

20 February 1985

EUROPEAN ECONOMIC COMMUNITY - PRODUCTION AIDS GRANTED  
ON CANNED PEACHES, CANNED PEARS, CANNED FRUIT  
COCKTAIL AND DRIED GRAPES

*Report by the Panel*  
(L/5778)

I. Introduction

1. In a communication dated 19 March 1982, which was circulated to contracting parties in document L/5306, the Government of the United States requested the CONTRACTING PARTIES to establish a Panel to examine a dispute between the United States and the European Economic Community regarding production aids granted by the European Economic Community on canned peaches, canned pears, fruit cocktail and dried grapes. The communication indicated that the two parties had engaged in consultations under Article XXIII:1 on 25 February 1982, but that no satisfactory adjustment of the problem could be reached.

2. At its meeting of 31 March 1982 the Council agreed to establish a Panel as requested and authorized its Chairman, in consultation with the Parties concerned, to decide on appropriate terms of reference and to designate the Chairman and Members of the Panel. The European Economic Community requested that the development of terms of reference for the Panel be delayed until further consultations had taken place between the two parties with regard to production aids on dried grapes (C/M/156).

3. These consultations under Article XXIII:1 took place on 21 April 1982. As no satisfactory settlement was reached, both parties agreed to the inclusion of dried grapes in the terms of reference of the Panel.

4. At the meeting of the Council on 29-30 June 1982, the Chairman of the Council informed the Council that, following consultations with the parties concerned, the composition and terms of the Panel had been agreed as follows:

Composition

Chairman:	Mr. J.L. MacNeil
Members:	Mr. Bo Henrikson
	Mr. Shi-Hyung Kim

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 production aids granted by the European Economic Community on the production of canned peaches, canned pears, fruit cocktail and dried grapes (L/5306), and to make such findings as will assist the CONTRACTING PARTIES in making recommendations or rulings as provided for in Article XXIII".

Following the departure of Mr. Kim from Geneva in January 1983, Mr. Hikang Hyun was nominated to the Panel in agreement with the two parties concerned.

5. At the meeting of the Council on 30 June, 1982, Australia said that it reserved its right to make a representation before the Panel. At this meeting the representative of the European Communities said that for the EC, the reference to "relevant GATT provisions" in the Panel's terms of reference essentially meant Article XXIV. It was the Panel's understanding that this was only in reference to dried grapes.

6. The Panel met four times with the two parties: on 29 September 1982, 29 October 1982, 27 February 1984, and 28 June 1984. In addition, the Panel met on numerous occasions between June 1982 and July 1984.

## II. Factual aspects

### A. EEC Regulations

7. On 14 March 1977, the European Economic Community adopted Council Regulation No. 516/77, which introduced a common organization of the market in the EEC for products processed from fruit and vegetables. For the commodities named in the regulation (OJ No. L 73/1 of 21.3.77) a common tariff and levy structure was established and provision was made for the possibility of export refunds. On 30 May 1978, the European Economic Community adopted Council Regulation No. 1152/78 (which amended Regulation No. 516/77) introducing a minimum grower price/production aid system for five types of processed fruits and vegetables. Under this regulation processors of the five products became eligible for a "production aid" if they bought fresh products from growers at at least the minimum specified grower price. The "production aid" would be calculated so as to "... make up the difference between the prices of Community products and those of products from non-member countries" (OJ No. L 144/2, 31.5.78). According to the regulation, the purpose of the production aid is to "... enable the products in question to be manufactured at a price lower than that which would result from the payment of a remunerative price to producers of the fresh products" (OJ No. L 144/1). Additionally, the aids were intended to "... enable (Community products) to be sold at prices which compete with those charged by the major non-member countries (OJ No. L 144/1). One of the products specified in Regulation No. 1152/78 is "peaches in syrup" (CCT heading No. ex 20.06B).

8. Pursuant to Article 3b.1 of Regulation No. 516/77, as amended by Regulation No. 1152/78, the "amount of aid shall be so fixed as to make up the difference between the prices of Community products and those of products from non-member countries". The cost of producing EEC products is to be calculated for each product as the minimum price paid for the fresh product adjusted by the trend in processing costs of that product (Article 3b.2). The prices for products from non-member countries are determined taking into account duty-free import prices of the product in question into the EEC and prices obtained in international trade (Article 3b.3).

9. Other amendments were also made to Regulation No. 516/77 by Regulation No. 1152/78. Article 3b.6 indicates that the amount of production aid is to be fixed before the beginning of each marketing year. Article 2a says that the marketing year for canned peaches is 1 July-30 June, commencing 1 July 1978. Article 3b.5 declares that the aid will be paid during the marketing year upon application from the processor, who must provide proof that he has purchased the fresh product under contract at least at the minimum price.

10. "Williams pears preserved in syrup" (CCT heading No. ex 20.06B) was added to the list of products eligible to receive production aid by Regulation No. 1639/79 of 24 July 1979. The marketing year was established as 1 July-30 June, commencing 1 July 1979.

11. Dried grapes were added to the list of products eligible for production aid (i.e. Article 3a of Regulation No. 516/77 was amended to include dried grapes) as a result of Greece's accession to the European Economic Community (OJ No. L 291 of 19.11.79, p. 79). Regulation No. 2194/81 of 27 July 1981 laid down the general rules for the system of production aid for, inter alia, dried grapes. In general terms the production aid system for dried grapes is the same as that for other processed fruits and vegetables, with the exception of the following:

(a) authorized storage agencies became eligible to receive storage aids (Article 10). These aids are to offset technical storage costs and interest costs (Article 10.2) incurred in storing dried grapes. The storage aid is paid on a weekly basis.

(b) compensation to storage agencies for sales of dried grapes at prices below the minimum purchase price (Article 10.3). In other words, if storage agencies are obliged to sell product at prices below the minimum grower prices (the agencies' purchase price) they are compensated for the difference.

(c) in the calculation of EEC processing costs (for the calculation of the amount of aid) it is specified that only the costs of "most efficient undertakings" will be considered, and that storage costs will not be considered as a cost of production.

12. The level of minimum producer prices and the amount of production aid for each of the commodities in question, and the amount of storage aid for dried grapes during the relevant respective marketing years are presented in the following Table 1.

TABLE 1

Levels of minimum grower prices and amounts of production aid for canned peaches, canned pears and dried grapes in the EEC, and the amount of storage aid for dried grapes.<sup>1</sup>

	<u>1978/79</u>	<u>1979/80</u>	<u>1980/81</u>	<u>1981/82</u>	<u>1982/83</u>
	- E C U's PER TONNE -				
1. <u>Canned peaches</u>					
a. Minimum grower price	286.30	301.30	315.80	334.70	356.50
b. Production aid	218.20	276.90	260.60	211.20	227.70
2. <u>Canned pears</u>					
a. Minimum grower price	-	281.30	294.80	324.28	345.36
b. Production aid	-	264.10	231.60	210.40	234.40
3. <u>Dried Grapes</u>					
a. Minimum grower price	-	-	-	1,171.80	1,331.70
b. Production aid	-	-	-	115.90	361.40
c. Storage aid	-	-	-	3.20/wk	3.70/wk

<sup>1</sup>Marketing year for peaches and pears is July-June, that for dried grapes is September-August.

Source: Nimexe and Official Journals of the European Economic Communities.

B. EEC tariff concessions on canned peaches, canned pears, fruit mixture and dried grapes

13. The tariff bindings on the relevant products, granted by the EEC in 1973 and 1979 are summarized in Table 2.

TABLE 2

Tariff concessions granted by the EEC on canned peaches, canned pears, fruit mixtures, and dried grapes in 1973 and 1979

	1973 <sup>1</sup> (Article XXIV:6)	1979 (Tokyo Round)
<u>Canned Peaches</u>		
20.06 B II a 7 aa	22% (+ unbound S.L. <sup>2</sup> )	22% + 2% B.S.L. <sup>3</sup>
20.06 B II a 7 bb	22%	22% + 2% B.S.L.
20.06 B II b 7 aa	24% (+ unbound S.L.)	22% + 2% B.S.L.
20.06 B II b 7 bb	24%	22%
<u>Canned Pears<sup>4</sup></u>		
20.06 B II a 6 aa	22% (+ unbound S.L.)	20% + 2% B.S.L.
20.06 B II a 6 bb	22%	-
20.06 B II b 6 aa	24% (+ unbound S.L.)	22% + 2% B.S.L.
20.06 B II b 6 bb	24%	-
<u>Canned Fruit mixtures</u>		
20.06 B II a 9 aa	21% (+ unbound S.L.)	20% + 2% B.S.L.
20.06 B II a 9 bb	22% (+ unbound S.L.)	-
20.06 B II b 9 aa	22% (+ unbound S.L.)	15% + 2% B.S.L.
20.06 B II b 9 bb	24% (+ unbound S.L.)	22% + 2% B.S.L.
<u>Dried Grapes</u>		
08.04 B	4%	3%

<sup>1</sup>The Panel noted that the final page of the tariff schedules of the EEC of 9 (LXXII and LXXIIbis) contains a paragraph which says:

"The initial negotiating rights accorded by the European Communities to the United States before 1 January 1973 and listed in the following documents shall be introduced into schedules LXXII and LXXIIbis:

- (i) the results of the Article XXIV:6 Negotiations of 1961/62
- (ii) the final schedule of the Dillon Round Negotiations."

