31 March 1992

FOLLOW-UP ON THE PANEL REPORT "EUROPEAN ECONOMIC COMMUNITY - PAYMENTS AND SUBSIDIES PAID TO PROCESSORS AND PRODUCERS OF OILSEEDS AND RELATED ANIMAL-FEED PROTEINS"

Report of the Members of
the Original Oilseeds Panel[1]
(DS28/R - 39S/91)

I. INTRODUCTION

1. At its meeting of 25 January 1990, the GATT Council adopted the report of the Panel on "European Economic Community - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins" (L/6627, dated 14 December 1989 and published as BISD 37S/86, hereinafter referred to as the Oilseeds Panel Report).

2. The recommendations and rulings made to the European Economic Community by the CONTRACTING PARTIES as a result of the adoption of the report as expressed in the conclusions (paragraphs 155 to 157) are as follows:

> "155. The Panel found that the Community Regulations providing for payments to seed processors conditional on the purchase of oilseeds originating in the Community are inconsistent with Article III:4 of the General Agreement, according to which imported products shall be given treatment no less favourable than that accorded to like domestic products in respect of all regulations affecting their internal purchase. The Panel recommends that the CONTRACTING PARTIES request the Community to bring these Regulations into conformity with the General Agreement.
>
> 156. The Panel further found that benefits accruing to the United States under Article II of the General Agreement in respect of the zero tariff bindings for oilseeds in the Community Schedule of Concessions were impaired as a result of the introduction of production subsidy schemes which operate to protect Community producers of oilseeds completely from the movement of prices of imports and thereby prevent the tariff concessions from having any impact on the competitive relationship between domestic and imported oilseeds. The Panel recommends that the CONTRACTING PARTIES suggest that the Community consider ways and means to eliminate the impairment of its tariff concessions for oilseeds.
>
> 157. The Panel finally considered that, as the inconsistency with Article III:4 and the impairment of the tariff concessions arise from the same Community Regulations, a modification of these Regulations in the light of Article III:4 could also eliminate the impairment of the tariff concessions. The Panel therefore recommends that the CONTRACTING PARTIES take no further action under Article XXIII:2 in relation to the impairment of the tariff concessions until the Community has had a reasonable opportunity to adjust its Regulations to conform to Article III:4."

3. Following discussions regarding the follow-up on the Oilseeds Panel Report at previous meetings of the Council, the United States proposed at the Council meeting on 8 October 1991 that the original Oilseeds Panel be reconvened for the purpose of assisting the CONTRACTING PARTIES in determining whether measures being taken by the European Economic Community (the Community) would bring its regulations into GATT conformity and would eliminate the impairment of the Community's tariff

[1] This report was first considered by the Council at its meeting on 30 April 1992. At its meeting on 19 June, the Council, without adopting the report, authorized the Community to enter into negotiations under Article XXVIII:4 for modification of tariff concessions with respect to certain relevant tariff positions (see paragraph 92 of the report in this respect).

concessions on oilseeds. Following further discussions in the Council and informal consultations, the CONTRACTING PARTIES at their Forty-Seventh Session reached an agreement on 3 December 1991 (SR.47/1 and DS 28/1 refer) under which the members of the original Oilseeds Panel were reconvened to begin work on the basis of document W.47/22 which provides as follows:

> "Paragraph I.3 of the "Improvements to the GATT Dispute Settlement Rules and Procedures," adopted 12 April 1989 (BISD 36S/61), provides that the Council shall monitor the implementation of recommendations and rulings adopted under Article XXIII:2. Acting pursuant to this provision, the CONTRACTING PARTIES hereby request the Director-General to reconvene the members of the Panel on European Economic Community - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins, adopted on 25 January 1990 (BISD 37S/86), for the purpose of examining whether the measures taken by the European Community in Council Regulation (EEC) 3766/91 of 12 December 1991, establishing a support system for producers of soya beans, rapeseed, colzaseed and sunflowerseed, comply with the recommendations and rulings, as expressed in the Conclusions (paragraphs 155-157), of the Oilseeds Panel Report as adopted on 25 January 1990. The original Panel Members shall provide such findings as will assist the CONTRACTING PARTIES within 90 days of this decision."

4. The Reconvened Members of the original Oilseeds Panel (hereinafter referred to as "the Panel" see Annex B), comprising Mr. Michael Cartland (Chairman), Mr. Janos Nyerges and Mr. Pierre Pescatore, met with the parties to the dispute on 3-4 and 20 February 1992. At the meeting on 20 February the Panel also considered the written submissions made by interested third contracting parties. The Panel submitted its report to the parties to the dispute on 16 March 1992.

II. FACTUAL ASPECTS

The Former (per tonne) Oilseeds Support System

5. The support system that was the subject of the original Panel's examination and findings (hereinafter referred to as the "former system"), which by virtue of Council Regulation (EEC) N° 3766/91 has now been superseded, was based on a system of target and intervention prices for rapeseed, colza and sunflowerseed harvested and processed within the Community (Regulation N° 136/66/EEC as amended) and on a system of guide and minimum prices for soya beans (Council Regulation (EEC) N° 1491/85 as amended). In both cases provision was made, where these prices were higher than world market prices, for the payment of subsidies to compensate oilseeds processors for the difference between the higher institutional prices payable to Community oilseeds producers and world market prices as calculated by the Commission.

6. These support arrangements were described in detail in paragraphs 12 to 34 of the Oilseeds Panel Report. The main features of this support system may be summarized as follows:

(i) guaranteed prices payable to Community producers of oilseeds were fixed independently of and at levels generally higher than world market prices of competing imports of oilseeds;

(ii) the guaranteed price to Community producers of oilseeds applied without limit to whatever quantity of oilseeds was produced;

(iii) under a system of budgetary stabilizers introduced in the 1982/83 marketing year and subsequently extended and reinforced, production in excess of Maximum Guaranteed Quantities resulted in reductions in guaranteed prices;

(iv) in the case of oilseeds other than soya beans provision was made for monthly increments in target and intervention prices to enable sales to be staggered.

The New (per hectare) Support System

7. Council Regulation (EEC) No. 3766/91 establishes a new support system involving direct per hectare payments to producers of soya beans, rapeseed, colza and sunflowerseed, without reference to the quantity produced. Regulation 3766/91 was published in the Official Journal of the European Communities on 24 December 1991 and entered into force three days after that date (No L 356/17, attached as Annex A).

8. In terms of Article 1 of Regulation 3766/91 the new system is to apply with effect from those plantings intended for harvest in 1992. In effect, oilseeds harvested on or after 1 July 1992 (the beginning of the July/June marketing year) would be subject exclusively to the new support arrangements. Oilseeds harvested and identified before 1 July 1992 would continue to be eligible for price support under transitional arrangements provided for in Article 10 of Regulation 3766/91.

9. The new support system supersedes the provisions relating to oilseed aids contained in Regulation 136/66 (rapeseed, colza and sunflowerseed) and Regulation 1491/85 (soya beans), although Article 10:4 provides that Regulation 136/66 as well as the implementing rules thereof shall remain in force in so far as they are compatible with the provisions of Regulation 3766/91.

10. In general terms the returns to Community producers of oilseeds under the new support system will essentially consist of two elements: firstly, the price received from the sale of oilseeds in the Community market, which would be determined in part by the price of competing imports; and, secondly, a direct per hectare payment the amount of which depends on average historic yields of cereals or oilseeds for the "production region" in which the producer's holding is located and on the extent to which an observed Community market reference price deviates from a projected reference price of Ecu 163 per tonne. These and the other features of the new support system are described in more detail in what follows.

Basis and Method of Calculation of Direct per Hectare Payments

11. Under Article 3:2 of Regulation 3766/91 a Community reference amount for oilseeds, which provides the basis for calculating the regionalised direct payments to eligible oilseeds producers, is set at Ecu 384 per hectare. As explained by the Community, EEC producers of oilseeds benefited during the 1980s from a level of price support per tonne between 2.3 and 2.7 times greater than the level of price support per tonne of cereals (i.e., between 2.3:1 and 2.7:1). The point of departure for the new system of direct payments to Community producers is calibrated on a reduced level of income support, equivalent to 2.1:1. The detailed calculations supplied by the Community in an explanatory memorandum submitted to the Panel are as follows:

Cereals price:		155 Ecu/t
Equilibrium price relationship:		2.1:1
Representing:		155 x 2.1 = 325.5 Ecu/t of oilseeds
Reference world market price	=	163 Ecu/t of oilseeds
Differential (325.5 - 163)	=	162.5 Ecu/t of oilseeds
EC average yield	=	2.36 Ecu t/ha of oilseeds

Oilseeds Reference Aid (162.5 x 2.36) = 383.5 Ecu/ha

Regional Amounts

12. The Ecu 384 per hectare amount is a Community reference amount for oilseeds which, as illustrated in the foregoing calculations, is based on an average Community yield of 2.36 tonnes per hectare. The amount that is payable to a producer is a function of the designated average yield of either cereals or oilseeds applicable to the production region in which the land planted to oilseeds is located. The production regions and related regional yields are determined by Member States on the basis of regionalization plans which have to comply with the criteria specified in Article 2 of Regulation 3766/91. Average yields for each production region are calculated for the five year period 1986/87 to 1990/91, excluding the year with the highest and the year with the lowest yield during that period.

13. Under Article 2:5 the Commission is required to ensure that each regionalization plan is based on appropriate, objective criteria and is consistent with available historical information, notably the Community average yields for cereals (4.6 tonnes per hectare) and oilseeds (2.36 tonnes per hectare) and the related national averages. Regionalization plans to which the Commission objects are subject to adjustment (Article 2:5). Regionalization plans may be revised after they have become operational either at the request of the Commission or at the initiative of the Member State (Article 2:6).

