actual Rotterdam price.

- (c) The price actually received by the farmer (Column B) was consistently lower than the target price (Column C), and the difference had been increasing, yet the Community continued to base its subsidy on the target price.

48. In response to foregoing points the Community submitted that, contrary to what was claimed by the United States, there was no inconsistency in the Community's replies to the questions put by the Panel. In this regard the Community made the following points:

- (a) World market prices for rapeseed (colza) and sunflowerseeds did not exist. To calculate Community aids correctly, it was necessary to have representative forward prices for five months for rapeseed and six months for sunflowerseed. To fix aid on the basis of oilseed prices, as the United States suggested, would not enable the Commission to establish a world price on the basis of concrete data. Under the system used, the price could be established on the basis of real, public, known and transparent data, i.e., Rotterdam oilcake prices. Furthermore, it was clear from the information submitted by the Community that the Oilworld weekly prices for sunflowerseeds were completely missing for ten months of 1988, and two months of 1987 and 1986; for rapeseed (colza), prices were missing for three months of 1988 and 1987, and seven months of 1986. As for the months for which prices existed, these were often limited to one or two weeks, and therefore completely unusable for aids that were fixed "at least once a week". With regard to 1989, up to and including the month of August, there were no Oilworld prices whatsoever for sunflowerseed, and only partial prices in August for rapeseed from Poland. Furthermore, with regard to the calculation of aid for rapeseed, the Community had to reject the Polish offer prices on the Rotterdam market, which were too low: taking them into account would have increased Community aid.
- (b) The Community, in particular in the notes reproduced in Annex B, had pointed out that the current calculation of aid took into account a fixed-rate price adjustment. This adjustment was aimed at improving the world price, and therefore had the effect, contrary to what was claimed by the United States, of reducing aid by the same amount (Section II, paragraph 4, of Annex B refers).
- (c) With regard to the third point made by the United States, the Community had never claimed that the producer received a price equal to the target price. As explained in the Community statement to the Panel on 27 June 1989: "with regard to rapeseed and sunflowerseed, the Regulation provides that the amount may be adjusted if there is a danger of giving preference to one seed over another (regardless of whether they are of Community or imported origin). This possibility has constantly been used in past years, and in practice the result is that aid for rapeseed and sunflowerseed has equalled the difference between the intervention price, in other words the price guaranteed to producers by the Regulation, and the world price. So there is no undue profit or extra bonus of any kind".

49. The United States also considered that the Community oilseeds régime afforded protection to like domestic products of imported oilseeds and that on the basis of key criteria such as the products' intended end-uses, commercial interchangeability, commercial value and price, purchaser preferences and physical characteristics (including the products' properties), nature and quality, oilseeds were a single like product within the meaning of Article III. In support of this argument the United States referred to the arguments and findings in the following reports: Panel Report on "EEC Measures on Animal Feed Proteins", BISD 25S/49 (1978); Panel Report on "Australian Subsidy on Ammonium Sulphate", BISD II/188 (1950); Panel Report on "Treatment by Germany of Imports of Sardines", BISD IS/53 (1952); Panel Report on "Spain, Tariff Treatment of Unroasted Coffee", BISD 28S/102 (1981); the Report of the "Working Party on Border Tax Adjustments", BISD 18S/102, para. 18.

50. The Community considered that the United States argument that all oilseeds made up "a single like product" was not supported by the Panel cases referred to, and that the fact that products were "directly competitive or substitutable" did not make them "like products" for the purposes of Article III:4. In this regard, the Community drew attention to the following definition of "like product" in footnote 18 to Article 6 of the Code on Subsidies and Countervailing Duties: "Throughout this Agreement the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e., alike in all respects to the product under consideration or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration". Finally, the Community observed that all production subsidies afforded protection to domestic production and that if this fact were to constitute an infringement of Article III, then Article III would effectively prohibit the use of production subsidies by all contracting parties.

51. The United States concluded by submitting that a violation of the so-called national treatment obligations of Article III constituted prima facie nullification or impairment of a benefit accruing to the United States within the meaning of Article XXIII and that it was not necessary, where there was a clear infringement of the provisions of the General Agreement, for the complaining party to demonstrate adverse effect. In this regard the United States referred to the following cases: Panel Report on "The Uruguayan Recourse to Article XXIII", BISD 11S/95, 100 (1962); Panel Report on "Italian Tractors", BISD 7S/60 (1958); Panel Report on "EEC, Measures on Animal Feed Proteins", BISD 25S/49 (1978); and Panel Report on "New Zealand, Imports of Electrical Transformers from Finland", BISD 32S/55, 70 (1985).

52. The Community submitted that while GATT practice as codified by the 1979 Understanding on Notification, Consultation, Dispute Settlement and Surveillance (BISD 26S/210) recognized that there was a presumption as to the adverse impacts of an infringement of the rules of the General Agreement, this did not dispense the party alleging such an infringement from affirmatively establishing the existence of such an infringement. The 1979 Understanding should, by virtue of the principle of the hierarchy of texts, take precedence over the conclusions of panels which mostly antedated the 1979 Understanding. In fact such allegations had been rejected in numerous cases precisely because no adequate evidence of violation had been adduced or sustained by the complainant. This principle had been followed, for example, in the report of the Panel on Exports of Sugar: BISD 27S, at p. 97. The general principle was therefore that the onus of proof lay with the complainant with respect to any violation of Article III in the present case.

Nullification and Impairment of Tariff Concessions

53. The United States considered that the benefits accruing to it under the tariff concessions on oilseeds and oilcakes granted by the Community pursuant to Article II in the 1960-62 tariff negotiations had been nullified and impaired in the sense of Article XXIII:1(b) by the subsequent introduction of and substantial increases in producer and processor subsidies on Community oilseeds and protein animal feed components. The United States considered that in accordance with prior GATT rulings there was a presumption of nullification and impairment in such circumstances. The United States further considered that even in the absence of such a presumption there was compelling factual evidence that the 1962 concessions have been nullified and impaired.

54. The Community considered that the 1962 concessions no longer existed since they had been repeatedly withdrawn and replaced by new tariff concessions granted by the Community in the course of successive EEC enlargement negotiations under Article XXIV:6. The United States could therefore only claim possible nullification or impairment of benefits stemming from the concessions relating to the 1986-88 enlargement negotiations. The Community considered, as a matter of principle and balance with regard to overall rights and obligations under the GATT: that in the absence of any violation of specific provisions of the General Agreement there could be no presumption of nullification

and impairment in relation to the impact of production subsidies on concessions bound pursuant to Article II; that such measures were permitted and governed by Article XVI which required that the adverse effects caused in terms of import displacement or impedance must be duly established by the complaining party; and that in the present case, whether in relation to the 1988 concessions or the defunct 1962 concessions, such effects as would constitute nullification or impairment in terms of Article XXIII:1(b) had not been established.

55. In support of its submission that no presumption of nullification or impairment could arise in the absence of any violation of specific provisions of the General Agreement, the Community cited the principle embodied in paragraph 5 of the Annex to the 1979 Understanding Regarding Notification, Dispute Settlement and Surveillance which provided that: "If a contracting party bringing an Article XXIII case claims that measures which do not conflict with the provisions of the General Agreement have nullified or impaired benefits accruing to it under the General Agreement, it would be called upon to provide a detailed justification" (BISD 26S/210, at 216).

56. Furthermore, the Community pointed out that the requirement that the adverse effects of subsidization on imports of bound products must be established under Article XVI stemmed from the provisions of the Code on Subsidies and in particular Articles 8.3 and 8.4 thereof. Article 8.3(b) dealt specifically with cases where a subsidy resulted in "nullification or impairment of the benefits accruing directly or indirectly to another signatory under the General Agreement", and the footnote thereto stated that such benefits "include the benefit of tariff concessions bound under Article II of the General Agreement". Article 8.4 of the Code provided that "the adverse effects to the interests of another signatory required to demonstrate nullification or impairment or serious prejudice may arise through "... the effects of the subsidy in displacing or impeding the imports of like products into the market of the subsidizing country". In the view of the Community these provisions should guide the interpretation and application of Article XVI in the case of alleged nullification through subsidies on concessions granted under Article II between contracting parties signatories to the Code. Furthermore these provisions confirmed the principle enunciated in the 1979 Understanding that the adverse effects of subsidies in such a case could not be presumed but had to be demonstrated by the complainant.

57. The United States submitted that tariff concessions such as those granted by the Community on oilseeds and oilcakes were the backbone of the GATT process of liberalizing world trade. The general purpose of the General Agreement was to facilitate this type of concession and to ensure that tariff obligations undertaken in accordance with Article II were not eroded by other measures. This principle applied to domestic subsidies which, although not prohibited under the General Agreement, operated to diminish the value of tariff concessions by expanding indigenous production and making domestic products artificially competitive with imports. Such measures had long been recognized as being capable of nullifying or impairing benefits accruing to a contracting party within the meaning of Article XXIII:1(b).

58. The United States cited two GATT Panel Reports¹ as authority for the principle that nullification or impairment of a benefit accruing to one contracting party occurred if domestic measures taken by a second contracting party subsequent to the adoption of the tariff concession: (i) could not reasonably have been anticipated by the party bringing the complaint at the time of the negotiation of the concession; and (ii) upset the competitive position of the imported products (i.e., altered the pre-existing market relationship in the host country). In the Ammonium Sulphate case the Panel found that Australia's decision in 1949 to discontinue subsidizing the sale of one fertilizer (sodium nitrate) on which Australia had granted Chile a duty-free binding in 1947, whilst continuing to subsidize another fertilizer

¹Report of the Panel on "The Australian Subsidy on Ammonium Sulphate", BISD 11/188 (1950); Report of the Panel on "Treatment by Germany of Imports of Sardines", BISD 1S/53 (1952).

(ammonium sulphate), although not conflicting with Australia's obligations under the GATT, nonetheless nullified or impaired benefits accruing to Chile as a result of the tariff concessions granted by Australia on sodium nitrate. Specifically the Panel found that Chile "had reason to assume" that the subsidy would not be removed from sodium nitrate before it was removed from ammonium sulphate, that the action by Australia impaired benefits accruing to Chile because Chile could not have reasonably anticipated the action, and that the action resulted in upsetting the competitive relationship between the two fertilizers. The Panel recommended an adjustment of the subsidies "to remove any competitive inequality".² In the German Sardines case a similar finding was made on facts which involved the subsequent introduction of more favourable import treatment for one species of fish in circumstances where, when the tariff concessions were negotiated, the exporting country had reason to assume that all fish in the same family would be treated similarly.³ The unadopted 1985 Panel Report on EEC Production Aids on Canned Fruits was also referred to by the United States in support of the principle outlined above.⁴

59. While noting that neither of these cases involved the issue of whether the introduction of a domestic production subsidy on a particular product subsequent to the granting of a tariff concession on that product would constitute nullification or impairment, the United States submitted that this issue had been affirmatively settled by the 1955 ruling of the CONTRACTING PARTIES at the 1954-55 Review Session which provides that:

"So far as domestic subsidies are concerned, it was agreed that a contracting party which has negotiated a concession under Article II may be assumed, for the purposes of Article XXIII, to have a reasonable expectation, failing evidence to the contrary, that the value of a concession will not be nullified or impaired by the contracting party which granted the concession by the subsequent introduction or increase of a domestic subsidy on the product concerned."⁵

60. Furthermore, the United States submitted that a 1961 Report on Subsidies made it clear that it was the burden of the party imposing the new measures, in this case the European Community, to overcome the presumption that the value of the concession would not be nullified or impaired:

"By 'failing evidence to the contrary' the Panel understands that the presumption is that unless such pertinent facts were available at the time the tariff concession was negotiated, it was then reasonably to be expected that the concession would not be nullified or impaired by the introduction or increase of a domestic subsidy."⁶

61. The United States considered that the reasons for these rulings were readily apparent: tariff concessions were negotiated with the expectation that the party granting the concession would not take new measures that would adversely affect conditions of competition for the product on which the

²At pp. 193 and 195.

³At pp. 58 and 59.

⁴Panel Report on "European Economic Community - Production Aids Granted on Canned Peaches, Canned Pears, Canned Fruit Cocktail and Dried Grapes", L/5778 dated 20 February 1985.

⁵Review Reports, Report by the Working Party on "Other Barriers to Trade" adopted on 3 March 1955: BISD 3S/222, paragraph 13.

⁶"Subsidies: Operation of the Provisions of Article XVI" - Report adopted on 21 November 1961: BISD 10S/201, paragraph 28.

concession was negotiated; and the subsequent introduction or increase of domestic subsidies could outweigh any advantage obtained in a tariff concession.

62. The Community stressed in its counter-argument that the rights and benefits conferred by the General Agreement were mainly protected, as in all legal systems, by the observance of all the obligations laid down by that Agreement. Non-tariff measures were the subject of a certain number of precise rules in the Agreement (for example, Articles II, III and XI) and rights and benefits accruing to a contracting party from a tariff concession were protected first and foremost by the observance of the obligations thus created. Subsidies fell within this category of measures with their own special rules as laid down in Article XVI (see also paragraphs 109 and 110 below).

63. With regard to the principle and the presumption adduced by the United States from the early reports, the Community considered that these reports needed to be put into context and into chronological order before attempts at generalization were undertaken. Moreover, in the Community's view the precedents invoked were not relevant to the present dispute.

64. The Community noted that the Ammonium Sulphate and German Sardines cases related to highly specific situations. They were delivered in the very first years of the application of Article XXIII at a time when panel reports did not have the nature of establishing interpretative principles with general authority. Both cases involved the discontinuance of "equality of treatment" between directly competitive but not "like" products. Equality of treatment in these early cases was a factor so essential that the concession was practically without economic value once such treatment ceased to exist. The Panel therefore considered that there was no longer any point to the concessions in question.

65. Furthermore the Community pointed out that the measures which resulted in the cessation of equality of treatment were measures totally outside the scope of the rules of the General Agreement. The Sardines case involved tariff treatment of an unbound product, which was sufficiently different from the bound product for that difference in treatment not to fall within the scope of Article I. The case of Ammonium Sulphate involved the discontinuation of subsidies on one of the two competing fertilizers. Thus the two Panels simply established that the tariff concessions were nullified or impaired solely where: (i) the value of a concession rests on a legitimate expectation (analysed at length in each case) of "equality of treatment" between the imported product and other imported or nationally produced products; and (ii) the cessation of such equality of treatment results in upsetting the competitive relationship. The Community considered that it would be improper to quote these highly specific decisions out of context and draw general conclusions on the granting of subsidies pursuant to Article XVI. The Ammonium Sulphate Panel explicitly stressed that: "The situation in this case is different from that which would have arisen from the granting of a new subsidy on one of two competing products owing to the freedom to impose subsidies and to select the products on which a subsidy would be granted".⁷ The Community considered that unlike these precedents, where the measures did not fall within the scope of the rules of the General Agreement, the granting of a production subsidy was covered by the obligations of Article XVI of the General Agreement. While in the two precedents cited by the United States, the absence of rules was the problem, in the present case a rule existed and applying these precedents would be tantamount to amending an existing rule.

