17 June 1981

SPAIN - MEASURES CONCERNING DOMESTIC SALE OF SOYABEAN OIL

Recourse to Article XXIII:2 by the United States
(L/5142)

I. Introduction

1.1 In November 1979, the Council (C/M/136) was informed by the United States that the United States had held consultations with Spain under Article XXIII:1 as a result of the restriction maintained by the Spanish Government on the sale of soyabean oil on the internal market and its alleged adverse effects on United States exports of soyabeans to Spain. As these consultations did not lead to a solution the United States referred the matter to the CONTRACTING PARTIES in accordance with the provisions of Article XXIII:2, requesting the establishment of a panel to investigate the matter. However, the Council requested Spain and the United States to continue the consultations and if these continued to be unsuccessful, the establishment of a panel would be decided upon at the next Council meeting.

1.2 At the Council meeting of 29 January 1980 (C/M/138), the parties reported that they had been unable to reach a satisfactory solution of the trade issues involved. The Council therefore agreed to establish a Panel with the following terms of reference:

> "To examine, in the light of the relevant GATT provisions, the matter referred to the CONTRACTING PARTIES by the United States relating to Spain's measures concerning domestic sales of soyabean oil (L/4859), and to make such findings as will assist the CONTRACTING PARTIES in making recommendations or rulings, as provided in Article XXIII."

1.3 The Chairman of the Council informed the Council of the agreed composition of the Panel on 26 March 1980 (C/M/139, paragraph 22).

Chairman: Mr. J.J. Real (Ambassador, Permanent Mission of Uruguay, Geneva)

Members: Mr. M. Besson (Chief of Section, Office fédéral des Affaires économiques extérieures, Palais fédéral, Bern).
Mr. F. Furulyas (Counsellor, Permanent Mission of Hungary, Geneva)

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

II. Factual aspects

2.1 The following is a brief description of the factual aspects of Spain's measures concerning the domestic sale of soyabean oil as the Panel understood them.

2.2 In 1941 the Spanish authorities issued the "Law of 24 June 1941 (Office of the Head of State). Reorganization. Office of the Commissioner General for Supply and Transport". The objectives of this law were inter alia "to strengthen the authority of the supply services by co-ordinating under a single management the efforts of the bodies and elements which up to now have been entrusted with functions related to supply."

2.3 The Law of 1941 established in its Article 1 the functions of the Office of the Commissioner General for Supply and Transport (CAT) inter alia as being:

(a) "Control of the products for whose distribution it is responsible and of the establishments in which they are produced, processed, stored or issued";

(b) "Fair distribution of available stores among all Spaniards";

(c) "Implementation of measures aimed at ensuring that such stores reach the consumer with a minimum increase over the production price";

(d) "Periodic proposal of imports and exports of products necessary for the nation's supply that may be required to supplement deficits arising in the supply budget"; and

(e) "Fixing of consumer prices for those products whose prices are controlled at the production stage".

2.4 The CAT, according to Article 3 of the above-mentioned law had competence over "products of primary necessity", the list of which included oils and fats, and in conformity with Article 4 the CAT "shall be competent to declare" the products listed in Article 3 "free or subject to control as regards transactions, distribution or consumption".

2.5 By a decree-law from 1973 CAT was reorganized while keeping "activities of a commercial nature for purposes of ensuring supply through the acquisition, storage, processing, transport, distribution or sale of products referred to in Chapters I and II of the Law of 24 June 1941 …". The decree-law stated that CAT was to "continue to have the character of an autonomous agency attached to the Ministry of Trade." However, the decree-law further stated that the functions and powers of CAT, which were set out in Articles 2, 4 and 51 of the Law of 1941, could only be exercised after approval by the Council of Ministers.

2.6 Certain Decrees and Orders were issued implementing and amplifying the above-mentioned laws, some of which were of a temporary character and of limited duration of validity, annually regulating the oil marketing season. In an Order, dated 21 November 1962, for instance, the CAT was authorized to "allow unrestricted admission, processing and trade in respect of soyabean oils" as from 1 January 1963 with any limitation or condition that CAT deemed appropriate. This Order was followed by a supplementary circular, dated 25 April 1963 and issued by CAT, pointing out that soyabean oil continued to be under State trading but that "… unrestricted marketing is authorized of soyabean oil derived from the grinding of beans freely imported" as from the date of publication of the circular. However, this marketing was subject to certain conditions, such as specified properties of the oil and a maximum price. This unrestricted marketing of soyabean oil was terminated on 15 August of the same year. As from 1972, like all food products, soyabean oil was shifted from a State-trading régime to a transitional State-trading régime pending adoption of a definitive import regime for this product.