The Panel noted, therefore, that the United States possessed INR's in respect of canned peaches, canned pears, and canned fruit mixtures packed in container of 1 kg or less at a rate of 25 per cent plus on dried grapes at rate of both 9 per cent and 8 per cent.

<sup>2</sup>"Sugar levy".

<sup>3</sup>Bound sugar levy.

<sup>4</sup>The concessions in 1973 are those granted to the United States only.

### III. Main Arguments

14. The United States delegation requested the Panel to find that the production aids granted by the EEC on canned peaches, canned pears, canned fruit cocktail and dried grapes had nullified or impaired tariff concessions granted by the EEC in 1962, 1967, 1973 and 1979. The United States presented its complaint as an example of a "non-violation" nullification and impairment complaint as contemplated by Article XXIII:1(b) of the General Agreement. The United States argued that when it had negotiated the tariff concessions on the products in question it had believed that these concessions would carry certain advantages for US exports to the EC. In the United States' view, however, the subsequent introduction of the production aid systems altered previous market relationships. In the United States' view the mere introduction of such subsidies constituted prima facie nullification and impairment of tariff bindings. The United States also submitted evidence so as to demonstrate the nature and magnitude of the prejudice suffered by its exports of each of the products. It requested the Panel to recommend that the EEC's production aids on the products in question be eliminated.

15. The United States representative noted that there had been previous GATT rulings in cases similar to the present one. She noted that a working party investigating a 1950 dispute between Australia and Chile (BISD II/188) had concluded that the removal of an Australian subsidy on the domestic sale of an imported product resulted in impairment of a tariff concession granted on that product, even though the removal of the subsidy was not in itself an infringement of any GATT obligation. In the United States' view the 1950 Working Party report combined with that of a 1955 Working Party confirmed that the introduction of a domestic subsidy on the production of a product subsequent to the granting of a tariff concession on that product would constitute nullification or impairment. The 1955 Working Party had 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 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 on the product concerned". (BISD 3S/224)

16. The US representative argued that their view was further confirmed by a later (1961) Panel report on subsidies. That report read:

"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 and impaired by the introduction or increase of a domestic subsidy". (BISD 10S/209)

The US delegation emphasized that at the time the tariff concessions on the four products in question were negotiated, the US could not reasonably have anticipated the subsequent introduction of the production aid system.

17. In the United States' view the production aid system had altered the previously existing market situation by upsetting the competitive relationship between EEC and imported products. In its view the aid system had stimulated production of each of the products and had reduced EC imports below what might have been expected absent the subsidies.

18. The United States contended that the stated objective of the subsidy was to eliminate the price differential between the domestic product and the imported product before the assessment of an import duty. The protective effect therefore, was not substantially different from applying an additional tariff. In effect, the United States argued, the aid system permitted EEC products to be marketed at prices lower than they would have been in the absence of the system. In its view the fact that EEC product

was made cheaper relative to imported product was equivalent to making imported product more expensive relative to domestic product. Therefore, in the United States' view, the subsidy was equivalent in protective effect to a tariff.

19. The United States claimed that since the subsidy was the difference between the EC's and third countries' prices of the final products, the EC processor was also subsidized to the extent that his processing costs were computed to be higher than those of third country suppliers. The US delegation claimed, however, that at the time the subsidies were introduced on these products there was no evidence to indicate that EEC processors were any less efficient than those of third countries since EEC processors had competed with those of third countries prior to the introduction of the processing subsidy. Data was provided illustrating the magnitude of the processor subsidy for canned peaches and canned pears in relation to costs of production. It was claimed that the subsidies represented a significant proportion of the cost of producing canned peaches, canned pears and fruit cocktail.

20. In relation to the question of stimulation of production the United States' delegation contended that the subsidies had already increased EEC production of canned peaches, canned pears and fruit cocktail. It was asserted that this had occurred because more EEC fruit had been diverted from the fresh fruit market into the processing industry. Data was presented which indicated that EEC production of each of canned peaches and canned pears increased sharply following the introduction of the subsidy system.

21. The United States delegation argued that the production aid systems had resulted in sharp decreases in the volume of EEC imports of the products in question. For canned peaches it was pointed out that in the three years following the introduction of the production aid system EEC imports averaged 5 per cent below the average for the 3-year period immediately preceding. In addition, the volume of US exports of canned peaches in the 1981/82 marketing year decreased by 77 per cent. In the 3 years following the introduction of the aid system for pears, EEC imports of canned pears averaged 4 per cent below the average of imports in the 3-year period immediately preceding the introduction of the system. The volume of canned fruit cocktail imports averaged 19 per cent below the 3-year average (1975-77) of imports in the 3-year period following the introduction of the aid system for peaches. US exports of canned fruit cocktail averaged 43 per cent below year-earlier during the 1981/82 marketing year. The US delegation contended that the aid system for dried grapes was largely responsible for the sharp reduction in US exports of dried grapes to the EEC. During the first 11 months of the 1981/82 marketing year US exports of dried grapes were 38 per cent less than in the 1980/81 marketing year.

22. In the case of dried grapes, the United States representative argued that the EEC system had also disrupted normal marketing relationships since its introduction in 1981. It was argued specifically that the availability and magnitude of storage aids had kept dried grapes off the market, disrupting the normal marketing flow of the product. Further, she asserted, the quantity of dried grapes in storage combined with the provision that storage agencies would be compensated for losses on sales of product had created the expectation that sale prices of the dried grapes would be progressively reduced. In her view, this expectation had been confirmed by successive reductions of the fixed prices of dried grapes held in storage. In summarizing, the United States representative claimed that the aggregate effect of the aid system for dried grapes had been to distort both the EC and world markets, to depress prices, and thus to impair the assumptions about the market that existed when tariff concessions on this product were given. In this context the United States also referred to the introduction of the EEC minimum import prices for dried grapes, which the EEC had notified in October 1982 as an emergency action under Article XIX of the General Agreement (L/5399 and addenda) and which, in the opinion of the United States, underscored the extent to which the EEC dried grape subsidy system disrupted the EEC and world dried grape markets.

23. The United States delegation also claimed that the production aid systems had stimulated increased plantings of peach and pear trees and would stimulate increased plantings of grape vines. As a consequence it was believed that the EEC's self-sufficiency in all the products in question would progressively increase and US interests would be progressively further prejudiced.

24. In defending the production aid system the EEC delegation stressed the following:

- (a) the aids granted by the EEC were reasonable and were given only to recompense processors for having had to pay the minimum price to growers;
- (b) the evolution of the United States' exports to the EEC had been satisfactory, and any difficulties which may have been encountered were unrelated to EEC aids;
- (c) the mere granting of an internal subsidy did not constitute a prima facie nullification or impairment of a tariff concession, and the United States had not demonstrated that the EEC production aids had distorted conditions of competition between EEC and imported product;
- (d) with respect to dried grapes, the United States legal basis was not appropriate. Aid to dried grape production was a heritage from a pre-existing situation and therefore the United States' could not claim any "legitimate expectation" regarding this matter. The matter actually fell under Article XXIV and was therefore within the competence of the Working Group on the accession of Greece to the EEC.

25. The EEC delegation emphasized that in its view the processor aid was simply a kind of reimbursement to the processor for the higher cost he had incurred owing to the necessity of paying the grower the minimum price. The processor acted as an intermediary enabling the Community to convey to the grower the deficiency payment deemed necessary in light of the Community's Mediterranean policy objectives and of the production structures of the mentioned products. It was the EC's view that the aid had been maintained within reasonable limits. In fact, available data indicated that while the aid to processors had been reduced for canned pears and increased slightly for canned peaches, the minimum prices which processors had had to pay had increased at a faster rate. In other words, the aid that processors had received upon inception of this scheme was partly eroded by the increase in the minimum price which they were obliged to pay to growers. Given these circumstances, the EEC delegation asserted that one could not say that the aid systems had constituted an unreasonable artificial incentive to processing.