66. As far as upsetting the competitive relationship was concerned, the Community noted that the United States considered that this occurs as a result of any alteration in the "pre-existing market relationship" whereas, in the opinion of the Community, "alter" and "upset" were not synonymous. The granting of a subsidy may alter the competitive relationship but it did not necessarily upset it to the point of substantially devaluing the concession. The proof was, in the case in point, that the granting

⁷At p. 193.

of Community subsidies has not prevented imports from more than quadrupling since 1966. This fact showed that Community concessions on oilseeds were still as valuable as before in spite of all the subsidies granted. The United States showed, moreover, during the last renegotiations under Article XXIV:6 (1986), that it placed great value on the concessions. The fact that neither at that time nor before did the United States request an amendment to the Community support system confirmed that the United States did not consider the concessions to have been affected or devalued. The situation was therefore radically different from that in the two precedents, where the Panels considered that the measure examined upset the competitive relationship (cessation of equality of treatment) to an extent that the concession became largely worthless.

67. The Community noted that the Canned Fruit Panel was the only case involving the application of the concept of non-violation impairment to subsidies under Article XVI. The Panel's Report was not adopted precisely because of disagreements between the contracting parties on the application of the concept of impairment to subsidies and on its consequences as regards the balance of rights and obligations arising from Articles II and XVI. Accordingly, whatever value may be placed on the Report of the Canned Fruit Panel, in the view of the Community, one cannot apply it by referring to part of its findings (recognition of non-violation impairment by the granting of a subsidy subsequent to the concession) and ignoring the other part (that the concession to be considered is that last negotiated and not the first negotiated).

68. The United States noted that the report of the Canned Fruit Panel was not adopted because the matter in dispute was settled by agreement between the parties. The report was not rejected by the Council; rather, one of the terms of the agreement was that the United States would not seek adoption of the report.

69. With regard to the presumption of nullification and impairment which the United States considered as having been established by the 1955 and 1961 Reports, the Community considered that the United States argument was not supported by sound, clear precedents and that it also contradicted the text of the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance approved by the CONTRACTING PARTIES in 1979. Paragraph 13 of the 1955 Review Session Report was confined to dispensing the party which negotiated the concession from providing proof of its expectation as to the subsequent introduction of subsidies on the product concerned and could not be interpreted as establishing a presumption as to the effect of a subsidy introduced subsequent to the granting of a concession. Moreover no such conclusion was reached in the few panels where the question of the presumption of adverse effects was raised. For example, in the 1962 Panel Report on the Uruguayan Recourse to Article XXIII it was stated that: "While it is not precluded that a prima facie case of nullification or impairment could arise even if there is no infringement of GATT provisions, it would be in such cases incumbent on the country invoking Article XXIII to demonstrate the grounds and reasons for its invocation. Detailed submissions on the part of that contracting party on these points were therefore essential for a judgment to be made under this Article".⁸ At all events in the Community's view this matter was settled by the 1979 Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance in Point 5 of the Annex thereto entitled "Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement". This requires that in cases of non-violation, a detailed justification is necessary. This requirement also formed part of the Code on Subsidies (Articles 8(3) and (4)) and ruled out the concept of presumption and reversal of the burden of proof.

70. The United States noted that the Community argument was tantamount to converting the absence of a prohibition on domestic subsidies into an affirmative right to subsidize not limited by other GATT

⁸Panel on "Uruguayan Recourse to Article XXIII", BISD 11S/95 at p. 100.

provisions, by interpretative precedents or by commitments under the General Agreement. The United States pointed out that the 1955 ruling occurred at the same time that the CONTRACTING PARTIES were reviewing Article XVI and adding to its provisions. In that ruling and again in the 1961 ruling, the CONTRACTING PARTIES, including countries now members of the EEC, explicitly recognized that subsidies can impair, and may be presumed to impair, tariff concessions, even though they are not prohibited by Article XVI. These rulings removed any uncertainty left open by the Ammonium Sulphate case that the subsequent introduction of subsidies could serve as a basis for nullification or impairment and it was thus clear that Article XVI was not intended to have exclusive jurisdiction over subsidies.

Status of the 1962 Concessions

71. The Community submitted that the concessions granted by the Community in 1962 pursuant to Article II had since been repeatedly withdrawn and replaced by new tariff concessions in the course of successive enlargement renegotiations under Article XXIV:6 (following the procedures of Article XXVIII). These negotiations took place in 1973/74, 1981 and most recently in 1986/87 when the Schedule of Concessions of the Community currently in force was concluded. The Community considered that for the purposes of the present case the rights and expectations of the parties should be determined on the basis of the 1988 concessions currently in force.

72. The Community referred to the following matters relating to the 1986/87 negotiations under Article XXIV:6. On 13 February 1986 the CONTRACTING PARTIES were notified (L/5936/Add.2) that the Schedules of Concessions of Portugal, Spain and of the European Community of Ten had been withdrawn. A modified duty was proposed as an offer by the Community based on a weighted average of the duties previously applicable together with annotated "blanks" which indicated that the products in question, which included oilseeds and oilcakes, were subject to renegotiation in accordance with Article XXVIII procedures. The offer made by the Community was for a tariff quota equal to the quantities traditionally imported by the twelve Member States bound at a rate lower than the weighted average of the former rates, together with an unbound variable levy on imports in excess of the tariff quota. In the course of these negotiations the Community support arrangements and their extension to Portugal and Spain were not challenged by the United States. For reasons of overall balance the Community bound the duty on oilseeds and oilcakes at zero, without quantitative limitation, whilst fully maintaining its system of aid for oilseed production. A bilateral EC-US agreement was concluded on this issue, which specified that "the GATT bindings of the EEC-10 ... will be restored and extended in view of the United States' recognition of the benefits which would result for certain United States exports". Accordingly, the only rights or expectations the United States had with regard to the concessions granted by the Community were those stemming from the 1988 concessions.

73. The United States considered that the Community's arguments on this point were without basis in GATT law or precedents. In the view of the United States, such an interpretation would, as had been pointed out by Australia in its submission to the Panel (paragraphs 123 to 125 below), appear to benefit none of the contracting parties except the Community. It would accord the Community a special status vis-à-vis other contracting parties notwithstanding the fact that the Community as such was not a member of the GATT and was permitted by other contracting parties to represent the Community Member States in tariff negotiations and in the publication of a common tariff schedule for these members. Moreover, the effect of the argument would be to permit the Community to impair concessions in a non-transparent and fundamentally inequitable manner. The United States noted that the argument that Community concessions had replaced as a result of Article XXIV:6 enlargement negotiations had been rejected in the EEC Canned Fruit case. Such an argument would also lead to the absurd result, for example, that the recent withdrawal and replacement of Schedules by a host of contracting parties in the context of the Harmonized System would have the effect of extinguishing the rights and expectations with respect to these Schedules without prior notice. The Community

argument would furthermore put the burden on other parties in GATT tariff negotiations to bring and settle all nullification and impairment claims before permitting a party to introduce a new Schedule, since otherwise these claims would expire. The United States submitted that there was no GATT basis for such a position, which would have a fundamental effect on the GATT balance of rights and obligations.

74. The United States noted with respect to the 1986/87 negotiations that it had flatly rejected the Community's proposal for a tariff quota for oilseeds and oilseed products. Moreover, in the EEC/US bilateral agreement on the outcome of the 1986/87 negotiations the Community specifically agreed that the EC(10)'s GATT bindings would be "restored and extended" to Portugal and Spain. In the view of the United States this agreement accurately reflected the understanding of both parties that concessions were being "restored" rather than extinguished and replaced. The same agreement also noted that certain other bindings would not necessarily be restored but that the United States retained Article XXVIII rights in further negotiations. The United States submitted that the Community did not consider in that instance that prior rights had been extinguished, notwithstanding that, formally, the Schedule of the Community had been withdrawn.

75. The Community pointed out, with regard to the agreed terms for the bindings, that in the notification to the GATT of the 1987 bilateral Agreement in question, the term "replaced" had not been challenged by the United States. Furthermore, the notion of "withdrawal of the concession" which was subsequently "replaced" had been accepted by the United States delegation in the 1973 negotiations. The Community also considered that the points made with respect to the legal status of the Community in relation to the General Agreement were purely academic. The Community was not asking for special privileges, it merely stressed that like any customs union it has had to carry out renegotiations on the occasion of each enlargement. The renegotiations were not a purely formal exercise. The value of a concession stemmed not only from the rate of duty but also from the trade involved. The fact that a concession which bound six countries henceforth bound nine or twelve countries necessarily brought a change in the value of the concession. Hence a concession that is withdrawn or replaced has legally been renegotiated even if it is replaced by a concession at the same bound rate. The Harmonized System exercise was a purely technical matter relating to nomenclature, whereas Article XXIV:6 negotiations involved the renegotiation of concessions on the basis of the provisions of Article XXVIII by virtue of the formal withdrawal of the former tariff Schedules and the establishment of a new Schedule.

76. With regard to the United States comments concerning the text of the bilateral Agreement on the outcome of the Article XXIV:6 negotiations, the Community observed that it would be incorrect to interpret the expression "restored and extended" in the way the United States had done. The two parties were not in agreement on the point, and the preamble to the Agreement recognized that it was "without prejudice to the views of either party in respect of Article XXIV:6". The Community considered that the GATT bindings were "restored" in that the previous offers of a zero binding with quantitative limitations (a tariff quota) were withdrawn in favour of a binding without limitations and extended - geographically - to the new member States, Spain and Portugal. With regard to the reference to the United States retention of its initial negotiating rights in certain cases, this was due merely to the fact that, at the time, the Community had not completed the negotiations for its products with the supplier countries. In such cases, the Community recognized, as was customary in tariff negotiations, that the United States had certain rights regarding what should be agreed with other countries at a later stage. In the Community's view this did not therefore justify the United States interpretation.

77. With regard to the Canned Fruit⁹ Panel the United States pointed out that the subsequent introduction of a subsidy system had been held to impair a 1974 concession of the Community but not a 1979 concession on the same item which post-dated the introduction of the subsidy system. The Panel's conclusion was that rights in the earlier concession survived even where a concession at a lower rate of duty was granted subsequently.¹⁰

78. The Community noted that the Canned Fruit Panel only considered that the 1974 concessions in that case (originally granted in 1962) had been impaired since they were the most recent concessions in relation to the period the Panel was examining.

79. The United States submitted, however, that the 1962 and 1967 concessions in that case were not at issue because the later (1974) concessions were more valuable.

Reasonable Expectation

80. The United States submitted that on the basis of the relevant principles and precedents, it could not reasonably have anticipated that the value of the 1962 concessions would be nullified and impaired, and that the onus was on the Community to overcome this presumption. The United States could not reasonably have anticipated at the time the EC granted the concessions on oilseeds and meal that the current production aid régime, or indeed anything even remotely resembling it, would be instituted. In 1962, there was no Community programme either in operation, or under consideration, to subsidize either oilseed production or processing. Oilseeds were not covered by the Common Agricultural Policy and proposals for future extensions of the CAP did not include a programme for oilseeds.

81. The Community submitted that, without prejudice to its position with regard to the legal status of the 1962 concessions, there were three points to be taken into account in evaluating the expectation which the United States may have had. Firstly, several Member States of the original Community applied support and protection arrangements for the production of oilseeds and in 1961 a broad debate was initiated with the submission of formal proposals by the Commission, both within and outside the Community, on a Common Organization of the market in the fats sector. Accordingly, as early as 1962 the United States could not ignore that the Community was preparing to introduce a Community system to replace the national systems. The draft Commission proposals were notified to the GATT and the United States was aware of this. For historical reasons connected with the establishment of the Community, the Common Customs Tariff was negotiated before the introduction of the Common Agricultural Policy, but the Community's partners and in particular the United States were not unaware that the concessions negotiated at the Conference on Tariffs in 1960-61 were negotiated having regard to future changes, in particular in agriculture. This was why a Joint EEC/US Declaration was signed in March 1962 and notified to the GATT alongside the grant of concessions. This Declaration contemplated the occurrence of subsequent events which "will be such as to modify appreciably the basic conditions that currently govern relations between the United States of America and the EEC in all fields, particularly in the agricultural field".

82. On this point the United States argued that the issues giving rise to the March 1962 Standstill Agreements did not relate to oilseeds and that at that stage the Community had not announced an oilseeds policy. It also pointed out that the full text of the excerpt from the 1962 Joint Declaration quoted by the Community, which in its view hardly constituted evidence that the United States "reasonably

⁹Panel on "EEC - Production Aids Granted on Canned Peaches, Canned Pears, Canned Fruit Cocktail and Dried Grapes", L/5778 (1985).

¹⁰At page 20.

expected" the introduction of a Community subsidy programme on oilseeds, let alone a programme such as that which now confronted the United States, read as follows: "The European Economic Community and the United States of America consider a series of events will occur during the year 1962 which in all probability, will be such as to modify appreciably the basic conditions that currently govern relations between the United States of America and the EEC in all fields, particularly in the agricultural field, and which will make advisable a new examination of these relations" (portion not quoted by the Community underlined). The United States also noted that the first public reference to an EEC oilseeds programme did not appear until November 1961, more than a year after the EEC made its proposal for duty-free treatment of oilseeds. The reference was an oblique comment made in passing in the context of a long address on the general developments in the Community since the Treaty of Rome. It appeared from the speech that, at the time, proposals for a Community programme in the fats sector were in early draft stage and still under initial consideration and discussion. The EEC did not enact legislation for the oilseeds sector until 1966, and even then, there was no expectation by other countries that this EEC programme would cause EEC production of oilseeds to expand significantly above its historic levels.