2.7 In a Decree from 1975 (2934/1975) provisions were established to govern the 1975/76 to 1978/79 oil-marketing seasons. These provisions were established, inter alia, to "ensure supply and stabilize prices of oils at levels assuring a fair income level for the producing sector and which are consistent with consumer interests." Article 1 of the Decree stated that oils of such seeds as sunflowerseeds, cottonseed as well as soyabeans and olives "shall be unrestricted in trade and movement without any limitations other than those established by the present Decree." This Decree further stated, in its Article 14, that "for each marketing season the Government shall determine the retail price for soyabean oil and where necessary, the quantity thereof to be auctioned for the domestic market." It was also pointed out that soyabean oil "shall in all cases be sold refined and unmixed."

2.8 In order to implement the above-mentioned Decree, particular Decrees were issued for each marketing season setting out specific rules. For instance for the 1976/77 oil-marketing season, Article 2 stated that FORPPA (the Farm Commodity and Price Stabilization Agency) "shall acquire all the virgin olive oil offered freely to it by producers". The Decree further established the time-limit and the purchase and selling prices of olive oil as well as rules for exports and packaging. As concerns seed oils Article 8 of the Decree provided that "the Government shall take appropriate action in the course of 1977 so that domestic consumption of oil obtained from imported seeds does not exceed 170,000 tons." It also provided that the Ministries of Agriculture and of Trade were to establish a system of control and inspection with regard to "the marketing, destination and use of soyabean oil." The specific rules for the following marketing season (1977/78) provided that "the Government shall fix maximum prices for sale to the public of refined and packaged soyabean and sunflowerseed oil". The soyabean oil to be consumed domestically in 1978 was not to exceed 10,000 tons per month. The Decree setting out rules for the 1978/79 marketing season specified, as concerns soyabean oil, that the maximum price was to be set "in appropriate relationship with olive oil". Furthermore, Article 24 provided that "purchase by tender of soyabean oil for the domestic market, both for consumption purposes and for industrial uses during the marketing season shall not exceed 25,000 metric tons per quarter, i.e. the usual domestic consumption." The same above-mentioned rules applied also to the 1979/80 oil-marketing season.

2.9 The stated overall objectives of the rules governing the Spanish vegetable oil sector were "basic protection to the olive sector and at the same time the consumer … by establishing a realistic protection price for olives and giving the consumer an opportunity to select … the prices determined by purely selective factors familiar to him".[1]

2.10 In the 1979/80 marketing season the maximum retail price for soyabean oil was Pta 70 per refined and packaged litre while the buying-in price for raw oil was Pta 48 per kg. of raw oil giving a relative margin of 46 per cent while the maximum margin for the retailer was 4.3 per cent of the retail price. The maximum price for sunflower oil was Pta 108 per packaged and refined litre, the buying-in price 84.50 kg. of raw oil, relative margin 27.8 per cent with a maximum margin for the retailer of 3.7 per cent of the retail price. Olive oil was subject to free pricing, the most frequent retail price being Pta 135 per litre of packaged and refined oil of 1 degree acidity, the buying-in price was Pta 114 per kg. of unrefined oil of 3 degree acidity, the relative margin 18.4 per cent while the maximum margin for the retailer was 4.0 per cent of the retail price.

2.11 Soyabeans have been bound at 5 per cent duty since Spain acceded to the GATT in July 1963 while soyabean oil was not bound. Total imports of soyabeans amounted to 15,612 tons in 1963, the totality of which coming from the United States, rising to 1,228,333 tons in 1970, of which 1,185,376 tons came from the United States. By 1978 total imports of soyabean amounted to 2,142,866 tons of which 1,652,439 tons were provided by the United States. A further increase was expected for 1979 and 1980. Soyabean oil imports amounted to 112,885 tons in 1963, 2,602 tons in 1970, 20,088 tons in 1975 and 6,824 tons in 1977. Spain exported a total of 108,135 tons of soyabean oil in 1971, 59,810 tons in 1973, 40,506 tons in 1975, 134,112 tons in 1977 and 272,729 tons in 1978.

III. Main arguments

3.1 In the course of its examination of the Spanish measures, the Panel heard arguments from the representatives of the United States and of Spain with respect to the following provisions of the General Agreement: Article III:1; Article III:5; Article III:4; Article XVII and Article XXIII.

[1]Order of 21 November 1962 (Office of the Prime Minister). Oil. 1962-63 oil-marketing season.

3.2 The representative of the United States stated that since 1969, the Government of Spain had maintained internal quantitative regulations and other measures in one form or another which had the purpose and effect of restricting the domestic sale of soyabean oil, thereby impairing the concessions granted by Spain on soyabeans. He further stated that in order to establish a violation of paragraph 1 of Article III, the United States had to show that the regulations or requirements affected the internal sale, offering for sale, purchase, transportation, distribution or use of products. The internal quantitative regulation and other measures at issue in this case such as packaging limitations and bottling restrictions could not have affected more directly all of the aspects of sale contemplated by Article III:1 since it constituted a total ban on all sales above a certain quantity. Furthermore, in the opinion of the United States, there was little doubt that the purpose was to protect domestic production of oilseeds. The edible oils which competed with soyabean oil were not affected by the measures and at one point in time not even soyabean oil processed from domestically-grown soyabeans was covered by the regulation which demonstrated the clear intent of protecting all domestic production of both like products and directly competitive or substitutable products. The effect of this protective measure could also be quantified since the reduction in the sale of soyabean oil in Spain had been matched by an increase in the domestic sale of other edible oils, principally sunflower oil.