26. The EEC delegation argued that the United States share of the EEC market for the products in question had actually increased in recent years. The United States' exports had actually declined by less than those of other exporters and the absolute decrease in the United States' exports had been due to other factors. The EEC delegation cited certain sources which blamed reduced US exports to the EEC in 1981-82 on the appreciation of the US dollar, increased prices of US product, and strong competition from other exporters (notably from Turkey in the case of dried grapes).

27. The EEC delegation was of the view that the United States had not provided sufficient evidence that tariff concessions had been nullified or impaired. It recalled that since the United States complaint was based on Article XXIII:1(b) of the General Agreement, and since the United States did not contend that any provisions of the General Agreement had been violated, it was incumbent upon the United States to clearly demonstrate the nature of the prejudice incurred. The EEC delegation noted, in this regard, a 1962 Panel report in which 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 provision, it would be in such cases incumbent on the country invoking Article XXIII to demonstrate the grounds and reasons for its invocation".  
(BISD 11S/100)

It was the opinion of the EEC delegation that the US delegation had misinterpreted and misunderstood the 1955 and 1961 reports (BISD 3S/224 and BISD 10S/209). It was one thing to establish a reasonable expectation that a tariff concession would not later be impaired or nullified: it was quite another to prove that this had in fact occurred. In its view the mere introduction or increase of a domestic subsidy subsequent to granting tariff bindings was not prima facie nullification or impairment as the United States delegation asserted and that in fact the two reports in question did not say this.

28. Moreover, the EEC delegation argued that the United States had not clearly demonstrated that the production aids systems had prejudiced its exports as the 1962 Panel report indicated it should. The mere coincidence of reduced exports and the existence of the production aid systems could not be accepted as evidence of nullification or impairment. The EC delegation drew attention to the evolution of the United States' canned peach exports. It suggested that the United States' trade performance into the EC market was not an isolated factor, but a symptom of a general loss of competitiveness by US canned fruit producers. Indeed the United States' exports had also declined in other markets where no aid was given to local producers.

29. The EEC delegation disputed the US delegation's contention that the production aid system had distorted competitive conditions for these products. In its view the processor aids could not be considered as being equivalent to a tariff. It was the EEC delegation's opinion that a tariff increase, by raising internal prices, discourages consumption. On the other hand deficiency payments (which the aids were) allow prices to be lower than they otherwise would be. It was not correct to say therefore, that an internal subsidy by its nature imparted effects equal to a tariff. The EEC delegation also argued that, even if competitive conditions on the EEC market had been distorted as the result of the measures in question, such distortion would not be prohibited by the General Agreement. According to its paragraph 8(b), Article III did not prevent the payment of subsidies exclusively to domestic producers. The EEC also referred to various provisions of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement in which it was recognized that contracting parties use subsidies " ... to promote important objectives of social and economic policy" preamble and Articles 8 and 11:1) and any 'adverse effects' resulting in nullification or impairment had to be demonstrated (Article 8:4).

30. With regard to dried grapes, the EEC recalled that it had entered a reservation during the Council deliberations regarding the procedure used in examining the United States complaint about dried grapes. Since this question was closely linked to the accession of Greece to the Community, this matter should be examined rather in the Working Group established to consider all matters relating to the accession. Moreover, the EEC had notified its intention to rectify the imbalance existing in overall reciprocal tariff concessions as between the EEC and the United States - to the detriment of the EEC - within the context of the current negotiations under Article XXIV:6. The concession on dried grapes had been mentioned as one possible concession which may be modified. This concession had been granted by the EEC of Nine and would not automatically be extended to cover Greek customs territory. Greece had not granted any tariff binding on dried grapes. Greece was the only Community producer of dried grapes and had already been granting, prior to its accession to the EEC, production aids substantially similar to those currently applied by the EEC.

31. Notwithstanding the legal question of whether the tariff concessions on dried grapes should be considered by the Panel, it was the EEC's view that neither had the production aid systems nullified or impaired concessions granted on dried grapes nor had they disrupted market conditions on either the EEC or world markets. Even if the concessions on dried grapes were maintained, in the opinion of the EEC delegate, the United States would still not have a valid basis on which to object to the aid granted to Greek processors. He pointed out that as this aid system was simply a continuation of the previous Greek aid system, the United States could not claim a reasonable expectation that this aid be reduced or abolished at the time of Greece's accession. Moreover, even before accession Greek

exporters benefitted from duty-free access to the EEC by virtue of the previous Association Agreement; consequently there was no change in the competitive situation of third country suppliers. As regards the damage which United States exporters claimed to have suffered during the 1981/82 campaign, the accumulation of large stocks since September 1981 was evidence that Greek dried grape processors had been harmed by world market conditions. The major cause of the disruption on the EEC market was the influx of low-priced imports from certain exporters, particularly from Turkey.

32. In a written submission to the Panel, dated 19 February 1984, and at a meeting with the Panel on 27 February 1984, the EEC presented additional factual information relevant to the questions before the Panel. Firstly, the EEC asserted that, in 1974, it had notified the GATT of its withdrawal of all tariff concessions previously granted and of their replacement by concessions resulting from the 1973 Article XXIV:6 negotiations. These concessions appeared in the EC schedules LXXII and LXXIIbis. As a consequence of this withdrawal, the EEC argued, any initial negotiating rights which the United States may have had prior to 1974 had, with the exception of the case of canned pears, disappeared. As to canned pears, the EEC recognized that the United States possessed initial negotiating rights as a result of the 1973 negotiations.

33. The EEC also submitted additional evidence as regards the prior national Greek subsidy scheme, specifically regarding the similarities between the current EEC scheme and the previous Greek national scheme. Firstly, the EEC stated that the previous Greek scheme had established annual minimum prices for growers as does the present EEC system. Secondly, it was stated that, while not paid on a weekly basis, all storage costs in relation to the Greek system were covered by Greek national authorities. Thirdly, it was stated that a national Greek agency had bought dried grapes from growers without limitation and sold them to processors/exporters at prices which would permit the product to be sold at competitive prices on world markets. This included that dried grapes could be sold at prices below the guaranteed minimum grower price at which the agency had purchased them. The EEC asserted that the net result was no different in practice to what occurred under the current scheme: under either scheme Greek dried grapes could be sold on the EEC market at prices which met those of any other supplier.

34. In responding to the additional EEC factual evidence the United States argued that there was no basis in Article XXIII for assuming that the right to challenge measures believed to cause nullification or impairment is confined to parties possessing initial negotiating rights. In fact, the United States asserted, it would be perilous to limit in any way the rights of contracting parties to claim nullification and impairment under Article XXIII. Even so, the United States argued, its interests involved in the concessions would clearly meet any conceivable standards for trade interest. In particular, the United States referred to its agreement with the EEC whereby Initial Negotiating Rights which the EEC had accorded to it prior to 1973 had been introduced into schedules LXXII and LXXIIbis (footnote 1 of Table 2, page 6 above).

35. The United States also contested the EEC claim that there was no difference between the previous Greek national system for dried grapes and the current one of the EEC. The United States argued that: under the Greek system there was no guaranteed subsidy to processors; the EEC aid system is less flexible than was that of Greece; the provision in the EC subsidy scheme for the sale of product below purchase price by Greek storage agencies was an addition to the subsidy system; fixed weekly storage aids are paid under the EEC system; under the EEC system there is no longer a moderating influence over the payment of subsidies based on a need to keep dried grapes competitive on world markets.

36. At a meeting of the Panel with the two parties on 28 June 1984, the United States presented data on annual minimum grower prices and annual average export prices for Greek dried grapes for the period 1965/66-1983/84 (the marketing year being September-August). The United States contended

that this data demonstrated that the level of the minimum grower price under the Greek national subsidy system had tended to be similar to or below average export prices. Since the initiation of the EEC's system, however, the minimum grower prices had been well above average export prices. The United States asserted that if one viewed the difference between Greece's average export prices and minimum grower prices as an indicator of the level of subsidization then it was quite clear that the level of subsidization was much higher under the EEC system than under the Greek national system. Evidence was also presented indicating that while Greek and United States' grower prices and export prices for dried grapes had evolved in a roughly similar manner to the point of Greek accession, they had diverged subsequently: with respect to grower prices, Greek prices had continued to increase while those for the United States had decreased; with respect to export prices Greek prices had decreased more sharply than those of the United States.