14. By way of example, if the average oilseeds yield for a particular production region is 3.0 tonnes per hectare, the regional amount payable to producers would be approximately Ecu 488 per hectare. Conversely if the average regional yield for oilseeds is 2.0 tonnes per hectare, the regional amount payable would be approximately Ecu 325 per hectare. In each case the relevant regional amount is obtained by dividing the Community reference amount (384 Ecu/ha) by the Community average oilseeds yield (2.36 tonnes per hectare) and then multiplying the result by the relevant regional yield. Analogous calculations would be used to derive regional reference amounts on the basis of cereals yields.

Adjustments to Community and Regional Reference Amounts

15. The Ecu 384 per tonne Community reference amount, and the regional amounts derived therefrom, are based on a projected average market price of Ecu 163 per tonne. Following the preceding harvesting period and not later than 30 January of the marketing year (1 July - 30 June) the Commission is required to determine the final regional reference amounts on the basis of an observed reference price for oilseeds (Article 3:4). As explained by the Community, the observed reference price is an average wholesale price in port areas.

16. If the observed reference price is not more than 8 per cent above or below the projected Ecu 163 reference price no adjustment is made to the reference amounts. For variations that are greater than 8 per cent the reference amounts are adjusted by the difference (e.g., 12 per cent variation minus 8 per cent "franchise" = 4 per cent adjustment). In practice this would mean, on the basis of a Community reference price of Ecu 163 per tonne, that no adjustments are made within an observed average market price range of about 150 to 176 Ecu per tonne.

17. The calculation of observed reference prices and regional amounts are made by the Commission in accordance with the procedures of Article 38 of Regulation No. 136/66/EEC. Under Article 3:5 of Regulation 3766/91 the Commission may make the final calculation separately for each oilseed, inter alia, to avoid favouring one oilseed rather than another.

Modalities of Payment

18. In order to qualify for payment, producers who are entitled to apply ("Producers established in the Community who sow and intend to harvest oilseeds": Article 4:1) must have sown oilseeds and have lodged an application that includes (Article 4:4):

(a) the area planted to each oilseed; and

(b) a detailed cultivation plan for his holding showing the land to be used for cultivating oilseeds, or a cultivation contract with an approved first buyer.

19. Under Article 4:3 applications may only be made in respect of arable land cultivated during the period 1989/90 to 1990/91, including fallowed land under certain conditions. Under Article 7:1 access to the direct payments for growers of rapeseed and colza is restricted to growers using seed of an approved quality and variety.

20. Once entitlement is established, an advance of no more than 50 per cent of the projected regional reference amount is payable (Article 4:5). Advances are not payable to producers who intend to plant soyabeans as a catch-crop (Article 4:7). The balance of the regional per hectare payment is payable once the final regional reference amount and the related observed market reference price have been determined. In order to qualify for the balance payable (the difference between the amount of the advance and the final regional reference amount), the producer must provide proof of harvesting in the form of evidence that the crop has been sold or is still owned by the producer (Article 4:6).

21. Under Article 6 of Regulation 3766/91 the final regional amounts payable are subject to reduction if the total Community area planted to an oilseed in respect of which payments are claimed, exceeds the following maximum guaranteed areas, which are based on an estimate of plantings for harvest in 1991/92 taking account of the situation in what was "East Germany" and of specific treaty obligations to Spain and Portugal. The relevant direct payments are subject to a reduction of 1 per cent for each 1 per cent overshoot. The maximum guaranteed areas are:

Soya beans		
EEC-12	509,000	hectares
Rape seed and colza seed		
EEC-12	2,377,000	hectares
Sunflower seed		
Spain	1,411,000	hectares
Portugal	122,000	hectares
The rest of the Community	1,202,000	hectares

22. In addition to the regional per hectare amounts that are payable, Regulation 3766/91 makes provision for the payment of an orderly marketing bonus to producers who retain ownership of harvested oilseeds for a period and on conditions to be specified.

Other Aspects

23. Regulation 3766/91 provides for a range of matters to be determined by the Commission in accordance with the procedure of Article 38 of Regulation No. 136/66 (EEC), under which draft measures are subject to consideration by a Management Committee for fats and oils consisting of representatives of the Member States.

24. The tariff concessions in question, their negotiating history and the support measures applied by individual Member States at the time these concessions were negotiated, are described in summary form in paragraphs 9 to 11 and 13 of the Oilseeds Panel Report.

III. MAIN ARGUMENTS

Findings Sought by the Parties

25. The United States requested that the following recommendations and rulings should be made by the Panel:

- that the new Community oilseeds régime does not comply with the recommendations and rulings as expressed in the Conclusions (paragraphs 155-157) of the Oilseeds Panel Report;

- more specifically, that the new Community oilseeds régime does not eliminate the impairment to benefits accruing to the United States in respect of tariff bindings on oilseeds and oilmeals in the Community Schedule of Concessions;

- that, to meet its obligation not to impair the bindings the Community must restore the competitive conditions existing at the time the tariff concessions were negotiated in 1962, in particular that the Community must not subsidize oilseed production in a more trade distorting manner than, nor at a level greater than, that provided at that time;

- that the CONTRACTING PARTIES should recommend that the Community expeditiously correct its regulations to restore the conditions of competition that existed in 1962.

26. The Community requested that the Panel make the following findings with respect to the measures taken by the Community in Regulation 3766/91:

(a) Violation

The original Panel found (paragraph 155) that the Community Regulations were inconsistent with Article III by providing for payment to processors conditional on the purchase of oilseeds of Community origin. The Community has abolished such payments to processors.

It has therefore taken steps in line with the normal solution to a violation case i.e. the elimination of the measure found inconsistent with GATT obligations.

The new direct payment system is a pure producer subsidy, paid directly to the producer on the basis of the area cultivated and decoupled from production performance.

As such it complies with Article III. Therefore it can be considered that the Community has complied with the recommendations of the CONTRACTING PARTIES to bring its Regulations into conformity with the General Agreement.

(b) Non-Violation

The original Panel found (paragraph 156) that "as a result of the introduction of production subsidy scheme which operate to protect Community producers completely from the movement of price of imports and thereby prevent the tariff concession from having any impact on the competitive relationship between domestic and imported oilseeds" the benefits of the zero tariff binding were impaired.

In accordance with paragraph 157 of the Oilseeds Panel Report, the Community while bringing its regulation into conformity with the GATT has also taken steps to eliminate the impairment of the tariff concessions found by the Panel.

The new regime has abolished any price support mechanisms based on the guarantee of a domestic Community price per tonne, which was found by the original Panel as having the effect of completely protecting the domestic producer from world market price movements.

The new legislation does not establish a domestic Community price regime, but an income support system, based on a calculation per hectare and average historic regional yields. This has the effect that the producer's return is affected by market price fluctuations, i.e. the movement of world market price.

The Community producers are no longer completely protected from the movement of the prices of imports. Moreover, imported oilseeds can freely compete with Community oilseeds, which no longer benefit from price support or intervention mechanisms guaranteeing their marketing.

It is therefore considered that the Community has eliminated the impairment of the tariff concessions found by the original Panel and has complied with both paragraphs 156 and 157 of the Oilseeds Panel Report (BISD 37S/86).

Submissions Regarding the Terms of Reference of the Panel

27. The Community, referring to the introductory comments by the Chairman of the Panel at its 3-4 February meeting with the parties (attached as Annex B hereto), considered that the terms of reference do not include either a re-examination of the original complaint nor an in-depth review of the whole of the new direct payment system established by the Community. In the view of the Community the terms of reference preclude not only a wide re-examination of the complaint of "violation" but also "non-violation impairment". Neither whether the new system of "direct payments" leads to other "violations" than those prescribed under Article III:4, nor whether the new system of "direct payments" leads to new elements other than those identified in the Conclusions of the Oilseeds Panel Report as susceptible to create "non-violation impairment", are within the formal terms of reference of what the Community described as this "ad hoc" group.

28. In the view of the Community it would be unreasonable to expect a Contracting Party in complying with the recommendations and rulings of a Panel to go beyond the specific clear guidance given. In this regard the impairment of the tariff concessions as found by the original Panel which the Community was recommended to eliminate arose from "production subsidies which operate to protect Community producers of oilseeds completely from the movement of prices of imports and thereby prevent the tariff concessions from having any impact on the competitive relationship between domestic and imported oilseeds".

29. The Community noted that there was no recommendation or ruling to reduce the level of subsidies. The Community could not therefore have been expected to take measures to comply with elements other than those ruled on by the original Panel. Moreover one could not go beyond the "terms of reference" of the "ad hoc" group to investigate whether there may be other elements which might impair

the concessions. The original Panel's recommendations and rulings did not conclude that the level of subsidies was either too high or indeed even relevant. Accordingly the United States may, if it wishes, have further recourse to either the normal dispute settlement process or consultations, if it believes that the new Community legislation is inconsistent with the General Agreement or even if consistent, impairs the value of the tariff concessions in ways other than that found by the original Panel.

30. The Community submitted that, in any event, the plaintiff is responsible for supplying the proof and the Community could see no good reason why it should be obliged to prove in an "ad hoc" group that new legislation is not a source of impairment. Indeed, in this context the United States has insisted on a timetable which, while it might be consistent with the domestic requirements of 301 legislation: prevents the Community from supplying all of the detailed implementing legislation relevant to the new direct payment system, because it is not yet finalized; and, precludes the Community from the possibility of proving its practical application and impact.