3.3 With reference to discrimination between soyabean oil from imported beans and soyabean oil from domestic beans the representative of Spain stated that it was Spain's understanding that the words "amounts or proportions" in paragraph 1 were equivalent, since Article III referred to regulations that required the use of a specified amount or proportion of a domestic product, thereby injuring an imported product. Consequently Spain was of the view that the legislation of a country which limited the use of a domestic product was not covered by Article III:1. If the contrary were accepted, the sovereignty of every State over its national resources would certainly be greatly restricted and any measures that might be taken to limit the domestic production of some products would be unlawful. Therefore, Spain was of the opinion that the principle set out in Article III:1 did not refer to the possible quantitative limitation by a State of the domestic production of a domestic product. Moreover, Article III:1 had to be interpreted in the general context of that Article.

3.4 The representative of the United States argued that once the violation of paragraph 1 had been established, it was only necessary to demonstrate that the measure was an "internal quantitative regulation" in order to establish that the measure also violated the second sentence of paragraph 5 of Article III. In the opinion of the United States, the measure was by its very nature a quantitative regulation which would violate Article XI if it were applied directly to the importation of soyabeans.

3.5 The representative of Spain argued, with reference to Article III, paragraph 5, second sentence, that Spanish imports of soyabean oil were practically nil, the domestic production covering all its needs. Accordingly, Spain was of the view that the first sentence of the interpretative note[1] to paragraph 5 applied. As concerns the compatibility of the first sentence of paragraph 5 of Article III with the measure in question the Spanish representative stated that the existing Spanish legislation did not require, for the use, processing or mixture of soyabean oil, that any specified amount or proportion had to be supplied from domestic sources, confining itself to establishing a quota for consumption of domestic oil.

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[1]Ad Article III, paragraph 5:

"Regulations consistent with the provisions of the first sentence of paragraph 5 shall not be considered to be contrary to the provisions of the second sentence in any case in which all of the products subject to the regulations are produced domestically in substantial quantities."

3.6 The representative of the United States argued that Article III was intended by the drafters of the GATT to ensure that once imported products entered the customs territory of a country and had paid the customs duties, they would be afforded equal competitive opportunity with domestic products. The interpretation offered by the Government of Spain would severely limit the scope and application of this principle. If one accepted the Spanish proposition that a product ceased to be covered by Article III once it became a domestic product, that is, once it was so transformed that a change in tariff headings resulted or 30 per cent of value was added, Article III would be open to a variety of abuses. In the case of soyabeans, such an interpretation could have disastrous results for soyabeans were quite unique in having only one use, namely, the production of oil and meal. Indeed, it was proper to conceptualize the importation of soyabeans as nothing more than the importation of oil and meal - in a package as it were.

3.7 The representative of the United States further argued that the application of quantitative regulations to soyabean oil processed from imported soyabeans, but not to other like products, including soyabean oil processed from domestic soyabeans, was inconsistent with the requirement of equal treatment in paragraph 4 of Article III. Applying criteria from former panel findings[1] he stated that it was clear that soyabean oil processed from domestic soyabeans was a "like" product for the purpose of Article III:4. Furthermore, he argued that there was a strong case for considering sunflower oil and soyabean oil "like" products under this paragraph in view of their interchangeability, similarity in processing, marketing and general price movement and comparable acid content. Neither soyabean oil processed from domestic soyabeans nor sunflower oil had any domestic sale restrictions. In the opinion of the United States the reason for this discriminatory treatment was clear: Spain was seeking to protect domestic production of its oilseeds.

3.8 Furthermore, the representative of the United States contended that a separate and additional element of discrimination could be found in the application of the Spanish price control laws to soyabean oil. Under Spanish law the Government administered price controls for all edible oils, including soyabean oil. However, the marketing regulation for 1979/80[2], for instance, required that the Government establish a maximum retail price for refined and packed soyabean oil in appropriate relation with the price of olive oil. Under this regulation, the retail price for soyabean oil was set at a level which was insufficient to permit the processing and sale of soyabean oil whereas this was not the case with olive oil and other edible oils. This difference in treatment could not be justified on grounds other than the objective of protecting domestic production of other edible vegetable oils and the failure to apply price controls to different types of oil on the same basis was inconsistent with Article III:4. In addition paragraph of Article III required that contracting parties considered the effects of price control measures on the interests of other contracting parties.