37. The United States also reiterated its view that the changes as regards compensation for storage and handling costs under the EEC system and the introduction of the tendering system under the EEC system represented net additional distortive elements.

38. The United States' delegation indicated that it accepted the notion that the United States had no reason to expect that, in the event of Greek accession to the EEC, Greek producers would not continue to benefit from "an equivalent" EEC subsidy scheme. However, and while continuing to contend that the Greek and EEC systems were not equivalent, the United States' delegation argued that any criteria of equivalence must be confined to Greek producers. If producers in other EEC countries were to benefit from the EEC subsidy system then the EEC system would have clearly "gone beyond" the Greek system. The United States acknowledged however, that, at present, only Greek producers benefited from the EEC system.

39. Finally, the United States re-emphasized that, according to the 1955 Working Party report (BISD 3S/224) and the 1961 Panel report on subsidies (BISD 10S/209) an increase in levels of subsidization under existing subsidy schemes could impair concessions as much as the introduction of a new scheme. As a consequence, even if it was accepted that subsidization occurred under the previous Greek system, the increase in magnitude of subsidization subsequent to accession must be viewed as an impairment of tariff concessions. Furthermore, as regards the notion of "reasonable expectations", the United States delegation asserted that it would be unrealistic to presume that the United States should have been able to foresee, at the time it negotiated the concessions, any increases in subsidies which had been possible under the then existing subsidization scheme. Such an interpretation would be an unduly rigorous interpretation of "reasonable expectations".

40. At its meeting of 28 June 1984 and in an additional submission dated 6 July 1984, the Panel also received further factual information from the EEC concerning the previous Greek national subsidy system for dried grapes. This information pointed out in particular the facility by which Greek processors/exporters had been able to purchase dried grapes from the national intervention authority (KSOS) at prices below the minimum grower price (i.e. below the price at which KSOS had purchased them). The EEC delegation indicated that, in essence, the sale price to processors/exporters had been set on the basis of average export prices for dried grapes minus estimated costs of processing. If this price was less than the minimum grower price the loss accruing to KSOS had been covered by the Greek government. The EEC delegation argued that this constituted an indirect production aid, identical in its effect (i.e. permitting Greek product to be marketed at competitive prices on world markets) to the current EEC system.

#### IV. Position of Australia

41. A written representation was made to the Panel by the Government of Australia which had indicated, at the Council meeting of 30 June 1982 (C/M/159/Corr.1), that it had reserved its right to make a presentation to the Panel. The Australian presentation indicated that the Government of Australia was currently consulting with the EEC under Article XXIII:(1) of the GATT in relation to production subsidies on canned peaches and apricots, canned pears and canned fruit mixtures. The presentation also indicated that Australia had made a number of bilateral representations to the EEC with regard to production aids on dried grapes. As an initial observation, the Australian submission noted that EEC concessions on the products in question were included in the EC schedule (LXXII) on 1 August 1974. The production aid systems were introduced 4 and 7 years, respectively, later. Consequently, Australia contended that the introduction of the production aid system constituted prima facie nullification and impairment of those concessions. As did the United States delegation, the Australian submission cited the working party report of 1955 and the report of the Panel on Subsidies of 1961 (BISD 3S/224 and BISD 10S/209). It was not, however, the purpose of the Australian submission to present a case that these subsidies had nullified or impaired the rights of either the United States or Australia. The general observations on the effects of the subsidies were made in order to underline Australia's concern and interest in the matter.

42. The Australian submission offered statistical analyses indicating the price depressing effects on the EEC market of the production aids for canned fruits. It was also argued that the production aid systems had already stimulated increased production by diverting fruit from the fresh market to the processing industry. Additionally the aids had stimulated increased plantings of fruit trees which would result in expanded production later. Projections were presented which indicated that the effect of the system would be to make the EEC a net exporter of canned deciduous fruit by the year 1987 (assuming no changes to the system).

43. With regard to dried grapes the Australian submission also insisted that the production aid system had depressed market prices and created market instability. It was also argued that the system had and would stimulate production. In this connection it was alleged that Greek national aids to dried grape producers were continued after Greek accession to the EEC and were supplementing EEC aids.

#### V. Findings

##### A. Introduction

44. The Panel recalled that the United States' complaint was based on two arguments:

- (a) that the aid system constituted, prima facie, nullification and impairment of tariff concessions obtained by the United States on the products in question in 1962, 1967, 1973 and 1979; and
- (b) that there was additional evidence which demonstrated that the EEC production aid systems had already caused market distortion and trade injury, thus confirming the existence of nullification and impairment of the tariff concessions concerned. The United States contended that:
  - (i) the aid offered to processors was such that it eliminated any competitive advantage of product imported from the United States. As a consequence imported products' share of the EC market had decreased.

- (ii) that the minimum price granted to EC growers of fresh peaches and fresh pears and primary producers of dried grapes were excessive and that they were stimulating increased plantings of peach and pear trees and of grape vines. It was the United States' assertion that these increased plantings, while not currently causing nullification or impairment, threatened to do so at some time in the future.
- (iii) that the production aid system as well as the ancillary provisions of the system for dried grapes had been, and were currently, disrupting normal marketing relationships and had depressed world market prices for dried grapes.

B. Consideration of whether to address the issue of dried grapes

45. The Panel noted first that the EC had expressed doubts in the framework of the GATT Council, regarding the appropriateness of including dried grapes in the terms of reference of the Panel. It was the EC's view that this issue was closely linked to the accession of Greece to the Community. Consequently, in the EC's view, the appropriate framework for dealing with this matter was the Working Party established to examine all matters relating to Greek accession. The Panel noted that the EC had notified contracting parties that it intended to modify, in the context of Article XXIV:6, the existing concession on dried grapes.

46. The Panel also noted, however, that its terms of reference, which had been set by the Council, included reference to dried grapes, and that the EC had accepted these terms of reference. The Panel felt obliged to address the issue of whether tariff concessions granted by the EC on dried grapes were being nullified and impaired by the subsidy system. Moreover, the Panel noted that, more than two years after the opening of Article XXIV:6 negotiations, the EC tariff concessions on dried grapes had not been withdrawn or modified and continued to apply to the customs territory of the EC. The Panel was of the view that the mere opening and continuation of Article XXIV:6 negotiations could not curtail the right of contracting parties to invoke existing tariff bindings and to claim that benefits accruing under these tariff bindings had been nullified or impaired by the subsequent introduction of subsidies. The Panel was also of the view that its conclusions could not add to or diminish existing rights and obligations of contracting parties under Article XXIV:6 of the General Agreement.

47. The Panel concluded therefore that it would examine the United States' claim with respect to dried grapes in the same manner as it would for the other commodities. As regards the emergency action, which the EEC had taken after the establishment of the Panel and notified in October 1982 under Article XIX (document L/5399 and add.) and to which the United States had referred in its submission to the Panel (see above paragraph 22), the Panel was of the view that it was not within its terms of reference to determine whether the introduction of EEC minimum import prices for raisins was consistent with Article XIX or with any other provision of the General Agreement.

C. Consistency of the EC Measures with the Provisions of the General Agreement

48. The Panel noted that the United States had presented its complaint to the Panel as a case of a "non-violation" nullification and impairment. It was the Panel's understanding that the United States had not contended that the EC production aid system on the four products in question had violated any specific provisions of the General Agreement. The Panel considered that in these circumstances it was not for the Panel to examine the consistency of the EC production aid system with the provisions of the General Agreement. Having noted this the Panel then proceeded to an examination as to whether the EC production aids had nullified or impaired the tariff concessions granted on canned peaches, canned pears, canned fruit cocktail and dried grapes.