31. With regard to the Chairman's introductory comments on the evidential aspects of the proceedings (Annex B, paragraph 5), the Community made the following points:

> - that the terms of reference of the "ad hoc" group are restricted to "the" impairment found by the original Panel. In consequence, it is sufficient to conclude that the mechanisms and the effects of the old system that were criticised do not persist. It is not necessary to see whether the new measures might provide a source of impairment;
>
> - while the Community expected to have to demonstrate that not only had it abrogated the measures which led to the finding of impairment, it also expected to be called upon to demonstrate that this same impairment had not been reconstituted by the back door, it did not believe that it is incumbent on the Community to bear the burden of proof that its new system of direct payments can not under any circumstances be a source or even a risk of any kind of possible impairment.

In other words, the Community believed that to demonstrate its compliance with the recommendations and rulings of the original Panel, notably paragraph 156, it was sufficient to provide the elements which show that the Community producers of oilseeds will no longer be completely isolated from the movement of prices of imports. However, in the view of the Community, it had gone much further than simply following a literal interpretation of the recommendations and rulings of the original Panel and had done so earlier than originally undertaken.

32. The United States considered that the mandate of the Panel is to determine whether, having been accorded a reasonable period within which to adjust its oilseeds support system, the Community continues under its new support system to impair the benefits accruing to the United States under the General Agreement. In the view of the United States, the Community accordingly bears the burden of demonstrating that recent changes in its regulations will eliminate the impairment. The United States rejected the argument that by changing from a system of price support to a system of direct producer subsidies akin to deficiency payments, the Community has exposed its producers to fluctuations in world market prices, and is thus immune from any substantive scrutiny unless a new complaint is initiated under the dispute settlement process. It also rejected the Community argument that the only impairment that the Panel is entitled to examine is "the" impairment resulting from the price support system that has been abolished and not any impairment of the concessions resulting from any other means of subsidization of oilseeds production. Finally, the United States submitted that the Community agreed to the timetable for this proceeding, and that the reference to section 301 of the Trade Act of 1974 was misdirected as there was no relevant action in progress under that section.

33. In the view of the United States the mandate of the Panel provides the authority, and indeed the responsibility, to determine whether the Community's new support system, regardless of its structure,

continues to impair the tariff concessions. The original Panel's recommendations and rulings included the conclusion that the Community had impaired benefits accruing to the United States under Article II of the General Agreement as a result of "production subsidy schemes". The mandate of the Panel, as set forth in document W.47/22, is therefore to examine whether recent changes in the Community's regulations comply with those recommendations and rulings.

34. The United States further considered that the Community's narrow interpretation of the mandate would render the current proceedings meaningless and would have grave consequences for the GATT dispute settlement process itself. The United States complaint was presented more than four years ago and remains unresolved. Two years had passed since the original Panel's recommendations and rulings were adopted. It is unacceptable after the Community had been accorded a reasonable period in order to comply, for the Community to be permitted to continue to impair the benefits of the tariff concessions merely by altering the means by which subsidies are provided to producers. In the view of the United States the Community's legal arguments on the mandate are an attempt to avoid any real scrutiny of its new oilseeds support system.

National Treatment: Article III

35. The United States did not make formal submissions to the Panel on whether the measures taken by the Community were in compliance with Article III and did not contest the Community's argument in this regard. In the course of the proceedings the United States confirmed that it did not claim that the measures taken by the Community were inconsistent with Article III.

36. The Community noted that the original Panel had found that the Community Regulations then in force were inconsistent with Article III in that payments were made to processors conditional on the purchase of oilseeds of Community origin. The Community had therefore taken steps, as required in a case of violation, to eliminate the measure found to be inconsistent with GATT obligations. As a result of Article 1:2 of Regulation 3766/91 the system of aids to processors and the related complex of institutional target, intervention, intervention buying-in, guide and minimum prices are abolished. Under the new support system payments are made directly to producers and as such are not inconsistent with Article III. In these circumstances it was submitted by the Community that it had complied with the Recommendation made to the Community by the CONTRACTING PARTIES in terms of paragraph 155 of the Oilseeds Panel Report.

Impairment of Tariff Concessions: Article II

37. In summary, the United States submitted that the Community had taken the production subsidies that were found to have impaired the benefits of the 1962 tariff concessions accruing to the United States under Article II of the General Agreement and had altered their form without altering the level of those subsidies, nor altering the impairment by those subsidies of the benefits accruing to the United States under the General Agreement. In particular, by replacing production subsidies based on a system of guaranteed prices with production subsidies based on direct payments that were designed, according to the Community's own calculations, to continue to provide Community producers with returns equivalent to approximately double the world price, the Community ensured that the adverse impact on the competitive relationship between domestic and imported oilseeds of the former support system remains under the new system, and ensured that the benefits accruing to the United States under the General Agreement would thereby continue to be impaired.

38. In summary, the Community submitted that it had fully complied with the Recommendations contained in the Conclusions of the original Panel, including those relating to impairment of the oilseeds tariff concessions resulting from "the introduction of production subsidy schemes which operate to protect Community producers of oilseeds completely from the movement of prices of imports and thereby

prevent the tariff concessions from having any impact on the competitive relationship between domestic and imported oilseeds" (paragraph 156: emphasis added). The Community maintained that in bringing its regulations into conformity with Article III of the General Agreement it had, as envisaged in paragraph 157 of the original Panel's conclusions, also taken steps to eliminate the impairment of the tariff concessions. It had abolished the production subsidies involving price support mechanisms based on the guarantee of a domestic Community price per tonne, which had been found to have the effect of completely protecting domestic producers from world market price movements.

39. In the view of the Community the new Regulation established an income support system under which producers returns are affected by the movement of world market prices and are no longer completely protected from the movement of prices of imports. Imported oilseeds could therefore compete freely with Community oilseeds which no longer benefited from price support or intervention mechanisms guaranteeing their marketing. It was submitted by the Community that in these circumstances the impairment of the tariff concessions as found by the original Panel had been eliminated.

Legitimate Expectations and Levels of Subsidization

40. The United States submitted that the new support system introduced by the Community continued to deny the United States the benefits of the improved competitive opportunities that it legitimately expected from the 1962 tariff concessions. The fundamental principle, as confirmed by the CONTRACTING PARTIES in 1955 (BISD 3S/222, 224), was that improved competitive opportunities resulting from tariff concessions are not maintained when the country granting the concessions introduces or successively increases subsidies on domestic production of the product concerned. In the view of the United States the conditions of competition prevailing in 1961-1962 when these concessions were negotiated and bound under Article II, which involved no Community oilseeds programme and very limited Member State subsidization, were radically different from what they had become over the succeeding thirty years. In 1962 Community production of oilseeds was 300,000 metric tonnes and consumption 3.5 million metric tonnes. As a result of the subsequent introduction and increase in subsidies under the former support system, Community production had increased to 650,000 metric tonnes in 1977 and to 13 million metric tonnes in 1991.

41. In the view of the United States the new oilseeds support system replaces one form of subsidy with another, but continues to maintain the impairment of the benefits of the tariff concessions accruing to the United States as a result of the high level of subsidization and the payments to producers who are able to sell their oilseeds insulated from the effects of price competition. The fundamental premise of the new support system is to enable Community producers to obtain a guaranteed return that varies only marginally in response to supply, demand or price. The guaranteed return of approximately double the world market price established under the new system is equivalent to the level of support provided under the former. Only the form in which this support is delivered, direct payments to producers in place of payments to Community oilseeds processors, had changed, not the substance.

42. The United States also pointed out that in addition to the high levels of subsidy provided as a result of the level of the per hectare reference amount itself, the new system contains distortions which would enable producers from regions with lower than average oilseed yields but relatively better cereals yields to obtain still higher payments by virtue of the option to have regional reference amounts calculated on the basis of cereals yields. The United States submitted that this change in the form in which subsidies are now provided would do nothing to alter the significant incentives to produce oilseeds given the high level of return and that Community production of oilseeds would continue at recent high levels or above.

43. The Community pointed out, with regard to the expectations of the United States at the time the tariff concessions were negotiated, that the original Panel had recognized (paragraph 149) that the evidence showed that the United States must have reasonably expected the transformation of national

producer support measures into a Community support scheme. Furthermore, the Community maintained that the level of subsidies on which the United States relied, either in relation to the situation in 1962 or subsequently in relation to the former price support system, was not a factor which formed part of the original Panel's conclusions. If the original Panel had considered the level of subsidies "per se" as relevant, it would have so indicated.

Production Subsidies and the Decoupled Nature of the Direct Payments

44. The Community submitted that the production subsidies which had been found to impair the oilseeds tariff concessions by protecting producers completely from the movement of prices of imports have been replaced with a new system of decoupled income support payments to individual producers who sow oilseeds with the intention of harvesting. In the view of the Community it would have been in compliance with the original Panel's conclusions on impairment if producers had only been minimally exposed to the movement of prices of imported oilseeds. Instead, the Community had gone much further by abolishing the elements which gave rise to the original Panel's conclusions and by introducing an income support system in place of the price support system. Thus each of the following elements had been abolished:

- payments to processors conditioned on the purchase of oilseeds of Community origin;

- any price guarantees such as those offered by institutional prices for oilseeds (Intervention Price, Minimum Price);

- market support such as intervention purchasing of oilseeds.

45. The Community explained that the following features of the new system of partial income support involved payments made directly to individual producers that are:

- not based on production in any aggregate sense;

- not based on individual production;

- not based on current or future yields;

- not based on the price per tonne received by an individual producer if he markets his crop.

In this connection the Community stressed that the main points of the new system of direct payments are: firstly, that payments are made directly to individual producers for an allocation of land, since the producer is not obliged to market a commercial crop of oilseeds in order to receive payments; secondly, the amount of the payment is not related to the production, yield or price obtained by individual producers; and thirdly, at the time of sowing individual producers have no certainty about the yield, production, price or direct payment they will receive, nor do producers have any assurance of a guaranteed minimum return per tonne.