3.9 The representative of Spain stated that Article III:4 referred exclusively to imported products. Accordingly Article III:4 did not apply in this case since Spain was of the view that all soyabean oil extracted in grinding-mills established in Spain, whether processed from domestic soyabeans or from imported ones, was Spanish oil. Since no harmonization of rules of origin had been achieved in the GATT, it would seem that the statement made at the time of negotiating the GATT must still be deemed valid. The authors of the draft text stated in fact that it was a matter for each importing country to determine the origin of imported products in accordance with its own rules of origin. The law in Spain provided that goods transformed or processed in different countries were to be considered, for customs purposes, to originate in the last country having participated in the production process provided that the resulting products would either fall under a different tariff heading or that the "new" product entailed a value added of at least 30 per cent. In the case of soyabean and soyabean oil, both criteria were

[1]L/4599, paragraph 4.2.

[2]Olive Oil/Edible Oil Regulation for the 1979/80 Marketing Year.

reached as soyabean oil fell under a different tariff heading and even in a different chapter than soyabeans as well as adding far more than 30 per cent to the value. The representative of Spain said that while it may be dangerous to agree that processing of a product allowed one to flout the provisions of Article III, it was more dangerous in the Spanish view, to agree that a domestic product might not be subjected to regulation if some of the material used for producing it was imported. Such a principle if taken to the extreme, would render impossible any government action to regulate the production of a product, since in any production there was bound to be, in greater or lesser degree some imported goods (or services).

3.10 The representative of Spain stated moreover that the Royal Decree establishing rules for the 1977 season did indeed differentiate between oils processed not only from soyabeans but from oilseeds in general, domestic and imported. Therefore, it would undoubtedly have been contrary to the provision of Article III:4 of the GATT. He pointed out, however, that in the case of this soyabean oil what was involved was a Spanish product. The possible conflict with Article III:4 would also have applied to other oilseeds and was explainable on the basis of the particular circumstances of the legislative period in which Spain found itself at the time. But, in the subsequent regulations - for 1978, 1979 and 1980 - the Spanish authorities corrected this legislation and no longer differentiated between oilseeds, nor between domestic and imported beans, thereby complying with what was prescribed in Article III:4. Moreover, in regulating the last three seasons, the legislation established a domestic quota for soyabean oil which it must be remembered was a Spanish product - whether processed from domestic beans or imported beans - and did not fix a global quota for all oilseed oils without distinction. Previously, and prior to 1963, quotas for domestic consumption had been fixed by measures not published in the Boletín Oficial del Estado, i.e. by communicated orders. Thus, there had not been any discrimination between imported soyabeans, soyabean meal or soyabean oil and domestically-produced soyabeans, soyabean meal or soyabean oil as regards their sale, offering for sale, purchase, transportation, distribution or use. Furthermore, and referring exclusively to domestic oils - and hence to olive oil and to soyabean oil obtained from imported or domestic soyabeans and sunflower oil obtained in Spain - an analysis of commercial margins had shown that there was no discrimination in law among those oils which all were subject to the same general scheme of commercial organization and transport as they were contained in the annual marketing season rules.

3.11 The representative of Spain further stated that the oil-pricing policy of the Spanish Government had been determined by two variables, i.e. keeping the domestic retail market supplied with low-priced oils as an anti-inflation measure and as much as possible, to afford an outlet in the domestic market for olive oil produced in Spain. As a result of this policy, edible oils other than soyabean oil, sunflowerseed oil and olive oil had been disappearing or had been marketed only in very small quantities. He further stated that the price at which CAT acquired soyabean oil from grinders was determined by virtue of contracts in which this price was based on the quotations for the oil on the Chicago Exchange during the last seven days of the preceding month and the first seven days of the current month. The acquisition of Spanish oil by CAT was based solely on international quotations. CAT then sold the oil to packagers or food processors at a price which was fixed for each marketing season in advance and mentioned in the Decree regulating the annual season. Those prices did not vary in keeping with the buying price of the oil acquired from the grinders, and consequently, in keeping with changes in market prices which in the past resulted in a bounty for soyabean oil. Thus, far from practising unfavourable discrimination with respect to soyabean oil, the fact was that CAT had bought that oil from grinders at international prices, and that the oil was sold to consumers up to and including 1977. with a subsidy promoting its consumption. Moreover, throughout the marketing process, it was precisely the soyabean oil which had the largest relative margin and also the largest margin at the retail level.