D. Nullification and Impairment of the Concessions granted to the United States on Canned Peaches, Canned Pears, Canned Fruit Cocktail and Dried Grapes

a) Nullification or impairment of tariff concessions in the case of a "non-violation" complaint

49. The Panel first considered the question of whether and to what extent the United States could claim "any benefit accruing to it directly or indirectly under this Agreement" (Article XXIII:1) in respect of the tariff concessions invoked. The Panel noted, firstly, the EEC's claim that it had withdrawn, in 1973, the tariff concessions granted in 1962 and 1967 on the four product categories concerned. The Panel noted that the EEC had notified in GATT document L/4067 of 6 August 1974 that, with effect from 1 August 1974, the concessions previously granted by the EEC (Schedule XL) had been withdrawn and were replaced by the concessions in the common customs tariff of the European Communities, which had resulted from the Article XXIV:6 negotiations (Schedules LXXII and LXXIIbis). The Panel further noted the EEC legal position that: (1) its GATT tariff bindings on dried grapes had not been extended to Greece, and (2) the United States could not claim initial negotiating rights in respect of all the tariff concessions invoked. However, the Panel noted that the EEC had neither contested the existence of the tariff bindings of 1974/79 invoked by the United States nor the US submission that the EEC tariff bindings on canned peaches, canned pears, fruit mixtures and dried grapes had been given "as a part of a balance of concessions". The Panel also noted that, pursuant to Articles I and II of the General Agreement, tariff concessions, and the benefits deriving therefrom, have to be accorded on a most favoured nation basis independent of the existence of initial negotiating rights in respect of the tariff concessions concerned. The Panel found, therefore, that the tariff bindings granted by the EEC in 1974/79 on the four product categories concerned had created for the United States "benefits accruing to it directly or indirectly under this Agreement" in terms of Article XXIII:1 of the General Agreement.

50. The Panel then considered whether there was any legal basis in the General Agreement for limiting the rights of contracting parties to bring a "non-violation complaint" under Article XXIII to contracting parties having initial negotiating rights. The Panel found no legal justification in either Article XXIII or past GATT practice for limiting the right of contracting parties to challenge under Article XXIII an alleged nullification or impairment of tariff concessions which have to be applied on a most-favoured-nation basis. The Panel noted that neither past Panel proceedings concerning "non-violation complaints" in respect of tariff concessions (BISD II/188; 1S/53; 11S/95) nor the parties to this dispute had suggested any such limitation of the rights of contracting parties under Article XXIII. The Panel also noted that the United States had in fact claimed to have initial negotiating rights or substantial interests in the tariff concessions invoked.

51. The Panel considered the definition given to 'nullification or impairment' of tariff concessions in past GATT Panel reports which had examined "non-violation complaints" in respect of tariff concessions (BISD II/193; 1S/58). It agreed with the findings in these reports that nullification or impairment of tariff concessions would exist if the measure in question: (1) could not have reasonably been anticipated by the party bringing the complaint at the time of negotiation of the tariff concessions and (2) the measure resulted in the upsetting of the competitive position of the imported products concerned. In the present case, this meant that nullification or impairment of the tariff concessions would exist if the introduction or increase of the EEC production aids could not have been reasonably anticipated by the United States at the time of the negotiations for the tariff concessions on those products (below under b) and the aid systems had upset the competitive position of imported canned peaches, canned pears, canned fruit cocktail and dried grapes on the EC market (below under c).

b) Consideration of the existence of reasonable expectations on the part of the United States

52. The Panel observed that the EC production aids for canned peaches and canned pears had been introduced in 1978 and 1979, respectively, and that no party to the dispute had contended that the United States could have reasonably expected the introduction of these subsidies at the time it had received tariff concessions on these products in 1974. The Panel next observed that the EC production aids for canned peaches had been introduced by Regulation No. 1152/78 of 30 May 1978 prior to the conclusion of the Geneva (1979) Tariff Protocol on 30 June 1979. In the Panel's view, therefore, the United States should have been aware of the existence of this subsidy and have taken due account of it in the negotiation of the tariff concessions for canned peaches in 1978/79. Since peaches are a principal component of canned fruit cocktail, the Panel found that the United States should also have been aware of any possible effects of these production aids on the economic benefit of the tariff concessions for fruit mixtures negotiated in 1978/79. As regards the EC tariff concessions of 1979 for canned pears, the Panel noted that the production aids had been introduced subsequent to the conclusion of the Geneva (1979) Tariff Protocol and that neither party to the dispute had contended that the EEC Regulation No. 1639/79 of 24 July 1979 could have reasonably been foreseen by the United States at the time it negotiated these tariff concessions.

53. With regard to dried grapes the Panel noted the arguments made by the EC that the tariff concessions of 1979 did not cover Greece's customs territory and that the EC production aids were only a heritage from the earlier national Greek subsidization system of which the United States had been fully aware. It was the EC's view that the previous Greek subsidy system and the EC production aids were financed in a substantially similar manner and extended to the same economic beneficiaries, so that the question of budgetary source was not important for GATT. Since Greece is the only Community producer and the annual increases in the national Greek subsidies prior to Greece's accession to the EC had been greater than the increase due to EC production aids since accession, the EC contested the ability of the United States to claim any kind of 'legitimate expectation' in respect of the tariff concession granted for dried grapes.

54. In considering the various EC arguments relating to the EC tariff concessions on dried grapes, the Panel first recalled its previous finding (above paras. 41 and 44) that the EC tariff bindings of 1974 and 1979 on dried grapes had not been withdrawn. Even if they had not been extended to Greece in terms of Article II of the General Agreement, they continued to apply to the customs territory of the "EEC of nine" to which the United States exported its dried grapes. The Panel therefore found that, even in the absence of tariff concessions granted by Greece in respect of the Greek territory, the granting of the EEC tariff bindings had justified reasonable expectations on the part of the United States in respect of the benefits deriving from these tariff concessions. The Panel also found, however, that Greece had granted grower support prices, storage subsidies and subsidization of processors/exporters already prior to the granting of the EEC tariff concessions on dried grapes in 1974/79. In the Panel's opinion the United States had no reason to assume during the negotiation of the various tariff concessions on dried grapes that Greek raisins would not continue to benefit from such subsidies. The Panel also observed that Greek producers had benefitted from duty-free access to the EEC at least since 1974. The Panel found therefore that the United States should have reasonably anticipated during the tariff negotiations that - in the case of an accession of Greece to the EEC - the national Greek subsidy scheme would possibly be replaced by an equivalent EC subsidy scheme for Greek processors. In making this finding, the Panel attached importance to the fact that the EEC subsidy scheme - while being applicable de jure to all EEC raisin producers - was applied de facto only to Greek raisin producers; the above Panel finding in no way implies that the United States also had reason to assume that an EEC subsidy scheme would also subsidize other EEC producers outside Greece who had not previously been subsidized.

c) Consideration of the upsetting of the competitive position of canned peaches, canned pears, canned fruit cocktail and dried grapes imported from the United States on the EEC market

55. The Panel recalled its earlier finding (paragraph 46) that in past GATT practice it had been established that the upsetting of the competitive position of an imported product as a result of a subsequent domestic measure, which could not have reasonably been anticipated by the party bringing the complaint at the time of negotiation of a tariff concession on the imported product, would constitute nullification or impairment of the tariff concessions. The Panel noted that this principle had been established in two cases brought before the GATT: the Report of the Working Party on the Australian subsidy on ammonium sulphate (BISD Vol. II/448, 193) and the Report of the Panel on the treatment by Germany of imports of sardines (BISD 1S/58). The Panel noted that the wording of each report was similar. In the latter report it stated, for example:

"[The Panel] agreed that such impairment would exist if the action of the German Government, which resulted in upsetting the competitive relationship between preparations of clupea pilchardus [imported from Portugal] and preparations of other varieties of clupeoid family [imported from Norway], could not reasonably have been anticipated by the Norwegian Government at the time it negotiated for tariff reductions on preparations of clupea sprattus and clupea harengus".

Canned peaches, canned pears and canned fruit cocktail

56. The Panel proceeded to an examination as to whether the aid system had upset the competitive relationship between EC and imported canned peaches, canned pears and canned fruit cocktail. The Panel noted that there were two elements to the production aid system for canned fruit: the minimum grower price and the processor aid. The Panel first examined the minimum grower price to see if it had or could upset the competitive relationship between EC processed products and imported processed product.

57. The Panel noted that the United States' claim with regard to the minimum grower prices was that they had stimulated increased production of fresh peaches and pears. The United States claimed that this increased production of fresh product necessarily implied increased production of canned product and therefore a distortion of the competitive relationship between EC and imported canned product. The Panel was of the opinion, however, that even if the minimum grower price had stimulated production of fresh product this need not upset the competitive relationship between EC and imported canned product. The Panel noted that regardless of the supply situation in the fresh fruit market, EC processors were still required to pay growers the minimum price. It was the Panel's opinion that any adverse effects imparted its imported products by the minimum grower price would be to imported fresh product and not to imported canned product.

58. The Panel next addressed the issue of the production aid to see if it had upset the competitive relationship between EC and imported canned peaches, canned pears and canned fruit cocktail. It noted firstly that the EC had argued that the purpose of the production aid was to reimburse processors for having had to pay a price for fresh product which was higher than that which would otherwise have existed. By this the Panel understood that the purpose of the aid was to compensate the processor for the difference between the minimum grower price and the price which the processor would have paid for the fresh fruit had there been no guaranteed price.