83. Secondly, the Community contended that whatever the legal validity of the original expectation it was improper to claim definitively to "freeze" that legitimate expectation and maintain that the competitive relationship existing at the time of the negotiations was guaranteed and that any modification to the competitive relationship resulting from subsequent government measures should be presumed to come as a surprise to the party that negotiated that concession. Moreover, a competitive relationship may be affected not only by the country which granted the concession but also by the policies of the country which negotiated it, as in the case of United States price support and export assistance programmes on soyabeans. Expectations may also be affected by embargoes or threats of embargoes and could induce the party granting the concession to reassess the reliability of its principal suppliers and to enhance its own security of supply.

84. Thirdly, the Community pointed out that the expectations which the United States may have had in 1962 regarding the future development of oilseed imports into the Community, whatever method of assessment is used, had been more than satisfied by the actual trend of Community imports. These imports had quadrupled since 1966. The Community argued that its imports would have been significantly lower had the level of oilcake utilization in the Community not developed, because of an excessive level of consumption, to a point which was systematically 50 per cent higher than in the United States (see also paragraph 93 below). This was not intended to suggest that the value of tariff concessions should be frozen in terms of the original assessment or expectation obtaining at the time they were negotiated. It was however clear that just as a contracting party's expectation regarding the original value of a concession could not be fixed once and for all, it should equally not be possible to freeze definitively expectations regarding the original competitive relationship between imported and domestic products.

85. The United States noted that while Community imports had increased appreciably since 1962, the measure of a contracting party's reasonable expectations with regard to a concession was not a particular level of sales, but rather a question of "trading opportunities". A contracting party would not have legitimate grounds to complain in GATT if trade declined or was even eliminated because of national disaster, shifts in consumer preference or the development of new or better products. The corollary, however, was that a party granting a concession did not have the right (unless the provisions of Article XIX were invoked) to take measures to offset the concession where there is a large growth in trade. The United States also considered that whatever the causes underlying the expansion of Community oilseed imports since 1962, there was no basis for concluding that there was an "excessive" or a "correct" level of consumption of protein feeds in the EEC. The particular economic environments in the Community and in the United States simply dictated different patterns of protein feed usage. Moreover, the implications of the Community's thesis that a party granting a tariff concession could

be permitted to determine when the level of consumption is "excessive" would be ominous for the continued proper functioning of the GATT system.

86. The Community submitted that the July 1973 embargo, in particular on exports of soyabeans by the United States, which was introduced without consultation with the United States' trading partners, was highly relevant to the question of reasonable expectations: (i) the embargo lasted from 28 June 1973 to 2 July 1973 but was replaced from 2 July by quantitative export restrictions which were applied up to 1 October 1973; (ii) the Community quoted official United States reports in which it is recognized that the measures taken by the United States undermined importing countries' confidence in the United States as a reliable supplier of oilseeds and prompted them to diversify their suppliers; and (iii) the Community stressed that the legislation currently in force in the United States (Food Security Act, 1985) enabled the United States to restrict and prohibit exports. It also noted that in 1977 the United States adopted but subsequently abolished export control regulations on soyabeans, that an embargo on exports of soyabeans and other agricultural products to the Soviet Union was introduced in 1980, and that the possibility of an embargo recurred in 1988.

87. The United States considered that the claim that the Community subsidy system was caused or justified by the 1973 embargo was without merit and not supported by the facts. Firstly, the Community subsidy policies were established seven years before the embargo with the explicit purpose of "offsetting" the value and benefits of the tariff concessions granted in 1962.

88. Secondly, the 1973 embargo lasted for a period of five days (27 June to 2 July 1973), following which exports were permitted subject to export licensing requirements and initially to certain quantitative restrictions. These requirements and all other restrictions were terminated on 1 October 1973. Neither the embargo nor the export controls had an appreciable effect on the total amount of United States exports to the Community. In 1972/73 United States exports to the Community increased by 4.95 million tons in the case of soyabeans, and by 80,000 tons in the case of soya meal. In fact, in 1972/73 there was neither drought or reduced production of soyabeans in the United States. In 1972/73 both yields and production increased in the United States, and world soyabean production reached a record high. Finally, the United States considered the assertion that matters came close to an embargo in 1988 to be completely without any basis in fact. Despite the severe drought conditions in the United States in 1988, there was no attempt whatsoever to limit exports of soyabeans or soyabean meal. Thus the facts simply did not support the Community argument that its subsidy practices were justified because the United States had been an "unreliable supplier".

Competitive Relationship

89. The United States submitted that prior to the 1980s the effects of the Community system on production were modest relative to the overall growth in demand for oilseeds. Community production aids, while always generous, were not granted at levels high enough to induce producers to increase acreage or production of oilseeds and other protein ingredients in animal feeds. However, the 1980s have seen a dramatic surge in Community production, accompanied by a corresponding decline in the share of imports into the Community market. The detrimental effects of this subsidy system on imports became most conspicuous in the 1980s, when relative support levels were increased to the point of eliciting a very large surge in domestic production with consequent adverse effects on imports. The United States further submitted that there was ample evidence that the Community system of producer subsidies and processor incentives had upset the competitive relationship among domestic and imported oilseeds and other protein animal feed.

90. Specifically, the United States submitted that the EEC system of production and processing aids has upset the competitive position of imported oilseeds and oil meals vis-à-vis EEC domestic oilseed and animal feed proteins in five principal ways. Firstly, the EEC system has stimulated production

of oilseeds and pulses to levels far in excess of those that prevailed before the incentives were established, with particularly large increases in the 1980s and with competing imports having been displaced. In the view of the United States these sharp increases were attributable largely to the system of incentives, both absolute and relative, that induced Community producers to devote substantially increased crop land to the production of oilseeds and pulses. Improved yields have contributed in only a minor way to the overall production increase. EEC oilseed production increased from approximately 300,000 tons in 1962 to more than 10 million tons in recent years. Production of pulses increased from 1 to 4 million tons.

91. The Community considered that the quantities produced in the Community and the trend in production were not sufficient in themselves to explain the trend in Community imports. Nevertheless, Community production of oilseeds had not displaced imports because in the period between 1966 and 1988: (i) an increase in oilseeds production over the previous year coincided with an increase in Community imports in fourteen cases (64 per cent of the total number of cases); (ii) an increase in Community production coincided with a fall in imports in five cases (23 per cent); (iii) a fall in production coincided with a fall in imports in two cases (9 per cent); and (iv) a fall in production coincided with an increase in imports in one case only.

92. In this regard the United States noted that an analysis of imports, production and consumption, as opposed to an analysis based on the absolute volume of imports, confirmed that imports had been losing market share over the past decade. This was illustrated, inter alia, by the detailed data reproduced in Annex E.

93. The Community submitted that the following factors must also be taken into account when attempting to explain objectively the trend in imports of oilseeds and oilcakes. Imports of oilseeds depend to a certain extent on the situation on the export markets for both oils and oilcakes. The Community has a crushing capacity greatly exceeding its internal needs. This capacity is mobilized - triggering off imports - when opportunities present themselves. Community imports of such products have been greatly stimulated by the rise in the consumption of compound feedingstuffs in the Community following the development of intensive stockfarming and the general improvement in the quality of animal feed. The trend in such imports was also the direct result of the price ratios existing between these products and other feeds (in particular cereals). The use of oilcakes to the detriment of other products was artificially encouraged by a series of determining factors. These included: price ratios within the Community between oilseeds and cereals which resulted in systematically higher levels of oilcake utilization in the Community (in the period 1980/81 to 1988/89 an estimated 8.2 million tonnes less oilcake would have been used in the EC-10 if the average incorporation rate for oilcakes in the Community were the same as in the United States); the trend in the structure of animal production (e.g. feedlot operations), which has meant that a higher protein content was required in animal rations; the development of cereal substitute imports with a low protein content also encouraged greater use of oilseeds (e.g. 7.5 million tons of manioc and sweet potato imports annually called for additional imports of nearly 2 million tons of oilcakes); and a similar phenomenon was associated with the current increase in the use of oils and fats with zero protein content in the manufacture of compound feedingstuffs.

94. The Community stressed the importance of taking quantitative factors into account. In this regard it submitted that an economic analysis of the situation in 1988, a year in which imports declined marginally, indicated that there was no cause-and-effect relationship between the decrease in imports and the increase in domestic production. In that year world production of oilseeds declined by 9.2 million tons (United States production declined by 10.6 million tons) and world prices of soyabeans and cake increased by 110 per cent. Because of price interrelationships this price increase discouraged the use of soyabeans in Community feedingstuffs. A decline in soya oil prices on the world market (attributable in the view of the Community to the United States Export Enhancement Program) reduced

processors' margins in the Community and led them to cut their purchases of beans. Finally, Community exports of soyacake dropped substantially owing to the discontinuation of Community exports to the Soviet market. All these factors explain the fall in Community imports of soyabeans and cake in 1988, a fall which did not result from increased Community production since this in fact declined in 1988.

95. The United States suggested that the foregoing arguments with respect to the Export Enhancement Program were diversionary and flawed. EEP sales of vegetable oils were authorized in response to the blatant and excessive subsidies in the Community oilseed sector. These exceeded more than 3 billion dollars annually. In 1987/88 and 1988/89 combined 230,000 tons or about 14 per cent of total United States exports were subsidized under the Export Enhancement Program. EEP shipments in 1987/88 (208,000 tons) represented 1.1 million tons of soyabeans compared with a total United States soyabean crop of more than 50 million tons. It was submitted by the United States that the existence of the Export Enhancement Program did not explain why the share of all imports in the Community market had been declining throughout the present decade whereas the share of Community production had been increasing.

96. The Community considered that EEP subsidies had led to a drop in United States exports of oilseeds and oilcakes and to an increase in oil exports, as well as substantially altering the relationship between United States and Community prices of oils and oilcakes. In the Community's view, these two factors explained recent developments in the trade between the United States and the Community.

97. Secondly, the United States contended that the Community production aids in the form of minimum grower prices had upset the competitive relationship between domestic and imported products because such prices have consistently been set above world market levels, thus insulating Community production from world price movements (Annex D refers).

98. The Community responded that this contention called into question the very principle of subsidization, since it could not be disputed that by its very nature any subsidy insulated and protected domestic production from the world market to a greater or lesser extent. Consequently, the United States argument that subsidization insulated and protected domestic production, upset the competitive relationship between imported and domestic products and consequently affected the scope of the concession, would imply that the subsidization of bound products or products entering into competition with bound products was prevented. This argument was so novel and extreme that it contradicted the practice of most contracting parties, including that of the United States. Subsidizing domestic production at higher than world market prices has long been an established practice among contracting parties, as it was in compliance with Article XVI. The fact that the United States granted subsidies on nationally produced products imports of which were bound and that periodic adjustments of these subsidies took no account of the competitive relationship existing when the concessions were granted (since the levels of support were regularly re-evaluated in the United States) clearly showed the slight credence the United States attached to that argument and consequently deprived it of the right to call for its application and observance by other contracting parties.

99. Furthermore, the Community pointed out that the conditions governing observance of Article 16 obligations were spelled out in the provisions of the Subsidies Code, particularly in Article 8 which provided that, in assessing the adverse effects that may arise from subsidies, the existence or absence of import displacement must be taken into account. With regard to the methods for calculating Community aid, as perceived by the United States, the Community pointed out that there were no objective data constituting what the United States described as world rapeseed and sunflowerseed prices. The Community had cited several examples of situations where, de facto, no such prices existed. It pointed out that, furthermore, the price policy as applied by the Community authorities corresponded to a specific production structure in the Community and that the so-called world market price could not be considered a parameter to be taken into account in determining the policy. With regard to the

United States' assertion that a minimum price was taken into account, the Community recalled that no such price existed for rapeseed and sunflowerseed.

100. Thirdly, the United States contended that Community aids to processors in the form of payments to oil crushers who purchase the overwhelming majority of domestic oilseeds, established an impenetrable margin of protection analogous to the production aids which were found in the 1985 Canned Fruit Panel to have upset the competitive relationship and to have nullified or impaired the benefits of the concessions in that case. As a result of the method employed in the calculation of payments to processors, imported oilseeds were unable to improve their competitiveness vis-à-vis domestic oilseeds in the Community processing market. The United States further argued that under the Community system a decline in the lowest obtainable price of the imported products was automatically converted into a correspondingly higher level of payments to processors.

101. The Community considered that the United States argument was unfounded. In its view, the Community had demonstrated, in relation to the complaint under Article III, both that the criteria for the calculation of the aid were devised simply to offset the extra cost to processors of using products of Community origin which were subject to higher internal production prices than those of imported products, and that the methods employed in making this calculation were neutral. The Community also recalled that the aids in question were paid at a later marketing stage for reasons of administrative convenience.

102. Fourthly, the United States contended that the method by which the level of processing aids was calculated by the Community was wholly artificial and provided a bonus payment to Community crushers for purchasing domestic rather than imported oilseeds. The spread between the institutional and fictitious market prices upon which the aid was calculated versus the difference between real transaction and actual world market prices, provided an additional impenetrable margin of protection for Community oilseeds and pulse producers, further impairing the value of the concessions by guaranteeing that Community products would always be purchased first, and in preference to, imports. Moreover, as growth in the Community oilseed production sector (spurred on by producer subsidies) had exceeded increases in demand, domestic oilseeds had captured an increasing share of the Community market.

103. The Community considered that this contention was at variance with the facts as demonstrated in connection with the complaint under Article III and that therefore the Community aid could not constitute an incentive for the purchase of Community oilseeds in preference to imported oilseeds. The Community also emphasized that, although there was a difference between the transaction price and the price used in calculating the aid, in practice, the first aim was to narrow the difference (see Annexes B and C). Furthermore, the difference between the two prices was also due to objective criteria concerning the state of the product, and the difference in presentation between farmgate products and imported products.

104. Finally in this regard the United States considered that the Community system of minimum grower prices for certain pulses and related incentive payments to feed compounders had substantially increased domestic production of these products and had led to the replacement of closely related and directly substitutable imported soyabean meals and meals produced from imported soyabeans, thus nullifying and impairing the benefits of the Community concessions on these products. The United States also considered that Community subsidy arrangements for the incorporation of skim milk powder by animal feed compounders also nullified and impaired the bindings.

105. The Community considered that the extension of the non-violation concept to prevent the subsidization of bound or unbound products that merely competed with imported oilseeds or oilcakes was not justified. With regard to milk powder, the Community pointed out that the extension of the non-violation concept to prevent the subsidization of unbound products was not justified. As regards

high-protein products, the Community argued that since these products merely competed with imported oilseeds and oilcakes, the extension of the non-violation concept to the subsidization of high-protein products was also unfounded. The range of products to be considered in the present case should be limited to like products that were really comparable such as oilseeds and oilcakes. In this regard it was also noted that the 1955 Review Session Report referred to the much narrower concept of subsidies on "the product concerned".