46. The United States considered that the direct payments under the new support system could in no way be treated as "decoupled" because they are linked to production and distort trade. The United States also noted that these payments would fail to meet the more detailed tests set out in the Draft Final Act under negotiation in the Uruguay Round. In the view of the United States the direct payments are fundamentally linked to the "type or volume of production" undertaken by the producer. In order to qualify for payments a producer has to be engaged in the production of oilseeds. Under the new support system a producer also has to file a "detailed cultivation plan for his holding showing the land to be used for cultivating oilseeds", or else the producer must have a "cultivation contract

with an approved first buyer" and have actually sown the seed on the designated acreage with the intent to harvest. Moreover, under Article 4 of Regulation 3766/91 eligibility for final payment is conditioned on actual harvest of the crop. The Community payments are therefore related to, and based on, the prices applying to current production, with the observed reference price being adjusted for actual market prices. The payments are also related to the factors of production currently employed, since payments are tied, among other things, to the use of land for oilseeds.

47. In the view of the United States the production subsidies provided under the new support system distort producers' production decisions and the incentives for the use of the producers' land. They therefore provide artificial incentives to devote land to the production of oilseeds. Producers would therefore continue to make production decisions on the basis of the artificially high returns guaranteed at approximately twice the world price, rather than on the basis of expected market returns.

48. The Community considered the arguments of the United States regarding the decoupled nature of the new system of direct payments to be incorrect and irrelevant. The Community could not be expected to implement a new support system in advance of the outcome of the Uruguay Round and at the same time be expected to comply with a draft Uruguay Round definition of decoupling that had not been approved. The new system nevertheless represented a substantial move in the direction of what was proposed for the future, notably the lack of any direct link with current production, yields, or individual performance and the absence of any guarantee with respect to prices or returns. In the Community's view the irrelevancy of the United States arguments on the decoupled nature of the payments derived from the fact that, in any event, all that the Community was required to do in terms of the Conclusions of the original Panel was to avoid protecting producers "completely" from the movement of prices of imports. However, in the view of the Community, it had done more than simply follow a literal interpretation of the recommendations and rulings of the original Panel and had done so earlier than originally undertaken.

Exposure to the Movement of Import Prices

49. The United States submitted that Community producers would not be exposed to the movement of import prices in any economically meaningful way under the new system of support, because producers were guaranteed a minimum level of return on average of about Ecu 313 per tonne, or approximately twice the Ecu 163 medium term world market reference price calculated by the Community, regardless of the trend of world market prices. In the view of the United States the 8 per cent franchise was essentially meaningless since the total level of returns (market price plus direct payments) would not vary by more than 4 per cent and within a relatively narrow fixed range of, on average, between Ecu 313 and Ecu 339 per tonne, which would be well above the Community's medium term projection of world market prices. Moreover, whatever under-compensation occurs where observed market prices are less than 8 per cent below the Ecu 163 reference price would be counterbalanced by the over-compensation that would occur where observed market prices are less than 8 per cent above the reference price. Thus, in the view of the United States, while returns might vary marginally from year to year, Community producers could be expected, on average, to obtain returns equivalent to approximately twice the world price and would, in practice, not be exposed to the movement of world market prices. In these circumstances the United States did not consider that the 8 per cent franchise would diminish the impairment of the tariff concessions resulting from the high level of subsidy. The effective adjustment of direct payments in response to market prices would therefore prevent the tariff concessions having any impact on the competitive relationship between domestic and imported oilseeds.

50. The Community considered that these arguments were false because under the new support system domestic oilseeds would have to be marketed without the benefit of market price support instruments in a market dominated by imports and by extremely volatile world market prices. The price at which a producer sells his harvest would depend on prices ruling on the day of sale, which would generally

be no more than half, or even less, of what he obtained under the former support system. The direct payments received by producers would only be adjusted if average market prices deviated by more than 8 per cent of the reference price. Since the observed reference price is calculated at the end of January of the marketing year and therefore does not cover prices ruling after that date, and because only the net average is taken into account, individual producers may well sell at prices outside the Ecu 150-176 franchise band (Ecu 163 plus or minus 8 per cent) without this leading to an adjustment of the level of direct payments and without there being any question of a minimum return to producers of at least Ecu 313 per tonne, or any 4 per cent limit to variations in total returns, as asserted by the United States.

51. In support of this argument the Community cited the example of a producer with an output of 4 tonnes per hectare, which would be above the designated yield for the production region concerned. After taking account of transport and conditioning costs, the net price received would be Ecu 123 per tonne (ruling market price Ecu 148 per tonne less Ecu 25 costs to port area). The producer's gross return per tonne ex post, consisting of Ecu 492 realized from sale (net market price Ecu 123 x 4) plus Ecu 521 from the direct payment (corrected for 1 per cent net deviation of Ecu 148 market price from Ecu 163 reference price), would be Ecu 253 per tonne rather than Ecu 313 as submitted by the United States. The Community also pointed out that if the price fluctuations which characterized the 1987/88 to 1990/91 period were to recur, producers could be exposed to price reductions for merchandise delivered to port areas of between 25 and 75 per cent, depending on the particular oilseed concerned, without there being any adjustment of direct per hectare payments.

52. In the view of the Community the foregoing was sufficient to illustrate that under the new system there is no assured return per tonne for an individual producer who sows oilseeds and that producers returns are determined largely by market prices resulting from competition with other Community producers and imported oilseeds. In this new situation the mechanism for adjustments to direct payments is designed to act as a safety-net and to respond to sustained deviations in market prices. The Community concluded that any assertion that producers would not be exposed to the impact of market prices in any economically meaningful way was therefore at variance with market realities, unless there had been a sudden conversion of the United States to an economic theory under which price levels and price volatility are irrelevant to production decisions.

53. The United States observed that in examining the new support system, it is necessary to consider total returns to the producer, which consist of the direct government payment as well as returns from the market, and that it is misleading to ignore the returns to the producer from the direct payment. The United States further contended that the operation of the provisions for adjustments to the per hectare payments as described by the Community was misleading, since average world market price fluctuations in seven of the last ten years had exceeded the 8 per cent franchise. In the view of the United States the new system effectively creates an income floor involving a return, on average, of at least Ecu 313 per tonne, since even if prices are driven down to close to zero levels Community producers would receive a return of, on average, at least Ecu 313 per tonne. In the case of the example given by the Community and on the basis of its reply to the related Panel question, the producer would receive a total return (subsidy payment plus farm gate price) of 195 per cent of the Rotterdam price and 234 per cent of the farm gate price. In all these circumstances the United States considered that Community producers would continue to be completely protected from the movement of import prices under the new system.

54. The Community considered that the United States analysis of the new support system was simplistic in that it was based on averages which bore little, if any, relation to the new situation in which individual producers would be exposed to and influenced by world market prices. Individual producers would not be compensated for any or all low prices received but only partially for sustained and substantial

average price changes. In the view of the Community the new support system would lead many producers to re-assess the value of oilseeds cultivation in their crop rotation.

55. The United States maintained that the use of averages in this context was an accurate means of analysis since for every example of a producer receiving less than the average, there must be countervailing examples of producers receiving more than the average in order for the figures to be true averages. The United States queried whether the fact that direct payments are to be adjusted annually rather than on a continual basis, that payments to individual producers are not determined by the actual size of harvest, and that there were no incentives to strive for higher yields, are supposed to indicate that the new system could have been constructed in an even more trade distortive manner. However, in the view of the United States, none of this altered the conclusion that the new system as promulgated will continue to guarantee returns that are substantially higher than world market levels, will continue to artificially induce production and will continue to impair the tariff concessions.

Production Incentives and Maximum Guaranteed Areas

56. Moreover, in the view of the United States the system of Maximum Guaranteed areas and the related pro-rata penalties, which involves an increase of 700,000 hectares in the total area eligible for direct payments in 1992/93 compared to actual 1989-91 levels, would not affect the production distorting effect of the subsidies.

57. The Community submitted that the net impact of the changes in support could be a significant reduction in production resulting from a combination of reduced plantings and reduced yields, as illustrated by its latest estimates of current rapeseed plantings. Moreover, if plantings of any oilseed increase, the direct payments to each individual producer would be decreased as a result of the pro-rata Maximum Guaranteed Area penalties. It was neither expected nor assumed that plantings of oilseeds would increase. Nor was it expected that plantings would remain at the levels of recent years. While the new system could have no production targets as such, the changes taken overall including the arrangements relating to Maximum Guaranteed Areas would be likely, in the view of the Community, to remove any undue stimulus to high yields and hence to damp down production levels. Community expenditure on the oilseeds programme was also projected to decline by about 25 per cent compared to recent levels.

58. The Community also noted that as the original Panel considered that data on production and trade flows are not relevant considerations, it would be inconsistent to expect assurances on the volume of future production. As regards the increase in Maximum Guaranteed Areas relative to actual plantings, the Community pointed out that, after allowing for specific commitments or situations (Spain, Portugal for sunflower seed, and the integration of plantings in the former East Germany), the guaranteed areas approximate actual plantings for harvest in 1991/92.

59. The United States submitted that the Community's assertion that the new support system has no production-inducing intent could not be seriously credited having regard to public statements by the Community that the new system was designed to maintain returns for oilseed producers at levels that would prevent a shift from oilseeds to cereals production. In this regard the United States noted that in response to a question posed by the Reconvened Panel Members the Community stated that an underlying justification was the avoidance of the re-allocation of 5 million hectares of arable land (currently devoted to oilseed production) to cereals production. In the view of the United States the new system is designed to ensure that oilseeds, a crop for which the Community is a net importer, are not replaced by a product in surplus such as cereals. Moreover, the United States considered that, in effect, the new oilseed support system is designed to ensure a high level of return that, as was evident from the Community's reply to a question put by the Panel members, will provide the same protection

and incentives for Community oilseed production that the variable levy and intervention systems provide for cereals.