59. The Panel observed that, although the EEC had maintained that the production aid was granted to reimburse processors for having to pay a higher price for fresh fruit than they would otherwise have to, the production aid for each fruit was actually calculated as the difference between a "computed" EEC price for each canned fruit and the average duty-free price of the corresponding imported products.

The "computed" EEC price for each fruit was calculated as the sum of the minimum grower price for fresh fruit in the EEC and the estimated cost of processing fresh fruit into canned fruit in the EEC.

[CALCULATION OF PRODUCTION AID FOR CANNED FRUIT IN THE EEC]

[graph]

To aid CONTRACTING PARTIES to understand this complicated calculation method, and the resulting subsidization effects, the Panel decided to include a graphical illustration of the process of calculation of production aid in the EEC. In Fig. 1, the "computed" EEC price for canned fruit is represented by (B). The duty-free price of imported product is represented by (C). The difference between these two prices, (A), is the production aid. The "computed" price for EEC canned fruit (B) is composed of two parts: the minimum grower price for fresh fruit in the EEC (D) and the computed cost of processing in the EEC (E). The difference between (D), the minimum grower price, and (F), the price for fresh fruit in the apparent "free market" in the EEC, is represented by (G). This is the increased cost experienced by EEC processors. The Panel observed, however, that there was only one way in which this method of calculation would yield an amount of aid which would exactly compensate the EEC processor for this increased cost (G). This would be in the situation here the sum of the computed processing costs in the EEC (the amount E) and the cost of fresh fruit in the apparent "free market" (the amount F) exactly equalled the duty-free price of imported products (C). Expressed more briefly, the Panel noted that:

since,  $G + F + E = C + A$   
only if  $F + E$  equalled  $C$  would  $A$  equal  $G$

60. The Panel noted, however, that if the cost of producing canned product in non-member countries was lower than that in the EEC (either because of lower processing costs or because of lower prices of fresh fruit) the EEC processor would receive an aid in excess of that which would compensate him for the difference between the minimum grower price and the "free market" price in the EEC. That is to say, the amount represented by (A) in figure 1 would exceed that represented by (G). It was the Panel's opinion that in this situation the EEC processor would receive a net subsidy enabling him to improve the price competitiveness of his products vis-à-vis the prices of imported product. This meant that the production aid ensured that EEC product would never be any less competitive than imported product. In addition, the Panel noted that this meant that foreign suppliers would never be able to improve their competitive position in the EEC market even if productivity gains in their industries, or other circumstances, permitted them to lower the cost of producing their product. The Panel noted from the EEC Agricultural Price Statistics (reproduced in the Annex) that the production aids had always more than compensated the difference between the EEC minimum grower prices and the "free market" prices for fresh peaches and Williams Pears.

61. The Panel next noted that, in fact, the stated objective of Regulation (EEC) No. 1152/78 was to eliminate any price advantage enjoyed by imported product. It noted in particular that Article 3 b, paragraph 1, of this regulation stated that "the amount of aid shall be so fixed as to make up the difference between the prices of Community products and those of products from non-member countries". The Panel found that it was difficult to reconcile this Article with either the EC's contention that the aid was intended only to compensate the processor for having had to pay a guaranteed minimum price for fresh fruit or with the possibility that it was ever intended that the processing costs and prices of fresh fruit in non-member countries should serve as reasonable proxies for the equivalent costs and prices in the EC.

62. The Panel noted that the production aid for canned peaches had in each of the two most recent years amounted to roughly 63 and 64 per cent, respectively, of the minimum grower price (Table 3). It also noted that the aid had been as high as 92 per cent of the minimum grower price in 1979/80.

With regard to canned pears it noted that the aid had been 65 and 68 per cent, respectively, of the minimum grower price in the last two years and had been as high as 94 per cent in 1979/80. The Panel noted that even at the reduced level of the two most recent years, these proportions implied that - if the EEC production aids had not more than compensated any increased costs resulting from the paying of the minimum grower price - the hypothetical "free market" price for fresh fruit must have been at least two-thirds lower than the minimum grower price for each product in each of those years. The Panel noted that the EEC Agricultural Price Statistics (reproduced in the Annex) illustrated that this had not been the case.

TABLE 3

Production aid for canned peaches and canned pears in the EC  
of 9 as a proportion of the minimum grower prices for  
peaches and pears

	<u>Peaches</u> (%)	<u>Pears</u> (%)
1978/79	76.2	-
1979/80	92.0	94.0
1980/81	82.5	78.6
1981/82	63.1	64.9
1982/83	63.9	67.9

EEC submission to Panel

63. The Panel next observed that the price of imported product used in the calculation of the production aid was the duty-free price of imported product. The Panel found that, on average, this meant that the duty for imported product served as an absolute margin of protection for domestic processors. In other words, regardless of the assumptions made regarding processing costs and prices of fresh fruit in either the EC or non-member countries, EC processors could use the production aid to ensure an absolute margin of protection (equal to the bound duty rate) between their products and those of foreign competitors. It was the Panel's opinion that this factor further upset the competitive relationship between EEC and imported product.

64. The Panel then recalled the United States' assertion concerning the "inflexibility" of the production aid system. By this the Panel understood that under the EEC system the amount of production aid was fixed but once per year, at the beginning of the marketing year. It remained unchanged during the marketing year despite the possibility of significant changes in market prices for canned fruit and/or costs of processing. Thus, for example, if subsequent to the fixing of the production aid market prices were to rise above the level which had been used to determine the amount of production aid, the EC processor/exporter would receive a net subsidy beyond that required to merely compensate him for having had to pay the minimum grower price. The Panel noted for example that the average value of canned peaches imported into the EC had increased in each year between 1978 and 1981 and that the average value of canned pears had increased in each year between 1979 and 1981. It was the Panel's view that this indicated that it was highly probable that there had been "over-compensation" of processors during that period even though there had been a downtrend in the respective production aids. In any event the Panel found that the possibility existed for such over-compensation. At the same time the

Panel noted that in a situation of falling world prices for canned product this "inflexibility" could imply, equally, an "under-compensation" of processors/exporters.

65. The Panel therefore found that there were at least three ways in which the production aid had upset the competitive relationship between domestic and imported canned peaches and canned pears:

- since the production aids made up any differences between the prices of Community products and those of products from non-member countries, foreign products could never improve their competitiveness in the EEC;

- whenever EEC fresh fruit prices and processing costs for peaches and pears were higher than those in non-EC countries, EEC processors of peaches and pears were compensated for the differences in fresh fruit prices and processing costs. To this extent, the EEC production aids more than merely compensated EEC processors for the costs resulting from the granting of a minimum price to growers. EEC Agricultural Price Statistics indicated that production aids to EEC processors of peaches and pears had always exceeded that amount necessary to compensate for any increased costs resulting from the minimum grower price for fresh fruit;

- since the production aid is calculated as the difference between the computed EEC price and the duty-free price of imported product the bound rates of tariff duty had become an absolute margin of protection for EEC products cancelling any cost and price advantages of foreign competitors.

66. The Panel noted that peaches and pears were both principal components of canned fruit cocktail and that producers of canned fruit cocktail were eligible for the same production aid as those of canned peaches and canned pears. The Panel found, therefore, that its preceding findings with regard to upsetting of competitive relationship applied equally to canned fruit cocktail.

#### Dried grapes

67. The Panel proceeded to an examination of whether the EEC aid system for dried grapes had gone beyond the prior national Greek aid system and had, thereby, caused an additional upsetting of the competitive position of United States' dried grapes on the market of the EC of 9; an upsetting which the United States could not have reasonably anticipated during the negotiation of the tariff concessions (see above para. 49). The Panel noted that there were essentially four elements to the production aid system for dried grapes: the minimum grower price, the production aid, the storage aid and the tender price system.

68. The Panel first addressed the issue of the minimum grower price. The Panel noted that the issue of the minimum grower price for dried grapes differed from those for peaches and pears to the extent that there was no alternative use for dried grapes as there was for fresh peaches and fresh pears. In other words, while a stimulation of production of fresh peaches or pears did not necessarily imply increased production of canned peaches, pears or fruit cocktail, a stimulation of production of dried grapes in the primary sector of the industry necessarily meant increased marketings of dried grapes by processors. The Panel could not, however, establish any definitive links between the minimum grower price and actual production trends based on the evidence at its disposal.