106. The United States considered that the argument that pulses did not compete with imported oilmeals or meals derived from imported soyabeans was untenable given the objectives of the subsidy scheme, since it was noted in the preamble to the relevant EEC Regulations that "the removal of import barriers would leave the Community market in oilseeds, oleaginous fruit and their oils without defence against disturbances caused either by certain imports from third countries or by disparities, resulting from action by third countries, between prices for products derived from oilseeds and oleaginous fruit and prices for these seeds and fruit".

107. The Community reiterated that steps had been taken within the Community to remedy the situation resulting from the trends in consumption of oilseeds. Community production of the three oilseeds, which had reached 11.9 million tons before the introduction of stabilizers, would be 9.9 million tons in the current year. More significantly 500,000 hectares of land had gone out of production of oilseeds due to the effect of the stabilizers. In the Community's view there must be limits to the granting of aids to production linked to the requirements of Article III as regards over-compensation and limits as to the effects that production aids can have on imports. The rule of the Subsidies Code was that if there was no displacement or impedance then these "limits" had been respected. If there was displacement then action was required. This was in fact what the Community had done by introducing stabilizers which constituted an effective curb on the risks of displacement.

108. The United States considered that the Community system of stabilizers failed to address the fundamental issue of over-production and rejected the contention that the system of stabilizers constituted a remedy for the Community's over-production problem. In the view of the United States the system had, if anything, locked in levels of production more than sufficient to nullify and impair benefits accruing to the United States as a result of the 1962 concessions.

Articles II, XVI and the Subsidies Code

109. With respect to the relationship between Articles II and XVI of the General Agreement, the Community submitted that the criteria relating to upsetting the competitive relationship and reasonable expectation, which were based on 1950's cases that were concerned with very particular and proximate situations, would mean, if applied in the present case, that a contracting party would, de facto, be limited in granting subsidies on a bound product, or even on an unbound but competitive or closely related product, since such subsidization could give rise to non-violation complaints. This would therefore mean granting protection to tariff concessions under Article II that went far beyond the precise rules of that Article. It would amount to a re-writing of the GATT rules without any negotiation among contracting parties. However, this did not mean that a contracting party could make unlimited use of Article XVI, the essential point being that it was necessary to watch out for possible adverse effects that may arise when subsidies are granted.

110. The Community considered that the means for overcoming any conflict between the provisions of Articles II and XVI were provided by the Subsidies Code which was explicit on three points. First, it was drafted to "interpret the provisions of Articles VI, XVI and XXIII of the General Agreement". Secondly, the Code explicitly dealt with Article II tariff concessions since Article 8.3(b), which dealt with the specific problem of the effects of subsidies, provided in the footnote 24 thereto that: "benefits accruing directly or indirectly under the General Agreement include the benefits of tariff concessions

bound under Article II of the General Agreement". In the Community's view it therefore provided that in the case of tariff concessions granted under Article II of the General Agreement the provisions of the Code should guide the interpretation to be followed. Thirdly, in Article 8 the Code sets out the criteria that should be used to assess the present complaint and to establish the adverse effects for third countries that may arise from the grant of a subsidy by a contracting party. It stated clearly that to judge these effects it was necessary to assess whether or not there has been displacement of imports. This was not to suggest that the present case should be dealt with through the machinery of the Code. A contracting party was free to choose the ground on which it wished to pursue its complaint, but the present case should be weighed up in the light of the provisions of the Code as being among the sources of law applicable to the present case. As between the parties that signed it the Code created in the Community's view a reasonable expectation as to the criteria that might be used to judge Article XXIII complaints. On the recognized principle of the hierarchy of legal texts, an international agreement such as the Code had at least as much value as a panel report and having been concluded in 1979 the Code took precedence over earlier panel reports and resolutions.

111. The United States submitted that it would be inappropriate and unprecedented for a GATT panel such as the present one to decide questions of GATT rights and obligations by applying the Subsidies Code. Although in the United States view the outcome of this complaint would not be different if brought to a Subsidies Code panel, the fact remained that the Panel's mandate in the present case was to examine the complaint in the light of the relevant provisions of the GATT. The United States and the EC were both signatories of the Subsidies Code, but most contracting parties to the GATT were not. Deciding disputes brought under the GATT differently based on whether some or all of the disputants (or others who might have rights in the matter) were also members of a Tokyo Round code could create a fractured GATT system. While the Subsidies Code could not be considered relevant for the above reasons, the Code was clearly not intended to reduce discipline over subsidies or to encourage their distortive effects relative to the GATT. Rather, the intent of the Subsidies Code, like other codes arising out of the Tokyo Round, was to reduce or eliminate non-tariff trade restrictions and distortions. The Subsidies Code recognized that subsidies can cause nullification or impairment, and notes that such nullification or impairment can arise, inter alia, from displacement of imports. Moreover, the United States did not share the view that Code provisions should be interpreted to narrow GATT rights.

112. The Community had stressed that it was not a question of "restricting" rights stemming from the General Agreement but rather of "specifying" them. The Code was an instrument accepted by both parties to the dispute for interpreting and applying the provisions of the General Agreement and in particular Articles II and XVI. In this case, it was a question of protecting "rights" stemming from Article XVI for the country granting the subsidy (and not of restricting them) while taking into account the "legitimate expectations" of the country which negotiated the concession (and not its rights in the strict sense) stemming from the grant of Article II concessions.

Article XXIII: "Non-Violation" Nullification and Impairment

113. The Community submitted that the principles that are clearly set out in the texts and in the agreements that have been concluded should govern the present case and that recourse to the "non-violation" concept under Article XXIII:1(b) should remain exceptional, since otherwise the trading world would be plunged into a state of precariousness and uncertainty. It was furthermore no accident that the preamble to the Subsidies Code states that it is necessary to provide "greater certainty" and "greater uniformity" with regard to the interpretation of Articles VI, XVI and XXIII. This was not to say that one provision should be given precedence over another but rather that it was necessary to look at everything as a whole, to take account of all the elements which make up the delicate balance on which the General Agreement has been built and developed, and therefore to also take account of Article XVI.

114. The United States concurred in the proposition that non-violation nullification or impairment should remain an exceptional concept. Although this concept had been in the text of Article XXIII of the General Agreement from the outset, a cautious approach should continue to be taken in applying the concept. The United States did not consider that any change of governmental policies, even if it has harmful trade effects, constitutes non-violation nullification or impairment. A contracting party does not have a reasonable expectation that a contracting party which grants it a tariff concession will not change general income tax rates. The complaint in the present case, however, is well grounded in the traditional approach of the GATT to non-violation nullification or impairment since most past cases have, like the present case, concerned impairment of tariff concessions through significant changes in governmental subsidy policies or measures affecting the competitive position of the product concerned.

General Arguments

115. At a general level the Community submitted that the United States complaint raised two fundamental issues: one was the extent to which GATT tariff concessions were protected having regard to other provisions of the General Agreement and in particular Article XVI thereof; and the other was whether there were limits on the right to subsidize domestic production in competition with imported products in respect of which the tariff was bound. The Community considered that the 1955 Review Session Report and the related precedents were adopted at a stage in the evolution of GATT practice where an overall systematic reassessment of the schedules of concessions in relation to the expectations of the various parties occurred at relatively frequent intervals. At that stage, the problem of dealing with expectations which dated back several decades did not therefore arise. Moreover the reference in paragraph 14 of the 1955 Review Session Report to negotiations on matters, such as subsidies, which might affect the practical effects of tariff concessions clearly indicated, in the Community's view, that in the Working Party's mind protection afforded by concessions in relation to domestic subsidies was limited, temporary and negotiable. Whatever the scope of the original expectation of the country which negotiated the concession, it could therefore not be frozen once and for all nor shielded for an indefinite period from the legitimate rights recognized by the General Agreement.

116. The Community considered that the exercise of legitimate rights under relevant GATT provisions should not be considered unusual or unforeseeable since to do so would imply that there was an implicit renunciation of the exercise of legitimate rights or that there was a promise of reparations where such rights were exercised. Thus the view had been taken in the Panel Report on Chilean Apples (L/6491, April 1989) that imports of bound products could be restricted under Article XI:2 without giving rise to compensation. If therefore the exercise of a right to resort to otherwise specifically prohibited measures did not imply compensation, then a fortiori neither did the foreseeable exercise of the right to use subsidies under Article XVI. The Community submitted that for these reasons the protection of the benefits accruing from concessions could not be extended to the exercise of a right recognized by the General Agreement being affected de jure or de facto without a change in the relationships between the various Articles of the GATT and thus in the balance between the rights and obligations of contracting parties.

117. The Community also noted that the application of the concept of non-violation impairment in the case of subsidies posed special problems for the dispute settlement procedures. The pre-existing competitive relationship generally could not be re-established without discontinuing the subsidy and in the absence of specific recommendations the negotiation of compensation aimed at re-establishing the benefits impaired would be problematic. In the Community's view the concept of non-violation impairment in relation to subsidies affecting tariff concessions was superfluous and legally disputable, since it would involve the notion of rights and obligations being superseded by considerations of equity and subjective expectations. The matter should therefore be dealt with in accordance with Article XVI and the relevant principles governing its interpretation and application.

118. The United States noted that the Community's approach was that the most important GATT principle in this dispute was that Article XVI did not prohibit subsidies, that this absence of a prohibition should be converted into a right to subsidize and that other GATT provisions or interpretative precedents could not be applied to limit this right. The United States considered this approach to be patently incorrect on the grounds that the absence of a prohibition did not create an affirmative right, that there was no basis for claiming that the absence of a prohibition in one GATT Article should take precedence over rights and expectations of contracting parties with respect to other GATT provisions and negotiated commitments. Article XXIII itself recognized in clear terms that nullification or impairment may exist in the absence of any contravention of specific GATT obligations and GATT provisions and rulings established that a finding of nullification or impairment could and should be made in the present dispute. In essence what was claimed by the Community was that GATT provisions and rulings should be re-interpreted or rejected in order to facilitate subsidization and to make subsidization rather than tariff reduction GATT's highest principle.

119. Finally the United States noted that the CONTRACTING PARTIES had traditionally not recommended the elimination of impairing actions in non-violation cases and that compensation or retaliatory action were alternatives which would be less desirable for both parties. What the United States sought therefore was a remedy with respect to its non-violation complaint that would restore the benefit of the concessions.

Submissions by Other Contracting Parties

Argentina

120. Argentina considered that the system of subsidies under which oilseeds were produced in increasing quantities and marketed in the Community had resulted, *inter alia*, in the displacement of imports, particularly from 1980 onwards, and that this constituted *prima facie* nullification and impairment of tariff concessions negotiated by the Community within the framework of the General Agreement. Argentina also considered that the system of subsidies to processors was inconsistent with Article III:4 and 8(b).

121. Argentina considered that legal insecurity would result in regard to the rights accruing to contracting parties which have negotiated a concession in good faith if a concession guaranteeing market access could be modified substantially by subsequent regulations without this having been agreed or explicitly indicated. Otherwise the initial negotiating conditions could be unilaterally altered by internal regulations and this would be in contradiction with the principle of foreseeability and stability that constituted the basis of any international agreement. This expectation of foreseeability and stability of concessions had been confirmed in the 1955 Review Session Reports and is confirmed in various provisions of the General Agreement including Article XXIV. Negotiations under Article XXIV:6 had to fulfil the requirements of paragraph 5(a) of that Article concerning the non-impairment of the situation existing prior to the formation or enlargement of a customs union. This led to the conclusion that if the negotiating parties confirmed the concessions originally negotiated in 1962, without any explicit modifications, the principle of foreseeability and stability in regard to the maintenance of the regulations of commerce existing in the EEC at that date must prevail in order to protect the benefits deriving from the concession.

122. The Community considered that the argument relating to Article XXIV:5(a) was not admissible because the United States complaint did not address itself to Article XXIV:5. The Community also considered that it was incorrect to regard the Article XXIV:6 enlargement negotiations as a purely formal exercise or one that was confined to new concessions.

Australia

123. Australia considered that the Community subsidies to processors contravened Article III:4 and did not qualify for the exception in Article III:8(b). With regard to the status of the Community's 1962 concessions on oilseeds, Australia submitted that the Community's position could only lead to one of two logical conclusions. Either the EEC was claiming that it has a unique status in the GATT in that on each occasion that it adds additional members, it automatically abrogates all prior obligations entered into by itself, as an entity, or by individual Member States, or it believes that the unilateral act of withdrawal by any contracting party of its GATT schedule or an individual concession automatically has that effect even if that concession is subsequently reinstated through negotiations conducted under Article XXVIII procedures.

124. Australia considered that there was no basis for the Community claiming to have unique privileges or rights for itself or its schedules in the GATT. On the contrary, the status of the Community schedules in the GATT was somewhat obscure. Article II referred only to the schedules of contracting parties. As the EEC Member States individually were contracting parties, it must be presumed that the EEC has a single schedule for all twelve members by custom rather than by right.

125. Australia considered that the second proposition should also be rejected. If it were to be accepted that any contracting party or the EEC was able at any time of its choosing to abrogate all of its non-rate commitments by the act of withdrawing its schedule or individual concessions, obligations relating to Article II:1(b) and the expectations of other contracting parties that concessions would not be nullified or impaired by other measures, would be altered each time Article XXVIII was used to withdraw concessions, even though these may be replaced by alternative concessions. There would be an incentive for contracting parties to regularly withdraw and replace their schedules as this would enable them to clear existing non-rate obligations. The provisions of Article II are of fundamental importance to the GATT. To subordinate the intentions of this Article to a technical or strict legal interpretation could only have the effect of weakening the GATT.

126. The Community considered that the Australian argument, on the fact that the single Community schedule was merely a custom and not a right, was a purely academic one and led to a denial of the practical effect of recourse to Article XXIV:6 and even the legal existence of customs unions in GATT. In any case, it was without practical legal value insofar as all the Community's partners in GATT had agreed to negotiate on a single Community schedule in the course of three rounds of negotiations. Furthermore, it followed from this acceptance of renegotiations (and their conclusions) that a new balance of mutual advantages had been established within the meaning of Article XXVIII. Consequently, the legitimate expectations of the negotiations were those of the renegotiations, and it was not possible, as Australia did, to assimilate non-tariff commitments, negotiating "expectations" and "rights" under Article II:1(b). Furthermore, the fact that Australia wished to reject too strict a legal interpretation so as to ensure that Article XXVIII was not invoked in order to modify existing non-tariff obligations (including those stemming from initial negotiating expectations) resulted in the denial of the elementary rights stemming from Article XXVIII, whose precise purpose was to allow a renegotiation of commitments (inevitably implying a new assessment of negotiating expectations). Finally, the Community stressed that it was not seeking recognition of a special status for itself from the fact that on each of its enlargements it had had to engage in renegotiation of the tariff commitments undertaken earlier by the contracting parties constituting the enlarged Community. The fact that the Community had been enlarged on three occasions, which implied Article XXIV:6 negotiations, was merely a historical circumstance, and in no way a form of legal particularism.