3.12 The representative of the United States argued that CAT should be considered a State enterprise for the purposes of Article XVII of the GATT. The plain meaning of the language of Article III argued, in the opinion of the United States, in favour of a broad scope of application with respect to a "State

enterprise" or "any enterprise" enjoying "formally or in effect, exclusive or special privileges". The critical factors were that it had exclusive or special privileges and that it engaged in purchasing and selling activity. Ad Article XXII underlined the importance of a broad reading of the provision by referring explicitly to marketing boards as covered by Article XVII. Indeed the Ad Article stated that marketing boards were covered by Article XVII in the purchasing and sales activity and by other GATT articles when they were acting as regulatory agencies. He stated that CAT had a dual role in controlling the marketing of soyabean oil in Spain. On the one hand, it had a monopoly over the domestic sale of soyabean oil, a monopoly which was clearly an "exclusive or special privilege" within the meaning of Article XVII. On the other hand, the CAT was able to regulate the marketing of soyabean oil through such measures as the allocation of oil only to processors who also bottled olive oil. In both these purchasing and sales functions it was fair to conclude that CAT was acting as a State enterprise within the meaning of Article XVII. The representative of the United States further argued that from the determination that the CAT was a State enterprise within the meaning of Article XVII, it should also follow that the CAT was not acting in accordance with that Article. In particular, the application of internal quantitative restrictions was discriminatory and totally contrary to the commercial considerations which should have guided purchases and sales of such entities. The fact that CAT was operating on a discriminatory basis without regard for commercial considerations was self-evident from the nature of the internal restrictions which it administered.

3.13 The representative of Spain stated that CAT was defined as an autonomous agency attached to the Ministry of Trade. The establishment of an autonomous agency was simply a matter of isolating an administrative function and, by endorsing it with appropriate budgetary, physical and personnel resources, or providing it with autonomy of operation vis-à-vis the department to which it belonged and of which the function thus isolated and made autonomous, had previously been a part. In keeping with such origin, CAT's regulation was absolutely public and aimed at ensuring effective compliance with that portion of the public interest to which it addressed itself. The only specific feature of CAT was that its administrative public function consisted in securing, acquiring or controlling products for the country's supply, and that function necessarily took the form of acts of buying or selling. It had, however, never had, either more recently or at its beginning, the freedom of economic action characteristic of an enterprise, or the means, interests of functions of an enterprise. Moreover, in absolute conformity with its nature and public function, CAT also had the task of adopting the control and distribution measures, including (at a certain time) price-fixing required for the country's supply. Thus, he stated, it was clear that CAT was a personalized administrative function and in no case a commercial enterprise of the State, for which it had neither the legal nor the economic character. Therefore, it could not be argued that the behaviour of CAT violated the provisions of Article XVII of the GATT since the presuppositions of that Article, as to both subject and object were not applicable to CAT.

3.14 The representative of the United States was of the opinion that the restrictions on the sale of soyabean oil were not exempt from Spain's GATT obligations by virtue of Spain's protocol of application. The provision in the Spanish protocol that Spain would apply Part II of the GATT only "to the fullest extent not inconsistent with its legislation existing on the date of the Protocol" did not permit Spain to maintain internal controls on soyabean oil. These measures were neither required or in effect at the time of Spain's accession and were in violation of its GATT obligations. He further said that the "grandfather clause" had consistently been interpreted as permitting violations of GATT obligations if, and only if, compliance with GATT would be inconsistent with a country's domestic legislation on the date of its accession, the purpose being to allow countries to join the GATT without amending their existing legislation. Only in cases of legislation of a mandatory character would the exception ever be required. Clearly, the Spanish legislation was not of a mandatory character. Rather, it constituted a grant of discretionary authority which necessarily implied that restricted and unrestricted trade were equally acceptable and consistent with the legislation. As a result, removal of marketing restrictions as necessary to fully comply with Spain's GATT obligations would not be inconsistent with the legislation and the interpretation of the "grandfather clause" offered by Spain should be rejected.

3.15 The representative of Spain said that the Protocol for the Accession of Spain to the GATT of 30 June 1963 reserved the application of Part II of the GATT with the formula "to the fullest extent not inconsistent with its legislation existing on the date of this protocol". The only legislation then existing and still existing was the Law of 21 June 1941 establishing CAT. In implementation thereof and for oils only, the Office of the Prime Minister issued the Ministerial Order of 21 November 1962, regulating the 1962/63 oil marketing season. It was this Order which authorized CAT, in the light of circumstances, to establish unrestricted domestic trade in respect of soyabean oil. Circular 6/63 (and other similar circulars that have followed up to the present time) was not one of the legal norms that could have been included in the concept of existing legislation, but a general administrative act providing for circumstantial application of the Ministerial Order referred to. The circular itself could not even have had validity beyond the framework, limited in scope and in time, of the higher norm which authorized it, i.e. "admission, processing and trade in respect of soyabean oils" for the period of the 1962/63 oil marketing season. In fact, the only thing the circular did was to exclude the soyabean oil traffic from mandatory passage through CAT, since both the specifications and the maximum price of the oil were limited by that circular.