69. With regard to the production aid the Panel believed that its findings with regard to the production aid for canned peaches and pears applied equally to that for dried grapes. It was the Panel's understanding that the production aid for dried grapes was calculated in a substantially similar manner as that for canned fruit, namely as the difference between a calculated EC price for dried grapes and the duty-free price of imported product. The Panel found, therefore that:

- since the production aids make up any differences between the prices of Community product and those of product from non-member countries, foreign product could never improve its competitiveness in the EEC;

- whenever the sum of the "free market" price for dried grapes in the EEC and the estimated cost of processing dried grapes in the EEC exceeded the duty-free price of imported dried grapes, the EEC processors were compensated for this difference. EEC production aids, therefore, more than merely compensated EEC processors for the costs resulting from the granting of a minimum price. EEC Agricultural Price Statistics indicated that production aids to EEC processors of dried grapes had always exceeded the amount necessary to compensate for any increased costs resulting from the minimum grower price for dried grapes;

- since the production aid is calculated as the difference between the computed EEC price and the duty-free price of imported product the bound rate of tariff duty had become an absolute margin of protection for EEC dried grapes cancelling any cost and price advantages of foreign competitors.

70. The Panel then considered whether the market distortions imparted by the EEC production aids went beyond those imparted by the previous Greek subsidy scheme. The Panel noted that under the previous Greek national subsidy scheme the Greek buying agency had bought dried grapes from growers without limitation at the guaranteed grower price and sold them to processors/exporters at prices which enabled them to compete on world markets, including in the EEC. Since the Greek intervention agency could also sell and had actually sold dried grapes at prices below the minimum grower price (and took full account of processors' costs of production), the Panel found that the Greek marketing system at the time of the negotiation of the tariff concessions had provided for indirect production aids to processors/exporters (resulting from the sale of dried grapes below the minimum grower price). The Panel then noted that, since 1971, the minimum grower prices for Greek growers had increased in each year except in 1974/75. The Panel found, therefore, that the United States had no reason to assume during the tariff negotiations in 1974/79 that Greek growers would not continue to benefit from annually increasing minimum grower prices. The Panel also found that the amount of the indirect subsidization of the processors/exporters under the previous national Greek subsidy scheme was a function of the level of the domestic minimum grower price, of the Greek processing costs and of world market prices, including those received in the EEC. The function of the indirect subsidization of processors/exporters under the prior national Greek subsidy scheme had been to ensure that processors/exporters were no less competitive on world markets, including on markets of the EEC, than Greece's major competitors. The Panel noted that, similarly, the EC production aid system was designed to ensure that Greek dried grapes were no less competitive in the EEC than those of other major suppliers.

71. The Panel then considered the United States' assertion that the EC production aid system was "less flexible" than had been the previous Greek system. The Panel first recalled its findings regarding the "inflexibility" of the fixing of the EC production aids in paragraph 64. It then noted, by way of contrast, that under the previous Greek system the prices at which dried grapes had been sold to processors/exporters had been fixed relatively frequently throughout the marketing year. Therefore, any tendency to "over-compensate" processors/exporters could have been more quickly corrected. That being said however the Panel noted that, on the basis of data supplied to it by the United States, prices for dried grapes exported from Greece had decreased in each year subsequent to accession. Consequently the Panel found that it was unlikely that any such "over-compensation" had yet occurred and, therefore, that the competitive relationship between EC and imported dried grapes had as yet been affected by this factor.

72. Therefore, in comparing the market distortions imparted by the prior national Greek subsidy scheme with the market distortions imparted under the present EC subsidy scheme, the Panel found that:

- the annual increases in the minimum grower price under the prior national Greek subsidy scheme had in some years (e.g. increases by more than 100 per cent in 1973, 27 per cent in 1978, 37 per cent in 1979) been considerably larger than those under the EEC subsidy scheme (e.g. 6 per cent in 1981, 23 per cent in 1982, 16 per cent in 1983);
- the considerable increase, since 1981, in the difference between minimum grower prices and average export prices was due both to the considerable decrease in world market prices (by more than 50 per cent between 1980/84) and increases in the minimum grower prices; in a situation of decreasing world market prices, the prior national Greek subsidy scheme would likewise have permitted the granting of whatever subsidies were necessary for the marketing of Greek dried raisins at competitive prices in world and EEC markets;
- at least since 1974 Greek exporters had also benefited from duty-free access to the EEC;
- while the annual fixing of the EEC production aids might entail "less flexibility" compared to the more frequent fixing of average export prices under the prior national Greek subsidy scheme, the Panel concluded from the evidence before it that this aspect of the EEC system had not yet resulted in any additional competitive distortions. It was recognized however that such could be the case in a situation of rising world prices for dried grapes;
- the change in funding of the aid system from Greek to EEC budgetary sources did not affect the fact that Greek dried grapes were, under either system, subsidized and sold at "competitive prices" on world and EEC markets.

The Panel was unable to establish, therefore, from the evidence before it that the introduction of the EEC production aids had as yet resulted in an additional upsetting of the competitive relationship between US dried grapes and Greek dried grapes in the "EEC of nine" which would not have been possible and likely under the prior national Greek subsidy scheme. The Panel recognized that although the "lesser flexibility" of the EEC subsidy system might impart some additional market distortion at some time in the future should there be increases in world market prices for dried grapes, it was unable to find that such distortion had, as yet, occurred.

73. With regard to the aids granted to storage agencies to compensate for costs of holding product, the Panel was unable to find that this in any way upset the competitive relationship between EC and imported dried grapes. The Panel agreed with the EC argumentation that, to the extent that this storage aid prevented EC product from being marketed, it could benefit the competitive position of foreign product in the EC.

74. With regard to the system whereby EC storage agencies sold dried grapes by tender, the Panel noted that this system permitted EC storage agencies to sell dried grapes to processors at prices below those at which they had been purchased. Such purchases would represent an amount of indirect subsidization of EC processors in addition to the production aid. The Panel noted, however, that under the previous Greek system the Greek authorities had large discretion in the fixing of export prices and thus in subsidizing processors. Given this latitude of Greek authorities regarding subsidization the Panel was unable to find that the trade distorting effects of the provision for tender sales in the EC system exceeded those which had been possible under the previous Greek system.

d) Consideration of whether the production aid systems constitute prima facie nullification and impairment

75. The Panel noted that the United States had claimed that the production aid systems constituted a prima facie nullification or impairment of tariff concessions. The United States claimed that it must be assumed that, at the time it had negotiated the tariff concessions concerned, it could not have reasonably anticipated the introduction of the production aids and that the production aids upset the competitive relationship between EEC and United States' products.

76. The Panel was of the view that the three Panel reports which had examined "non-violation complaints" under Article XXIII of the General Agreement (i.e. the Report of the Working Party on the Australian subsidy on ammonium sulphate, BISD II/188F the Report of the Panel on the treatment by Germany of imports of sardines, BISD 1S/53; and the Panel Report on Uruguay's recourse to Article XXIII, BISD 11S/95) had not precluded the possibility that an unforeseeable subsequent introduction or increase of a domestic subsidy on a product, for which a tariff concession had been previously granted, could constitute an assumption of prima facie nullification or impairment of the tariff concession concerned. The Panel also noted that the Working Party Report of 1955 on other barriers to trade (BISD 3S/222, 224) and the Panel Report on subsidies of 1961 (BISD 10S/201, 209) had established a principle 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 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 on the product concerned" (3S/224). Since the Panel agreed that it had established the existence of nullification or impairment of tariff concessions and that this finding did not depend on any assumptions of prima facie nullification or impairment of tariff concessions, the Panel found that an examination of whether the production aid systems constitute prima facie nullification or impairment would have no bearing on the Panel conclusions. The Panel decided, therefore, not to include its deliberations on this legal question in the Panel report.

e) Consideration of statistical evidence presented by both parties regarding trade damage

77. The Panel was of the view that it was not necessary to establish statistical evidence of damage in order to make a finding of nullification and impairment under Article XXIII. It noted that this view had also been adopted in the Panel report on Treatment by Germany of Imports of Sardines (BISD 1S/56, para. 9). Benefits accruing from bound tariff concessions under Article II also encompass future trading opportunities. Consequently, complaints by contracting parties regarding nullification and impairment should be admissible even if there was not yet statistical evidence of trade damage. The Panel was convinced that, in this case, it possessed sufficient evidence to make a finding of nullification and impairment without recourse to the statistical evidence submitted by both parties. The Panel decided therefore to include neither the statistical data regarding trade damage nor its written analysis of this data in its report to the CONTRACTING PARTIES.