Brazil

127. Brazil considered that for foreign competitors the Community market had shrunk because of increased EEC production encouraged by subsidies and that exporters faced artificial disadvantages in relation to domestic producers because of the preferential absorption of their output. Processors were stimulated to pay guaranteed minimum prices regardless of conditions prevailing in the market. In 1986/87 European soyabean growers received at least US\$548 per ton, whereas the amount paid to the processors enabled them to retain a margin of US\$70 per ton. Brazil also considered that as a competitive exporter to world markets the difficulties it faced had been exacerbated by the United States Export Enhancement Program.

Canada

128. Canada observed that the Community oilseeds régime as it related to rapeseed had stimulated production within the Community and had substantially reduced the EEC market for imports. Furthermore, as indicated in an analysis of EEC prices presented by Canada, the system guaranteed higher profits to Community oil producers when they purchased rapeseed of EEC origin in preference to imported rapeseed enabling them to export their oil at more competitive prices on the world market.

129. Canada submitted that the requirements with respect to the lodging of securities in respect of imported rapeseed resulted in financial burdens which constituted an internal charge inconsistent with Article III and that the operation of the processor subsidy arrangements were inconsistent with Article III and were not covered by the exemption under Article III:8(b). In particular Canada considered that for the purposes of Article III:8(b) the term "producer" should be construed according to its common usage. (One is the "producer" only of the products one makes and sells. Raw material suppliers are not producers of the end product; rapeseed growers are not producers of rapeseed oil or meal, etc.) Thus, payment of the rapeseed crushing subsidy to oil/meal etc. producers did not allow the EEC to sustain an argument that the subsidy regulation qualified for the exemption provided under Article III:8. This exemption would allow for a payment of a subsidy exclusively to domestic producers, which in this case are the EEC rapeseed growers. Article III:8 thus did not provide the basis for limiting the granting of the subsidy to the purchase of EEC-produced rapeseed to the exclusion of imported rapeseed and the practice was clearly inconsistent with the stated national treatment obligations in Article III:4.

130. The Community considered that the argument raised with respect to import deposits raised a matter that was not brought to the attention of the CONTRACTING PARTIES when the Panel's terms of reference were established. These issues should be confined to matters raised by the parties to the dispute.

FINDINGS

Introduction

131. The legal issues before the Panel arise essentially from the following facts. In 1962, as an outcome of tariff negotiations with the United States and other contracting parties in the framework of the Dillon Round, the Community included in its Schedule of Concessions in accordance with Article II of the General Agreement duty-free tariff bindings for oilseeds and oilcakes (hereinafter referred to as "oilseeds"). The bindings were the result of general negotiations on the reduction of tariffs and of negotiations rendered necessary under Article XXIV:6 as a result of the creation of a common external tariff by the Community replacing the tariffs of the individual member States. On the occasion of each of its successive enlargements the Community conducted negotiations based on Article XXIV:6 and established a new Schedule of Concessions replacing the previous Community Schedule and the

Schedules of the new member States, most recently in 1986/1987. The duty-free tariff bindings for oilseeds were maintained after each of these negotiations.

132. In 1966 the Community established a common organization of the market for rapeseed and sunflowerseed under Regulation No. 136/66. This Regulation has since been amended and complemented on numerous occasions but its principles have remained unchanged. The introductory clauses in Regulation No. 136/66 state that access to imported oilseeds duty free had made it easier for the Community processing industries to obtain raw materials at reasonable prices but that the Community producers of oils and fats "would be adversely affected if the effects of the removal of import barriers were not offset by other measures." The market organization for the oilseeds concerned is based on a price system, but it does not provide, in contrast to other market organizations, for any import levies. Under the Regulation the Community fixes a "target price" and an "intervention price" for oilseeds. The target price is established at a level which, according to Article 23 of the Regulation, "is fair to producers, account being taken of the need to keep the Community production at the required level". The intervention price determines the price level at which the intervention agencies established in the framework of the market organization have the obligation of buying domestic oilseeds. The intervention price, according to Article 24 of the Regulation, must be "as close as possible to the target price", allowing however for certain reductions to take account of adaptation to general and local market fluctuations and transport costs within the Community.

133. Article 27 of the same Regulation provides for subsidies to be paid on rapeseed and sunflowerseed harvested and processed within the Community, to make up for the difference between the target price and the world market price whenever the target price is higher than the world market price, which has generally been the case. According to Article 29, the world market price is "calculated" on the basis of the most favourable purchasing opportunities and may be adjusted to take the prices of competing products into account. In practice the amount of the subsidy is calculated using reconstructed prices and adjustment factors because, as explained by the Community, world market prices for these products are either unreliable or do not exist. Eligibility of oilseeds for the benefit of the subsidy provided for by Article 27 is currently determined by Council Regulation No. 1594/83, as amended. Under this Regulation subsidies are paid to oil processors and producers of animal feeds (hereinafter referred to as "processors") whenever they establish by documentary evidence that they have transformed oilseeds of Community origin. It appeared from the information provided to the Panel that the oilseeds market has functioned on the basis of the payment to processors, which has rendered intervention purchases largely superfluous.

134. In 1974, a guide/minimum price scheme based on the same principles was introduced for soyabeans under Regulation No. 1900/74. This scheme was subsequently replaced or amended and the relevant rules are found at present in Regulation No. 1491/85. In the introductory clauses of Regulation No. 1900/74 it was stated that appropriate measures of support should be provided to promote the development of the production of soyabeans which was subjected to direct competition from soyabeans imported from third countries duty free. Under Regulation No. 1491/85 subsidies are provided to make up for the difference between the "guide price" determined by the Community and the world market price for soyabeans. The payment of the subsidy to processors or first purchasers is conditional on the conclusion of contracts with Community producers providing for the payment of a price at least equal to the "minimum price".

135. The United States claims that the payments to processors are made on conditions that give them an incentive to purchase domestic rather than imported oilseeds. The United States considered this to be contrary to Article III:4 of the General Agreement which provides that:

"the products of the territory of any contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all ... regulations ... affecting their internal ... purchase ...".

The United States further claims that most of the economic benefits generated by the payments to processors accrue to the producers of oilseeds and that the resulting incentive to produce oilseeds in the Community has impaired benefits it could reasonably expect to accrue to it under the tariff concessions for oilseeds. The United States therefore considered that it was entitled to redress under the provisions of Article XXIII:1(b) and 2 dealing with the impairment of benefits accruing under the General Agreement. The Community considers both claims to be unfounded.

National Treatment: Article III

136. The Panel first examined the United States' claim that the payments to processors generate an incentive to purchase domestic rather than imported oilseeds inconsistently with Article III:4. The Panel noted that the Community considers the payments made to processors to be covered by Article III:8(b) which provides that Article III "... shall not prevent the payment of subsidies exclusively to domestic producers ...". The Community argues that the payments to processors are made conditional upon the transformation or purchase of domestic oilseeds sold at prices determined by the Community Regulations, are therefore passed on to the producers of domestic oilseeds and consequently constitute producer subsidies within the meaning of that provision.

137. The Panel noted that Article III:8(b) applies only to payments made exclusively to domestic producers and considered that it can reasonably be assumed that a payment not made directly to producers is not made "exclusively" to them. It noted moreover that, if the economic benefits generated by the payments granted by the Community can at least partly be retained by the processors of Community oilseeds, the payments generate a benefit conditional upon the purchase of oilseeds of domestic origin inconsistently with Article III:4. Under these circumstances Article III:8(b) would not be applicable because in that case the payments would not be made exclusively to domestic producers but to processors as well. The Panel noted that the payments may constitute the grant of a benefit to processors conditional upon the purchase of domestic oilseeds in two situations:

- (a) the payments to the processors are based on prices determined by the Community authorities higher than the prices the processors actually pay to producers; and
- (b) the payments to the processors are based on import prices determined by the Community authorities lower than the prices that the processors would actually have to pay if they bought imported instead of domestic oilseeds.

138. As to the first point it appeared from the evidence before the Panel that under the Community's intervention schemes for rapeseed and sunflowerseed, processors receive a subsidy based on a target price but they need not demonstrate that they in fact paid the target price to a Community producer. In all cases in which processors are able to purchase Community oilseeds at a price below the target price or the market price objective aimed at by the Commission (Annex B, Sections I and II, paragraph 5 refer), the subsidy payments are based on prices higher than the prices processors actually pay to producers. In the case of soyabeans the subsidy paid to producers is based on a "guide" price; however the processors obtain the subsidy whenever they demonstrate that they paid a price at least equal to a "minimum price" (Article 2 of Regulation No. 1491/85). Whenever the guide price is higher than the minimum price the subsidy payment creates an incentive to purchase Community rather than imported soyabeans. The minimum price is fixed "at a level guaranteeing sales for producers at a price as close as possible to the guide price, allowing in particular for market fluctuations and the cost of transporting the beans" (Article 2:3 of Regulation No. 1491/85) and must therefore be generally below the guide

price. For these reasons the Panel concluded that the Community Regulations do not ensure that the payments to processors are based on prices processors actually have to pay when purchasing Community oilseeds.

139. As to the second point, the Panel noted that the prices which the Community authorities determine to be the import prices are those that prevailed in certain markets at a certain time. These prices are not necessarily the prices that prevail at the time the subsidy recipients decide to purchase domestic rather than imported products. The Community recognized this when it replied as follows to a question by the Panel: "It is true that there may always be some uncertainty relating to the difference between, on the one hand, the case-by-case decisions taken by an individual operator (who may furthermore take anticipatory or indeed speculative positions) and, on the other, an evaluation made by the public authorities based on market prices (involving the approximation inherent in the concept of prices)". The Panel further noted that for rapeseed and sunflowerseed the Community uses reconstructed prices to determine the subsidy payments and that the "world market price" implicit in the amount of the payment (namely the market price objective aimed at by the Commission less the subsidy payment) would not necessarily in all cases be the same as the price at which competing imports of these oilseeds are available to processors. The Panel found that due to these various factors, the Community Regulations do not ensure that the subsidy payments are based on prices that the subsidy recipients would actually have paid had they chosen to buy imported rather than domestic products.

140. For the reasons indicated in the preceding paragraphs, the Panel found that subsidy payments made to processors can be greater than the difference between the price processors actually pay to producers and the price that processors would have to pay for imported oilseeds. Whether such over-compensation creating an incentive to purchase domestic rather than imported products takes place depends on the circumstances of the individual purchase. The Community Regulations are thus capable of giving rise to discrimination against imported products though they may not necessarily do so in the case of each individual purchase.

141. Having made this finding the Panel examined whether a purchase regulation which does not necessarily discriminate against imported products but is capable of doing so is consistent with Article III:4. The Panel noted that the exposure of a particular imported product to a risk of discrimination constitutes, by itself, a form of discrimination. The Panel therefore concluded that purchase regulations creating such a risk must be considered to be according less favourable treatment within the meaning of Article III:4. The Panel found for these reasons that the payments to processors of Community oilseeds are inconsistent with Article III:4.

Nullification or Impairment of Tariff Concessions: Article II

142. The Panel then turned to the complaint by the United States that the grant of subsidies to Community producers of oilseeds had nullified or impaired benefits accruing to the United States under the Community's tariff concessions for oilseeds. The Panel first examined whether its finding that the payments to the processors are inconsistent with the General Agreement might make an examination of the question of the nullification or impairment of the tariff concessions unnecessary. The Panel noted that this would be the case if compliance by the Community with the finding on Article III:4 would necessarily remove the basis of the United States claim of nullification or impairment. The Panel noted that the subsidies the Community presently grants to producers of oilseeds result from the maintenance of producer prices at levels generally exceeding the price of competing imports through payments to processors conditional upon the purchase or transformation of domestic oilseeds. The finding of the Panel under Article III:4 does not relate to the benefits accruing to the Community producers under the Community subsidy schemes but only to the benefits accruing to processors. The Panel further noted that the Community could comply with the Panel's finding on Article III and still make available in the Community market oilseeds produced with the benefit of producer prices maintained

at levels exceeding the price of competing imports. Compliance with the finding on Article III thus could, but would not necessarily, eliminate the basis of the United States complaint that the benefits accruing to the Community producers of oilseeds impair the Community's tariff concessions for oilseeds. The Panel therefore decided that it had to examine that complaint as well.

143. The Panel noted that the tariff concessions for oilseeds were originally made in 1962 following negotiations with the United States and other contracting parties in the Dillon Round and under Article XXIV:6 after the Community had established a common external tariff. The United States bases its case on expectations it claims to have had in 1962 when the concessions for oilseeds were first incorporated into the Community Schedule. The Community argues that the United States can base its claim only on expectations it could reasonably have had when the Schedule of Concessions currently in force was negotiated, namely in 1986 when the production subsidies had already been introduced.

144. The first issue the Panel examined in this context was therefore whether the benefits accruing to the United States under the tariff concessions on oilseeds presently in force include the protection of expectations that prevailed in 1962 when the tariff concessions on oilseeds were originally incorporated in the Schedule of Concessions of the Community. The Panel, noting that there is no explicit rule nor a precedent to guide it in this matter, considered the issue in the light of the purpose of the provisions of Article XXIII relating to the impairment of benefits accruing under the General Agreement. The Panel noted that these provisions, as conceived by the drafters and applied by the CONTRACTING PARTIES, serve mainly to protect the balance of tariff concessions.¹¹ The idea underlying them is that the improved competitive opportunities that can legitimately be expected from a tariff concession can be frustrated not only by measures proscribed by the General Agreement but also by measures consistent with that Agreement. In order to encourage contracting parties to make tariff concessions they must therefore be given a right of redress when a reciprocal concession is impaired by another contracting party as a result of the application of any measure, whether or not it conflicts with the General Agreement.