60. The Community explained, in response to the Panel question referred to above, that, as cereals were widely cultivated throughout the Community, it was necessary in order to avoid stimulating interest in the cultivation of oilseeds, to take a realistic and reliable basis as a point of departure for estimating the return per hectare in Europe which would be comprehensible throughout Europe. As cereals were the most common crop in Europe, the return per hectare of cereals was chosen as the basic historic reference for a per hectare oilseeds return. However, this point of departure did not purport to establish a relationship between returns to producers of cereals and returns to producers of oilseeds, as both will be treated differently and will evolve in a totally disconnected manner. Community oilseed producers would thus be able to appreciate that the average benefits to be expected are: less than in the past; less than for growing cereals; and are dependent on import prices, because all market price support instruments have been abolished.

61. Finally, the Community drew attention to the fact that since 1979, imports of soyabeans and soyameal had increased by 5.2 million tonnes, from 15.4 to 20.6 million tonnes (expressed in soyameal equivalent) and that over the same period imports from the United States had declined by 4.5 million tonnes, whereas imports from other sources had increased by more than 9 million tonnes. The Community submitted that, in view of these developments, the erosion of the United States position as a supplier to the Community market was not due to Community policies but to other factors.

Submissions by Other Contracting Parties

Argentina

62. Argentina, noting that oilseeds accounted for 20 per cent of its export revenue, submitted that the impairment of tariff concessions had not been eliminated because: (i) production subsidies are maintained and the provisions of Regulation 3766/91 tend to ensure that the level of production is maintained; (ii) both production and areas eligible for subsidies are increased (by 27 per cent compared to the year immediately prior to the adoption of the Oilseeds Panel Report); and (iii) the relationship between domestic subsidies and the world price had not been reduced and, moreover, the arrangements for adjusting direct payments in response to world market prices ensures that domestic production of oilseeds continues to be insulated from the movement of import prices.

63. With regard to compliance with the original Panel's findings under Article III, Argentina noted that products such as linseed would continue to be governed by the provisions of the former support system that had been found to be inconsistent with Article III:4. Argentina also noted that in the system established by Regulation 3766/91, the reference to the contract with the first approved buyer and the proof of sale for the producer to receive additional payments, might signify that bargaining leverage is given to such buyer from which he can derive economic benefits; this would therefore give rise to a preference for processing domestic raw materials rather than imported products. In other words, the inconsistency with Article III:4 of the General Agreement could persist.

Australia

64. Australia considered that the issue for the Panel members was whether the revised system will allow the tariff concessions to have any impact on the competitive relationship between domestic and imported goods, and that this issue should not be decided solely on the basis that one form of producer subsidy is more GATT consistent than other forms of producer subsidy. In the view of Australia a support scheme reasonably expected by the United States at the time the concession was granted could also be expected to apply evenly at all points of world price between zero and infinity. The

arrangements in the new Regulation ensure that this will not be the case, causing producers to be protected completely from the movement of prices for imports that take place below 8 per cent of the national reference price. At these points the concession has no value and is therefore impaired. With reference of the orderly marketing bonus provided for in Article 4:6, Australia noted that experience with similar private storage aids in the EEC beef sector demonstrated that producers can secure significantly higher payments than by selling into public intervention (which was available to Community oilseeds producers under the former system). Australia submitted that the European Community subsidy scheme does not conform to the criteria set by the Panel established to consider the United States initial complaint. Australia therefore concluded that the impairment of the United States zero tariff concessions will continue under the new Community arrangements.

Brazil

65. Brazil, noting that oilseeds provide one of its major sources of export revenue, considered that the new Community support system would not effectively expose Community producers to world price movements since final regional reference amounts will be maintained for fluctuations in world prices outside the 8 per cent predicted margin (upwards or downwards) in relation to the projected reference price of Ecu 163 per tonne. Brazil considered that the new Community support system for oilseeds, although modified in relation to the previous one, continues to be a means of powerful protection and that there remains a case of impairment in the light of the relevant GATT provisions.

Canada

66. Canada noted that whereas the Community market for rapeseed (for which Canada was granted Initial Negotiating Rights at a zero bound rate) had increased by 600 per cent over the last twenty years, Canadian exports of rapeseed to the Community had fallen from a peak of 514,000 tonnes in 1970/71 to 5,000 tonnes in 1990/91. Canada considered that the new direct payments were production based; that the Community market would continue to be isolated from the world market as a result of the arrangements for adjusting direct payments in relation to changes in world market prices; that the new support system does not limit production; that the provision relating to maximum guaranteed areas, which only affect part of the producers returns would not constitute an effective penalty and that, consequently, Community rapeseed production will continue to increase.

67. Canada concluded that Community producers will continue to expand output beyond current EC rapeseed crushing capacity and that the Community support programme does not restore the competitive relationship between domestic and imported oilseeds and thus does not alter the nullification or impairment found to exist under the previous oilseeds support programme. Until such time as real steps were taken to address the imbalance in the competitive relationship caused by the Community's oilseed support programmes, the tariff concession negotiated in 1962 would continue to have no effect.

68. The Community recalled that it had complied with the letter and the spirit of the recommendations and rulings on oilseeds in paragraphs 155 and 156 by the abolition of the elements which gave rise to these conclusions: viz

- payments to processors conditional on the purchase of quantities of oilseeds of Community origin;

- any price guarantees per tonne such as those offered by institutional prices for oilseeds (Intervention Price, Minimum Price);

- market support such as Intervention purchases of quantities of oilseeds.

Moreover, the Community had gone further than the recommendations and rulings of the Panel in that the new direct payment system to individual producers is per hectare sown and is not based on current production, individual production, neither current or future yields nor individual yields and not based on the price per tonne received by an individual producer. In particular an individual producer was not compensated for price movements. The Community also considered for the reasons earlier outlined that the direct payments are as decoupled from current production as it is reasonable to expect and in consequence disagreed with the assertions to the contrary by Argentina, Australia, Brazil and Canada.

IV. FINDINGS

Introduction

69. The legal issues before the present Panel arise essentially from the following facts. In June 1988, the Council agreed to establish a panel (the "original Panel") to examine the dispute referred to the CONTRACTING PARTIES by the United States concerning EEC payments and subsidies paid to processors and producers of oilseeds and related animal-feed proteins. The Report of that Panel (the "Oilseeds Panel Report") was adopted on 25 January 1990. The recommendations and rulings in that Report concerned: a request made to the Community by the CONTRACTING PARTIES to bring the Community Regulations providing for payments to seed processors conditional on the purchase of oilseeds originating in the Community into conformity with Article III:4 of the General Agreement; a finding that the Community's system of support for oilseeds impaired the tariff concessions on oilseeds accorded by the EEC in 1962; a suggestion by the CONTRACTING PARTIES that the Community consider ways and means to eliminate the impairment of its oilseed tariff concessions; and a recommendation by the original Panel that the CONTRACTING PARTIES take no further action under Article XXIII:2 in relation to the impairment of the tariff concessions until the Community had had a reasonable opportunity to adjust its Regulations to conform to Article III:4.

70. Since the Oilseeds Panel Report was adopted, the Community has enacted a changed subsidy régime for producers of oilseeds, in Council Regulation (EEC) N°3766/91 of 12 December 1991. The principal differences between the system of support that was the subject of the Oilseeds Panel Report (the "former system") and the new system of support introduced under Regulation 3766/91 (the "new system") are as follows:

(i) the former system was based on arrangements under which guaranteed prices were payable by EEC processors to Community producers of oilseeds, with provision being made, where these prices were higher than world market prices, for payments to compensate processors for the difference between the prices guaranteed to producers and world market prices as calculated by the Commission. Under the new system these arrangements have been abolished, except as provided for under the rules governing the transition from the former system to the new system;

(ii) under the former system producers benefited from guaranteed prices per tonne for whatever quantity of oilseeds they produced. Under the new system producers benefit from direct per hectare payments for whatever area of eligible land they devote to oilseeds production;

(iii) under the former system, production on a Community-wide basis in excess of maximum guaranteed thresholds resulted in reductions in guaranteed prices. Under the new system, plantings in excess of Maximum Guaranteed Areas (in respect of which per hectare payments are claimed) result in a reduction of the per hectare payments;

(iv) under the former system, producers' returns were in general determined by the level of guaranteed prices. Under the new system, producers' returns will be determined by two factors: the price

they are able to obtain on the Community market in competition with other producers and imported oilseeds; and a direct payment linked to average yields of cereals or oilseeds assigned to the production region in which the producers' holdings planted to oilseeds are located. These direct per hectare payments are subject to adjustment (up or down) depending on the extent to which average Community market prices for oilseeds in general or for particular oilseeds, as calculated by the Commission, deviate by more than 8 per cent from the ECU 163 reference price;

(v) Under the former system, monthly increments in intervention prices for rape, colza and sunflower seeds were provided in order to stagger the marketing of these crops. Under the new system, an orderly marketing bonus may be payable for these oilseeds as well as for soya beans.

71. The present Panel, comprising the Members of the original Oilseeds Panel, was called upon to examine whether the measures taken by the Community in Council Regulation (EEC) N° 3766/91 comply with the recommendations and rulings, as expressed in the Conclusions (paragraphs 155-157) of the Oilseeds Panel Report as adopted on 25 January 1990, and to provide such findings as will assist the CONTRACTING PARTIES (paragraphs 3 and 4 above, and Annex B hereto refer).