3.16 The representative of the United States said that the United States believed that the restrictions imposed by the Government of Spain on the domestic sale of soyabean oil nullified or impaired benefits accruing to the United States under the GATT. Furthermore, the measures were inconsistent with Spain's explicit GATT obligations and had, therefore, to be considered a prima facie case of nullification or impairment under Article XXIII. The effect of the restrictions on the sale of soyabean oil, a principal by-product of soyabeans, was to alter in a fundamental way the competitive conditions for the processing and sale of soyabeans in a manner contrary to the reasonable expectations of the United States. These expectations were that it would benefit from the soyabean concession through internal Spanish consumption of the products, of the soyabeans, to the extent that there was market demand for these products in Spain. Instead, the market for one of those products, soyabean oil, representing 35 per cent of the value of soyabeans, had been forcibly curtailed by a government measure inconsistent with the GATT. He stated that while Spanish imports of soyabeans were increasing, the total value of the end products (meal and oil) remaining in the Spanish market had not increased in the last few years, and, in fact, had actually declined due to the progressive lowering of the soyabean oil-marketing quota which had forced a larger share of the soyabean oil into export. In calendar year 1979, Spain exported roughly 70 per cent of all soyabean oil produced from imported beans. Due in large part to the domestic market quota, Spain was currently the third largest soyabean oil exporter in the world after the United States and Brazil. The very sharp increase of Spanish soyabean oil exports had tended to disrupt traditional vegetable oil trade patterns, particularly in North Africa and the Middle East. The United States as the world's largest exporter of soyabean oil has had to sustain an annual loss of export earnings equal to the displacement in traditional markets such as Morocco, Turkey and Tunisia resulting from the Spanish diversion of soyabean out of the domestic market into export. The forced reduction in Spanish soyabean oil consumption had reduced the value of the United States concession on soyabeans in Spain, a reduction estimated at US$175 million in 1979 and around US$250 million in 1980, representing a loss of 280,000 tons and 400,000 tons of soyabean oil marketings respectively.

3.17 The representative of Spain stated that on the occasion of its accession to GATT in 1963, Spain bound tariff heading 12.01.B.3 (soyabeans) establishing for it an ad valorem duty at the rate of 5 per cent. Since 1963 soyabean imports had been growing continuously, except in two years - 1973 and 1977 - from a level of 15,612 tons imported in 1963 to more than 2 million tons in 1978. The provisional data for 1979 indicated a figure higher than for 1978, and the United States Department of Agriculture had calculated that for 1980 Spain's imports were expected to be more than 25 per cent above the 1979 level. United States had a market share in excess of 60 per cent of these imports, with a share of practically 100 per cent in the early years. This spectacular increase in imports showed quite clearly that no action taken by Spain had impaired the volume or the rate of soyabean imports from all sources and from the United States in particular, so that it was particularly difficult to quantify

any injury caused. This fact was reaffirmed by the trend in customs duties on Spain's imports of this product. At no time over the long period since 1963 had Spain established customs duties at a level above the 5 per cent bound rate. On the contrary, the duties applied throughout that period were at a constant rate of 2.5 per cent until 1971 and had been nil since then. He said that according to past practice of Panels, quantification of any injury or threat of injury caused by a given measure was an essential factor in their examination. The data furnished to the Panel showed that in this case Spain had complied strictly with the commitments it had entered into, i.e. to maintain the binding on soyabeans at the level of 5 per cent and not to impose discriminatory quantitative restrictions that would adversely have affected imports. The regular import growth registered since 1963 was broken only once, in 1973, as a result of an export prohibition imposed by the United States authorities. The representative of Spain further stated that Spain could not accept the United States argumentation that the alleged and non-declared violation or infringement of Articles III and XVII of the GATT by Spain's legislation with regard to the establishment of a quota for soyabean oil for domestic consumption entailed presumption of nullification or impairment of a benefit. In his view it was necessary for the Panel previously to have expressly declared that the violation existed for the Spanish authorities to accept the burden of proving that, there was in actual fact no nullification or impairment of any benefit accruing to the United States.

Conclusions

ARTICLE III:1

4.1 The Panel examined the conformity of the Spanish measures with the provisions of Article III, paragraph 1. The Panel noted that according to the drafting history as well as according to past practice the provisions of Article III were intended to ensure that imported products, once they had entered the customs territory of a country and paid the customs duties, were afforded treatment no less favourable than that accorded to domestic products. It further noted that paragraph 1, according to the wording of that paragraph and also according to past GATT practice, was not limited to "like products" in the sense of paragraph 4. The Panel also noted that the Spanish measures concerning the vegetable oil sector according to their own wording had been instituted in order inter alia to protect domestic production of olive oil. The Panel further noted that another reason behind the measures was that of preventing fraud, in particular as concerns blending, packaging and labelling.