145. The Panel concluded from the above that the answer to the question of whether the expectations of 1962 continue to be protected depends on whether the concessions on oilseeds resulting from the subsequent renegotiations under Article XXIV:6 were part of a new balance of concessions or whether the reinstatement of the concessions at the same rate after the successive enlargements of the Community meant that the balance of concessions originally negotiated in 1962 was to be continued. The Panel noted that the result of the initial Article XXIV:6 negotiations of the Community in 1962 was the creation of a Schedule of Concessions for its common external tariff that had replaced the tariffs of the six founding member States. In these negotiations, the trading partners of the Community compared the benefits accruing to them under the previous tariff concessions of the individual member States with the benefits accruing to them under the common external tariff in the whole territory of the Community. The result of the Article XXIV:6 negotiations following the successive enlargements of the Community was not the creation of a new common external tariff but the extension of the existing tariff concessions

¹¹EPCT/A/PV6, page 5; "The Australian Subsidy on Ammonium Sulphate", report adopted on 3 April 1950 (BISD, Vol. II/188, 194-5); "Treatment by Germany of Imports of Sardines", report adopted on 31 October 1952 (BISD 1S/53, 58-59); "Operation of the Provisions of Article XVI", report adopted on 21 November 1961 (BISD 10S/201, 209).

of the Community to the new member States.¹² On the occasion of these negotiations pre-existing concessions of the Community were renegotiated as well but such modifications remained exceptional. Except where such modifications were specifically renegotiated, the partners of the Community could confine themselves to comparing the benefits accruing to them under the previous tariff concessions of the new member States with the benefits accruing to them as a result of the application of the Community's tariff concessions by the new member States. They had no reason to proceed to a global reassessment of the value of all the Community's concessions in the whole of the Community's territory.

146. In these circumstances, the partners of the Community in the successive renegotiations under Article XXIV:6 could legitimately assume, in the absence of any indications to the contrary, that the offer to continue a tariff commitment by the Community was an offer not to change the balance of concessions previously attained. The Panel noted that nothing in the material submitted to it indicated that the Community had made it clear to its negotiating partners that the withdrawal and reinstatement of the tariff concessions for oilseeds as part of the withdrawal of the whole of the Community Schedule meant that the Community was seeking a new balance of concessions with respect to these items. There is in particular no evidence that the Community, in the context of these negotiations, offered to compensate its negotiating partners for any impairment of the tariff concessions through production subsidies or that it accepted compensatory tariff withdrawals by its negotiating partners to take into account any such impairment. The balance of concessions negotiated in 1962 in respect of oilseeds was thus not altered in the successive Article XXIV:6 negotiations. The Panel therefore found that the benefits accruing to the United States under the oilseed tariff concessions resulting from the Article XXIV:6 negotiations of 1986/87 include the protection of reasonable expectations the United States had when these concessions were initially negotiated in 1962.

147. The Panel carefully analysed the price mechanism established in the framework of the Community's market organization for oilseeds and found that the production subsidy schemes of the Community protect Community producers completely from the movement of prices for imports and hence prevent the lowering of import duties from having any impact on the competitive relationship between domestic and imported oilseeds. The Panel examined whether it was reasonable for the United States to expect that the Community would not introduce subsidy schemes systematically counteracting the price effect of the tariff concessions. The essential argument of the United States on this point was that the CONTRACTING PARTIES had already recognized in 1955 the legitimacy of such expectations when they decided that:

"a contracting party which has negotiated a concession under Article II may be assumed, for the purpose of Article XXIII, to have a reasonable expectation, failing evidence to the contrary, that the value of the concession will not be nullified or impaired by the contracting party which granted the concession by the subsequent introduction or increase of a domestic subsidy ...".¹³

The essential argument of the Community in this respect was that it is not legitimate to expect the absence of production subsidies even after the grant of a tariff concession because Articles III:8(b) and XVI:1 explicitly recognize the right of contracting parties to grant production subsidies. This right would be effectively eliminated if its exercise were assumed to impair tariff concessions.

¹²"Article XXIV:6 Negotiations: Communication from the Commission of the European Communities", document L/3807 dated 11 January 1973; "Negotiations Under the Provisions of Article XXIV:6: Communication from the Commission of the European Communities", document TAR/16 dated 20 May 1961; "Enlargement of the European Economic Community: Accession of Portugal and Spain", document L/5936, Add.2 and Third Geneva (1987) Protocol, Schedule LXXX.

¹³"Other Barriers to Trade", Report adopted on 3 March 1955 (BISD 3S/222, 224).

148. The Panel examined in detail the implications of these arguments and found the following: the case before it does not require the Panel to address the question of whether the assumption created by the 1955 decision of the CONTRACTING PARTIES applies to all production subsidies, including generally available subsidies serving broad policy objectives of the kind mentioned in Article 11:1 of the Subsidies Code. At issue in the case before it are product-specific subsidies that protect producers completely from the movement of prices for imports and thereby prevent tariff concessions from having any impact on the competitive relationship between domestic and imported oilseeds. The Panel considered that the main value of a tariff concession is that it provides an assurance of better market access through improved price competition. Contracting parties negotiate tariff concessions primarily to obtain that advantage. They must therefore be assumed to base their tariff negotiations on the expectation that the price effect of the tariff concessions will not be systematically offset. If no right of redress were given to them in such a case they would be reluctant to make tariff concessions and the General Agreement would no longer be useful as a legal framework for incorporating the results of trade negotiations. The Panel does not share the view of the Community that the recognition of the legitimacy of such expectations would amount to a re-writing of the rules of the General Agreement. The CONTRACTING PARTIES have decided that a finding of impairment does not authorize them to request the impairing contracting party to remove a measure not inconsistent with the General Agreement; such a finding merely allows the contracting party frustrated in its expectation to request, in accordance with Article XXIII:2, an authorization to suspend the application of concessions or other obligations under the General Agreement.¹⁴ The recognition of the legitimacy of an expectation thus essentially means the recognition of the legitimacy of such a request. The recognition of the legitimacy of an expectation relating to the use of production subsidies therefore in no way prevents a contracting party from using production subsidies consistently with the General Agreement; it merely delineates the scope of the protection of a negotiated balance of concessions. For these reasons the Panel found that the United States may be assumed not to have anticipated the introduction of subsidies which protect Community producers of oilseeds completely from the movement of prices for imports and thereby prevent tariff concessions from having any impact on the competitive relationship between domestic and imported oilseeds, and which have as one consequence that all domestically-produced oilseeds are disposed of in the internal market notwithstanding the availability of imports.

149. Having made this finding the Panel examined whether the Community had submitted any evidence to rebut that assumption. The Panel noted that the evidence submitted by the Community showed that the United States was aware that there existed in 1962 subsidies for oilseeds in some of the member States of the Community and that a common agricultural policy was being elaborated by the Community. Nothing in the evidence submitted by the Community, however, indicates that the Community had made it known at that time that it planned to introduce subsidy schemes insulating oilseed producers completely from import competition. The evidence thus showed that the United States must reasonably have expected the transformation of national producer support measures into a Community support scheme but that it could not reasonably have anticipated the introduction of subsidy schemes which protect producers completely from the movement of prices for imports and thereby prevent the tariff concessions from having any impact on the competitive relationship between domestic and imported oilseeds.

150. The Community claims that the subsidy schemes for oilseeds, even if they could not reasonably have been anticipated, did not actually impair the concessions because they did not displace or impede imports, as imports of rapeseed, sunflowerseed and soyabeans had risen from 4.5 million tonnes in 1966

¹⁴"The Australian Subsidy on Ammonium Sulphate", report adopted on 3 April 1950 (BISD Vol.II/188, 195); and "Reports of Committees and Principal Sub-Committees", Geneva, September 1948 (ICITO I/8, page 155).

(EC-6) to 20.4 million tonnes in 1988 (EC-12) on a meal equivalent basis. The United States' view is that they did impair the tariff concessions because they upset the competitive relationship between domestic and imported oilseeds. These arguments of the parties raise the question of the nature of the benefit accruing under Article II: does that benefit consist of the protection of expectations on competitive conditions or on trade flows? The Panel noted that the CONTRACTING PARTIES have consistently interpreted the basic provisions of the General Agreement on restrictive trade measures as provisions establishing conditions of competition. Thus they decided that an import quota constitutes an import restriction within the meaning of Article XI:1 whether or not it actually impeded imports and that an internal tax on imported products does not meet the national treatment requirement of Article III whether or not the tax is actually applied to imports.¹⁵ A previous panel pointed out that Articles III and XI are "to protect expectations of the contracting parties as to the competitive relationship between their products and those of other contracting parties. Both articles are not only to protect current trade but also create the predictability needed to plan future trade".¹⁶ In the past Article XXIII:1(b) cases, the CONTRACTING PARTIES have adopted the same approach: their findings of nullification or impairment were based on a finding that the products for which a tariff concession had been granted were subjected to an adverse change in competitive conditions. In none of these cases did they consider the trade impact of the change in competitive conditions to be determining. In one case they specifically rejected the relevance of statistics on trade flows for a finding on nullification and impairment.¹⁷ It is of course true that, in the tariff negotiations in the framework of GATT, contracting parties seek tariff concessions in the hope of expanding their exports, but the commitments they exchange in such negotiations are commitments on conditions of competition for trade, not on volumes of trade.

151. The approach of the CONTRACTING PARTIES reflects the fact that governments can often not predict with precision what the impact of their interventions on import volumes will be. If a finding of nullification or impairment depended not only on whether an adverse change in competitive conditions took place but also on whether that change resulted in a decline in imports, the exposure of the contracting parties to claims under Article XXIII:1(b) would depend on factors they do not control; the rules on nullification and impairment could consequently no longer guide government policies. Moreover, the contracting parties facing an adverse change in policies could make a claim of nullification or impairment only after that change has produced effects. Such claims could consequently not be made to prevent adverse effects; they could only be made to obtain redress *ex post*. If Article II were considered to be protecting expectations on trade flows it would be necessary for the CONTRACTING PARTIES to determine what export volumes a contracting party can reasonably expect after having obtained a tariff concession. The Panel is not aware of any criteria or principles that could be applied to make such a determination. The Panel further noted that changes in trade volumes result not only from government policies but also other factors, and that, in most circumstances, it is not possible to determine whether a decline in imports following a change in policies is attributable to that change or to other factors. The provisions of Article XXIII:1(b) could therefore in practice hardly be applied if a contracting party claiming nullification or impairment had to demonstrate not only that an adverse change in competition has taken place but also that the change has resulted in a decline in imports.

¹⁵"Panel on Japanese Measures on Imports of Leather", report adopted on 15/16 May 1984 (BISD 31S/113); "Brazilian Internal Taxes", report adopted on 30 June 1949 (BISD Vol.II/184-185).

¹⁶"United States - Taxes on Petroleum and Certain Imported Substances", report adopted on 17 June 1987 (BISD 34S/160).

¹⁷"Treatment by Germany of Imports of Sardines", panel report adopted on 31 October 1952 (BISD 1S/53, 56).

152. For these reasons the Panel found that benefits accruing to the United States under Article II of the General Agreement in respect of the zero tariff bindings for oilseeds in the Community Schedule of Concessions were impaired as a result of subsidy schemes which operate to protect Community producers of oilseeds completely from the movement of prices of imports and thereby prevent the oilseeds tariff concessions from having any impact on the competitive relationship between domestic and imported oilseeds.

153. The Panel took note of the arguments of the Community relating to the embargo imposed on exports of soyabeans by the United States in 1973. The Panel considered that this embargo, though it may have understandably aroused concern in the Community about the security of its supplies, could provide no justification for measures adversely affecting the competitive position of imports originating not only in the United States but in any one of the contracting parties benefiting under Article II from the Community's tariff binding. It was open to the Community to bring this matter before the CONTRACTING PARTIES at the appropriate time and to seek the remedies provided for under the General Agreement.

154. The Panel was established to make findings "in the light of the relevant GATT provisions"; it therefore does not have the mandate to propose interpretations of the provisions of the Subsidies Code which the Community invokes to justify its position. However, the following may be noted in this respect. The Subsidies Code states in Article 8:4 that a nullification or impairment may arise through "the effects of the subsidy in displacing or impeding imports of like products into the market of the subsidizing country". The Community takes the position that its production subsidies for oilseeds were followed by a rise in imports of oilseeds; they therefore neither displaced nor impeded imports and consequently did not cause nullification or impairment. The Community's position implies that Article 8:4 redefines the benefit accruing under a tariff concession as being no longer the protection of expectations on conditions of competition but the protection of expectations on the level of trade volumes even though the CONTRACTING PARTIES have consistently decided otherwise. It is to be recalled that the CONTRACTING PARTIES considered in 1960 that "it is fair to assume that a subsidy which provides an incentive to increased production will, in the absence of offsetting measures, e.g., a consumption subsidy, either increase exports or reduce imports".¹⁸ The implication of the Community's position is that, under the Subsidies Code, this assumption could no longer be made. The Panel noted that the purpose of the Subsidies Code is, according to its preamble, "to apply fully and interpret" provisions of the General Agreement. In the view of the Panel this speaks in favour of interpreting Article 8:4 in conformity with the decisions of the CONTRACTING PARTIES rather than, as the Community suggests, revising these decisions in the light of a particular interpretation of a Code accepted by a portion of the contracting parties.

CONCLUSIONS

155. The Panel found that the Community Regulations providing for payments to seed processors conditional on the purchase of oilseeds originating in the Community are inconsistent with Article III:4 of the General Agreement, according to which imported products shall be given treatment no less favourable than that accorded to like domestic products in respect of all regulations affecting their internal purchase. The Panel recommends that the CONTRACTING PARTIES request the Community to bring these Regulations into conformity with the General Agreement.

156. The Panel further found that benefits accruing to the United States under Article II of the General Agreement in respect of the zero tariff bindings for oilseeds in the Community Schedule of Concessions were impaired as a result of the introduction of production subsidy schemes which operate to protect

¹⁸"Review Pursuant to Article XVI:5", report adopted on 24 May 1960 (BISD 9S/188, 191).

Community producers of oilseeds completely from the movement of prices of imports and thereby prevent the tariff concessions from having any impact on the competitive relationship between domestic and imported oilseeds. The Panel recommends that the CONTRACTING PARTIES suggest that the Community consider ways and means to eliminate the impairment of its tariff concessions for oilseeds.

157. The Panel finally considered that, as the inconsistency with Article III:4 and the impairment of the tariff concessions arise from the same Community Regulations, a modification of these Regulations in the light of Article III:4 could also eliminate the impairment of the tariff concessions. The Panel therefore recommends that the CONTRACTING PARTIES take no further action under Article XXIII:2 in relation to the impairment of the tariff concessions until the Community has had a reasonable opportunity to adjust its Regulations to conform to Article III:4.