72. The Panel considered that its task was therefore: to examine whether the Community had brought the regulations examined in the prior case into conformity with Article III:4 of the General Agreement: to examine whether the impairment of the Community's tariff concessions on oilseeds had been eliminated; to review whether the Community's measures had responded satisfactorily to the recommendation in Paragraph 157; and to provide such findings as will assist the CONTRACTING PARTIES. The Panel examined the measures taken by the Community in the light of the submissions and explanations made by the parties, and in reaching its findings was guided by established practice under the GATT dispute settlement procedures.

Paragraph 155: National Treatment: Article III

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

74. The facts before the Panel, which were not challenged by the United States, indicated that in respect of the products covered by Regulation 3766/91 (soya beans, rape seed, colza seed and sunflower seed), Article 1(2) of that Regulation provided that the new system would be applied with effect from those plantings intended for harvest in 1992, thereby superseding the provisions relating to oil-seeds aids contained in Regulation No. 136/66/EEC and Regulation (EEC) No. 1491/85. The Panel noted that Regulation 3766/91 did not provide for any subsidy payments to processors, and that the Community had stated that this Regulation had abolished intervention purchases and aids to processors for oilseeds harvested from and after 1 July 1992. Thus, these facts indicated that the payments to processors conditional on the purchase of domestic oilseeds that had given rise to the inconsistency found by the original Panel had been superseded, there being no provision for such payments under the new support system other than in the transitional arrangements provided for in Article 10.

75. The Panel noted that Argentina had raised the possibility that the provisions of Regulation 3766/91 relating to approved first buyers (Article 4:4(b)) in combination with the provisions relating to proof of sale as a condition for the receipt of additional payments (Article 4:6) might confer bargaining leverage

on such buyers, thus reviving the possibility of a preference for processing domestic raw materials rather than imported products. The Panel noted, however, that the United States, which had not submitted any arguments in relation to paragraph 155 of the Oilseeds Panel Report, had confirmed that it did not claim that the measures taken by the Community were inconsistent with Article III. In these circumstances the Panel suggests that the CONTRACTING PARTIES take note of the Community's statement that the new support system for oilseeds under Regulation No. 3766/91 was intended to eliminate any inconsistency with Article III:4 by the discontinuation of payments to processors conditional on the purchase of domestic oilseeds.

Paragraph 156: Nullification or Impairment of Tariff Concessions

76. The Panel then turned to paragraph 156 of the Oilseeds Panel Report, in which the original Panel concluded that "benefits accruing to the United States under Article II of the General Agreement in respect of the zero tariff bindings for oilseeds in the Community Schedule of Concessions were impaired as a result of the introduction of production subsidy schemes which operate to protect Community producers completely from the movement of prices of imports and thereby prevent the tariff concessions from having any impact on the competitive relationship between domestic and imported oilseeds. The Panel recommends that the CONTRACTING PARTIES suggest that the Community consider ways and means to eliminate the impairment of its tariff concessions for oilseeds."

77. The Panel would note at the outset that the Conclusions of the original Panel cannot be severed from the reasoning underlying those Conclusions. The Panel recalled that even if subsidies are permitted under the General Agreement they are nevertheless recognized as being capable of distorting international trade and impairing the benefits accruing to contracting parties under the General Agreement in unacceptable ways. Thus the CONTRACTING PARTIES recognized as early as March 1955 that, for the purposes of Article XXIII, a contracting party which has negotiated a concession under Article II is presumed, failing evidence to the contrary, to have a reasonable expectation that the value of the concession will not be nullified or impaired by the subsequent introduction or increase of a domestic subsidy on the product concerned (1955 Review Session BISD 3S/222, 224, as reconfirmed in 1961, BISD 10S/201, 209). The original Panel therefore found:

- that the benefits accruing to the United States under the tariff concessions in force include the protection of expectations that prevailed in 1962 when the tariff concessions on oilseeds were originally incorporated in the Schedule of Concessions of the Community;

- that the production subsidy schemes of the Community protected Community producers completely from the movement of prices for imports and hence prevented the lowering of import duties from having any impact on the competitive relationship between domestic and imported oilseeds;

- that the United States could be assumed not to have anticipated the introduction of subsidies which protect Community producers of oilseeds completely from the movement of prices for imports and thereby prevent tariff concessions from having any impact on the competitive relationship between domestic and imported oilseeds, and which have as one consequence that all domestically-produced oilseeds are disposed of in the internal market notwithstanding the availability of imports;

- that the evidence showed that the United States must reasonably have expected the transformation of national producer support measures into a Community support scheme but that it could not reasonably have anticipated the introduction of subsidy schemes which protect producers completely from the movement of prices for imports and thereby prevent the tariff concessions from having any impact on the competitive relationship between domestic and imported oilseeds; and

- that the subsidies concerned had impaired the tariff concessions because they upset the competitive relationship between domestic and imported oilseeds, not because of any effect on trade flows.

78. In the light of this analysis of the reasoning underlying the original Panel's conclusions on the impairment of the benefits of the 1962 tariff concessions, the Panel considered the argument presented by the United States that there had been a change of form but not of substance in the production subsidies which impaired and continued to impair the concessions by enabling Community producers to sell their oilseeds insulated from the effects of price competition; and the counter argument of the Community that the price based production subsidies had been abolished and replaced by an income support system which, because it no longer protected Community producers completely from the movement of import prices and allowed imported oilseeds to compete freely with domestic oilseeds, had eliminated the impairment of concessions as found by the original Panel. The Panel accordingly considered that it was required to address the following issues: firstly, whether the subsidies provided to oilseeds producers under the new support system constitute production subsidies; and secondly, whether the tariff concessions continue to be impaired under the new support system, even if producers are no longer completely protected from the movement of prices for imports.

79. In essence the Community's argument with respect to the first issue is that the subsidies provided under the new support system are not subsidies for the production of oilseeds but subsidies to support producers' incomes that are paid for a particular allocation of land and are not directly linked to the production of oilseeds. The Panel would note that the 1955 Decision refers to "a domestic subsidy" without making any distinction as to the manner in which such subsidies are provided. Accordingly what is relevant, as regards the issue under consideration, is not whether the subsidies provided under the new support system are described as income or price support, or in some other manner, but rather whether they are product-specific production subsidies.

80. In this regard the Panel considered the following elements of the new support system to be relevant in determining whether the subsidies in question are to be treated as product-specific production subsidies. Firstly, the direct payments are payable only in respect of oilseeds and not only in respect of oilseeds in general but also in relation to particular oilseeds. Secondly, the direct payments are specifically designed to supplement returns from the production of oilseeds. Thirdly, payment of the balance of the final regional amounts is dependent on proof of harvest, in other words that oilseeds have in fact been produced. The fact that payments may exceptionally be made in respect of a crop that is not harvested does not in the Panel's view alter this clear linkage with the production of oilseeds. Fourthly, the payments are specifically linked to yields for individual production regions in a manner which would appear to be designed largely to maintain recent levels of production on a regional basis. In addition, other elements of the new support system establish a linkage with the production and sale of oilseeds, such as the provisions for the payment of an "orderly marketing" bonus under Article 4(6) of Regulation 3766/91. In these circumstances the Panel concluded that the subsidies provided under the new support system are to be considered as product-specific production subsidies.

81. The Panel then turned to the second issue, namely, whether the tariff concessions continue to be impaired as a result of the subsidies provided under the new system. The Panel recalled that the original Panel had considered that the main value of a tariff concession is that it provides an assurance of better market access through improved price competition. Contracting parties negotiate tariff concessions primarily to obtain that advantage. They must therefore be assumed to base their tariff negotiations on the expectation that the price effect of the tariff concessions will not be systematically offset. There was, therefore, nothing in the reasoning of the original Panel that indicated that the impairment of tariff concessions through a production subsidy could only take place through a subsidy which completely protected producers from the price movements of imports. Applying this finding to the present situation, the Panel considered that the assurance of better market access through improved price competition would be meaningless if the effect of the general movement of prices on the production

level of the product subject to the concession were to be systematically counteracted. The Panel considered that the original Panel's finding with respect to impairment had not been based on the specific method of delivering production subsidies, but rather on the Community's systematic denial, through substantially offsetting the effect of the general movement of import prices on the allocation of resources to production, of the benefits reasonably to be expected from the reciprocal exchange of tariff concessions.

82. The Panel considered that whether the extent of protection of production would be sufficient to impair the tariff concession could be determined neither solely on the basis of an analysis of the new system's effects on selective examples of individual producers, nor solely on the basis of simple averages derived from the parameters in Regulation 3766/91 as explained by the Community. From the point of view of the original Panel's conclusions and reasoning with regard to competitive conditions, what is relevant is whether the EEC oilseeds production as a whole continues to be protected from the effect of the general movement of import prices, not whether particular categories or individual oilseeds producers are protected from each and every movement of import prices with respect to particular transactions.

83. The Panel then examined whether the Community's new support system for oilseeds under Regulation 3766/91, even though it might not present as extreme a case as the former support system, nevertheless involves a systematic offsetting of the effect of the general movement of import prices on production levels. The Panel considered that the new support system had retained the essential features which had led the original Panel to find that the former scheme gave rise to impairment of concessions. In the new system, the subsidies are still production subsidies specific to the product which is the subject of the tariff concessions in question. The system was designed to maintain producers incomes by systematically supplementing their returns in a way which would effectively protect them from dependence on movements in prices. While the Community had argued that it would only correct for sustained movements in prices, the Panel noted that under Article 3:4 of Regulation 3766/91 corrections are to be made whenever the observed reference price, for oilseeds in general or for particular oilseeds, deviates by more than 8 per cent from the Ecu 163 Community reference price established under Article 3:1 of Regulation 3766/91. The Panel noted that while it could not be established, as claimed by the United States, that the new system would necessarily provide a minimum return of Ecu 313 per tonne, it was nevertheless apparent that the new system provided a floor for the returns of producers in general, the level of which would depend essentially on the relationship between designated and realized yields in particular production regions. The Panel considered that, in these circumstances, the new system of regionalized, direct, yield-based per hectare payments, effectively offsets the general movement of import prices and renders the level of Community production substantially insensitive to the general movement of world market prices, and thereby continues to impair the benefits the United States could reasonably expect to accrue to it under the tariff concessions in question.