4.2 The Panel found that regulations or requirements applied to imported or domestic products and which afforded protection to domestic production, had to have adverse effects on directly competitive or substitutable imported products in order to be contrary to the provisions of Article III, paragraph 1. Notwithstanding the fact that the Panel had doubts that soyabeans as such were directly substitutable or competitive with vegetable oils, it decided to examine whether the Spanish measures had had any adverse effects on the imports of soyabeans in the sense of paragraph 1 of Article III since that was the claim of the United States and since one of the end products of soyabeans, once processed, id est soyabean oil, was undoubtedly substitutable or competitive with vegetable oils. The Panel found that the Spanish measures concerning soyabean oil, could be assimilated to "regulations and requirements affecting the internal sale, offering for sale … or use of products" as set out in Article III, paragraph 1. The Panel also found that these measures, and in particular the consumption quota on soyabean oil, did protect the domestic production of olive oil. The Panel further felt that it could not entirely exclude that the Spanish measures may directly or indirectly have had a protective effect on the domestic production of sunflower oil but it did not find that it had sufficient evidence to make a definite conclusion in this regard. The Panel examined whether the imports of soyabeans from the United States had been restricted or limited as a result of the Spanish measures. The Panel found that according to the statistics available to it, there had been a considerable increase of soyabean imports since 1963, an increase which did not show any signs of weakening, on the contrary, since a further substantial rise in soyabean imports was expected for 1980. Furthermore, the Panel found that, even taking into account the rise

in soyabean oil exports by Spain measured as soyabean equivalent, net imports of soyabeans had increased substantially since 1963.

4.3 Therefore, the Panel found that the Spanish measures, including such measures as packaging limitations and bottling restrictions, but in particular the consumption quota, had not had restrictive effects on the imports of soyabeans from the United States. Moreover, the Panel found that, on the basis of the evidence before it, the internal price of soyabean oil was not set at a level that weakened the economic incentive to process and sell soyabean oil in the Spanish market. Consequently, the Panel concluded that the measures instituted by Spain concerning soyabean oil, were not inconsistent with the provisions of Article III, paragraph 1, nor to the principles set forth therein.

ARTICLE III:5

4.4 The Panel examined the conformity of the Spanish measures with the provisions of Article III, paragraph 5, second sentence. The Panel noted in this connection that Ad Article III, paragraph 5[1] provided that "regulations consistent with the provisions of the first sentence of paragraph 5 shall not be considered to be contrary to the provisions of the second sentence in any case in which all of the products subject to the regulations are produced domestically in substantial quantities." The Panel further noted its own conclusions concerning the conformity of the Spanish measures with the provisions of Article III, paragraph 1.

4.5 The Panel found that all of the products subject to the Spanish measures and in particular soyabean oil, were produced domestically in substantial quantities. The Panel further found, that according to its own conclusions, these measures were not contrary to the principles of paragraph 1 of Article III. Consequently, the Panel concluded that the Spanish measures were not inconsistent with the provisions of the second sentence of paragraph 5 of Article III.

ARTICLE III:4

4.6 The Panel examined the conformity of the Spanish measures with the provisions of paragraph 4 of Article III. The Panel noted that according to the wording of paragraph 4, imports "shall be accorded treatment no less favourable than that accorded to like products of national origin." The Panel further noted that it had to define two concepts in this paragraph to determine whether there had been any violation of this paragraph, namely the terms "like products" and "of national origin". It noted in this connection the narrow definition given to "like products" in this paragraph in past GATT practice, meaning more or less the same product. It further noted the lack of authoritative international rules concerning origin of goods and that according to past practice the national rules of origin of goods would thus prevail.

4.7 The Panel found that soyabean oil produced in Spain whether from imported or domestically-grown soyabeans was to be considered a Spanish product. It also found that domestically-produced soyabean oil was a "like product" to imported soyabean oil but that no other oil could be considered to be "like" that of soyabean oil in the context of paragraph 4. Considering that paragraph 4 was concerned only with treatment of imports being "no less favourable than that accorded to like products of national origin", the Panel concluded that the Spanish measures were not inconsistent with the provisions of paragraph 4 of Article III.

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[1]BISD, Vol. IV, page 64.

ARTICLE XVII

4.8 Even though it had not found that the Spanish measures discriminated against imports in the sense of Article III, the Panel decided to examine whether the CAT should be considered a State enterprise for the purpose of Article XVII of the General Agreement. In this connection the Panel noted that CAT had been set up by the Spanish Government. It also noted that CAT according to the Spanish legislation was an autonomous agency attached to the Ministry of Trade and governed by the rules regulating autonomous State institutions. The Panel further noted that CAT had certain functions and powers with regard to control and marketing of inter alia vegetable oils. It also noted that CAT was invested with these functions and powers for purposes of ensuring supplies of various products to the Spanish people. However the Panel also noted that according to the rules governing latter years' marketing seasons for vegetable oil, the Government of Spain as such was to fix maximum prices for sale to the public of soyabean oil and sunflower oil as well as take appropriate action to limit domestic consumption of soyabean oil. Moreover certain of CAT's functions and powers could be exercised only after approval by Spain's Council of Ministers.