ANNEX A

EVOLUTION OF EEC INSTITUTIONAL OILSEED PRICES AND WORLD MARKET (ROTTERDAM) PRICES
(ECU per 100 kg.)

Marketing Year	RAPESEED/COLZA			SUNFLOWERSEED			SOYABEANS		
	Target Price	Intervention Price	Target Price	Intervention Price	Target Price	Intervention Price	Guide Price	Minimum Price	
1967/68	24,48	23,76	24,48	23,76	24,48	23,76	-	-	
1968/69	24,48	23,76	24,48	23,76	24,48	23,76	-	-	
1969/70	24,48	23,76	24,48	23,76	24,48	23,76	-	-	
1970/71	24,48	23,76	24,48	23,76	24,48	23,76	-	-	
1971/72	24,48	23,76	24,48	23,76	24,28	23,76	-	-	
1972/73	25,21	24,48	25,45	24,48	25,45	24,72	-	-	
1973/74	25,46	24,72	25,70	24,72	25,70	24,96	-	-	
1974/75	27,47	26,68	28,39	26,68	28,39	27,56	28,18	-	
1975/76	30,59	29,97	32,05	29,97	32,05	31,07	31,57	-	
1976/77	33,29	32,36	34,61	32,36	34,61	33,61	34,46	-	
1977/78	34,49	33,50	37,21	33,50	37,21	36,11	37,04	-	
1978/79	35,87	34,84	39,07	34,84	39,07	37,96	38,89	-	
1979/80	36,41	35,36	39,66	35,36	39,66	38,51	39,48	-	
1980/81	38,69	36,77	42,63	36,77	42,63	40,05	42,05	38,69	
1981/82	42,56	39,71	47,75	39,71	47,75	44,06	46,26	41,63	
1982/83	46,39	42,13	54,44	42,13	54,44	49,73	52,74	46,41	
1983/84	48,22	43,80	57,71	43,80	57,71	52,71	56,17	49,43	
1984/85	47,26	42,92	58,22	42,92	58,22	53,27	57,01	50,17	
1985/86	46,41	42,15	57,35	42,15	57,35	52,47	57,58	50,67	
1986/87	46,41	42,15	55,43	42,15	55,43	50,55	57,58	50,67	
1987/88	40,52	33,81	52,52	33,81	52,52	44,45	50,27	43,36	
1988/89	41,58	34,88	46,80	34,88	46,80	38,71	50,07	43,16	
1989/90	n.d.	n.d.	n.d.	n.d.	n.d.	n.d.	n.d.	n.d.	

NOTES

1. The EEC institutional prices correspond to the price at the beginning of the marketing year, to which monthly increases may be added.
2. The EEC institutional prices reflect reductions resulting from the application of "stabilizers" in 1987/88 and 1988/89.
3. The intervention prices for rapeseed and sunflowerseed correspond to 94 per cent of the intervention price fixed by the Council, less the reduction resulting from the system of guaranteed maximum quantities.
4. Up until 1982/83, the intervention prices for rapeseed and sunflowerseed were the basic intervention prices fixed for Rotterdam. Lower intervention prices were fixed in the production centres. Since 1983/84, a single intervention price has been fixed in relation with the guarantee to be ensured for producers in surplus production areas.
5. Support measures for soyabeans were introduced in 1974/75.
6. n.d. = not determined

SOURCES: EEC Institutional Prices: EEC submission to Panel, July 1989.

ANNEX B

NOTES SUPPLIED BY EEC COMMISSION ON CALCULATION
OF AID IN RESPECT OF OILSEEDS

I. SUNFLOWERSEED

1. For each marketing year, the Council fixes a target price and an intervention price for Community-produced sunflowerseed. The intervention buying-in price is equivalent to 94 per cent of the intervention price.
2. The Commission is not able to record a world market price for sunflowerseed on the basis of real purchasing opportunities for such seed by Community operators.
3. It therefore reconstructs that price on the basis of the value of average quantities of oil and oilcake resulting from the processing of sunflowerseed in the Community (Article 2 of Regulation (EEC) No. 115/67).
4. If the aid was equivalent, as stipulated in the Community Regulations, to the difference between the target price and the reconstructed price, it would be excessive since Community operators do not purchase the seed at the target price. In order to avoid this undue profit, and since the Regulation explicitly mentions the target price, the Commission increases the reconstructed price by a fixed-rate adjustment. For the 1988/89 marketing year, for example, that adjustment was normally at the rate of ECU 10.2/100 kg. The price applied is therefore appreciably higher than the reconstructed price.
5. Justification of the basic adjustment: ECU 10.2/100 kg.

For reconstructing the price, the Commission uses a quotation of oilcake of non-husked sunflowerseed, whereas the 39 per cent oilcake content used in calculating the aid corresponds to oilcake of husked seed. There is therefore an artificial reduction of the reconstructed price (between ECU 1.5 and ECU 2/100 kg.) which has to be offset.

The difference between the target price and the intervention buying-in price is approximately ECU 8/100 kg.

The processing costs taken into account under the existing Regulations, of ECU 5.2/100 kg., seem unduly high, by approximately ECU 0.8.

The maximum adjustment possible would be approximately ECU 11 if Community seed was available to the processor at the intervention buying-in price. The difference of 0.8 in relation to the adjustment applied corresponds to the difference sought by the Commission between the market price and the intervention buying-in price for the 1988/89 marketing year.

In practice, the market price fluctuates according to the respective competitive positions of the farmers and the processors.

As a result of this practice the processors are not in a position to pay the target price for the seed.

6. The basic aid is then equal to the difference between the target price and the price used.

7. Where appropriate, the basic aid is lowered by the reduction resulting from the system of guaranteed maximum quantities (Article 27 bis of Regulation (EEC) No. 136/66).

Example: Aid of 20 June 1989, for the month of June.

N.B.: The aid is fixed for the current month plus four.

Target price: 60.996 ECU/100 kg., including monthly increases.

Calculation of reconstructed price:

Recorded price of oils: 45.225 ECU/100 kg.

Average oil yield: 42 per cent

Oil contribution: $0.42 \times 45.225 = 18.995$ ECU/100 kg.

Recorded price of oilcake: 10.251 ECU/100 kg.

Average oilcake yield: 39 per cent

Oilcake contribution: $0.39 \times 10.251 = 3.998$ ECU/100 kg.

Price of oil + oilcake: $18.995 + 3.998 = 22.993$ ECU/100 kg.

Processing costs: 5.2 ECU/100 kg.

Reconstructed price: $22.993 - 5.2 = 17.793$ ECU/100 kg.

Basic adjustment: 10.2 ECU/100 kg.

Price used: $17.793 + 10.2 = 27.993$ ECU/100 kg.

Basic aid: $60.996 - 27.993 = 33.003$ ECU/100 kg.

GMQ reduction: 11.55 ECU/100 kg.

Aid: $33.003 - 11.55 = 21.453$ ECU/100 kg.

II. COLZA AND RAPESEED

1. For each marketing year, the Council fixes a target price and an intervention price for Community-produced colzaseed. The intervention buying-in price is equal to 94 per cent of the intervention price.

2. The Commission is not able to record a world market price for colzaseed on the basis of real purchasing opportunities for such seed by Community operators.

3. It therefore reconstructs that price on the basis of the value of average quantities of oil and oilcake resulting from the processing of colzaseed in the Community (Article 2 of Regulation (EEC) No. 115/67).

4. If the aid was equivalent, as stipulated in the Community regulations, to the difference between the target price and the reconstructed price, it would be excessive since Community operators do not purchase the seed at the target price. In order to avoid this undue profit, and since the regulation explicitly mentions the target price, the Commission increases the reconstructed price by a fixed-rate amount. For the 1988/89 marketing year, for example, that amount was slightly more than ECU 6.5/100 kg. The price used is therefore appreciably higher than the reconstructed price.

5. Justification of fixed-rate amount of approximately ECU 6.5

The gap between the target price and the intervention buying-in price is ECU 6.705/100 kg.

The processing costs used seem to be about ECU 0.7 higher than real average costs.

The maximum fixed-rate amount would therefore be ECU 7.4/100 kg if Community seeds were available to the processor at the intervention buying-in price. The difference of ECU 0.9 in relation to the amount used corresponds to the difference aimed at by the Commission for the 1988/1989 marketing year between the market price and the intervention buying-in price. In practice, the market price fluctuates according to the respective competitive positions of the farmers and the processors.

As a result of this practice the processors are not in a position to pay the target price for the seeds.

6. The basic aid is then equal to the difference between the target price and the price used.

7. Where appropriate, the basic aid is lowered by the reduction resulting from the system of guaranteed maximum quantities (Article 27 bis of Regulation (EEC) No. 136/66).

8. In practice, therefore, the aid is calculated as in the case of sunflowerseed, but because of constraints under the regulations, the calculation is presented differently. Indeed, the "basic adjustment" (used in practice to fix the amount of aid on the basis of a market price deemed desirable by the Commission, and not on the basis of the target price) was introduced historically for another purpose: to harmonize the interest of crushing the various types of seed, and in particular to harmonize the crush margin for Community seeds and for imported soyabeans (Article 6 of Regulation (EEC) 115/67).

So that this comparison can take place, the Commission reconstructs, on the basis of Winnipeg quotations and on the basis of the fixed-rate transport cost, a recorded price for colza c.i.f. Rotterdam, which does not correspond to any real transaction.

9. The Commission establishes a crush margin for colza seed in the Community, which results from the difference between the above-mentioned recorded price and the reconstructed price. The difference between this margin and the margin for soyabeans represents the maximum adjustment allowed under the Community regulations.

10. The real basic adjustment is then calculated, subject to this limit, so that the price used is exactly the reconstructed price increased by the fixed-rate amount determined by the Commission.

Example 1: Aid of 20 June 1989, for the month of June

N.B: The aid is fixed for the current month plus five

Target price: ECU 47.246/100 kg, including monthly increases

Calculation of reconstructed price:

Recorded price of oils: ECU 35.256/100 kg

Average oil yield: 39 per cent

Oil contribution: $0.39 \times 35.256 =$ ECU 13.750/100 kg

Recorded price of oilcake: ECU 12.174/100 kg

Average oilcake yield: 56 per cent

Oilcake contribution: $0.56 \times 12.174 = \text{ECU } 6.817/100 \text{ kg}$

Price oil + oilcake: $13.750 + 6.817 = \text{ECU } 20.567/100 \text{ kg}$

Processing costs: $\text{ECU } 4.3/100 \text{ kg}$

Reconstructed price: $20.567 - 4.3 = \text{ECU } 16.267/100 \text{ kg}$

Basic adjustment: $\text{ECU } 6.55/100 \text{ kg}$

Price used: $16.267 + 6.55 = \text{ECU } 22.817/100 \text{ kg}$

Basic aid: $47.246 - 22.817 = \text{ECU } 24.429/100 \text{ kg}$

GMQ reduction: $3.44 \text{ ECU}/100 \text{ kg}$

Aid: $24.429 - 3.44 = \text{ECU } 20.989/100 \text{ kg}$

Example 2: Calculation of basic adjustment, colza, for the month of June 1989. Aid of 20 June 1989.

Recorded price: $\text{ECU } 29.337/100 \text{ kg}$ (c.i.f., Rotterdam)

Reconstructed price: $\text{ECU } 16.267/100 \text{ kg}$

Crush margin, colza: $16.267 - 29.337 = - \text{ECU } 13.070/100 \text{ kg}$

Soya margin: $- 2.878 \text{ ECU}/100 \text{ kg}$

Maximum basic adjustment: $- 13.070 - (-2.878) = - \text{ECU } 10.192/100 \text{ kg}$

Basic adjustment necessary to obtain desired price used:

$$22.817 - 29.337 = - \text{ECU } 6.52/100 \text{ kg}$$

III. SOYABEANS

1. For each marketing year the Council fixes a guide price for soyabeans.
2. The Commission records a price c.i.f. Rotterdam for beans imported into the Community. According to the period of the year, the origin of the beans is either the United States or Brazil.
3. The basic aid is equal to the difference between the guide price and the recorded price (Article 2 of Regulation (EEC) No. 1491/85).
4. Where appropriate, the aid is reduced by the amount of the reduction resulting from the system of guaranteed maximum quantities (Article 3 bis of Regulation (EEC) No. 1491/85).

Example: Aid fixed on 19 June 1989, EUR - 10

Guide price: $\text{ECU } 55.85/100 \text{ kg}$.

Recorded price: $\text{ECU } 23.3/100 \text{ kg}$. (origin: Brazil, c.i.f. Rotterdam)

Basic aid: $55.85 - 23.30 = \text{ECU } 32.55/100 \text{ kg}$.

GMQ reduction: $\text{ECU } 5.78/100 \text{ kg}$.

Aid: $32.55 - 5.78 = \text{ECU } 26.77/100 \text{ kg}$.

Weekly prices for soyabeans in 1989

Price used by the Commission (c.i.f. Rotterdam) for calculating aid			(US\$/ton) OILWORLD Price (c.i.f. Rotterdam)		
<u>Date</u>	<u>Origin</u>	<u>t.</u>	<u>Date</u>	<u>Origin</u>	<u>t.</u>
9/10/11 January	USA	325	12 January	USA	325
28/30 January	USA	305	26 January	USA	302
15/16 February	USA	302.5	16 February	USA	301
27 February	USA	312.5	23 February	USA	310
			2 March	USA	309
15 March	USA	318	16 March	USA	305
23/28/29 March	BRA	307	30 March	USA	305
10/11/12 April	BRA	284.5	6 April	USA	288
				ARG	285
			13 April	USA	291
				ARG	291
24/25/26 April	BRA	297	27 April	USA	300
				ARG	287
10/11/12/16/17 May	BRA	294	18 May	USA	293
				ARG	282
25/26/29 May	BRA	284.5	25 May	USA	289
				ARG	278

Conversion into ECU of World Market Price Expressed in dollars

Under the European agri-monetary system and since the beginning of the 1984/85 marketing year, there is a difference between the real ECU, determined within the framework of the European monetary system, and the green ECU, used for the common agricultural policy. This stems from the provisions of Article 6, paragraph 1 of Regulation (EEC) No. 1677/85 as amended by Regulation (EEC) No. 1889/87.