84. The Panel noted in this context that under the system of Maximum Guaranteed Areas the level of Community production of oilseeds that had been achieved as a result of the impairment of the tariff concessions would be maintained or at least not discouraged. The Panel also noted that the Community had aligned the support for oilseeds under the new system with the support or returns for producers of alternative crops protected by variable levies which completely insulate Community producers from world market prices; the Panel noted that this alignment as such would appear to be difficult to reconcile with the reasonable expectations of the United States at the time the zero tariff bindings were negotiated.

85. Accordingly, the Panel found that benefits accruing to the United States under Article II of the General Agreement in respect of the zero tariff bindings for oilseeds in the Community Schedule of Concessions continued to be impaired as a result of the production subsidy scheme provided for in Regulation 3766/91.

Paragraph 157 of the Oilseeds Panel Report

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

87. The Panel noted that over two years had passed since the Oilseeds Panel Report had been adopted by the CONTRACTING PARTIES. While the Community Regulations had been modified, the impairment of the tariff concessions had not been eliminated. Under these circumstances, the Panel can see no reason for the CONTRACTING PARTIES to continue to defer consideration of further action in relation to the impairment of the tariff concessions.

88. The Panel therefore recommends that the Community should act expeditiously to eliminate the impairment of the tariff concessions -- either by modifying its new support system for oilseeds or by renegotiating its tariff concessions for oilseeds under Article XXVIII. In the event that the dispute is not resolved expeditiously in either of these ways, the CONTRACTING PARTIES should, if so requested by the United States, consider further action under Article XXIII:2 of the General Agreement.

CONCLUSIONS

89. With respect to Paragraph 155 of the Oilseeds Panel Report, the Panel suggests that the CONTRACTING PARTIES take note of the Community's statement that the new support system for oilseeds under Regulation No. 3766/91 was intended to eliminate any inconsistency with Article III:4 by the discontinuation of payments to processors conditional on the purchase of domestic oilseeds.

90. With reference to paragraph 156 of the Oilseeds Panel Report, the present Panel finds that benefits accruing to the United States under Article II of the General Agreement in respect of the zero tariff bindings for oilseeds in the Community Schedule of Concessions continue to be impaired by the production subsidy scheme provided for in Council Regulation (EEC) No. 3766/91.

91. With reference to paragraph 157 of the Oilseeds Panel Report, the Panel considers that there is no reason for the CONTRACTING PARTIES to continue to defer consideration of further action in relation to the impairment of the tariff concessions.

92. The Panel accordingly recommends that the Community should act expeditiously to eliminate the impairment of the tariff concessions -- either by modifying its new support system for oilseeds or by renegotiating its tariff concessions for oilseeds under Article XXVIII. In the event that the dispute is not resolved expeditiously in either of these ways, the CONTRACTING PARTIES should, if so requested by the United States, consider further action under Article XXIII:2 of the General Agreement.

ANNEX A

COUNCIL REGULATION (EEC) No. 3766/91
of 12 December 1991

establishing a support system for producers of soya beans, rapeseed and colza seed and sunflower seed

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 42 and 43 thereof,

Having regard to the proposal from the Commission[1],

Having regard to the opinion of the European Parliament[2],

Having regard to the opinion of the Economic and Social Committee[3],

Whereas a new support system for the producers of soya beans, rapeseed and sunflower seed harvested within the Community, has to be established; whereas the best way to achieve this objective is to provide for a direct payment for producers who sow and intend to harvest such products; whereas this system shall be applied with effect from those plantings intended for harvest in 1992 thereby superseding the provisions relating to oilseeds aids contained in Regulation No. 136/66/EEC[4] and Regulation (EEC) No. 1491/85[5];

Whereas such direct payments should reflect the specific structural characteristics that influence yields and that the drawing up of a regionalization plan based on objective criteria should be left to the Member States; whereas the regionalization plans must be consistent with the average yields of each region achieved in a given period; whereas a specific procedure should be provided in order to examine these plans on the Community level;

Whereas in order to calculate a direct payment it is necessary to establish a projected reference price, a Community reference amount, the calculation method and appropriate corrective measures;

Whereas rules must be established in order to take into account the specific situation in Spain and Portugal, including the different rates of progress towards integration as foreseen in the 1985 Act of Accession;

---

[1]OJ No. C 255, 1 October 1991, page 8.

[2]Opinion delivered on 9 December 1991 (not yet published in the Official Journal).

[3]Opinion delivered on 31 October 1991 (not yet published in the Official Journal).

[4]Regulation No. 136/66/EEC of the Council of 22 September 1966 on the establishment of a common organization of the market in oils and fats (OJ No. 172, 30 September 1966, page 3025/66), as last amended by Regulation (EEC) No. 1720/91 (OJ No. L 162, 26 June 1991, page 27).

[5]Council Regulation (EEC) No. 1491/85 of 23 May 1985 laying down special measures in respect of soya beans (OJ No. L 151, 10 June 1985, page 15) as last amended by Regulation (EEC) No. 1724/91 (OJ No. L 162, 26 June 1991, page 35).

Whereas as long as an integrated approach to support for the producers of arable crops as proposed by the Commission is not applied, it seems appropriate to ensure a system of maximum guaranteed areas;

Whereas a quality policy for rapeseed is required;

Whereas the Member States should enact appropriate measures in order to ensure the respect of Community legislation concerning oilseeds;

Whereas it is necessary to provide for transitional measures, in particular to preserve the acquired rights of operators holding stocks of oilseeds on 30 June 1992,

HAS ADOPTED THIS REGULATION:

Article 1

1. This Regulation establishes a support system for producers of soya beans, rapeseed and colza seed and sunflower seed.

2. The system referred to in paragraph 1 shall be applied with effect from those plantings intended for harvest in 1992 thereby superseding the provisions relating to oilseeds aids contained in Regulation No. 136/66/EEC and Regulation (EEC) No. 1491/85.

3. The marketing year for the products listed in paragraph 1 shall run from 1 July to 30 June.

Article 2

1. Each Member State shall establish a regionalization plan setting out the criteria for the establishment of separate production regions. The criteria used must be appropriate, objective and provide the necessary flexibility for the recognition of distinctive homogeneous zones of a minimum size and allow for specific structural characteristics that influence yields such as soil fertility, including, where appropriate, due differentiation between irrigated and non-irrigated land.

2. For each production region, the Member State shall give details of the areas and yields of cereals and, whenever possible, oilseeds produced in that region during the five-year period 1986/87 to 1990/91. An average cereals yield shall be calculated for each region by excluding the year with the highest and the year with the lowest yield during that period; whenever possible an analogous calculation shall be made for oilseeds.

3. Each Member State shall specify for each region on the basis of appropriate, objective criteria whether the projected regional reference amount (and the final regional amount) shall be derived by a comparison between the regional and Community average yields for either cereals or oilseeds. When exercising this choice, the Member State may not come to a global result which would be higher than if it had used exclusively either cereals yields or oilseeds yields.

4. Member States shall submit their regionalization plan to the Commission together with all available supporting information including, if necessary, the measures the Member State intends to take in the case of applications for the sowing of seed on unsuitable land with as a main objective obtaining the direct payments rather than the growing of a commercial crop. These plans shall be submitted to the Commission by a date fixed by the Commission in accordance with the procedure laid down in Article 38 of Regulation 136/66/EEC.

5. The Commission shall examine the regionalization plans submitted by the Member States and shall ensure that each plan is based on appropriate, objective criteria and is consistent with available historical information, notably the Community average yield for cereals (4.6 tonnes per hectare) and oilseeds (2.36 tonnes per hectare) and the related national averages.

The Commission may object to plans which are not compatible with the relevant criteria in particular with the average yield of the Member State. In this case the plans shall be subject to adjustment by the Member State concerned after consultation with the Commission.

6. The regionalization plan may be revised by the Member State concerned at the request of the Commission or at the initiative of that Member State in accordance with the same process as outlined in the preceding paragraphs.

Article 3

1. A projected reference price for oilseeds is set at ECU 163 per tonne.

2. A Community reference amount for oilseeds is set at ECU 384 per hectare.

3. For each region identified pursuant to Article 2, a projected regional reference amount for oilseeds shall be established by the Commission which reflects the comparison between either the cereals yield for that region and the average cereals yield for the Community (4.6 tonnes per hectare) or the oilseeds yields for that region and the average oilseeds yield for the Community (2.36 tonnes per hectare).

4. Before 30 January in each marketing year the Commission, acting in accordance with the procedure laid down in Article 38 of Regulation No. 136/66/EEC, shall calculate a final regional reference amount based on the observed reference price for oilseeds. The final calculation shall be made by substituting the observed reference price for the projected reference price; no account shall be taken of price variations within 8 per cent of the projected reference price.

5. The Commission may make the final calculations separately for each oilseed in order to avoid favouring one oilseed rather than another and to take account of the possible application of Article 6, including taking due account of the lower yields typically associated with the catch-cropping of soya beans.

6. The Commission shall publish the aforementioned amounts in the *Official Journal of the European Communities*. The publication shall include a succinct explanation of the calculations made.

Article 4

1. Producers established in the Community who sow and intend to harvest the products listed in Article 1 shall be entitled to apply for a regionalized system of direct payments. The direct payment shall be made to the producer who makes the application, provided that entitlement to such a payment is recognized by the Member State on whose territory the production holding is located.