VI. Conclusions

78. The Panel concluded that the production aids granted by the EEC since 1978 to processors of peaches and since 1979 to processors of pears nullified or impaired benefits accruing to the United States from tariff concessions granted by the EEC under Article II of the General Agreement in 1974 on canned peaches, canned pears and canned fruit mixtures and in 1979 on canned pears.

79. The Panel examined whether there was any evidence that the United States could have reasonably expected the introduction of the EEC production aids during the negotiation of the tariff concessions on the products concerned. With regard to canned peaches, canned pears and canned fruit mixtures

the Panel concluded that the United States could not have anticipated the introduction of the subsidy at the time it negotiated concessions on these products in 1973. As regards concessions received in 1979 the Panel concluded that the United States should have been aware of the existence of the aid system for canned peaches. Inasmuch as that aid system benefits processors of canned fruit mixtures the United States should have taken due account of it in negotiating concessions of that product. The Panel concluded that the United States could not have reasonably foreseen the introduction of the aid system for canned pears. With regard to dried grapes the Panel concluded that the United States could have reasonably anticipated during the various tariff negotiations that Greek producers and processors would continue to benefit from support prices, storage subsidies, and subsidization of the selling price of product from governmental agencies. Only to the extent that the EEC subsidy scheme for dried grapes was more than a continuation of the prior national Greek subsidy scheme and resulted in an additional upsetting of the competitive relationship between US dried grapes and Greek dried grapes on the market of the "EEC of nine" (i.e. without Greece), could the United States not have reasonably anticipated such additional EC subsidies and competitive distortions resulting therefrom.

80. The Panel considered whether the aid systems for each product upset the competitive relationship between EEC products and those imported from the United States. With regard to canned peaches, canned pears, and canned fruit mixtures the Panel concluded that the minimum price granted to growers of fresh peaches and pears did not adversely affect the competitive relationship between EEC and imported canned peaches, pears or fruit cocktail. With regard to the production aids granted on canned peaches, canned pears and canned fruit mixtures the Panel concluded that:

- since the production aids made up any differences between the prices of Community products and those of products from non-member countries, foreign product could never improve its competitiveness in the EEC;
- whenever EEC fresh fruit prices and processing costs for peaches and pears were higher than those in non-EEC countries, EEC processors of peaches and pears were compensated for the differences in fresh fruit prices and processing costs. To this extent, the EEC production aids more than merely compensated EEC processors for the costs resulting from the granting of a minimum price to growers. The Panel noted that, since their introduction, the production aids had always exceeded that amount necessary to compensate for any increased costs resulting from the minimum grower prices for fresh fruit;
- since the production aid is calculated as the difference between the computed EEC price and the duty-free price of imported product, the bound rates of tariff duty had become an absolute margin of protection for EEC products cancelling any cost and price advantages of foreign competitors.

The Panel concluded, therefore, that the production aids granted to processors upset the competitive relationship between EEC and imported canned peaches, canned pears and canned fruit cocktail.

81. With respect to the production aids granted to processors of dried grapes the Panel concluded that Greek processors had benefited already prior to 1974 from subsidies by Greek authorities so as to be able to market their product at competitive prices in the EEC. The United States could have reasonably expected at the time of tariff negotiations in 1974 and 1979 that, in the case of an accession of Greece to the EC, Greek processors would continue to benefit from no less generous a system. In the light of new factual evidence submitted by the EC at a late stage of the Panel proceedings, the Panel could not exclude that the market distortions resulting from EEC production aids to the detriment of competing dried grapes imported from the US had also been possible under the prior Greek subsidy scheme as it was at the time of the tariff negotiations in 1974/79. Also as regards the three other aspects of the subsidy system for dried grapes, namely the minimum grower price, the storage aids and the

compensation for losses on sales by tenders by storage agencies, the Panel could not conclude that there was nullification or impairment on the basis of available evidence. The Panel recognized that the EC production aid system for dried grapes was "less flexible" than had been the previous Greek system in terms of the frequency of the fixing of the amount of subsidization of processors/exporters. The Panel concluded that although the "lesser flexibility" of the EC system might impart some additional market distortion at some time in the future should world market prices for dried grapes increase, it was unable to conclude that, as yet, such distortion had occurred.

82. Having established the existence of nullification and impairment of tariff concessions with respect to canned peaches, canned pears, and canned fruit mixtures, the Panel considered what suggestions it could make so as to assist CONTRACTING PARTIES in their task of formulating recommendations to achieve a satisfactory settlement of the matter. The Panel noted that in past "non-violation" complaints of nullification or impairment of tariff concessions (BISD II/195; 1S/30, 31, 59) the CONTRACTING PARTIES had recommended that the party against which the finding had been made consider ways and means to remove the competitive inequality brought about by the measure at issue. The Panel was aware of the finding of the Working Party Report on the Australian subsidy on ammonium sulphate that "there is nothing in Article XXIII which would empower the CONTRACTING PARTIES to require a contracting party to withdraw or reduce a consumption subsidy" ... and that the "ultimate power of the CONTRACTING PARTIES under Article XXIII is that of authorizing an affected contracting party to suspend the application of appropriate obligations or concessions under the General Agreement" (BISD II/195, para. 16). In making the following draft recommendation, the Panel also wishes to emphasize that the recommendation cannot constitute a legal obligation for the EEC to remove or reduce its domestic production subsidies and does not preclude other modes of settling the dispute such as granting of compensation or, in the last resort, a request for authorization of suspension of concessions. The Panel also wishes to emphasize that this recommendation cannot detract from the rights of contracting parties under Article XXIV:6 of the General Agreement.

83. The Panel therefore suggests that the CONTRACTING PARTIES recommend to the EEC that it consider ways and means to restore the competitive relationship between imported US and domestic EC canned peaches, canned pears and canned fruit cocktail which derived from the tariff concessions granted in 1974 on these products and in 1979 on canned pears. In accordance with agreed dispute settlement procedures (BISD 29S/15, para. (viii)), the EEC should be invited to report within a reasonable, specified period on action taken pursuant to this recommendation.

ANNEX

	<u>EEC</u> <u>minimum grower</u> <u>price,</u> <u>fresh peaches</u>	<u>Apparent</u> <u>"free market" price</u> <u>fresh peaches</u>		<u>Difference between</u> <u>minimum price and</u> <u>"free market" price</u>		<u>Production</u> <u>aid, EEC</u>
		<u>Italy</u> <sup>1</sup>	<u>Greece</u> <sup>2</sup>	<u>Italy</u>	<u>Greece</u>	
		- E C U P E R T O N N E -				
1978/79	286.30	379.00	-	-93.00	-	218.20
1979/80	301.30	331.20	-	-29.90	-	276.90
1980/81	315.80	419.90	-	-104.10	-	260.60
1981/82	334.70	347.60	255.40	-12.90	79.30	211.20
1982/83	356.50	578.90	387.20	-222.40	-30.70	227.70

<sup>1</sup>Average price of most representative varieties (both white and yellow) franco processing plant.

<sup>2</sup>Average price of all varieties, ex. farm.

Source: Eurostat, Agricultural Price Statistics, 1971-82

	<u>EEC</u> <u>minimum grower</u> <u>price,</u> <u>Williams pears</u>	<u>Apparent</u> <u>"free market" price</u> <u>Williams pears</u>		<u>Difference between</u> <u>minimum price and</u> <u>"free market" price</u>		<u>Production</u> <u>aid, EEC</u>
		<u>Italy</u> <sup>1</sup>	<u>Greece</u> <sup>2</sup>	<u>Italy</u>	<u>Greece</u>	
		- E C U P E R T O N N E -				
1979/80	281.30	252.60	-	28.70	-	264.10
1980/81	294.80	227.70	-	67.10	-	231.60
1981/82	324.28	190.70	317.10	133.58	7.18	210.40
1982/83	345.36	285.30	339.80	60.06	5.56	234.40

<sup>1</sup>1st quality, franco warehouse

<sup>2</sup>ex farm

Source: Eurostat, Agricultural Price Statistics, 1971-82

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	<u>EEC</u> <u>minimum grower</u> <u>price,</u> <u>dried grapes</u>	<u>"Free market" price</u> <u>sultanas, Greece</u>	<u>Difference between</u> <u>minimum grower price and</u> <u>"free market" price</u>	<u>Production</u> <u>aid, EEC</u>
	- E C U P E R T O N N E -			
1981/82	1171.80	1302.10	-130.30	115.90
1982/83	1331.70	1416.10	-84.40	361.40

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<sup>1</sup>Delivered at wholesaler store

Source: Eurostat, Agricultural Price Statistics, 1971-82