This difference is currently (since 1 July 1987) as follows:

$$1 \text{ green ECU} = 1.137282 \text{ real ECU.}$$

Consequently, all Community agricultural prices fixed in terms of the green ECU are, in fact, increased by 13.7282 per cent in relation to the real ECU.

World market prices recorded in a foreign currency are converted into the green ECU by dividing the exchange rate between the foreign currency concerned and the real ECU by the coefficient 1.137282.

The important thing is to express the world market price and the Community price in the same currency unit, but the application of the green ECU system has no effect on the level of the difference between Community prices and the world market price.

Source: EEC submission to Panel: July 1989

ANNEX C-1

DATA ON PRICES AND AID PAYMENTS
SUPPLIED BY THE EEC COMMISSION

COLZA/RAPESEED

(ECUs/ton)

Annual averages 1977-1988

	(A)	(B)	(C)	(D)	(E)	(F)	(G)
	Reconstituted world price ¹	Community seed price ²	Target price ³	Intervention price	Basic adjustment	Constructed world market price (A)+ (E)	Aid (B)-(A) or (C)-(F)
1977	237	348	355	344	40	277	78
1978	215	350	367	357	17	234	133
1979	216	370	377	366	7	225	152
1980	202	380	391	374	11	213	178
1981	223	414	423	397	10	233	190
1982	225	457	465	429	8	235	230
1983	297	479	495	448	16	314	181
1984	387	470	500	453	30	417	83
1985	303	467	490	444	23	326	164
1986	137	445	486	444	41	181	305
1987	112	395	452	395	57	169	283
1988 ⁴	186	346	422	353	92	278	144

¹Price reconstructed on the basis of oil and cake prices

²Price in France, the main producer. In other Member States, producer prices are usually higher.

³Includes monthly increases

⁴For many months and following the Chicago market crisis in June, aid in 1988 was set at non-operational levels to avoid the risk of speculative operations.

Source: EEC submission to Panel: September 1989

ANNEX C-2

SUNFLOWERSEEDS

(ECUs/ton)

Annual averages 1977/1988

	(A)	(B)	(C)	(D)	(E)	(F)	(G)
	Reconstituted world price ¹	Community seed price ²	Target price ³	Intervention price ³	Basic adjustment	Constructed world market price (A)+ (E)	Aid (B)-(A) or (C)-(F)
1977	250	n. d.	369	359	38	288	81
1978	237	383	393	382	10	247	146
1979	244	399	407	396	8	252	155
1980	205	307	421	403	16	221	200
1981	273	446	459	428	13	286	173
1982	260	501	565	481	64	324	241
1983	291	551	578	527	27	318	260
1984	437	592	602	552	10	447	155
1985	337	573	602	549	29	366	236
1986	152	540	589	537	50	202	387
1987	109	496	563	497	67	176	387
1988 ⁴	172	433	518	434	117	289	229

¹Price reconstructed on the basis of oil and cake prices

²Price in France, the main producer. In other Member States, producer prices are usually higher.

³Includes monthly increases

⁴For many months and following the Chicago market crisis in June, aid in 1988 was set at non-operational levels to avoid the risk of speculative operations.

Source: EEC submission to Panel: September 1989

ANNEX C-3

SOYABEANS

(ECUs/ton)

	(A) World price	(B) Aid	(C) Community bean price ¹	(D) Additional costs	(E) User cost price	(F) Indicative price	(G) Minimum price
1986	190	381	510	59	576	571	503
1987	169	388	519	39	587	557	488
1988	223	279	450	52	513	502	433

¹NB: Price of Community beans in Italy, the main producer, following inter-trade agreements

Owing to the low level of Community production, no prices existed before 1986.

Source: EEC submission to Panel: September 1989

ANNEX D-1

DATA ON EEC PRICES SUBMITTED BY THE UNITED STATES

EC RAPESEED PRICES

Yearly Averages

(ECU/100 kg)

YEAR	TARGET PRICE ¹	INTERVENTION PRICE ²	ROTTERDAM PRICE ³	EC CALCULATED PRICE ⁴
1977	35.412	34.433	27.364	27.594
1978	36.688	35.678	23.245	23.339
1979	37.676	36.637	22.747	22.478
1980	39.125	37.418	22.392	21.298
1981	42.315	39.694	26.799	23.190
1982	46.468	42.913	29.159	23.260
1983	49.464	44.795	37.690	31.392
1984	49.993	45.267	43.343	41.821
1985	49.088	44.442	38.469	37.565
1986	48.643	44.383	25.779	18.370
1987	45.299	40.671	14.119	13.231
1988	43.907	38.691	20.200	22.814

¹January 1977 through November 1986 monthly prices published in "Agricultural Markets", Commission of the EC, Luxembourg (last published data November 1986); December 1986 through December 1988, derived FAS, USDA.

²January 1977 through November 1986 (except July 1985-June 1986) monthly prices published in "Agricultural Markets", Commission of the EC, Luxembourg (last published data November 1986); December 1986 through December 1988, derived FAS, USDA.

³Oil World weekly, Canadian rapeseed: 40 per cent, CIF Rotterdam, converted to ECUs (exchange rates, Wall Street Journal).

⁴January 1977 through November 1986 monthly prices published in "Agricultural Markets", Commission of the EC, Luxembourg (last published data November 1986); December 1986 through December 1988, derived FAS, USDA.

Source: United States submission to Panel: June 1989

ANNEX D-2

DATA ON EEC PRICES SUBMITTED
BY THE UNITED STATES

EC SUNFLOWERSEED PRICES

Yearly Averages

ECU/100 kg.

YEAR	TARGET PRICE ¹	INTERVENTION PRICE ²	ROTTERDAM PRICE ³	EC CALCULATED PRICE ⁴
1977	36.909	35.882	25.408	28.775
1978	39.265	38.171	22.874	24.623
1979	40.730	39.593	23.047	25.201
1980	42.142	40.330	23.307	22.144
1981	45.944	42.795	28.689	28.653
1982	51.755	48.141	28.952	27.664
1983	57.665	52.688	32.895	31.699
1984	60.229	55.250	44.002	44.730
1985	60.164	54.935	36.510	40.819
1986	58.994	53.779	21.414	20.369
1987	58.608	53.728	17.697	19.930
1988	59.722	54.842	32.510	32.990

¹January 1977 through November 1986 monthly prices published in "Agricultural Markets", Commission of the EC, Luxembourg (last published data November 1986); December 1986 through December 1988, derived FAS, USDA

²January 1977 through November 1986 (except July 1985-June 1986) monthly prices published in "Agricultural Markets", Commission of the EC, Luxembourg (last published data November 1986); December 1986 through December 1988, derived FAS, USDA

³Oil World weekly, US/Canadian sunflowerseed, c.i.f. Rotterdam, converted to ECUs (exchange rates, Wall Street Journal)

⁴January 1977 through November 1986 monthly prices published in "Agricultural Markets", Commission of the EC, Luxembourg (last published data November 1986); December 1986 through December 1988, derived FAS, USDA

Source: United States Submission to Panel: June 1989

ANNEX D-3

DATA ON EEC PRICES SUBMITTED
BY THE UNITED STATES

EC SOYABEAN PRICES

Marketing Year

(ECU/100 kg.)

<u>YEAR</u>	<u>GUIDE PRICE¹</u>	<u>MINIMUM PRICE²</u>	<u>ROTTERDAM PRICE³</u>	<u>EC CALCULATED PRICE⁴</u>
1974/75 ⁵	28.18	-	20.20	28.29
1975/76	31.57	-	18.88	18.36
1976/77	34.45	-	25.32	24.51
1977/78	37.04	-	20.68	19.95
1978/79	38.89	-	21.78	20.24
1979/80	39.48	-	20.02	20.19
1980/81	42.05	38.69	26.66	n.a.
1981/82	46.26	41.63	25.24	n.a.
1982/83	52.74	46.41	28.73	n.a.
1983/84	56.17	49.43	37.35	n.a.
1984/85	56.17	50.17	29.06	n.a.
1985/86	57.58	50.67	22.28	n.a.
1986/87	57.58	50.67	18.67	n.a.
1987/88	55.85	48.94	23.62	n.a.
1988/89	55.85	48.94	23.67	n.a.

^{1,2}EC Regulations setting annual prices, Commission of the EC, EC minimum prices not established until 1980/81

³Oil World weekly, US soyabeans, c.i.f. Rotterdam

⁴EC Regulations setting average world prices, series ended in 1979/80. New system established in 1980/81, EC calculated world average prices from 1980/81 to present not available.

⁵Subsidy not paid during the first year as average world price was set above the guide price.

Source: US Submission to Panel: June 1989

ANNEX E

EC VEGETABLE PROTEIN MEAL CONSUMPTION

IMPORTS VS. PRODUCTION¹

1965/66 - 1989/90²

('000 MT)

YEAR	EC CONSUMPTION	NET SEED AND MEAL IMPORTS	EC PRODUCTION
1965/66	3,834	3,648	230
1966/67	4,050	3,841	218
1967/68	4,073	3,890	276
1968/69	4,463	4,215	320
1969/70	5,958	5,666	342
1970/71	6,666	6,409	394
1971/72	6,985	6,815	468
1972/73	8,764	8,308	561
1973/74	10,487	10,145	548
1974/75	10,285	9,688	618
1975/76	11,684	11,303	503
1976/77	12,044	11,686	530
1977/78	14,839	14,555	501
1978/79	16,192	15,640	626
1979/80	17,581	17,216	683
1980/81	15,655	14,417	1,124
1981/82 ³	19,573	18,227	1,689
1982/83	18,775	17,067	2,295
1983/84	18,549	16,128	2,522
1984/85	20,174	17,017	3,623
1985/86	24,740	20,928	4,669
1986/87	26,413	22,130	5,798
1987/88	25,787	19,607	8,356
1988/89	24,571	17,396	8,154
1989/90	25,809	19,442	7,770

¹On a soyabean meal equivalent basis for sunseed, rapeseed and soyabeans

²1965/66 through 1971/72 = EC (6); 1972/73 through 1979/80 = EC (9); 1980/81 through 1984/85 = EC (10); 1985/86 through 1989/90 = EC (12)

³Pulse data included for 1981/82 through 1989/90; estimated for 1988 and 1989.

Source: USDA/FAS DATA: United States submission, September 1989

ANNEX F

EEC - BALANCE SHEET FOR OILSEEDS

TOTAL (COLZA/RAPESEED, SUNFLOWER, SOYA, OTHER)

('000 tons of soya meal equivalent)

Year	Production	Imports	Total availabilities	Of which: exports
1966	259	6,364	6,623	326
1967	331	6,328	6,659	415
1968	377	6,690	7,067	424
1969	388	6,935	7,323	391
1970	433	8,919	9,352	491
1971	504	9,783	10,287	612
1972	518	10,222	10,740	716
1973	561	10,297	10,858	856
1974	654	13,525	14,179	972
1975	556	12,480	13,036	417
1976	588	14,854	15,442	463
1977	682	14,399	15,081	493
1978	678	17,902	18,580	579
1979	717	19,564	20,281	595
1980	1,132	20,472	21,604	968
1981	1,210	19,711	20,921	1,318
1982	1,640	21,699	23,339	1,384
1983	1,671	21,964	23,635	2,307
1984	2,301	19,625	21,926	1,094
1985	2,763	22,128	24,891	1,654
1986	3,683	26,010	29,693	1,052
1987	5,912	26,007	31,919	1,726
1988	5,342	23,023	28,365	1,061

METHODOLOGICAL NOTE

Period

1966 - 1972 = EUR 6
1973 - 1980 = EUR 9
1981 - 1985 = EUR 10
1986 - 1988 = EUR 12

- Production: by marketing year; for example 1985/86 = 1985
- Foreign trade: by calendar year
- Definition: The heading "OTHER" covers all other oilseeds and oleagineous fruit falling within heading No. 23.04 "oilcake", mentioned in the United States submission (page 1), with the exception of maize germ meal.
- Method of calculation
- Production: Seeds produced in the Community and converted into soya meal equivalent
- Imports and exports: Seeds and cake or meal converted into soya meal equivalent
- Total availabilities: = Production + Imports converted into soya meal equivalent
- Conversion table: (Not included in this Annex)

Source: EUROSTAT/EC submission, July 1989

ANNEX G

EVOLUTION OF EEC PRODUCTION AND AREAS UNDER PRODUCTION
FOR PRINCIPAL OILSEEDS

AREA: '000 hectares
PRODUCTION: '000 ton seed weight

YEAR	COLZA/RAPESEED		SUNFLOWER		SOYA		THE THREE (Colza + Sunflower + Soya)	
	Area	Production	Area	Production	Area	Production	Area	Production
1966	237	439		23				
1967	270	580		23				
1968	322	658		26				
1969	367	693		31				
1970	419	781		55				
1971	407	916		81				
1972	442	937	56	89				
1973	514	1,000	58	118				
1974	539	1,190	60	102				
1975	499	938	101	156				
1976	498	1,022	84	127				
1977	495	944	76	132	1	2	572	1,078
1978	513	1,231	62	124	3	5	578	1,360
1979	522	1,205	107	222	15	22	644	1,449
1980	731	1,995	135	302	9	18	875	2,315
1981	881	1,999	214	513	9	21	1,104	2,533
1982	1,005	2,679	348	746	13	31	1,366	3,456
1983	1,107	2,492	512	985	36	89	1,655	3,566
1984	1,173	3,490	630	1,193	58	156	1,861	4,839
1985	1,277	3,725	783	1,760	121	342	2,181	5,827
1986	1,254	3,682	2,056	3,162	280	905	3,590	7,749
1987	1,848	5,913	2,270	4,098	608	1,880	4,726	11,891
1988	1,850	5,253	2,148	4,006	552	1,611	4,550	10,870
1989 ^F	1,660	4,600	2,192	3,500	n.d.	n.d.	4,435	9,941

^FOILWORLD forecast of June 1989

NOTE: 1966-1972 = EUR 6; 1973-1980 = EUR 9; 1981-1985 = EUR 10;
1986-1988 = EUR 12

Source: EEC submission to the Panel, July 1989

ANNEX H

Comparison of EC Rapeseed Prices - 1977-1988

ECU/MT

600

500

400

300

200

100

0

1977 1978 1979 1980 1981 1982 1983 1984 1985 1986 1987 1988

CALENDAR YEARS

TARGET PRICE (C)

FRENCH PRICE (B)

ROTTERDAM PRICE

CALC. WORLD PRICE W/ADJUSTMENTS (F)

CALC. WORLD PRICE W/O ADJUSTMENTS(A)

Source: United States Supplementary Submission: October 1989