4.9 In view of the above, the Panel found that although it was undeniable that CAT had been instituted by the Spanish Government, and although CAT had various functions as concerns marketing and control of inter alia vegetable oils, and although these functions may be construed so as to constitute "exclusive or special privileges", it had not been established to the satisfaction of the Panel that the purchases or sales effectuated by CAT involved "either imports or exports". Consequently, the Panel concluded that CAT could not be considered to be an enterprise of the kind referred to in Article XVII thus excluding the activities of the CAT from the provisions of that Article.

"Existing Legislation"

4.10 Even though the Panel did not find that the Spanish measures were inconsistent with the invoked articles of the General Agreement, thus making the "existing legislation" clause irrelevant and since this question had been raised by the parties, it decided to examine whether the Spanish regulation would have been exempt from conformity with the General Agreement by virtue of the above-mentioned clause, i.e. that "Part II of the General Agreement will be applied to the fullest extent not inconsistent with legislation which existed on … the date of the Protocol providing for such accession."

The Panel noted that such a formula was customary on accession to the General Agreement and that Spain had it inserted in its Protocol of Accession. The Panel further noted that the "existing legislation" clause had in past GATT practice been agreed to mean that "a measure is so permitted, provided that the legislation on which it is based is by its terms or expressed intent of a mandatory character - that is, it imposes on the executive authority requirements which cannot be modified by executive action."[1] It also noted that the legislation invoked by Spain in this matter was in existence on the date of Spain's accession to the GATT and at the date of the Panel's examination.

4.11 The Panel found that the legislation in question did not require CAT to take specific measures, although CAT was authorized to do so at a certain point of time. Moreover, according to a more recent Decree-Law[2], some of the decisions that CAT could take were to be approved by the Council of Ministers. The Panel therefore concluded that the legislation invoked could not be considered to be of the kind that was covered by the "existing legislation" exception.

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[1]BISD, Vol. II, 1952, p. 62.

[2]Decree-Law of 1973, Final provisions.

ARTICLE XXIII

4.12 The Panel examined the conformity of the Spanish measures with the provisions of Article XXIII. The Panel noted that a benefit accruing to a contracting party directly or indirectly under the General Agreement may according to Article XXIII, paragraph 1 be impaired or nullified as the result of:

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

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

(c) the existence of any other situation, …"

As the Panel did not find that the Spanish measures were inconsistent with the GATT Articles invoked, it concluded that there had been no nullification or impairment of United States' interests as a result of the situation described in paragraph 1(a) of Article XXIII.

4.13 The Panel therefore decided to examine whether any benefits accruing to the United States under the General Agreement had been nullified or impaired as a result of the situation described in paragraph 1(b) or 1(c). The Panel noted in this regard the statement by the United States that "the effect of the restrictions on the sale of soyabean oil, a principal by-product of soyabeans is to alter in a fundamental way the competitive conditions for the processing and sale of soyabeans in a manner contrary to the reasonable expectations of the United States." The Panel also noted that the United States was of the view that Spain had become the third exporter in the world of soyabean oil largely as a result of the domestic market quota and that these exports had tended to disrupt traditional vegetable oil trade patterns resulting in an annual loss to the United States soya oil exporters of export earnings equal to the displacement in traditional markets. The Panel further noted that domestic disappearance of soyabean oil averaged 159,560 tons for the years 1963-1979, whereas the average was 147,817 tons for the three-year period 1977-1979. It further noted the substantial increase in soyabean imports since Spain acceded to the GATT as well as the steady increase in soyabean oil exports although the latter had not been as regular as that of the former. The Panel also noted that Spain was traditionally a vegetable oil producer and exporter.

4.14 The Panel, basing itself on the above-mentioned considerations, could not entirely exclude the possibility that the Spanish measures, although not conflicting with the evoked articles of the General Agreement, could have had some effects on Spanish exports of soyabean oil in such a way as to displace exports of soyabean oil by the United States from some of its traditional markets, and thus possibly nullifying or impairing benefits accruing to the United States in the sense of paragraph 1(b) or 1(c) or Article XXIII of the General Agreement.

Mindful of its doubts as to the possible effects of the Spanish measures on soyabean oil exports by the United States to third markets and taking into account the intention of the CONTRACTING PARTIES relating to dispute settlement[1], the Panel suggested that the CONTRACTING PARTIES recommend to Spain that it accord sympathetic consideration to any concrete representations which the United States might wish to make in relation to this matter.

[1]"Understanding regarding notification, consultation, dispute settlement and surveillance", Document L/4907.