2. In order to qualify for any payment a producer must, by the date specified for the region in question:

- have sown the seed, and

- have lodged an application.

3. Applications may only be made in respect of arable land cultivated during the period 1989/90 to 1990/91, including land shown to have been fallowed in conformity with a publicly funded scheme, temporarily under grass as part of an arable rotation or exceptionally arable land fallowed throughout this period.

4. The application must include:

(a) the area planted to each oilseed; and

(b) a detailed cultivation plan for his holding showing the land to be used for cultivating oilseeds, or a cultivation contract with an approved first buyer.

5. Producers who apply shall be entitled to an advance payment of no more than 50 per cent of the projected regional reference amount. Member States shall carry out the necessary checks to ensure that entitlement to the advance is justified. Once entitlement to the payment is established, payment of the advance should be made.

6. Applications for further payments must include proof of harvesting in the form of evidence that the crop has been sold or is still owned by the producer. When the Commission has published the final regional reference amounts, a balance shall be paid, equal to the difference between the amount of the advance and the final regional reference amount.

Where a producer demonstrates that he has retained ownership of the product for a period to be specified, an orderly marketing bonus may be payable. The amount and the conditions determining eligibility shall be set by the Commission in accordance with the procedure referred to in Article 38 of Regulation No. 136/66/EEC.

7. By way of derogation from the foregoing provisions, producers who intend to plant soya beans as a catch-crop shall apply by 30 May respecting the other requirements of this article. No advance payment shall be paid to these producers.

8. The timetable of the regionalized system of payments to applicants shall be established by the Commission in accordance with the procedure referred to in Article 38 of Regulation No. 136/66/EEC.

Article 5

For Spain and Portugal a national projected reference amount for producers for sunflower seed will be set as the point of departure for regionalization within those countries. These amounts will be set at ECU 292 per hectare for Spain and ECU 272 per hectare for Portugal. These amounts will be fixed unless the maximum guaranteed areas for Spain and Portugal are exceeded, and are subject to the possible adjustments as a result of world market price developments as foreseen in Articles 3, 4 and 6. For Spain the amount shall be adjusted for subsequent years to reflect the transitional steps foreseen in the Act of Accession.

Article 6

1. A system of maximum guaranteed areas shall apply for payments. The maximum guaranteed areas shall be:

Soya beans

EEC-12	509,000	hectares

Rapeseed and colza seed

EEC-12	2,377,000	hectares

Sunflower seed

Spain	1,411,000	hectares
Portugal	122,000	hectares
The rest of the Community	1,202,000	hectares

2. If the area planted to an oilseed exceeds the maximum guaranteed area then the relevant direct payments shall be reduced by 1 per cent for each 1 per cent overshoot. The application of the foregoing provisions shall be based exclusively on the areas for which these payments are claimed. The relevant direct payments shall be reduced by the Commission when the final regional reference amounts are calculated.

Article 7

1. Access to the direct payment for growers of oilseed rape and colza shall be restricted to those growers using seed of an approved quality and variety.

2. The Commission, in accordance with the procedure laid down in Article 38 of Regulation No. 136/66/EEC, shall establish what rapeseed and colza seed shall be eligible for aid pursuant to paragraph 1.

Article 8

The determination of the amounts, the rules governing the payment of the direct payments, including the determination of the minimum size of a region and the other detailed rules for the implementation of this Regulation shall be decided on by the Commission in accordance with the procedure laid down in Article 38 of Regulation No. 136/66/EEC.

Article 9

1. Member States shall take all action necessary to ensure that the provisions of this Regulation are fully respected.

2. Detailed rules for the application of this Regulation shall be adopted in accordance with the procedure laid down in Article 38 of Regulation No. 136/66/EEC, and in particular those relating to:

- the minimum are to be cultivated; such rules shall take particular account of the monitoring requirements and of the sought-after effectiveness of the scheme in question,

- monitoring; such rules shall include, *inter alia*, the use of means of remote sensing and/or plausibility monitoring on the basis of binding official documents that are already available in the national administrations,

- the date referred to in Article 4 (2), which may be varied for specific regions to take account of normal and exceptional circumstances.

Article 10

1. The provisions of Regulation (EEC) No. 1491/85 and the related provisions in the Regulations in force on 30 June 1992 shall continue to apply after that date to soya beans harvested in the Community and identified by 30 June 1992.

2. The provisions of Regulation 136/66/EEC and the related provisions in the regulations in force on 30 June 1992 shall continue to apply after that date to rapeseed and colza seed and sunflower seed harvested in the Community and identified by 30 June 1992.

3. The relevant provisions relating to the Community support system for the products mentioned in paragraphs 1 and 2 above shall remain applicable until the products in question are no longer eligible for Community support. Transitional measures necessary to facilitate the disposal or orderly marketing of these products shall be adopted in accordance with the procedure laid down in Article 38 of Regulation No. 136/66/EEC.

4. Regulation No. 136/66/EEC and Regulation (EEC) No. 1491/85 as well as the implementing rules thereof shall remain in force in so far as they are compatible with the provisions of this Regulation.

Article 11

Should additional or transitional measures be necessary to facilitate the transition from the system in force to that established by this Regulation, in particular if the introduction of this system would give rise to substantial difficulties in respect of certain products such measures shall be adopted in accordance with the procedure laid down in Article 38 of Regulation No. 136/66/EEC.

Article 12

This Regulation shall enter into force on the third day following its publication in the *Official Journal of the European Communities*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 12 December 1991.

For the Council
The President
P. BUKMAN

ANNEX B

Extract From Introductory Comments as Delivered by the Chairman
of the Reconvened Members of the Original Oilseeds Panel
at the First Meeting with the Parties on 3-4 February 1992

Establishment and mandate

1. I would recall that the establishment of this body and the mandate assigned to it resulted from discussions at meetings of the GATT Council from April 1991 onwards concerning the follow-up on the Oilseeds Panel Report and the agreement reached at the Forty-Seventh Session of the CONTRACTING PARTIES on 3 December 1991.

2. The Note circulated by the Chairman of the CONTRACTING PARTIES in the context of the follow-up to the Oilseeds Panel Report, DS28/1 of 13 January 1992, sets out the position regarding the reconvening of the members of the original Panel and the mandate assigned to them as follows:

> "1. At their Forty-Seventh Session the CONTRACTING PARTIES agreed that without further action on their part their Chairman would reconvene the members of the original Panel as soon as the Community had informed the Director-General that the oilseeds regulation was final; the understanding being that the members of the original Panel could begin work on the basis of document W.47/22 immediately after having been reconvened.
>
> 2. Document W.47/22 provides, inter alia, for the Panel to be reconvened for the purpose of examining whether the measures taken by the Community in its Regulation No.3766/91 of 12 December 1991 comply with the recommendations and rulings, as expressed in the Conclusions (paragraphs 155-157), of the Oilseeds Panel Report as adopted on 25 January 1990, and that the original Panel members shall provide such findings as will assist the CONTRACTING PARTIES within ninety days of this decision.
>
> 3. In a communication dated 6 January 1992, the Permanent Representative of the Commission of the European Communities to the GATT informed the Director-General that Council Regulation (EEC) No.3766/91 of 12 December 1991, establishing a support system for producers of soya beans, rapeseed and colza seed and sunflower seed, was published in the Official Journal of the European Communities on 24 December 1991 (No.L 356, page 17) and had thus entered into force three days after that date.
>
> 4. The members of the original Panel are accordingly being reconvened to begin work on the basis of document W.47/22."

3. The first point to which I would draw your attention is that we, the members of the original Panel, have been reconvened as a body to carry out a specific task, namely, to examine the measures taken as regards their compliance with the Recommendations and Rulings in question and to provide such findings as will assist the CONTRACTING PARTIES. Thus, the Members of the original Panel have been reconvened for a specific purpose and not, for example, to re-try the whole case ab initio, or to pass judgement on the consistency of the new Community support system for oilseeds in relation to provisions of the General Agreement other than those that were directly relevant to the original Panel's reasoning and conclusions.

4. A second general point is that the matters that this body is required to examine and make findings on concern a formal request made to the Community by the CONTRACTING PARTIES to bring its Regulations into conformity with Article III:4 of the General Agreement, and a formal suggestion that the Community consider ways and means to eliminate the impairment of the oilseed tariff concessions as found by the original Panel.

5. In these circumstances we consider that the Community is required in these proceedings to demonstrate that the measures it has taken satisfy the ruling relating to Article III:4 in paragraph 155 of the Oilseeds Panel Report; and that, in relation to the ruling in paragraph 156 of that report, as qualified by paragraph 157 thereof, the Community would be expected to demonstrate, if this is what the Community is asserting, that the measures it has taken have in fact also eliminated the impairment of concessions as found by the original Panel. In other words, if the assertion of the Community is that the impairment of concessions as found by the original Panel has been eliminated, then this body would expect the Community to substantiate its assertion because this is a matter which has a bearing on the matters to be examined by this body and on the nature of the findings it is required to make in terms of its mandate.

6. Finally, I would like to say that what I have referred to as "this body", or as "the Reconvened Members of the original Oilseeds Panel", is not the original Panel. That is clear since we have a different mandate. On the other hand we have a specific mandate from the CONTRACTING PARTIES and are required to exercise the functions of a Panel in the examination of certain matters and in making findings. As a practical matter it is therefore our intention to conduct these proceedings as a Panel on the basis of the established working practices and procedures that are designed to protect the interests of all parties concerned.

7. Accordingly, if for convenience or other reasons we refer to ourselves as the Panel or the Reconvened Panel, I would trust that, in the light of my comments, this is understood to mean the members of the original Oilseeds Panel reconvened for the purposes decided by the CONTRACTING PARTIES in the context of the follow-up on the Report of the original Panel.